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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

AMICUS CURIAE BRIEF

ON

THE APPELLATE REVIEW IN THE COURT OF BOSNIA AND HERZEGOVINA

Adopted by the Venice Commission at its 134th Plenary Session (Venice 10-11 March 2023)

On the basis of comments by

Mr Paolo CAROZZA (Member, United States of America)
Ms. Marta CARTABIA (Member, Italy)
Mr Kaarlo TUORI (Honourary President, Expert, Finland)

Opinion co-funded by the European Union

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I. Introduction

1. By letter of 19 September 2022, Ms Valerija Galić, President of the Constitutional Court of Bosnia and Herzegovina (hereinafter "Constitutional Court") submitted a request for an *amicus curiae* brief to the Venice Commission. The request for the review of constitutionality of Article 9 (1), Article 10 (4) and Article 11(1) (b) of the Law on the Court of Bosnia and Herzegovina (hereinafter "the Law") concerns Case No. U-15/20 initiated by the then Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Ms Borjana Krišto, on 17 December 2020.

2. Ms Marta Cartabia, (Member, Italy), Mr Paolo Carozza (Member, United States of America) and Mr Kaarlo Tuori (Honourary President, Expert, Finland), acted as rapporteurs for this *amicus curiae* brief.

3. This brief was prepared in reliance on the English text of the Constitution and the English translation of the laws. The translation may not accurately reflect the original version on all points.

4. The *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Background

5. The Constitution of Bosnia and Herzegovina does not include provisions on the organisation of the judicial power. The creation of a court at the State level was justified by the concept of the 'implied powers' of the State. In its 1998 Opinion on the Need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina, the Venice Commission argued for the constitutionality of a judicial institution at the level of the State of Bosnia and Herzegovina, stating that *"under the Constitution of Bosnia and Herzegovina the state of Bosnia and Herzegovina is vested with own powers, in particular legislative ones, and must be capable of establishing the institutions necessary to guarantee the effectiveness of Bosnia and Herzegovina legislation. If the lack of a court at state level undermines that effectiveness, Bosnia and Herzegovina must have the authority to create one."*[1] The Commission found that "constitutional silence" does not imply that all State level courts are banned by the constitutional system of Bosnia and Herzegovina.[2]

6. In a different 2012 Opinion, the Venice Commission further elaborated on the concept of implied powers. The Commission referred to the Constitutional Court's decision U 25/00 of 23 March 2001, where the Court stated that *"the issues not explicitly listed in Article III. 1 of the Constitution of Bosnia and Herzegovina, referring to the competencies of the institutions of Bosnia and Herzegovina, do not necessarily fall within the exclusive competence of the Entities"*.[3] According to the Venice Commission, *"There are, therefore, a number of "implied powers", which are not necessarily "residual powers" within the meaning of Article III.3 (a) and thus do not necessarily belong to the Entities but to either the state or the Entity which has the relevant primary powers. In other words, they are incidental powers which have not been attributed by the Constitution explicitly but follow and find their legitimacy in the primary powers"*.[4]

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[1] Venice Commission, CDL-INF(98) 17, "Opinion on the Need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina", chapter 2.
[2] For further details on the constitutional basis and the principle of implied powers see background section in the Opinion on the draft Law on the Courts CDL-AD(2023)003.
[3] Venice Commission, CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, para. 16.
[4] Venice Commission CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, paras. 17-18.

7. The Court of Bosnia and Herzegovina (hereinafter: "the Court") was initially introduced by an act of the High Representative for Bosnia and Herzegovina on 12 November 2000 to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and the respect for human rights and the rule of law. The act was subsequently endorsed by the Parliamentary Assembly of Bosnia and Herzegovina as the law on the State Court of Bosnia and Herzegovina and amended several times.[5] The Court is the only judicial institution at the State level besides the Constitutional Court. It consists of a Plenum (general meeting of all judges) and three Divisions, namely the Criminal Division, the Administrative Division, and the Appellate Division, the latter dealing with appeals from the other Divisions and appeals related to decisions of election bodies.

8. The Court has been a part of the legal order of the country for over two decades but its internal structure, and, in particular, the co-existence of two instances within the same Court have been debated for a long time. In its 2012 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, the Commission, while recognising that the current model is not contrary to the Constitution or international standards, supported the establishment of a separate higher court.[6] It proposed various options for re-organising the State level judiciary including the establishment of a Supreme Court at the State level which would require amending the Constitution or setting up a separate court of appeals through an ordinary law.[7] The Commission further noted that it would be preferable to regulate the position of the courts through a new law which covers both first and second instance courts.[8]

9. In 2013, at the request of State authorities, the Commission issued an Opinion on a draft law on the Courts of Bosnia and Herzegovina, generally supporting the idea of separating the first instance and appellate jurisdiction through the creation of a separate High Court which would be competent to receive cases on appeal from a first instance court and also adjudicate other matters as determined by law.[9] The 2013 Draft law on the Court of Bosnia and Herzegovina was never adopted, but the reform of the State level judiciary remained on the agenda of the authorities of Bosnia and Herzegovina, and remains one of the conditions for the opening of negotiations for the country's accession to the EU.[10]

