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**(VENICE COMMISSION)**

# DRAFT OPINION

# ON LEGAL CERTAINTY AND THE INDEPENDENCE OF THE JUDICIARY

# IN BOSNIA AND HERZEGOVINA

## on the basis of comments by


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## I. Introduction

1. Within the context of the European Union (EU) and Bosnia and Herzegovina's (BiH) Structured Dialogue on the work of the judiciary, the Venice Commission received a request for an opinion on 19 October 2011 from the European Commission (EC) on: "How the judicial framework, the division of powers and the existing co-ordination mechanisms affect legal certainty and the independence of the judiciary in Bosnia and Herzegovina". The Venice Commission was represented in meetings of the International Consultative Group on the BiH judiciary, which is gathered by the European Commission in the framework of the Structured Dialogue. The BiH authorities were informed and welcomed this process.

2. The EU-BiH's Structured Dialogue was launched in Banja Luka on 6-7 June 2011 and is an integral part of the Stabilisation and Association Process. The EC first made preliminary recommendations covering, inter alia, the implementation of the Justice Sector Reform Strategy and the National War Crimes Strategy and then adopted recommendations for BiH in November 2011, which included encouraging the BiH authorities to fully co-operate with the Venice Commission in the preparation of this opinion.

3. A delegation of the Venice Commission visited both Sarajevo and Banja Luka on 2-4 April 2012 and met with representatives of a number of judicial bodies of BiH and the Entities as well as with legal practitioners. The delegation was composed of Ms Veronika Bilkova, Mr Lucian Mihai and Mr Kaarlo Tuori, who were accompanied by Mr Thomas Markert and Ms Tanja Gerwien from the Secretariat of the Venice Commission, together with Ms Orsolya Szekely from the Council of Europe office in Sarajevo.

4. This draft opinion takes the information received during the above-mentioned visit into account and is based on the comments provided by Ms Veronika Bilkova, Mr Giorgio Malinverni, Mr Lucian Mihai, Mr Jean-Claude Scholsem and Mr Kaarlo Tuori.

5. *The present opinion was adopted by the Venice Commission at its …Plenary Session (Venice, …).*

## II. General remarks

6. The Venice Commission has dealt with questions pertaining to the judiciary of Bosnia and Herzegovina (BiH) in a number of its opinions since the late 1990s. These opinions have covered questions involving electoral, criminal and human rights matters and issues ranging from the assessment of the structure of BiH's judicial system, covering the need of enhancing judicial co-operation between the Entities and the District, to the establishment of a new judicial body at the state level, i.e. the Court of BiH.[1] It is however, the first time that it has been asked to deal with this issue up front, as a whole, from the perspective of the strengthening of two fundamental principles of the rule of law: legal certainty and the independence of the judiciary.

[1] Opinion on the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina - http://www.venice.coe.int/docs/1997/CDL(1997)021rev-e.pdf,
Opinion on the number of municipal courts to be established in Mostar - http://www.venice.coe.int/docs/1998/CDL(1998)037-e.asp,
Inter-Entity judicial co-operation in Bosnia and Herzegovina - http://www.venice.coe.int/docs/1998/CDL-INF(1998)011-e.asp,
(draft) Opinion on the need for a judicial institution at the level of the State of Bosnia and Herzegovina - http://www.venice.coe.int/docs/1998/CDL(1998)079-e.pdf
and Merger of the Chamber of Human Rights and the Constitutional Court of Bosnia and Herzegovina - http://www.venice.coe.int/docs/2000/CDL-INF(2000)008-e.pdf.
**For all opinions by the Venice Commission on Bosnia and Herzegovina**, see: http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&CID=50.

7. Legal certainty and the independence of the judiciary are principles that are found in international instruments by which BiH is bound, notably the European Convention on Human Rights[2] and the International Covenant on Civil and Political Rights[3]. More concrete definitions of legal certainty and the independence of the judiciary are provided by soft-law instruments adopted by the United Nations[4] and the Council of Europe[5] and fine-tuned through international case law.

8. The Venice Commission has dealt with the concept of the rule of law in its Report on this topic in 2011[6] and has established a list of the necessary elements that need to be met in order for a country to be seen as applying the rule of law: (1) legality, which includes a transparent, accountable and democratic process for the enactment of laws, (2) legal certainty, (3) the prohibition of arbitrariness, (4) access to justice before an independent and impartial court, including judicial review of administrative acts, (5) respect for human rights and (6) non-discrimination and equality before the law.[7]

9. On the national level of BiH, these principles contained in the relevant international instruments are applicable through Article II (2) of the Constitution of BiH. Article I (2) of this text states *"Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections"* and adds under Article II (6) that all organs of BiH and of its Entities *"shall apply and conform to the human rights and fundamental freedoms"*. Courts, government bodies and other agencies are explicitly mentioned in this provision.

10. During its visit to BiH, the Venice Commission's delegation was pleased to note that there seemed to be an existing, albeit largely informal, co-operation that had gradually been built up in the country between legal professionals and among judicial bodies (see paragraphs 39-44 and 57 below). This type of co-operation has managed to alleviate, to some extent, the problems created by a state structure as complicated as the one of BiH. However, it seems quite clear to the Venice Commission that more will need to be done in the short as well as in the long run to provide a more stable and secure basis for the entire system. This will be needed in order for BiH to be seen as providing legal certainty and as having an independent, as well as accountable, judiciary.

11. This opinion will deal with the principles of legal certainty and the independence of the judiciary separately, as these raise different issues and hence require different replies. It will also attempt to look more specifically at the structure and functioning of the judiciary in BiH, both from the perspective of the judiciary and from that of the individual citizen.

## III. The constitutional framework in Bosnia and Herzegovina

[2] See Articles 5-7.
[3] See Articles 14 and 15.
[4] See UN *Basic Principles on the Independence of the Judiciary*, endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; UN *Basic Principles on the Role of Lawyers* and UN *Guidelines on the Role of Prosecutors*, adopted at the 8th UN *Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, September 1990.
[5] See *European Charter on the Status of Judges*, adopted at the multilateral meeting on the statute for judges in Europe, organised by the Council of Europe, 10 July 1998; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on *judges: independence, efficiency and responsibilities*; Venice Commission's *Report on the Rule of Law*, http://www.venice.coe.int/docs/2011/CDL-AD(2011)003rev-e.pdf; Venice Commission's *Report on the Independence of the Judicial System Part I: the Independence of judges*, http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.pdf; Venice Commission's *Report on European Standards as regards the Independence of the Judicial System Part II: the Prosecution Service*, http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.pdf.
[6] *Report on the Rule of Law* (CDL-AD(2011)003rev.).
[7] *Ibid.* paragraph 41.

## A. The State level

12. The Constitution of BiH was agreed at Dayton as Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina. As the Venice Commission stated in its previous opinions[8], this Constitution, without expressly saying so, established a federal State. It defines two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, as constituent parts of BiH and divides rights and powers between the institutions of BiH and those of the Entities. It establishes a citizenship of BiH, while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of BiH is competent to verify the compatibility of the constitutions of the Entities with the Constitution of BiH. The usual elements of a federal State are therefore present.

13. According to Articles I.1 and I.3 of the Constitution of BIH, both the Republika Srpska and the Federation are Entities of BiH which "*shall continue its legal existence under international law as a State, with its internal structure modified as provided herein...".* Thus, the Entities are part of the internal structure of BiH. and cannot be sovereign States in their own right[9].

