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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON

THE DRAFT LAW

ON THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL

OF

BOSNIA AND HERZEGOVINA

**adopted by the Venice Commission
at its 98th Plenary Session
(Venice, 21-22 March 2014)**

on the basis of comments by

**Ms Veronika BILKOVA (Member, Czech Republic)
Mr James HAMILTON (Substitute member, Ireland)
Mr Konstantine VARDZELASHVILI (Substitute member, Georgia)**

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I. Introduction

1. The Venice Commission received a request for an opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina by letter of 1 November 2013 from Mr Bariša Čolak, Minister for Justice of Bosnia and Herzegovina.

2. The Venice Commission has invited Ms Veronika Bilkova, Mr James Hamilton and Mr Konstantine Vardzelashvili to act as rapporteurs for this opinion.

3. This opinion follows a series of opinions that were adopted by the Venice Commission on the judicial reform in Bosnia and Herzegovina, notably the Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (CDL-AD(2012)014) and the Opinion on the draft Law on the Courts of Bosnia and Herzegovina (CDL-AD(2013)015). It also takes into account the standards referred to by the Venice Commission in its opinions on high judicial and/or prosecutorial councils established in other countries, for instance in Serbia¹ and in Turkey.²

4. The present opinion was adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

II. General remarks

A. Background

5. The High Judicial and Prosecutorial Council (hereinafter, the “HJPC”) was established by the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, adopted by the Parliament of Bosnia and Herzegovina in 2004.³ It was established as a single, State-level council for both judges and prosecutors and entrusted with the task of ensuring the maintenance of an independent, impartial and professional judiciary in Bosnia and Herzegovina.

6. The Transfer Agreement⁴ concluded by the two Entities, the Federation of Bosnia and Herzegovina (hereinafter, “FBiH”) and the Republika Srpska in March 2004, made it possible for the HJPC to be set up. The Preamble of the Agreement states that: “The parties desire to consolidate the authority over the Entities’ judiciaries in order to strengthen the independence of the judiciary through the establishment of a single High Judicial and Prosecutorial Council of Bosnia and Herzegovina. (...) The council shall bear primary responsibility, as defined by the agreement, for the judiciary at all levels throughout Bosnia and Herzegovina and shall oversee judges and prosecutors in a manner that instils public confidence and trust in the judiciary.”

7. The HJPC is not explicitly foreseen by the Constitution of Bosnia and Herzegovina (hereinafter, “BiH”). Yet, as the Transfer Agreement refers to the Constitution (Article IV.4.a), it is generally considered that “the expanded sphere of State-level competences to cover ‘certain responsibilities for the affairs of the judiciary’ as outlined in the Transfer Agreement

¹ Interim Opinion on the draft decisions of the High Judicial Council and of the State Prosecutorial Council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia (CDL-AD(2011)015).

² Interim Opinion on the draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey (CDL-AD(2010)042).

³ See Official Gazette of Bosnia and Herzegovina, Law No. 25/04 Coll., as amended.

⁴ Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Sarajevo, 11 March 2004.

are grounded in the BiH Constitutional order”.⁵ The constitutionality of the 2004 Law on the HJPC of BiH was confirmed by the Constitutional Court of Bosnia and Herzegovina in 2009.⁶

8. The establishment of the HJPC was part of a broader judicial reform that took place in BiH since the conclusion of the Dayton Agreement (1995). This requirement was clearly formulated in the 2003 Feasibility Study for BiH, which called upon BiH to “adopt legislation establishing a single High Judicial and Prosecutorial Council for BiH with the aim of consolidating appointment authority over the Entity judiciaries and strengthening the independence of the judiciary throughout BiH”.⁷ It was also one of the European Union’s requirements within the framework of the EU-BiH Structured Dialogue - an integral part of the Stabilisation and Association Process - launched in June 2011.