10. On 7 September 2022, the Minister of Justice of Bosnia and Herzegovina[11] submitted a request to the Venice Commission for an Opinion on a new Draft Law on the Courts, which foresees the creation of a separate "High Court" as a second instance court of Bosnia and Herzegovina. The Commission will examine the new Draft Law[12] in an Opinion to be adopted at the 134th Plenary Session in Venice.[13]

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[5] The consolidated version thereof was published in Official Gazette of Bosnia and Herzegovina No. 49/09, amendments published in Official Gazette Nos. 74/09 and 97/09.
[6] Venice Commission, CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina paras. 62-63.
[7] Venice Commission, CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, para. 102.
[8] Venice Commission CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, para. 102.
[9] Venice Commission, CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina.
[10] In the opinion of the European Commission of 29 May 2019 on the opening of the accession negotiations for Bosnia and Herzegovina, it was recommended that a Law on the Courts should be adopted to prevent conflicts of jurisdiction and ensure the required legal certainty in criminal matters. The adoption of the new Law on Courts is the sixth key priority determined by the European Commission for the accession of Bosnia and Herzegovina to the European Union. These criteria were confirmed in the most recent EU Progress Report issued on 12 October 2022. On 15 December 2022, the EU Council unanimously decided to grant candidate status to Bosnia and Herzegovina on the condition that it implements the steps specified in the EU Commission's communication on enlargement policy of October 2022 including those in the area of the rule of law, the fight against corruption and organised crime, migration management and fundamental rights.
[11] Ministry of Justice in this brief refers to the Ministry of Justice of Bosnia and Herzegovina.
[12] Venice Commission, CDL-REF(2023)017, Draft Law and Explanatory Note on Courts of Bosnia and Herzegovina.
[13] Venice Commission, CDL-AD(2023)003, Opinion on the draft law on the Courts of Bosnia and Herzegovina.

III. Questions of the Constitutional Court and scope of the *amicus curiae*

11. The Constitutional Court put two related questions to the Venice Commission:

1. Does the manner of organization of the Appellate Division set out in the Article 9(1) of the Law violate the "principle of two instances" and the principle of independence and impartiality of the "tribunal" as provided for in Art. 6 § 1 of the Convention?

2. Does the power of the President of the Court under Art. 10 (4) and 11 (1) (b) of the Law, to assign the judges to different Divisions and panels of the same court (first instance and Appellate Division), violate the institutional and individual independence of judges guaranteed under Art. 6 § 1 of the Convention?

12. The intention of this *amicus curiae* brief is not to take a final stand on the issue of the constitutionality of the relevant provisions of the existing Law, but to provide the Constitutional Court with material to assess the compatibility of the disputed provisions with the applicable European standards. It is the Constitutional Court that has the final say as regards the compatibility of the disputed provisions of the national legislation with the Constitution. Furthermore, in this *amicus curiae* brief, the Venice Commission will not analyse the proposals contained in the new Draft Law introduced by the Ministry of Justice. However, this *amicus curiae* brief should be read in the light of the previous opinions of the Venice Commission on this issue, as well as the last opinion on the new Draft Law proposed by the Ministry of Justice and without prejudice to the latter.[14]

13. The Commission will examine these issues based on the relevant standards of the European Convention on Human Rights (hereinafter "ECHR") including Article 2 of Protocol no. 7 to the ECHR, which is incorporated into the legal order of Bosnia and Herzegovina by way of Article II(2) of the Constitution,[15] the case-law of the European Court of Human Rights (hereinafter "ECtHR"), and the International Covenant on Civil and Political Rights (hereinafter "ICCPR").[16] The Commission will also draw on the Rule of Law standards outlined in its previous reports and studies, and relevant acts of other Council of Europe bodies.[17]

14. During the preparation of this *amicus* brief, the Commission examined the contested provisions of the Law, the Rules of Procedures of the Court,[18] as well as the "Decision on Determining the Guiding Criteria for Assignment of Judges to the Appellate Division of the Court" of July 2022 establishing a procedure of assigning judges to the Appellate Division.[19] The Guiding Criteria were endorsed by the Plenum of the Court on 30 September 2022 and entered into force on 10 October 2022 following their publication in the Official Gazette of Bosnia and Herzegovina.[20] The Venice Commission has also considered the *amicus curiae* brief of the

[14] Venice Commission, CDL-AD(2023)003, Opinion on the draft law on the Courts of Bosnia and Herzegovina.
[15] Article II(2) of the Constitution of Bosnia and Herzegovina reads as follows:
"*The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law*".
[16] Bosnia and Herzegovina ratified the International Covenant on Civil and Political Rights on 1 September 1993.
[17] Council of Europe Committee of Ministers' Recommendation on Judges: Independence, Efficiency and Responsibilities, CM/Rec (2010)12. Council of Europe Committee of Ministers' Recommendation (94)12 on the Independence, Efficiency and Role of Judges. European Charter on the Statute of Judges (July 1998). Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges. CCJE Opinion No. 6 on Fair Trial within a Reasonable Time, CCJE Opinion No. 10 on the Council for the Judiciary in the Service of Society, and CCJE Opinion No. 11 on the Quality of Judicial Decisions.
[18] Official Gazette of Bosnia and Herzegovina, No. 38/20
[19] Official Gazette of Bosnia and Herzegovina, No. 51/22
[20] Official Gazette of Bosnia and Herzegovina, No. 67/28

Office of the High Representative for Bosnia and Herzegovina submitted on 19 August 2022 at the request of the Constitutional Court.