14. The division of powers (responsibilities) between the institutions of BiH and the Entities is regulated in the first place by Article III of the Constitution, whose paragraph 1 enumerates the exclusive responsibilities of the institutions of BiH and paragraph 2 those of the Entities. Paragraph 3 accords residual competence to the Entities: "*All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.*" In addition, para. 5 provides for other competencies of the State of BiH, notably for the possibility of transferring responsibilities from Entities to BiH through agreements: "*Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities."*

15. The state of Bosnia and Herzegovina as set up by the Dayton Constitution is a particularly weak one. The governmental functions not expressly assigned to the state appear to come within the competence of the Entities. Further, there is no clause conferring general implicit competence on BiH., although Article III.5.(a) (Art. III.5: "*Additional Responsibilities. a. Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities*.) may, in certain respects, come close to such a clause. Another sign of this weakness is the complete separation of the Entities' legal systems, discernible, inter alia, by the lack of a supreme judicial institution at state level responsible for guaranteeing uniform application and interpretation of the law[10].

16. However, in its Decision U 25/00 of 23 March 2001, the Constitutional Court of BiH stated that "*the issues not explicitly listed in Article III. 1 of the Constitution of BiH, referring to the competencies of the institutions of BiH, do not necessarily fall within the exclusive competence of the Entities*" and that "*under the Constitution, the Parliamentary Assembly of BH is competent to decide on the sources and amounts of the funds necessary for the operation of the institutions of BiH*."

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[8] Venice Commission, Opinion on the compatibility of the constitutions of Bosnia and Herzegovina and the Republika Srpska with the constitution of Bosnia and Herzegovina, CDL(1996)056rev2.; AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA ON THE LAW OF THE REPUBLIKA SRPSKA ON THE STATUS OF STATE PROPERTY LOCATED ON THE TERRITORY OF THE REPUBLIKA SRPSKA AND UNDER THE DISPOSAL BAN, CDL-AD(2011)030

[9] Venice Commission, Opinion on the compatibility of the constitutions of Bosnia and Herzegovina and the Republika Srpska with the constitution of Bosnia and Herzegovina, CDL(1996)056rev2.

[10] Venice Commission, Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina, (CDL-INF(1998)017).

17. The Constitutional Court has therefore clarified that the list of powers (responsibilities) of the institutions of Bosnia and Herzegovina contained in Article III of the Constitution is not exhaustive: the powers of the State of BH and of its Entities stem from the division of powers established in the constitution also outside that provision. The State Constitution sets up certain institutions at the State level and confers certain powers on them which may be found in several provisions of the Constitution (for example, in Article IV.4 for the Parliamentary Assembly and in Article V.3 for the Presidency). However, these powers are not necessarily enumerated, i.e. reiterated in Article III.1 of the State Constitution[6].

18. Incidental powers are therefore not necessarily "residual powers" within the meaning of Article III.3 (a) and belong to the state component which has the relevant primary powers. In other words, while the primary powers are distributed to each component of the state by the Constitution of BiH, instrumental or incidental powers, that are those powers which are necessary to carry out the primary powers, are not always attributed explicitly and are instead to be recognised to the relevant component on the basis of the distribution of primary powers.

19. The responsibilities of the State of BiH have been gradually extended on the basis of a number of provisions providing an opening towards increased state responsibilities[11] (human rights provisions and the principle of free movement of goods, services, capital and persons - Art. I.4; the provision in that the Presidency may facilitate inter-Entity cooperation - Art. III.4; additional responsibilities of the State – Art. III.5). For example, the Court of Bosnia and Herzegovina was set up "*In order to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and the respect of human rights and the rule of law in the territory of this State*"[12]

20. However, the extensive interpretation of state responsibilities has clear limits.

### B. The lower levels

21. The Constitution of the Republika Srpska was originally adopted in 1992. It is based on the concept of a unitary state.

22. The Constitution of the second Entity, the Federation of Bosnia and Herzegovina, was adopted in June 1994 as part of the Washington Agreement and reflected an American-brokered compromise between Bosniacs and Croats. It established a highly decentralised federation of ten Cantons. Each Canton has its own constitution.

23. The Brcko District is recognised by Article VI(4)[13] of the Constitution of BiH as *"a unit of local self-government with its own institutions, laws and regulations, and with powers and status definitively prescribed by the awards of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brcko Area" placed "under the sovereignty of Bosnia and Herzegovina and […] subject to the responsibilities of the institutions of Bosnia and Herzegovina as those responsibilities derive from this Constitution, whose territory is jointly owned by (a condominium of) the Entities"*.

## IV. Legal Certainty

### A. Functions and elements of legal certainty

24. Legal certainty has several functions: it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have knowledge of the law and comply with it. It also provides the individual with a means by which to measure whether there has

[11] Venice Commission, Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, §§ 22 ff. (CDL-AD(2005)004).
[12] Article 1, Law on Court of Bosnia and Herzegovina, Off. Gazette 49/09. See also Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina (CDL-INF(1998)017), http://www.venice.coe.int/docs/1998/CDL-INF(1998)017-e.asp.
[13] Official Gazette of BiH No. 25/09.

been any arbitrariness in the exercise of state power and helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations.

25. In its Report on the Rule of Law, the Venice Commission underlined that the principle of legal certainty plays an essential role in upholding trust in the judicial system and the rule of law and that this, in turn, is important for business arrangements and the economic development of a country.[14] If this does not exist, citizens (and investors from abroad) will not enter into contractual relationships with local partners and renounce to economic activities that are indispensable for the economic development of the country. The existence of legal certainty (or lack of it) therefore has an important economic impact. .Legal certainty should be promoted by all three branches of state power. It urges the legislature to ensure the good quality of laws and other legal instruments that it adopts. It requires the executive to respect this principle when it implements these legal instruments and in making decisions in general or on individual matters. Judicial power has to adhere to this principle when it applies legal instruments to concrete cases and in interpreting legal provisions.

26. From among international judicial institutions, it is predominantly the European Court of Human Rights that repeatedly engages in the analysis of the principle of legal certainty. In confirming that this principle is "*one of the fundamental aspects of the rule of law*",[15] the European Court of Human Rights ranks among its requirements *"that all law /should/ be sufficiently precise to allow the person /.../ to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"*[16]; "*that where the courts have finally determined an issue, their ruling should not be called into question*";[17] "*that cases /.../ are dealt with in a reasonable time and that past decisions are not continually open to challenge*",[18] or "*that /courts/ should not depart, without good reason, from precedents established in previous cases*".[19]

27. This case law, scholarly views and those of the Venice Commission[20] suggest that legal certainty could be defined as including the following requirements: publicity, precision, consistency, stability, non-rectroactivity[21]and the finality and binding force of decisions. *Publicity* means that legal instruments and judicial decisions must be publicly accessible. Access should not be subject to undue hurdles and should take into account the capacities of a common individual. *Precision* sets out that legal instruments and judicial decisions must be clear and precise as to their legal basis and content. Individuals need to be able to determine which court is competent to adjudicate their case, whether in private or in public litigation.