9. The establishment and performance of the HJPC have given rise to positive comments by the EU. In 2005, the European Commission marked the creation of the HJPC as “a crucial step to consolidate State authority over the Entity judiciaries and to strengthen the independence of the judiciary throughout Bosnia and Herzegovina”.⁸

10. The positive assessment of the HJPC has been consistently shared by the Venice Commission. In its 2012 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, the Venice Commission confirmed that “in practice the HJPC ha(d) played an extremely important role in strengthening the independence of the judiciary and in furthering contacts and co-operation among judges and prosecutors”.⁹ It also recalled that “the establishment of the HJPC and its performance over the eight years of its existence ha(d) been assessed positively by the representatives of the judiciary in BiH”.¹⁰

11. Despite the prevailing positive assessment, the establishment and performance of the HJPC have also given rise to a number of reservations. In its 2012 Opinion, the Venice Commission referred to three of them: firstly as to the procedure of selecting the members, which could be “vulnerable to inter-institutional and inter-personal rivalries in the judiciary”¹¹; secondly as to the problem created by having judges and prosecutors in the same Council,¹² as well as the obligatory ethnic composition of the Council, which should rather focus on professional competence. Thirdly, the limited scope of competences conferred on the HJPC preventing it from introducing a uniform system of financing of the judiciary, finding strategies to deal with the backlog of cases, and undertaking a more radical reform of the judiciary¹³. Finally, the absence of mandatory written exams as part of the process of appointing judges and the absence of a national pool of vacancies were criticised.

12. Several draft amendments to the 2004 Law on the HJPC in BiH were made in reaction to these reservations, some of which have been adopted. The Venice Commission provided comments on one of these draft amendments in its 2012 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina¹⁴. The Commission emphasised

⁵ HJPC, The High Judicial and Prosecutorial Council of BiH – a fundamental and irreversible component of the Judicial Reform Process in BiH, Informative Memorandum, November 2012, p. 7.

⁶ See Case No. U11/08.

⁷ Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union, Brussels, 18 November 2003, COM(2003)692 final.

⁸ Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union, Brussels, 21 October 2006, COM(2005)529 final.

⁹ Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina (CDL-AD(2012)014), paragraph 85.

¹⁰ Ibid., paragraph 86.

¹¹ Ibid., paragraph 88.

¹² Ibid., paragraph 89.

¹³ Ibid., paragraph 90.

¹⁴ Ibid.

in that opinion that there was a need to avoid the possibility for judges and prosecutors to outvote each other with respect to appointments and disciplinary proceedings. In this context, it endorsed the proposal of creating, within the HJPC, two sub-councils: one for judges and one for prosecutors.

13. In December 2012, the latest amendment to the 2004 Law on the HJPC in BiH was presented by the parliamentary majority. The amendment sought to strengthen the influence of the legislative and executive powers over the HJPC and especially over the appointment of prosecutors. These proposals met with disapproval by the legal community. As a result, the Ministry of Justice of BiH drafted a new Law on the HJPC in BiH, with the aim of reconciling the provisions proposed by the political parties and representatives of judicial institution in BiH and remedying deficiencies in the current legal provisions. This draft Law (see CDL-REF(2014)008) is under review in the current opinion.

B. International standards

14. The establishment and functioning of high judicial councils, as well as the activities in the competence of the HJPC (appointment of judges, disciplinary procedures etc.), are subject to international standards. The standards are enshrined in instruments adopted both at the universal and at the European level. Some of these instruments are legally binding on BiH. Others are soft law, but often codify existing customary rules or summarise best practices.

15. At the universal level, the International Bill of Rights, encompassing the Universal Declaration of Human Rights (1948) and the two International Covenants (1966), establishes fundamental human rights standards, including those relating to judicial power. The Universal Declaration of Human Rights (UDHR) declares that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (Article 10). The International Covenant on Civil and Political Rights (ICCPR) confirms this principle, giving it a more detailed list of various procedural rights (Articles 14-15). Both the UDHR and ICCPR moreover prohibit discrimination (Article 7 of the UDHR, Articles 3, 14, 25 and 26 of the ICCPR).