IV. Analysis

15. The questions put by the Constitutional Court are interrelated: thus, it is impossible to address the question of independence and impartiality of judges of the Court (Question no. 1) without examining their manner of appointment to the respective Divisions by the President (Question 2). Therefore, the Venice Commission prefers to first address the "principle of two instances", which is referred to in Question 1. Then it will turn to the examination of the principle of independence and impartiality, as referred to in the second part of Question 1 and in Question 2.

A. The right to a second degree of jurisdiction

16. The first issue to examine is whether the operation of the Appellate Division as a Division within the Court and not as a separate higher court is consistent with the requirements of Article 6 § 1 of the ECHR and Article 14 (5) of the ICCPR, and whether the said provisions require the Contracting Parties to establish separate courts of appeals.

17. Article 6 § 1 of the ECHR does not expressly mention the right to appeal to a higher tribunal, nor does it prescribe the type of the institutional arrangements that Contracting Parties may establish to effectuate the right to appeal. By contrast, the right to appeal a judicial decision in the criminal field is expressly guaranteed by Article 2 of Protocol no. 7 to the ECHR stating: "*Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal".* Article 2 of Protocol no. 7 leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by the domestic law.[21] A similar guarantee is enshrined in Article 14 (5) of the ICCPR stating that *"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*."[22]

18. The right to appeal against a judicial decision in criminal proceedings as expressly guaranteed by Article 2 of Protocol no. 7 to the ECHR and Article 14 (5) of the ICCPR is a general principle of the Rule of Law.[23] As underlined in particular in the Rule of Law checklist of the Venice Commission, any court whose decisions in criminal proceedings cannot be appealed would run the risk of acting arbitrarily.[24] On the other hand, the Commission notes that a right to appeal in civil, administrative, and disciplinary proceedings is not explicitly regulated to the same extent by the Article 6 of the ECHR.

19. As to the institutional forms of the right to appeal, the ECtHR has consistently held that Article 6 § 1 of the ECHR does not compel the Contracting Parties to set up courts of appeal or of cassation, but where such courts do exist, they have to comply with the Article 6 requirements of fair trial by an independent and impartial tribunal established by law.[25] This means that Article 6 § 1 of the ECHR establishes the minimum standards of fair trial without stipulating a right to appeal whereas Article 2 of Protocol no. 7 to the ECHR increases the standard by requiring a right of appeal in the criminal field.

20. The main aim of the right to appeal is to provide parties with an opportunity to rectify any judicial error in the first instance courts which can be offered by a differently composed bench. Whether this separate bench is in another court or is another chamber or another Division of the

[21] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.18
[22] Article 14(5) of the ICCPR
[23] Bosnia and Herzegovina ratified Protocol No. 7 to the ECHR (ETS No. 117) on 24 April 2002.
[24] Venice Commission; CDL-AD(2016)007, Rule of Law Checklist, para. 105
[25] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], Application No. 26374/18, 1 December 2020, § 243

same court which has heard the case in the first instance is not essential, provided that the judges who previously sat in the first instance are excluded from the adjudication in the higher instance.

21. As to the argument that a further level of jurisdiction in the legal order of Bosnia and Herzegovina means a separate court with its own structure and internal organisation established by law, the Commission underlines that, in the view of the ECtHR, a "tribunal" is characterised in the substantive sense of the term by its judicial function and institutional characteristics,[26] and not only its classification under the domestic legislation. Hence, the fact that the Appellate Division is not a separate court but just a Division of the same court does not mean that it is not a "higher tribunal" in the functional sense of this word.

22. Finally, the Commission observes that having both first instance and second instance jurisdiction exercised by two different Divisions of the same court is not unique in Bosnia and Herzegovina and internationally.[27] Comparative examples of similarly organised appellate instances can be found primarily in the international courts established to prosecute international crimes such as International Criminal Tribunal for Yugoslavia,[28] the International Criminal Tribunal for Rwanda,[29] the Special Tribunal for Lebanon,[30] and the Special Court of Sierra Leone.[31] In addition the Grand Chamber of the ECtHR can hear cases on referral from other sections in a chamber composed of the Court's President, Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing of lots. Another example, this time at the national level, is an *en banc* rehearing in a United States Federal Court of Appeals. Therefore, while it may be desirable, for various reasons, to separate the first and second instance jurisdictions, the co-existence of the first instance and appellate review instance in the same judicial institution can be found both within and outside Bosnia and Herzegovina, for national and international courts.