28. Under the *consistency* requirement, legal instruments must not contradict one another or be mutually incompatible. Judicial decisions must be based on legal instruments. Like cases must be treated alike both within one judicial institution and in between various courts (located on an either horizontal or vertical level). *Stability* means that legal instruments must not change so often as to make the *ignorantia juris non excusat* principle impossible for a common individual to follow. Courts should not depart from a previously held interpretation of a legal

[14] *Report on the Rule of Law*, paragraph 44.
[15] European Court of Human Rights, case of *Zasurtsev v. Russia*, no. 67051/01, 27 April 2006, paragraph 48.
[16] European Court of Human Rights, case of *Ječius v. Lithuania*, no. 34578/97, 31 July 2000, paragraph 56, case of *Baranowski v. Poland*, no. 28358/95, 28 March 2000, paragraphs 50-52.
[17] European Court of Human Rights, case of *Brumărescu v. Romania*, no. 28342/95 28 October 1999, paragraph 61; case of *Zasurtsev v. Russia*, no. 67051/01, 27 April 2006, paragraph 48.
[18] European Court of Human Rights, case of *Varnava and Others v. Turkey,* nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009*,* paragraph 156.
[19] European Court of Human Rights, case of *Demir and Baykara v. Turkey*, no. 34503/97, 12 November 2010, paragraph 153.
[20] See T. Tridimas, *The General Principles of EU Law*, Second Edition, Oxford: Oxford University Press, 2006, pp. 242-257; L. Fuller, *The Morality of Law*, Revised Edition, Yale University, 1969 and the Venice Commission's *Report on the Rule of Law*, paragraphs 44-51.
[21] At least in criminal law, see Article 7 ECHR.

instrument, unless they have a good reason to do so. *Non-retroactivity* requires that legal instruments not be applied retroactively. This rule can be derogated from only in exceptional circumstances (e.g. in criminal cases, when new legislation foresees a more lenient sentence than the old one).[22] *Finality and binding force of decisions* means that judicial decisions must be regarded as binding and, once adopted at the last instance, final. They need to be enforced by public authorities.

## B. Legal certainty and the plurality of legal orders in BiH

29. As is apparent from the description of the constitutional framework above, the legal and judicial system of BiH is the most complex and decentralised federal system among European countries today and probably the most complex in the world.

30. It is more difficult to maintain legal certainty in a federal state than in a unitary state. This is due to the fact that a federal state has a plurality of laws on the same subject and a plurality of courts that could claim to have jurisdiction. Hence, the first thing to do is to determine what law is applicable and which court has jurisdiction. This can be costly and time consuming for the parties to a case.

31. It is probably for this reason that many federal states have opted to harmonise fundamental laws such as procedural laws (e.g. the harmonisation of civil and criminal procedural law in Switzerland in the new Constitution of 1999 and the harmonisation of administrative procedures in Germany). A more radical approach is currently used in Belgium, where many competences have been decentralised, but the competence to oversee the organisation of all civil and criminal courts rests, in principle, with the federal power.

32. However, the situation in BiH is very different. The only State court in the country explicitly recognised in the Constitution of BiH is the Constitutional Court of BiH. The other judicial bodies of the central state (the Office of the Prosecutor of BiH, the Court of BiH and the High Judicial and Prosecutorial Council) were set up subsequently on the basis of general constitutional rules It would be desirable, in the long run, if these institutions were included *expressis verbis* in the Constitution of BiH.

33. Although BiH's legal system is a civil-law system, which was greatly influenced by the legacies of the Austro-Hungarian Empire and the Socialist Federal Republic of Yugoslavia, the four legal systems have developed on largely autonomous lines over the past two decades. Due to the autonomous nature of legislative procedures at the Entity and Brčko District levels, their legal orders vary in many areas of substantive and procedural law. In addition, since each Entity, the Brčko District and the BiH has its own judicial system, differences arise in the interpretation and the application of similar or even identical legal provisions.

34. This leads to a disjointed or fragmented structure on several levels: fragmentation of state powers, fragmentation of legislation and fragmentation of judicial bodies that apply the legislation. Although in and of itself, this fragmentation is a natural result of living in a federal system, the general feeling among the interlocutors that the Venice Commission's delegation met during its visit, is that the resulting discrepancies are perceived as a problem.

35. The fragmentation is more apparent in the Federation than in Republika Srpska, due to the cantonal constitutional structure of the former. The Venice Commission's delegation that visited BiH received slightly contradictory information about the similarities and differences between substantive and procedural laws in the two Entities. The fragmentation of the system must,

[22] See Article 7 ECHR.

however, be considered to be an ever present and potential source of conflict of laws and jurisdiction.[23]

36. There are discrepancies and inconsistencies in virtually all areas of the legal system, which manifest themselves in several ways. First of all, there are areas that are only regulated by one of the legal orders and not by the others. One such example is the introduction in Republika Srpska of the special laws consolidating the legislation relating to inheritance (wills, probate and conveyancing), extrajudicial procedures, real rights and companies. No corresponding laws seem to exist in the Federation or in the Brčko District. Secondly, there are differences in the regulation of the same types of legal situations within the two Entities. This is for instance the case with labour laws. The situation can arise in which people who are working for the same state institution, but live in different Entities, and go on maternity leave, are treated very differently. Similarly, the criminal codes of the two Entities differ in their catalogue of criminal offences, the definition of these offences and other parameters of criminal activities. What qualifies as a crime in one Entity, could simply be considered a misdemeanour in the other Entity, or it could avoid criminalisation altogether. Thirdly, similar or identical laws could be interpreted in different ways. For instance, there is a single law on medication in BiH regulating, *inter alia,* the reimbursement of the medication that is recorded on a drug list. Yet, the method for the composition of this drug list differs substantively between the Entities (and even among the cantons).

37. In many areas clear rules are lacking which could guide the resolution of discrepancies or conflicts that arise between the various legal orders. At the fore lies the fact that BiH's legal order lacks *consistency,* since a similar issue is often treated differently in different parts of BiH. This situation can create confusion as well as practical difficulties for BiH's citizens, especially those whose activities fall within the scope of the application of different legal orders (e.g. persons doing business in all territorial units). It is once again important to note that this fragmentation is a result of living in a federal system. However, it is clear that this is perceived as a problem in the country.

38. Over the past two decades, several initiatives have been made with the aim of unifying or harmonising legislation in the territory of BiH. State laws sometimes incorporate a harmonisation clause stipulating that the Entities have to harmonise their legal provisions in the object area within a certain period of time. The Venice Commission does not dispose of concrete information as to the concrete impact these clauses have on the Entities' legislation but both their effectiveness and legal basis are often questioned. Moreover, an attempt has been made to harmonise the procedural law in the country. Thus, in 2003, Civil and Criminal Procedural Codes were adopted at the State level, introducing a common civil and criminal procedure throughout the entire country. Nevertheless, although harmonisation has reached a higher degree in the area of procedural law than in that of substantive law, the desired uniformity does not seem to have been achieved.

39. Top-down strategies aimed at unifying or harmonising the legal order in BiH have not been very successful so far. This is not only due to the political circumstances, but also to the *ad hoc* nature of these very strategies and the related lack of any central authority for overseeing their implementation. To a certain extent, the deficiencies in the top-down approach seem to have been compensated for by a bottom-up approach (for the moment), based on the informal co-operation among various judicial and other institutions of BiH and the territorial units and sub units (the Entities, the Brčko District, the ten cantons of the Federation). However, this approach largely depends on personal contacts and the good will of participants, and has no formal institutional basis. As such, it brings different results in different areas of legal regulation and remains vulnerable to the changes in the personal contacts.

[23] This is also applicable, *mutatis mutandis*, to the Brčko District.

40. Co-operation between the various judicial and other relevant organs in BiH is not a new issue. The problems and challenges that were raised by it, have been repeatedly commented on by international bodies, including the Venice Commission. In 1998, the Venice Commission adopted an Opinion on the Inter-Entity Judicial Co-operation in Bosnia and Herzegovina, which dealt with the division of competences with regard to inter-entity judicial co-operation. The Opinion made it clear that the state level of BiH is competent to co-ordinate, to harmonise and to initiate co-operation with respect to all cases involving the two Entities or other countries (in criminal matters). The practical implementation of the co-operation is the task of the Entities, which are entitled to conclude agreements on the matter.[24]

41. Co-operation within the justice sector has also been boosted through the implementation of the Justice Sector Reform Strategy (2009-2013), which seems to have been accepted as an institutionalised framework to continue judicial reforms in BiH. For this process to continue successfully, the Venice Commission would like to encourage that it receive the political support and adequate human and financial resources it needs.

42. Nevertheless, at present, judicial co-operation remains a problem. In some areas, the level of co-operation is low if existent at all. For instance, the constitutional courts of the Entities have almost no co-operation with the Constitutional Court of BiH. Co-operation between various cantonal courts in the Federation is also limited, as is the co-operation between courts of the Entities and the Court of BiH. Moreover, where it exists, co-operation is mostly based on personal contacts rather than on institutionalised schemes. Thus, for instance, there is good co-operation between the supreme courts of the Entities whose representatives meet twice a year. The level of co-operation between prosecutors of the two Entities has also been assessed as good by the interlocutors met during the visit by the Venice Commission's delegation. In addition, judges and prosecutors from different institutions have the opportunity to meet in training sessions,

43. Whereas the level of judicial co-operation in BiH is much higher than one could assume from the legislative instruments due to personal initiatives and contacts, interlocutors met by the Venice Commission's delegation in Sarajevo and Banja Luka mostly agreed that it suffered from a lack of institutionalisation as well as from the absence of an effective central body responsible for it. This situation indirectly threatens legal certainty in the country. In the context in which various judicial and prosecutorial institutions do not co-operate or even communicate with each other regularly, the requirements of consistency or precision are rather difficult to meet.

44. This is one of the areas in which the Ministry of Justice of BiH and the HJPC could play a more active and central role by stimulating informal co-operation, organising various projects aimed at strengthening the exchange of ideas and experiences among judicial institutions and initiating, at the state or the Entities' and Brčko District level, the adoption of relevant instrument that would provide any existing co-operation with a legal basis.

45. Even if the existence of four legal systems in BiH does not automatically mean that the principles of the rule of law and legal certainty are breached[25], the authorities of BiH and its territorial units should be encouraged to take a more proactive approach to counter the excessive decentralisation of the legal orders. It might also be useful if the authorities ensured that the country's legislation is as consistent and precise in its content as possible.

46. This is also important for the country if it intends to be able to apply the *acquis communautaire*. In order to achieve this, the authorities of BiH and the territorial entities might

[24] Inter-Entity judicial co-operation in Bosnia and Herzegovina, http://www.venice.coe.int/docs/1998/CDL-INF(1998)011-e.asp, paragraphs 11 and 17.
[25] See Foundation Public Law Centre (CPJ), *Does B&H Need a Single Supreme Court?* p.3.

want to look into combining the already existing bottom-up approaches with more centralised, top-down strategies.

47. The Venice Commission, however, remains convinced that progress will remain limited without amending the Constitution of BiH and without strengthening the state level. Despite the fact that present constitutional provisions as well as the doctrine of implied powers have allowed to support state level legislative and institutional competences, this doctrine has its limits. For instance, as regards the Court of BiH (also called the State Court), it is difficult to imagine that the doctrine could be stretched any further than what has already been done with the enactment of the Law on the Court of BiH. One remaining possibility would be to expand the responsibilities of the state through agreements between the Entities as provided by Article III 5(a) of the Constitution of BiH.

48. A modest start could perhaps be the preparation of what are known as "model laws", even if they are no longer a part of the official terminology of the legal framework of BiH. These could be prepared at the state level on politically non-sensitive issues.

### C. Fragmentation of the judicial and the prosecutorial systems

49. The plurality of legal orders in BiH is mirrored in the fragmentation of its judicial system. There are currently four judicial (sub)-systems in the territory of BiH, namely the judicial systems of BiH, of the Federation of BiH, of the Republika Srpska and of the Brčko District. These systems differ considerably in their internal structure and the institutions they cover. The relationship between the systems is also not clearly defined, which gives rise to different interpretations and inter-judicial disputes.

50. There are only two institutions of judicial character at the State level, the Constitutional Court of BiH and the Court of BiH. The Court of BiH, established in 2000, is the only general court at the state level. It is competent mainly for criminal actions relating to war crimes, organised crime, economic crime, and corruption.[26] The fact that it is not mentioned explicitly in the Constitution has led to legal disputes. But, the constitutionality of the Court was upheld by the Constitutional Court of BiH. The Venice Commission has adopted an Opinion in 1998, in which it stressed the importance of such a court and confirmed the possibility to establish it in accordance with the Constitution on the basis of the implied or inherent powers of the State.[27]

51. The territorial units (the Federation, the Republika Srpska and the Brčko District) have their own judicial systems. What these three systems have in common is that they include general courts of first and second instance (called municipal and cantonal courts in the Federation and basic and district courts in the Republika Srpska and basic and appellate courts in the Brčko District). However, while the judicial system of the Brčko District is limited to these two types of courts, the judicial systems of the two Entities are more complex, with the added difficulty that the Federation is further divided into ten cantons. Each Entity has a constitutional court (Constitutional Court of the Federation and the Constitutional Court of Republika Srpska) and a supreme court (Supreme Court of the Federation, Supreme Court of Republika Srpska). In addition to courts of general jurisdiction, Republika Srpska has created courts of special jurisdiction: the district commercial courts and a Higher Commercial Court, which do not exist in the Federation.

52. The prosecutorial system is divided in a similar way to the judicial system. There are prosecutorial offices in the BiH, in the Federation (Entity level and 10 cantonal offices), in the

[26] See Law on the Court of Bosnia and Herzegovina.
[27] Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina (CDL-INF(1998)017), http://www.venice.coe.int/docs/1998/CDL-INF(1998)017-e.asp.

Republika Srpska and in the Brčko District. In addition, an office of a special prosecutor for organised crimes and corruption has been established in Republika Srpska. In the Federation, in addition to the Prosecutor's Office at the Entity level, there are prosecutors' offices in each of the ten cantons.

53. While the Constitutional Court of BiH, the Court of BiH and the BiH Prosecutor Office have some appellate and supervisory competences, these are rather limited in scope. Thus, for instance, the Court of BiH does not function as a general supreme court of the country. Besides adopting positions on legal issues upon the request of courts of the territorial units, it can only receive complaints relating to the violation of the Election Law or issues that fall under its "Administrative Jurisdiction"[28]. Even if citizens of BiH can challenge the decisions of the constitutional or supreme courts of the Entities and the Brčko District in front of the Constitutional Court of BiH or the Court of BiH, the scope of the review is limited. The Constitutional Court of BiH has no jurisdiction to render a decision on questions of interpretation or the application of Entity constitutions as such. However, if a court *"interprets or gives effect to that Constitution in a way which is incompatible with the requirements of the Constitution of Bosnia and Herzegovina, /…/ the Constitutional Court of BiH /..;/ shall have the constitutional authority to decide finally whether the decision of the court of the Republika Srpska (even if relating to the Constitution of Republika Srpska) is or is not consistent with the Constitution of Bosnia and Herzegovina*".[29]

54. In the structure as it stands, the legal systems are separate and the State-level courts in general are not entitled to apply and interpret the law of the Entities and the Brčko District. They apply and interpret the laws of BiH, which cover only some areas. In this respect, it should be mentioned that the Constitutional Court of BiH has jurisdiction over questions of compatibility of any legal act, judgment and decision with the Constitution of BiH. In other words, if a judgment that is being challenged before the Constitutional Court of BiH raises the question of an arbitrary application of an Entity law, the Constitutional Court of BiH may deal with it. However, once again, the scope for review is limited (although it has evolved over time).[30] For instance, the Court cannot review the procedure of the establishment of facts or the application and interpretation of laws made by lower instance courts. Its competence is limited to the assessment of whether a decision breaches an individual's constitutional rights; whether the decision has disregarded or wrongly applied constitutional rights; whether a court has applied the law in a manifestly arbitrary manner; whether the law applied is itself unconstitutional or whether the right to a fair trial has been breached.[31]