23. Institutional forms of an appeal to a "higher tribunal" are not clearly specified in the ECtHR case-law but any court vested with appellate jurisdiction should afford the parties the relevant fundamental fair trial guarantees contained in Article 6 § 1 stipulated in the phrase *"an independent and impartial tribunal established by law"* and developed in the ECtHR's case-law. Two characteristics of the notion of "judicial body with full appellate jurisdiction" can be derived from the ECtHR case-law: the power to quash in all respects, on questions of fact and law, the decision of a lower instance court,[32] and the power to issue binding decisions which may not be altered by a non-judicial authority.[33] The Appellate Division of the Court seems to fulfil these minimal criteria, even without being a separate judicial institution outside the Court.

24. Thus, read in conjunction, Article 6 § 1 and Article 2 of Protocol no. 7 to the ECHR and Article 14 (5) of the ICCPR do not compel Bosnia and Herzegovina to establish an appellate review mechanism as a separate court. The same standards do not prevent Bosnia and Herzegovina from establishing two institutionally separate courts, one for the first instance and one for the appellate jurisdiction.

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[26] ECtHR, *Belilos v. Switzerland*, application no. 10328/83, 29 April 1988, § 64

[27] The Supreme Court of the Federation of Bosnia and Herzegovina decides on legal remedies against the decisions of its own benches.

[28] The ICTY was situated in the Hague and had three Trial Chambers and an Appeals Chamber.

[29] The Tribunal was located in Arusha, Tanzania with offices in Kigali, Rwanda and the Appeals Chamber was located in The Hague, Netherlands.

[30] The Special Tribunal for Lebanon was divided into three sections: Pre-Trial Chamber: Trial Chamber and Appeals Chamber.

[31] The Special Court for Sierra Leone had two trial chambers and one appeals chamber.

[32] ECtHR, *Schmautzer v. Austria*, application no. 15523/89, 23 October 1995, § 36; ECtHR, *Gradinger v. Austria*, application no. 15963/90, 23 October 1995, § 44; ECtHR, *Grande Stevens and Others v. Italy*, application no. 18640/10, 7 July 2014, § 139

[33] ECtHR, *Findlay v. the United Kingdom*, application no. 22107/93, 25 February 1997, § 77

B. Whether the current system respects the principle of the "lawful judge" and endangers the internal judicial independence

25. What is contested in the case before the Constitutional Court is the manner of assignment of those judges to different Divisions and panel and the procedures for assigning cases to them (see Question 2). For the Venice Commission, this situation should be examined through the prism of two principles contained in Article 6 of the ECHR: the principle of the "lawful judge" (which is recognised in some legal orders and sometimes derived from the guarantee of a "tribunal established by law") and the principle of judicial independence. The Venice Commission will therefore deal with this issue together with the second part of Question 1, which also relates to the independence and impartiality of the "tribunal".

26. The ECtHR case-law has clarified that the object of the term "established by law" in Article 6 § 1 is to ensure "*that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament"*.[34] In the same vein, the ECtHR has stated that "*in countries where the law is codified, the organisation of the judicial system should not be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation"*.[35] The ECtHR considers that the procedure for the appointment of a judge and the "lawfulness" of the bench on which such a judge subsequently sits to be closely correlated, which suggests that the judge appointed in contravention of the relevant rules may lack the legitimacy to serve as a judge.[36]

27. According to Article 9 (1) of the Law, appellate jurisdiction is exercised by the Appellate Division. It shall have at least ten judges and it is competent to adjudicate appeals against judgments or decisions of the Criminal and Administrative Divisions and extraordinary legal remedies against final judgments reached by the Divisions of the Court, not including those that constitute the requests for reopening of proceedings. Furthermore, the Appellate Division (its Section III) adjudicates electoral appeals against a decision of any authority in Bosnia and Herzegovina, its entities and against courts of the last resort in the District of Brčko, which is not subject to another ordinary appeal.[37] Thus, the Appellate Division has clearly defined jurisdiction as a second instance and its core judicial function is to decide on appeal against the lower Divisions for both issues of law and facts.

28. The principle of "*lawful" or "natural"* judge implies that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*. As the Commission has noted in the past, this principle covers the assignment of judges or judicial panels in accordance with objective and transparent criteria and the existence of rules and criteria based on which cases are assigned to competent judges.[38]

29. The alleged arbitrary assignment of judges to the particular chambers or arbitrary assignment of cases to them by the President of the Court should also be analysed from the standpoint of *internal judicial independence*. In various cases, the ECtHR has considered potential threats to judges' independence from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a Division in the court. As the ECtHR has stated, *"any supervision of the work of judges*

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[34] ECtHR, *Zand v. Austria*, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80

[35] ECtHR, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII

[36] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], application no 26374/18, 1 December 2020, §§ 214, 226, 227

[37] Article 23 of the Law on the Court of Bosnia and Herzegovina

[38] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: Independence of Judges, paras. 77-78

involves a certain risk to their internal independence and that it is impossible to devise a system that would completely eliminate that risk".[39] On the other hand, the ECtHR case-law requires that the replacement of a judge and/or the reassignment of a case be devoid of any arbitrariness.[40] For example, the ECtHR did find a violation of internal judicial independence because the president of a court had replaced all the judges of the panel hearing a case three times, supporting the impression that they were replaced in order to secure a certain outcome of the case.[41]

30. In the following paragraphs, the Venice Commission will examine whether the system of assignment of judges to the Appellate Division and the system of assigning cases violate those principles of Article 6 of the ECHR.