55. The scope of the competence and jurisdiction of the state-level courts is also a contentious point. This is mainly the case for the Court of BiH. Article 7(2) of the Law on the Court of BiH stipulates that in addition to the jurisdiction over criminal offences defined in the Criminal Code and other laws of BiH, the Court of BiH *"has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences: a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina".* The interpretation of the terms under paragraphs a-b,

[28] See Article 8 of the Law on the Court of BiH.
[29] See, i.a. AP 2821/09 paragraphs 26-28.
[30] See e.g. Steiner & Ademovic: *Commentary of the Constitution of B&H, The scope of control*, pp. 167-171.
[31] As there is no Supreme Court at the state level that could review the question of whether lower courts have correctly applied laws, lawyers tend to use the "manifestly arbitrary manner" clause as another means fo challenge a decision before the Constitutional Court of BiH. The Constitutional Court of BiH does not always accept this argument.

and, hence, the extent of the Court's jurisdiction, remains a point of contention between the state bodies and those of the territorial units. This applies in particular to Article 7(2)(b), which was challenged in 2009 before the Constitutional Court of BiH. Although the Court upheld its legality, it found that this provision could violate human rights in individual cases if it were applied inappropriately. However, it underlined that the possible violation would relate to the application and not to the constitutionality of the provision itself.[32]

56. The Venice Commission was informed that the number of cases in which the Court of BiH applied Article 7(2) has been on a steady decline over the past few years and that the High Judicial and Prosecutorial Council of BiH (HJPC) together with a team of experts has been looking into the cases dealt with by the Court of BiH, in which this provision was applied. The Venice Commission believes that a clarification of this provision could be useful..

57. As there is no institutionalised relationship between the judicial and prosecutorial systems of the four units, the courts and prosecutors from different units can easily interpret similar or even identical provisions of their respective legal orders differently. Citizens have no means of challenging these different interpretations in a supreme judicial or prosecutorial institution and of having them harmonised. There are no formal mechanisms of harmonisation at the inter-unit level. Again, the lack of such mechanisms is partly compensated for by informal co-operation and exchange of information among various judicial and prosecutorial bodies of BiH and the territorial units and sub units (the Entities, the Brčko District and the ten cantons of the Federation). The same caveats – the *ad hoc* nature, the vulnerability to changes in personal contacts – apply here as well. The fragmentation of the judicial and prosecutorial system raises difficulties relating to legal certainty. Furthermore, as no tools for the harmonisation of the case law throughout the country exist, citizens living in different parts of the country may get a significantly different solution to similar cases.

58. The Venice Commission therefore concludes that such a situation can create problems and would like to encourage the authorities of BiH and the territorial units to seek a viable solution. Again, as in the previous case, consideration should be given to combine informal (as well as existing formal ones) bottom-up approaches with formal, top-down strategies. In addition to the measures discussed in this opinion (see paragraphs 62-63, below), such strategies might include several modifications in the structure of the judicial and prosecutorial systems of the country.

59. As the unification of this system – as desirable as it may seem – will be difficult to put into practice without reforming the entire territorial structure of BiH and revising the Constitution, it is rather the harmonisation of the four existing systems which should be considered at this stage. For instance, the work of specialised commercial courts in the Republika Srpska should be assessed and, if found to be successful, such courts could be introduced in the Federation (and, potentially, in the Brčko District). Similarly, the results of the work of the Special Prosecutor in the Republika Srpska could lead either to its creation in the Federation or to its abolition in the Republika Srpska.

60. On the level of the Federation, where there is a further fragmentation due to the existence of ten cantons, consideration should be given to introducing a single law on the prosecution service. Such a law would bring the prosecution service together and would govern it on the entire territory of the Federation.

### D. Court structures at the State level

61. The plurality of legal orders and the fragmentation of the judicial and prosecutorial system in BiH give rise to several concrete challenges. During the delegation's meetings in Sarajevo

[32] Case no. U 16/08 of 28 March 2009, paragraph 44.

and Banja Luka, the following challenges were identified as the most pressing: the lack of supreme judicial bodies in the country, issues relating to the HJPC (see item III., D., below), the co-operation among various judicial and prosecutorial institutions, the possibility of setting up a separate Court of Appeal and several other issues (the structure of the judicial and the prosecutorial system, the financial situation in the judiciary, the tenure of judges and prosecutors, etc.).

62. On the state level, the Court of BiH has an Appellate Division, the organisation of which has raised questions about its impartiality. The possibility of appealing judgments made by different sections within the same Court[33] to a different division of that Court, which is in effect separate from the rest of the Court should, in and of itself, not be a problem[34]. Although in practice a judge was never appointed in the Appellate Division for a case he or she had tried at first instance, a separate Court of Appeal would be seen as more independent than a division in an existing court. It would also create more trust in the fairness of its judgments and in the judicial system in general.

63. In this respect, the Venice Commission was pleased to note that there are on-going discussions with the Ministry of Justice of BiH on creating a separate Court of Appeal at the state level. This could be achieved by using the existing resources of the Court of BiH, notably by transforming the internal Appellate Division of this Court into a separate Court of Appeal, for which the existing draft by the Ministry of Justice of BiH is a good starting point[35]. In setting up such a Court, the authorities of BiH might consider introducing one law on BiH Courts rather than have two separate laws, one on the Court of BiH and one on the Court of Appeal of BiH – if this is at all possible. The Venice Commission would therefore like to encourage the Ministry of Justice of BiH to continue with this process by implementing the conclusions of the Working Group responsible for drafting the proposal for establishing the Court of Appeal of BiH.[36]

64. However, there is a more general issue that needs to be considered at the state level: although it forms one country, BiH lacks a supreme judicial body that would guarantee the unity of its legal order and the uniformity or at least the harmonisation of its judicial and prosecutorial systems. The need for such a body seems to be generally acknowledged throughout the country. Their creation is considered important both from the perspective of the judicial bodies themselves, for which it would provide useful guidelines on how to proceed with the interpretation and application of certain legal provisions, as well as from the perspective of BiH citizens, for whom it would provide legal certainty, foreseeability, and uniformity in the interpretation and application of the law in the country.

65. Supreme judicial bodies are expected to play an important role in ensuring legal certainty. It is believed that they would guarantee consistency in the case law as well as the stability and finality of decisions. Neither of the two existing state-level courts can fulfil this function at the current stage. The Constitutional Court of BiH's competences are limited to constitutional issues. It can ensure the unity of approaches solely in certain areas, such as human rights protection. The Court of BiH is slightly better placed, since it gives binding decisions on the enforcement of laws and has a certain appellate jurisdiction in administrative matters. However, once again, this competence is rather narrow and based on a limited access of individuals to the Court.

66. Suggestions for two main models have been discussed so far to redress the current situation:

[33] See Article 6 of the Law on the Court of Bosnia and Herzegovina.
[34] See Article 2 of the Protocol No. 7 of the ECHR; Article 14.5 of the International Covenant on Civil and Political Rights.
[35] Draft Law on the Appellate Court of BiH, Ministry of Justice of BiH, Sarajevo, December 2011.
[36] Ibid.

- the first model would be the creation of a **Supreme Court of BiH***.* Such a Court would be located at the state level, although it is still not very clear what kind of relationship it would have with the Court of BiH. The idea of the latter being gradually transformed into such a Supreme Court seems, however, to have largely been rejected by the representatives of the judiciary in the Entities, as well as by the representatives of the Court of BiH itself. Thus, a Supreme Court would most probably be a new institution, endowed with general jurisdiction to harmonise case law adopted at the territorial units' level. Although the potential importance of such a Supreme Court seems to be generally uncontested in the country, a certain amount of reluctance towards its creation persists. At this stage, the reluctance can be justified. Legislative powers at the state level would need to be increased to create key state laws in order for this Court to be able to function properly as a Supreme Court. This, however, requires either constitutional amendments or an inter-Entity agreement. The introduction of such a Court might be considered in the long run within the framework of a more comprehensive constitutional reform.
- the second model foresees the establishment of a **common or joint body** (also known as a "Joint co-ordination panel") bringing together the existing high judicial institutions at the state and the territorial units' level. Such a common body would most probably be composed of representatives from the supreme courts of the two Entities, with appropriate representation of the Appellate Court of the Brčko District and the Court of BiH (and in the future the still to be created Appellate Court of BiH). For the moment, there does not seem to be any concrete project for the creation of a common body and, hence, uncertainty prevails as to the competence, the frequency of meetings or the way in which decisions could be adopted.

67. Taking into account the current situation in BiH, the second model seems to be the preferable one, at least in the short run. First, the institution of a common body would develop the tradition of inter-court meetings which have already been organised occasionally over the past years. Although a common body would differ from those meetings by the degree of institutionalisation, the permanent nature and, probably, the composition, it could still be perceived as a continuation of the already existing inter-court co-operation. Secondly, the creation of a common body would raise fewer problems from a legal perspective. While there is currently no legal basis for the creation of a new Supreme Court, a common body could draw its legitimacy from the already existing courts and could use their authority to impose its positions on lower judicial organs in the territorial units.

68. The establishment of a common body in the short run should not be seen as an obstacle to the creation of a Supreme Court of BiH in the long run. . Nevertheless, the creation of a common or joint body should not be made in isolation but, rather, be a part of a more substantive judicial reform in BiH, which is necessary.

## E. Other issues

*Backlog of cases*

69. The backlog is currently quite a serious problem in many courts in BiH and its territorial units. With respect to the Federation, the Venice Commission was informed that there are a number of cantonal courts that are overrun with cases, creating a very heavy backlog (consisting mainly, however, of fairly trivial cases such as the payment of utility bills of low value) , while there are other cantonal courts that are less active, some of them almost idle. It might be useful for the Federation to consider, in the long run, to reduce the number of cantonal courts and provide more funding to those courts that are in need of funding due to a heavier workload. This would help in streamlining the Federation's judicial system and make it more effective. In addition, this situation sometimes results in cases being transferred from one court

to another court of the same type (e.g. between municipal and cantonal courts in the Federation). However, this threatens the principle of the "natural judge" or the right of access to a tribunal established by law, as the transfer can affect legal certainty in BiH.[37] Increasing efficiency and disposing of the backlog as soon as possible should therefore be seen as a priority. It would be useful if this database was recognised and used by the courts as a central database.

70. In this respect, the HJPC should be called upon to continue its initiative to tackle the backlog by proposing relevant measures which could include legislative changes, professional training of the judiciary, etc.

*Access to legal instruments and to case law*

71. Access to legal instruments seems to be met in BiH. Legislation is available online in the national languages of BiH and partly in English. The situation is more complicated with respect to case law. A central case law database exists in BiH, which contains around 8 500 cases. But this database is only accessible to judges, prosecutors and court associates, with no access granted to other legal professionals. Although a recent decision has been made to extend the access to defence attorneys, this is currently still awaiting a decision on the fees to be charged. Other legal professionals, students and the public in general will still not have access to this database.

72. The Supreme Courts of Republika Srpska and the Federation publish selections of their case law three times a year. Case law of the state-level courts is mostly online, sometimes also in English.

73. Although not uncommon in other countries, this situation is particularly worrying in a country with such a level of decentralisation of the judiciary as BiH. Publicity is one of the main requirements of legal certainty, if legal instruments and judicial decisions are publicly accessible and the access is free from undue hurdles. The effort of the HJPC to run a uniform case-law database should therefore be supported with the aim of making this database accessible to the public as soon as possible.

## V. Independence of the Judiciary

### A. General

74. The independence of the judiciary is an issue that affects all countries, whatever their systems and is related to the democratic regime and to the respect for the separation of powers. It is a fundamental guarantee of the rule of law, democracy and the respect for human rights. It ensures that justice can be done and seen to be done without undue interference by any other branch of power, other bodies inside the judiciary, other judges or any other actors. This independence has an objective and a subjective component. The objective component is the indispensable quality of the judiciary and the subjective component is the right of individuals to have their rights and freedoms determined by an independent judge.[38] This principle is protected, on a European level, by Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union.

[37] See Article 6 ECHR; Article 47 of the Charter of Fundamental Rights of the European Union; Venice Commission's *Report on the Independence of the Judicial System Part I: the Independence of Judges*, paragraphs 73-81.

[38] Venice Commission's *Report on the Independence of the Judicial System Part I: the Independence of Judges*, paragraph 6.

75. The independence of the judiciary can be seen as having two forms: institutional and individual independence. Institutional independence refers to the separation of powers in the state and the ability of the judiciary to act free of any pressure from either the legislature or the executive. Individual independence pertains to the ability of individual judges to decide cases in the absence of any political or other pressure.[39]

76. The UN Basic Principles on the Independence of the Judiciary of 1985 state that *"the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws. It is the duty of public institutions to respect and observe the independence of the judiciary"*[40]. The document enumerates several conditions for judicial independence, including the absence of any inappropriate and unwarranted interference with the judicial process, the exclusive jurisdiction of the judiciary over all issues of a judicial nature, the absence of the review of judicial decisions by non-judicial powers, a fair conduct of judicial proceedings and the respect for the rights of the parties, or the security of tenure and protection of the rights of individual judges.

77. The European Court of Human Rights has dealt with the independence of the judiciary in several cases. In the case of *Bryan v. the United Kingdom* (1995), it declared that *"in order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence".*[41] In the case of *Delcourt v. Belgium* (1970), the court stressed that the principles of independence and impartiality require that judges not have prejudicial connections to, or views about, any party to a dispute, either because of involvement in a previous stage of the dispute, or because of a personal pecuniary connection to a party or issue involved in the dispute.[42]

## B. Institutional independence

78. The judiciary must be independent and impartial. Institutional judicial independence focuses on the independence of the judiciary from the other branches of state power (external institutional independence). The relationship between courts within the same judicial system should also be taken into account (internal institutional independence).

79. Institutional independence can be assessed by four criteria.[43] The first criterion is independence in administrative matters, which means that the judiciary should be allowed to handle its own administration and make decisions without any external interference. It should also be autonomous in deciding on the allocation of cases. The second criterion is that the judiciary should be independent in financial matters. The judiciary must be granted sufficient funds to properly carry out its functions and must have a role in deciding how these funds are allocated. The third criterion is that it should have independent decision-making power. The judiciary must be free to decide cases without external interference. Its decisions must be respected (i.e. implemented) and should not be open to revision by non-judicial powers. The fourth criterion is that it should be independent in determining jurisdiction. The judiciary should

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[39] See OHCHR, *Human Rights in the Administration of Justice: Manual on Human Rights for Judges, Prosecutors and Lawyers,* Professional Training Series No. 9, New York and Geneva, 2003, pp. 113-158; and D. S. Law, Judicial Independence, *International Encyclopaedia of Political Science*, Vol. 5, 2010, pp. 1369-1372.

[40] *UN Basic Principles on the Independence of the Judiciary,* endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, http://www.unrol.org/doc.aspx?d=2248, paragraph 1.