1. Assignment of judges to different Divisions

31. The Law on the Court and the Law on the High Judicial and Prosecutorial Council (hereinafter: "HJPC") do not include specific criteria for the assignment of judges to any of the Divisions of the Court. The requirement of eight years of legal experience applies to all judges, regardless of which level they will serve after being appointed by the HJPC as judges of the Court. Once appointed by the HJPC, the President of the Court can make general or special assignments of judges to any Division and assign cases to each panel or judge "in accordance with the Rules of Procedure" of the Court which are adopted by the Plenum of the Court by a simple majority.[42]

32. Until recently, the current Rules of Procedure did not regulate the criteria for assigning judges or cases in much detail. According to those Rules of Procedures, the President is required to propose to the Plenum of the Court the working schedule elaborated at the beginning of each calendar year, providing for the allocation of incoming cases in advance and according to objective criteria.[43] Otherwise, the Rules (at the time) did not limit the discretion of the President in those matters. In essence, although the Law vests with the Plenum the power to limit the discretion of the President in the matters of assigning judges to the Divisions through the Rules of Procedure, in practice the Plenum did not use this opportunity until the endorsement of the Decision on Determining the Guiding Criteria for the Assignment of Judges to the Appellate Division of the Court in September 2022.[44]

33. The Commission is mindful that the lack of detailed rules in the Rules of Procedure created possibilities for frequent changes to the composition of first and second instance divisions as the Law itself does not contain criteria of seniority or professional competence based on which judges can be assigned to serve exclusively in the Appellate Division. The assignment of judges by the President of the Court without clearly prescribed and determined criteria may endanger the independence and impartiality of judges. Furthermore, frequent reshuffling of the Appellate Division is not conducive to the specialisation of judges dealing with appellate cases and may adversely affect the emergence of uniform court practice and legal certainty.

34. The fact that the President has some discretionary power on the assignment of a judge or composition of panel does not mean that the independence of the judges in the sense of Article 6 of the ECHR is violated.[45] What needs to be checked is what those powers consist of, what is

[39] ECtHR, *Agrokompleks v. Ukraine*, application no. 23465/03, 25 July 2013, §139
[40] ECtHR, *Pasquini v. San Marino*, application no. 50956/16, 2 May 2019 § 112; ECtHR, *Miracle Europe Kft v. Hungary*, application no. 57774/13, 12 January 2016, §§ 59-67
[41] ECtHR, *Moiseyev v. Russia*, application no. 62936/00, 9 October 2008, §§ 181-185
[42] Article 10(4) and Article 12. 2 (b) and (c) of the Law on the Court of Bosnia and Herzegovina.
[43] Article 11(2) of the Law on the Court of Bosnia and Herzegovina.
[44] The Venice Commission did not examine all previous versions of the Rules of Procedure and cannot confirm or disconfirm the *status quo ante.*
[45] ECtHR, *Parlov-Tkalčić v. Croatia*, application no. 24810/06, 22 December 2009, §§ 89-92

at stake for the judges, and whether those powers were or at least could have been used arbitrarily.

35. The potential misuse of the discretion to assign judges to the Appellate Division by the President may be problematic if serving in the Appellate Division entails additional benefits in terms of the financial treatment and other privileges attached to a higher judicial office. If this is the case, the power to assign judges to one of the two chambers may give the President a leverage to apply pressure openly or tacitly over certain judges. On the other hand, if all the judges of the Court enjoy the same status and privileges whatever the decisions taken by the President, then the possibility of the President to assign judges is not as problematic. This factor should be assessed by the Constitutional Court.

36. To this the Venice Commission adds that judges of the Court (Appellate Division and lower Divisions) are supervised, disciplined, suspended or removed by the HJPC based on legally established objective criteria and procedures. The President of the Court does not have a decisive power regarding judges' promotion or discipline which would be capable of generating a latent threat to the institutional and individual independence of judges of the Appellate Division.[46]

37. The next factor to consider is the existence of any rules capable of limiting the discretion of the President and preventing arbitrariness in the assignment of judges to the Appellate Division. As noted above, until September 2022, the Plenum of the Court did not use the opportunity provided by Article 10 (4) of the Law to regulate those matters in the Rules of Procedure.

38. Concerning the criteria for assigning judges to the Appellate Division, in 2022 the President of the Court adopted a Decision on Determining the Guiding Criteria for the Assignment of Judges to the Appellate Division (the Guiding Criteria).[47] These criteria have been endorsed by the Plenum and have become an integral part of the Rules of Procedure. As such, they cannot be changed unilaterally by the President anymore. The Guiding Criteria established several conditions for assigning judges to the Appellate Division and created the concept of a permanent assignment to the Appellate Division. This is stipulated in Section III of the Guiding Criteria: "*Once a judge has been assigned to the Appellate Division of the Court of Bosnia and Herzegovina by the Decision on Permanent Assignment, he will no longer be assigned to Divisions I, II and III of the Criminal Division or to the Administrative Division by the Decision of the President of the Court*." The Commission notes that the Guiding Criteria strengthen the collegiality by requiring the President to *"consult with the presidents of the Appellate, Criminal and Administrative Departments, as well as the Registrar of the Court"* before making any permanent decision.