[41] European Court of Human Rights, case of *Bryan v. United Kingdom,* no. 19178/91, 22 November 1995, paragraph 95.

[42] European Court of Human Rights, case of *Delcourt v. Belgium,* No. 2689/65, Judgment of 17 January 1970, paragraph 31.

[43] OHCHR, *Human Rights in the Administration of Justice: Manual on Human Rights for Judges, Prosecutors and Lawyers,* Professional Training Series No. 9, New York/Geneva, 2003, pp. 120-122.

determine exclusively whether or not it has jurisdiction in a certain case. In addition, the possibility for a person in BiH to move from political functions to positions within the judiciary could give raise to concern and should be avoided.

## C. Individual independence

80. Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. Judges must be independent and impartial. These requirements are an integral part of the fundamental democratic principle of the separation of powers: judges should not be subject to political influence and the judiciary should always be impartial.

81. This requirement has many aspects, out of which the following four seem of particular importance in the context of BiH.[44] The first one is the appointment and the promotion of judges. All decisions concerning the professional career of judges must be based on objective criteria and must avoid any bias and discrimination. The selection of judges and their promotion must be based on merit (professional qualifications, personal integrity). The second is the security of tenure and financial security. The term of office of judges must be adequately secured by law and, ideally, should end with the retirement of the judge. Adequate remuneration and decent working conditions must also be guaranteed. Any changes in the guarantees should occur only in exceptional situations. The third aspect is independence in the decision-making power. Individual judges must be free to decide cases without any external interference. The fourth refers to the rights of judges. As other individuals, judges enjoy an array of human rights, yet some of these rights (freedom of association, freedom of expression, etc.) are of special importance to them as these rights help in ensuring their individual independence. On the other hand, certain fundamental rights are somewhat limited for judges: for instance, freedom of expression is limited by the duty of confidentiality, which forms a part of the principle of impartiality.

## D. Situation in BiH

### 1. High Judicial and Prosecutorial Council

82. The Venice Commission stated, in its Report on Judicial Appointments, that an appropriate method of guaranteeing the independence of the judiciary is the establishment of a judicial council endowed with constitutional guarantees for its composition, powers and autonomy.[45] Although there is no standard model for a judicial council, the Venice Commission believes that a balance should be struck between judicial independence and self-administration on the one hand and the necessary accountability on the other in order to avoid negative effects of corporatism in the judiciary.[46] It also stated that a substantial element or a majority of the members of such a council should be elected by the judiciary itself and other members could be elected by Parliament in order to provide for democratic legitimacy of the council.

83. As regards prosecutorial councils, these are increasingly widespread, but there is no standard to establish such structures and it would be difficult to impose one model on all member states of the Council of Europe. Nevertheless, if they exist, their composition "*should include prosecutors from all levels but also other actors like lawyers or legal academics. (…) If prosecutorial and judicial councils are a single body, it should be ensured that judges and*

[44] For further details, see OHCHR, *Human Rights in the Administration of Justice: Manual on Human Rights for Judges, Prosecutors and Lawyers,* Professional Training Series No. 9, New York and Geneva, 2003, pp. 123-135. See also Recommendation CM/Rec (2010)12 of the Committee of Ministers on *judges: independence, efficiency and responsibilities* and the *European Charter on the Status of Judges.*

[45] Venice Commission's *Report on Judicial Appointments*, http://www.venice.coe.int/docs/2007/CDL-AD(2007)028-e.pdf, paragraph 48.

[46] *Ibid.* paragraphs 27-29.

*prosecutors cannot outvote the other group in each other's' appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the Conseil supérieur de la magistrature sits in two chambers, which are competent for judges and prosecutors respectively)."* [47] Italy, Romania and Turkey, like France, have judicial councils that are also competent for prosecutors.[48]

84. The single body that has been specifically created in BiH to consolidate and strengthen the independence of the judiciary is the High Judicial and Prosecutorial Council (HJPC). This body was established in 2004 by an Agreement on Transfer of Certain Entities' Responsibilities signed by the Prime Ministers of the Federation and the Republika Srpska and the Minister for Justice of BiH. The corresponding Law on the HJPC was then adopted by the Parliamentary Assembly of BiH pursuant to Article IV 4. a) of the Constitution of BiH. This Law is currently being revised. The Venice Commission recommends that in the long run, the HJPC be provided with an explicit constitutional basis.

85. It is obvious that in practice the HJPC has played an extremely important role to strengthen the independence of the judiciary and to further contacts and co-operation among judges and prosecutors. It consists of 15 individual members recruited among judges, prosecutors, and other legal professionals. One international member may be appointed by the High Representative for BiH. The HJPC appoints judges and prosecutors under the criteria that it sets, monitors the activities of judges and prosecutors and, if need be, conducts disciplinary proceedings against them.

86. In principle, the establishment of the HJPC and its performance over the eight years of its existence have been assessed rather positively by the representatives of the judiciary in BiH. Several interlocutors in Sarajevo and Banja Luka expressed the view that the HJPC had helped increase the institutional and individual independence of the judiciary. It has done so by introducing more transparent criteria for the appointment of judges and prosecutors; by applying these criteria itself; by seeking to modernise the judiciary with the help of new means of communication and the automatic selection of cases.. Some interlocutors believe that the HJPC could play an even more important role, notably by becoming the main driving force behind a more general reform of the judiciary in BiH.

87. Despite this prevailing positive assessment, some reservations were made *vis-à-vis* the composition and the work of the HJPC:

88. First, the procedure of selecting the HJPC members can be regarded as somewhat deficient. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by prosecutors, and five or six by judges. Due to this procedure, the selection could be vulnerable to inter-institutional and inter-personal rivalries in the judiciary.

89. Secondly, the wisdom of having judges, prosecutors, and legal professionals present in the institution which both determines the criteria for the appointment of judges and prosecutors and then carries out this appointment itself, can be challenged. The situation is particularly problematic in case of judges, as the majority of the members of the HJPC selecting them are prosecutors and legal professionals – that is, parties to the proceedings in front of the courts. Moreover, several interlocutors made remarks suggesting that sometimes, the criteria of

[47] *Report on European Standards as regards the Independence of the Judicial System Part II: the Prosecution Service,* paragraphs 64-68.
[48] *Ibid*. paragraph 64, footnote 6.

ethnicity prevailed in the appointment of judges and prosecutors over those of professional competence. In this respect, the authorities should reconsider the obligatory ethnic composition in the current model of the HJPC.

90. Thirdly, the achievements of the HJPC are sometimes considered as insufficient. The main objections pertain to the failure by the HJPC to introduce a uniform system of financing of the judiciary in BiH, to find an efficient strategy to fight the backlog, and to undertake a more radical reform of the judiciary. Those making such objections often admit that the HJPC has been prevented from realising certain tasks by the limited scope of competences it has under the Law on the HJPC.

91. Concern was also raised with respect to the appointment procedure of judges and prosecutors. In order to ensure the high quality and diversity of candidates, mandatory written exams should be introduced at the entry level; a national pool of vacancies should be established rather than having each vacancy published separately, as this would also improve the mobility of the judiciary across the country.

### 2. The Draft Amendment to the Law on the HJPC

92. This Draft Law seems to offer only a partial solution to these problems. First, while increasing the number of the HJPC members to 19, it also strengthens the position of the two main professions represented in the HJPC. Judges and prosecutors should now take up 16 out of 19 seats in the HJPC; the remaining three members would be appointed by political bodies. However, a balance should be struck in order to make sure that judges and prosecutors cannot outvote each other with respect to appointments and disciplinary proceedings (see paragraph 79 above). The absence of representatives from other legal professions, apart from judges and prosecutors, is also surprising and should be revisited.

93. Secondly, the Draft Amendment foresees the division of the HJPC into a judicial department and a prosecutorial department. Each department should consist of 11 members, including 8 judges or prosecutors – members of the HJPC, and should have the competence to decide in matters relating to judges (judicial department) or prosecutors (prosecutorial department). The creation of two departments within the HJPC is a reasonable initiative that could make the two legal professions less dependent on each other without depriving them of a common platform. In addition, it also solves the problem that would have arisen if two separate judicial councils would have been created, as the Transfer Agreement explicitly refers to the establishment of a High Judicial and Prosecutorial Council.

94. Thirdly, the competences of the HJPC are not revised in any way by the amendment. Thus, the HJPC is not granted any special powers in the area of financing of the judiciary or for undertaking a general reform of the judiciary in BiH. The lack of such competences is not in itself necessarily reproachable, as the financial and conceptual issues are usually decided by political bodies rather than by a self-governing professional body. Nevertheless, it is indubitable that when the relevant decisions are made, the HJPC should be granted the right to present its views on them.

### 3. Other issues

*Financial matters*

95. Several other specific issues arise out of the general situation of the judiciary in BiH. The first relates to the financial situation of the judiciary. The independence in financial matters, i.e. the right of the judiciary to be granted sufficient funds to properly perform its functions and to have a role in deciding how these funds are allocated, is one of the main elements of the

institutional (and also individual) independence of the judiciary[49]. Yet, during the meetings in Sarajevo and Banja Luka, several interlocutors drew the attention of the Venice Commission's delegation to the decentralised system of financing which fails to ensure this independence adequately.

96. The budgets of courts and prosecutors' offices are determined at the level of the State (state courts), the Republika Srpska (RS courts), the Federation (Central FBiH Courts), the cantons (cantonal courts), and the Brčko Distrct (BD courts). The Federation, due to its structure, bears the brunt of the budget fragmentation, which directly undermines the efficiency of the judiciary of the Entity.

97. No uniform rules exist in this area with the result that there are quite different budgets allocated to different courts and prosecutors' offices. Moreover, judicial bodies become easily vulnerable to pressure from the institution deciding on the budget.

98. The HJPC has made an initiative aimed at centralising the financing of the judiciary and bringing it to the state level. So far, this initiative has not been implemented, although the centralisation of the financing could be counted among the most important steps to be taken. On a lower scale, consideration should be given by the Federation, in the long run, to aim for the financing of the judiciary (both courts and prosecutor's office) to be concentrated at the Entity level. In the short run, the Federation might consider to at least bring the financing of salaries of judges and prosecutors to the Federation level and leave, for the time being, the financing of the expenditure relating to the running of courts to the cantonal levels.

## VI. Conclusions

99. The general situation of the judiciary in BiH gives rise to concern with respect to both legal certainty and its independence. The plurality of legal orders and the fragmentation of the judiciary make it difficult for BiH to comply with the requirements of consistency, precision, stability and finality of its legislation and case law as well as to meet the various aspects of the institutional and individual independence of the judiciary.

100. On a more concrete level, the absence of a constitutional basis for existing state-level institutions; the composition of the HJPC; the insufficient co-operation among various judicial and other bodies and, among others, the issues relating to the financial situation of the judiciary, access to legislation and case law, give rise to concern.

101. The Venice Commission remains convinced that progress will remain limited if the Constitution of BiH is not amended and if the state level is not strengthened.

102. In the view of the Venice Commission the following reforms could contribute to improving the situation:

- **reform the judiciary** in order to unify the system as much as possible and reduce decentralisation (especially on the level of the Federation);

- establishing a **Supreme Court** at the state level would require amending the BiH Constitution. In the long run this corresponds to a clear and generally uncontested need. For a Supreme Court to be able to effectively play its role of harmonising case law within the country, the legislative powers of the State would need to be increased;

[49] Venice Commission's *Report on the Independence of the Judicial System Part I: the Independence of Judges*, paragraphs 52-55.

- ***establishing a common or joint body.*** In the absence of other supreme judicial institutions, such a body, composed of the representatives from the supreme courts of the two Entities, with appropriate representation of the Appellate Court of the Brčko District and the Court of BiH, could ensure the harmonisation of the case law;

- ***establishing a separate Court of Appeal.*** Such a court could be set up by using the existing resources of the Court of BiH on the basis of the Draft Law prepared by the Ministry of Justice of BiH for such a Court. Towards that end, the Venice Commission would like to encourage the Ministry of Justice of BiH to continue with this process by implementing the conclusions of the Working Group responsible for drafting the proposal for establishing the Court of Appeal of BiH;

- ***regarding Article 7(2) of the Law on the Court of BiH.*** The Venice Commission was informed that the number of cases in which the Court of BiH applied Article 7(2) have been on a steady decline over the past few years and that the HJPC together with a team of experts was currently looking into the cases dealt with by the Court of BiH, in which this provision was applied. The Venice Commission believes that a clarification of this provision could be useful..

- ***harmonising legislation and the use of "model laws" (or equivalent).*** BiH and its territorial units should look into countering the excessive decentralisation of the legal orders and ensure that the country's legislation is as consistent and precise in its content as possible. This is important if the country intends to apply the *acquis communautaire*. In order to achieve this, the authorities of BiH and the territorial entities might look into combining and formalising the already existing bottom-up approaches with more centralised, top-down strategies. A first step could be based on "model laws" prepared at the state level on politically non-sensitive issues;

- ***harmonising the judicial and prosecutorial systems.*** Specialised bodies, such as the commercial courts in Republika Srpska might be assessed and if found to be useful, consideration should be given to introduce them in the Federation and perhaps in the District of Brčko. The same procedure might be applied to the institution of Special Prosecutor in Republika Srpska, which could either lead to its being copied in the Federation and/or at the state level or be abolished altogether;

- ***harmonising the judicial and prosecutorial systems on the Federation's level.*** Two suggestions should be considered: (1) introducing a single law on the prosecution service, which would bring the prosecution service together and would govern it on the entire territory of the Federation; (2) in the long run, reducing the number of cantonal courts and providing more funding to those cantonal courts that are in need of funding due to heavier workloads. This would help in streamlining the Federation's judicial system and make it more effective;

- ***centralising financial matters (to the extent possible).*** As a uniform and centralised budget for the entire BiH judiciary cannot, for the moment, be administrated at the state level (the HJPC's initiative aimed at centralising the financing of the judiciary and bringing it to the state level has not been implemented), steps might be envisaged at the *Federation's level* to move the financing of the judiciary away from the cantons and concentrate it at the Entity level (both for courts and prosecutors' offices). In the short run, the Federation might consider to at least bring the financing of salaries of judges and prosecutors to the Federation level and leave, for the time being, the financing of the expenditure relating to the running of courts at the level of the cantons;

- ***handling the backlog of cases.*** The current backlog of cases in some courts, threatens the principle of the "natural judge" or the right of access to a tribunal established by law and should be dealt with as soon as possible by means of measures proposed by the HJPC;

- ***allowing access to legislation and case law.*** Legislation and case law should be publicly available in the national language (in an official gazette or online);

- ***regarding the HJPC:*** with respect to its composition, a balance should be struck in order to make sure that judges and prosecutors cannot outvote each other with respect to appointments and disciplinary proceedings. The absence of representatives from other legal professions, apart from judges and prosecutors, is also surprising and should be revisited. As regards its structure: the creation of two sub councils within the HJPC is a reasonable initiative that could make the two legal professions less dependent on each other without depriving them of a common platform;

103. The Venice Commission remains at the disposal of the EC and the authorities of BiH for any further assistance that they may need.