39. It is not clear whether such rules had been in place before President proposed them in July 2022 and the Plenum endorsed in September 2022.[48] Be it as it may, since September 2022 the President's powers in this field are restrained by the Guiding Criteria integrated in the

[46] Chapter V and VI of the Law on High Judicial and Prosecutorial Council

[47] According to Section I of the Guiding Criteria, the President shall be guided by objective criteria to assign judges to the Appellate Division such as:

- Expertise, seniority, and experience of the judge in working on cases in the field of cases for which there is a need for scheduling.
- National and gender structure of judges within the Court.
- Previous results of judges' work expressed through the evaluation process.
- The judge's availability and motivation to work in appeal proceedings in cases under the jurisdiction of the Appellate Division.

[48] The Decision on Guiding Criteria refers to a series of decisions (Su-10-312/17 of July 5, 2017, Su-10-312-2/17 of 22.1.2019, Su-10-41/22 of 1 February 2022) as a pre-existing basis for the criteria for assigning judges but these acts have not been provided to the Venice Commission and were not examined by the rapporteurs.

Rules of Procedure, which aims to strengthen the permanent nature of the Appellate Division and make the process of assigning judges to the Divisions more predictable and objective.

40. It belongs to the Constitutional Court to decide whether guiding criteria are sufficient to constrain the discretion of the President and avoid arbitrariness. However, if such rules are now an integral part of the Rules of Procedure, are deemed to be sufficiently clear and fair, and if the President follows them, the Constitutional Court might conclude that the current model does not endanger the principles of the "lawful judge" and the judicial independence.

41. Alternatively, the criteria and procedure for assigning judges to various Divisions may also be entrenched in the Law. Furthermore, the competency of developing and adopting such rules may be given to an external independent body, such as the HJPC. In the latter case both the current law and the law on the HJPC should be amended accordingly. The Commission has continuously advised that the general rules for the assignment of judicial panels and cases (including exceptions) should be formulated by the law or by special regulations on the basis of the law (for example court regulations) laid down by the presidium or president of the court, which should be known in advance. Regulations should provide for exceptions, but they should always be justified.[49]

42. The establishment of two separate courts would likely deal with various issues of the internal organisation of the Court which have not been regulated in detail in the current Law.[50] Until a new law is adopted, the Commission encourages further development of the Rules of Procedure in order to strengthen the separation of the two instances and ensure that the President's powers are not used arbitrarily.

2. Assignment of cases to judges

43. Another aspect of the current regulations that should be assessed through the prism of the requirement of the "independence" and the principle of the "lawful judge" is the system of assignment of cases to the judges by the decision of the President of the Court.

44. The ECtHR has pointed out that safeguards to ensure the independence and impartiality of a judge are particularly important when a judge or judicial panel is replaced, or when cases are assigned and reassigned frequently.[51] Although states have some discretion over the system of assigning cases in courts, the ECtHR must be satisfied that this is compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality.[52]

45. In many legal systems, court presidents either individually or in combination with court registrars and/or other technical staff do play a role in the assignment of cases either manually or automatically. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.[53] In the past, the Venice Commission has strongly recommended that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by

[49] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, paras. 79-80
[50] As stated in Paragraph 41 of this *amicus curiae* brief, the Venice Commission does not oppose the regulation of assignment of judges and cases in secondary legislation provided that internal regulations or bylaws are adopted by the Plenum of the Court and not by individual decisions of the President of the Court.
[51] ECtHR, *Moiseyev v. Russia*, application no. 62936/00, 9 October 2008, § 182
[52] Ibid., § 176.
[53] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: Independence of Judges, paras. 79-80

special regulations on the basis of the law, e.g. in court regulations.[54] For the ECtHR, while court presidents often have certain administrative, managerial, and organisational functions over other judges, what is important is that relevant legislation and internal procedures should provide adequate safeguards against the arbitrary exercise of the court presidents' duty to assign cases to judges.[55]

46. The Commission notes that the Law has vested the President of the Court with the power to assign and reassign cases to any judge of the Appellate Division (or any Division).[56] However, in practice the assignment of cases is conducted through a computerised system envisaged in the Rules of Procedure. This system is authorised by the HJPC, and once cases are filed in Court, they are entered into a Case Management System (hereinafter "CMS") in the order they are received and are assigned a case number. The powers of the President in relation to the distribution of cases to judges in any of the Divisions are therefore limited by the system of the automatic assignment of cases in accordance with the Rules of Procedures.[57] The President does not have to assign cases to specific judges since the CMS distributes cases automatically.

47. The President does have the power to override the system for the automatic assignment of cases, but this is not *a priori* a cause for concern because the rules should be sufficiently flexible to deal with unexpected situations like sudden death or long-term illness of the assigned judge, the need for a specialised judge who would not otherwise be assigned to a case through the random assignment procedures or the need to resolve cases of recusal or disqualification of judges. What is important from the perspective of the Commission, is that any interference of the President with the automatic assignment of cases must be exceptionally dictated by the circumstances and always motivated.

48. In the case at hand, the President's authority to assign cases is sufficiently limited in practice as cases are assigned automatically through the CMS. Thus, the current system of case management does not seem to undermine the independence of judges or contradict the principle of the "lawful judge". However, the Venice Commission would encourage further elaboration of the rules of assignment of cases and exceptions from them in the Rules of Procedure adopted by the Plenum and not leave this power to the individual decisions of the President.

C. Whether the current system endangers the impartiality of the judges

49. Apart from the risk of arbitrary assignment of judges to the Divisions, or attribution of cases, the current system may arguably create another risk for the impartiality of judges of the Appellate Division, and this is for two reasons.

50. For the ECtHR, the principle of impartiality has two elements: subjective impartiality and objective impartiality.[58] To meet the requirement of being subjectively impartial, no member of the tribunal should hold any personal prejudice or bias. To be impartial from an objective viewpoint, the tribunal or the single judge must offer sufficient guarantees to exclude any legitimate doubt in this respect.[59] This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the external observer concerned is important but not decisive. What is decisive

[54] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: Independence of Judges, para. 81
[55] ECtHR, *Parlov-Tkalčić v. Croatia*, application no. 24810/06, 22 December 2009, §§ 88-95
[56] Article 10(4) of the Law on the Court of Bosnia and Herzegovina
[57] Articles 19 and 44 of the Rules of Procedures
[58] ECtHR, *Langborger v. Sweden*, application no. 11179/84, 22 June 1989, § 32; ECtHR, *De Cubber v. Belgium*, application no. 9186/80, 26 October 1984, § 24
[59] ECtHR, *Daktaras v. Lithuania*, application no. 42095/98, 10 October 2000, § 30

is whether this fear can be held to be objectively justified.[60] Unless there is sufficient evidence to the contrary, a tribunal must be presumed to be free of personal prejudice or partiality.[61]

51. First of all, the legal provisions allowing for the transfer of judges between different divisions may theoretically result in a situation where the same judge is assigned to hear a case in both instances at various stages of court proceedings.

52. To deal with this situation, the ECtHR established the principle that *"any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw".*[62] The existence in the national legislation of rules on recusal, withdrawal or disqualification of judges whose impartiality may be in doubt is an important factor for ensuring impartiality.[63] In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire.[64] For example, the ECtHR found a violation of the principle of impartiality in a case where some judges who had already ruled on the case were required to decide whether or not they had erred in their earlier decision and where another three judges had already expressed their opinions on the matter. The ECtHR observed that the dual role of the individual judge in a single set of proceedings created a situation that was capable of raising legitimate doubts as to the judge's impartiality.[65]

53. In this respect, the Commission observes that the situations of conflict of interest which would raise concerns about their impartiality are regulated in the Law under examination by the Constitutional Court and in other laws of Bosnia and Herzegovina. If the President of the Court intentionally or unintentionally assigns judges to adjudicate a criminal or civil case which they have also heard in the first instance divisions, these judges are required to recuse themselves.[66] The parties can also ask for the disqualification of judges when they present justified misgivings about their impartiality.[67] The Plenum decides on the disqualification of judges and the President has to assign a replacement if the Plenum so decides.[68] Similar recusal provisions are stipulated in the Code of Civil Procedure before the Court.[69] Therefore, while there is a theoretical possibility that the President may assign judges to adjudicate the same case in first and second instance, this situation is sufficiently regulated by the provisions on recusal, withdrawal, and disqualification of judges. Moreover, as understood by the rapporteurs, a judge of the Appellate Division has never been assigned to adjudicate the same case which he or she adjudicated in the first instance. As of 2022, following the amendments to the Rules of Procedure regarding the permanent assignment of judges to the Appellate Division, the composition of the Appellate Division would arguably become more stable thus further reducing the possibility of reassignments between Divisions and the need for the recusal of judges.

54. The second possible challenge to the impartiality of the judges of the Appellate Division is based on their proximity – in practical and personal terms – with the first-instance judges of the same Court. Judges of the Appellate Division and lower Divisions are presided by the same

[60] ECtHR, *Ferrantelli and Santangelo v. Italy*, application no. 19874/92, 7 August 1996, § 58, ECtHR, *Wettstein v. Switzerland*, application no. 33958/96, 21 December 2000, § 44

[61] ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, application no. 6878/75; 7238/751981, 23 June 1981 § 58

[62] ECtHR, *Case of Indra v. Slovakia*, application no. 46845/99, 1 February 2005, § 49

[63] ECtHR, *Micallef v. Malta* [GC], application no. 17056/06, 15 October 2009, §§ 99-102

[64] ECtHR, *Micallef v. Malta* [GC], application no. 17056/06, 15 October 2009, §§ 99; ECtHR, *Mežnarić v. Croatia*, application no. 71615/01, 15 July 2005, § 27.

[65] ECtHR, *Driza v. Albania*, application no. 33771/02, 13 November 2007, §§ 78-83.

[66] Article 29 of the Criminal Procedure Code of the Bosnia and Herzegovina

[67] Article 30 of the Criminal Procedure Code of the Bosnia and Herzegovina

[68] Article 11(c) of the Law on the Court

[69] Article 295-299 of the Code of Civil Procedure before the Court of Bosnia and Herzegovina. The Law on Administrative Disputes does not appear to regulate this issue explicitly and the Commission cannot confirm if the recusal provisions of the Code of Civil Procedure apply *mutatis mutandis* to administrative disputes before the Court of Bosnia and Herzegovina.

Court President, sit in the same Plenary, work in the same building, go to the same canteen, etc. In the eyes of some observers, this creates a risk that the appellate judges would not perform their functions impartially, out of solidarity with their colleagues.

55. The Commission recalls that similar claims have been previously considered by the Constitutional Court in two cases.[70] In both cases, the Constitutional Court rejected the appellant's allegations and concluded that there was no violation of the right to a fair trial as per Article II/3e of the Constitution and Article 6 of the ECHR as regards institutional independence and impartiality of the Court. The Venice Commission notes that, in many countries, judges of different courts and even judges and prosecutors sit in the same building and regularly meet and communicate. The Commission does not see any new argument which could persuade the Constitutional Court to change its approach and conclude that such proximity endangers the impartiality of the judges of the Appellate Division.

V. Conclusion

56. On 19 September 2022, the President of the Constitutional Court of Bosnia and Herzegovina requested the Venice Commission to provide an *amicus curiae* brief on the appellate review in the Court of Bosnia and Herzegovina. The President put two questions to the Commission:

1. Does the manner of organization of the Appellate Division set out in the Article 9 (1) of the Law violate the "principle of two instances" and the principle of independence and impartiality of the "tribunal" as provided for in Article 6 § 1 of the [European Convention on Human Rights]?
2. Does the power of the President of the Court under Articles 10 (4) and 11 (1) (b) of the Law, to assign the judges to different Divisions and panels of the same court (first instance and Appellate Division), violate the institutional and individual independence of judges guaranteed under Art. 6 § 1of the Convention?

57. Answering to the first part of the first question, the Commission concluded that neither Article 6 § 1 nor Article 2 of Protocol no. 7 to the European Convention on Human Rights requires that appeals be heard by an entirely separate court. The relatively limited case-law of the European Court of Human Rights under Article 6 regarding appellate review does not specify the institutional forms of exercising an appeal to a "higher tribunal". Therefore, international standards do not constrain the discretion of Bosnia and Herzegovina to maintain a system whereby appeals are considered by a separate division within the same court if it has all attributes of a judicial body with appellate jurisdiction. The same standards do not prevent Bosnia and Herzegovina from establishing two institutionally separate courts, one for the first instance and one for the appellate jurisdiction.

58. Answering the question about the independence and impartiality and having regard to the current powers of the President of the Court to assign judges to various divisions and allocate cases to them, the Venice Commission concluded as follows. Indeed, the Law gives the power to the President of the Court in these matters. This might be seen as giving the President too much discretion and contradicting the principle of the "lawful judge" which can be derived from Article 6 of the European Convention on Human Rights. However, the Decision on Determining the Guiding Criteria adopted by the President in July 2022 and integrated in the Rules of Procedure by the Plenum in September 2022 may be considered to have imposed constraints on the discretion of the President in this respect. The Guiding Criteria contain rules which arguably render the assignment of judges to the panels more predictable, objective, and permanent. The power of the President to assign cases to specific judges is circumscribed by

[70] Constitutional Court of Bosnia and Herzegovina, Case No. AP 767/04 of 17 November 2005, and Constitutional Court of Bosnia and Herzegovina, Case No. AP 1785/06, 30 March 2007

the operation of the automatic system of allocation of cases. These are the factors which, in the opinion of the Venice Commission, limit the President's discretion in those matters.

59. While the current system appears not to be in conflict with the above-mentioned principles, the Commission would encourage a further development of the rules on the assignment of judges to the Divisions and on the allocation of cases. This development could be done, first of all, in the Rules of Procedures, as required by the current Law. These rules could also be elevated to the legislative level – either by including relevant regulations in the current Law, or by granting the necessary power to regulate such matters to the High Judicial and Prosecutorial Council.

60. Another possible way of achieving this objective would be to strengthen the institutional separation between the first and the second instances, akin to the proposal of the Ministry of Justice examined in the Opinion of the Venice Commission on the draft Law on the Courts of Bosnia and Herzegovina (CDL-AD(2023)003). The current constitutional framework allows for the creation of a separate second-instance court, which could be a good solution as stated in this Opinion.

61. The Venice Commission remains at the disposal of the Constitutional Court of Bosnia and Herzegovina for any further assistance that the Constitutional Court may need in this matter.