16. The basic standards enshrined in the International Bill of Rights are further specified and elaborated upon by a series of non-binding, soft-law instruments that deal with various aspects of the operation of the judiciary. These instruments include the UN Basic Principles on the Independence of the Judiciary (1985),¹⁵ the Basic Principles on the Role of Lawyers (1990),¹⁶ the Guidelines on the Role of Prosecutors (1990),¹⁷ the Universal Charter of the Judge (1999),¹⁸ the Bangalore Principles of Judicial Conduct (2002)¹⁹ and the UN Commission on Human Rights Resolutions 2003/39: Integrity of the Judicial System and 2004/33: Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers. The IFES Seven International Best Practices for Judicial Councils

¹⁵ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁶ Basic Principles on the Role of Lawyers, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹⁷ Guidelines on the Role of Prosecutors, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹⁸ The Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999.

¹⁹ The Bangalore Principles of Judicial Conduct, The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, and endorsed by the UN Social and Economic Council Resolution 2006/23.

(2004),²⁰ which enumerate seven principles that should guide judicial councils, should also be mentioned.

17. At the European level, it is the European Convention on Human Rights (1950) that states that: “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (Article 6). Under Article II(2) of the Constitution of BiH, the European Convention on Human Rights is directly applicable on the territory of BiH and superior to all other laws.

18. The standards of the European Convention are further elaborated by a series of instruments that have been adopted by the Council of Europe’s Committee of Ministers and Parliamentary Assembly (Recommendation CM/Rec(2010)12 of the Council of Europe’s Committee of Ministers to member states on judges: independence, efficiency and responsibilities, the Council of Europe’s Parliamentary Assembly Resolution 1703(2010) on the Judicial Corruption). Of relevance are also the Venice Commission’s Report on Judicial Appointments,²¹ Reports (I and II) on the Independence of the Judicial System²² and the Consultative Council of European Judges’ (CCJE) Opinions No. 1(2001),²³ No. 3(2002),²⁴ No. 7(2007),²⁵ No. 12(2009)²⁶ and its Magna Carta of Judges (2010).²⁷

III. Draft Law on the High Judicial and Prosecutorial Council

A. General

19. The draft Law on the HJPC (hereinafter, the “draft Law”) is a very complex and comprehensive instrument seeking to regulate all aspects of the functioning of the HJPC. The text is divided into ten sections: General provisions; Members and organisation of the Council; Competence and powers; Requirements and term of office; Appointment; Disciplinary responsibility of judges and prosecutors; Suspension from duty of judges or prosecutors until criminal proceedings, disciplinary proceedings or dismissal proceedings are completed; Conflict of duties of judges and prosecutors with other duties, and immunity; Cessation of duty; and Final provisions. The text is carefully drafted and it seeks to take into account international standards.

20. The draft Law, although it is similar to the previous 2004 Law, represents a substantial improvement over the 2012 draft Law - yet many provisions in this new draft Law have remained unaltered from the 2004 version. The changes introduced by the draft Law primarily concern the composition of the HJPC, the election of its members, their term of office and cessation, the establishment of two sub-councils, the appointment of judges and prosecutors, the assessment of their performance and disciplinary proceedings.

B. General principles

21. The draft Law’s scope is broad, defining not only the composition and competencies of the HJPC, but also “the requirements and term for serving as a judge or a prosecutor; appointment of judges and prosecutors; disciplinary responsibility of judges and prosecutors;

²⁰ K. Henderson (ed.), *Global Best Practices: Judicial Councils. Lessons Learned from Europe and Latin America* IFES Rule of Law White Paper Series, 2004.

²¹ CDL-AD(2007)028.

²² CDL-AD(2010)004 and CDL-AD(2010)040.

²³ CCJE, Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges, 23 November 2001.

²⁴ CCJE, Opinion No. 3 on ethics and liability of judges, 19 November 2002.

²⁵ CCJE, Opinion No. 7 on justice and society, 27 November 2005.

²⁶ CCJE, Opinion No. 12 on the relations between Judges and Prosecutors in a democratic society, 8 December 2009.

²⁷ CCJE, Magna Carta of Judges, 17 November 2010.

suspension of judges and prosecutors from duty; conflict of duties of judges or prosecutors and other duties; cessation of the term of office of judges and prosecutors; and any other issues related to the operation of the Council” (Article 1).

22. A report on judicial councils in Europe, commissioned by the Netherlands in the late 1990s, distinguishes two main models of judicial councils: the Southern European model, in which the council primarily focuses on the management of the judiciary; and the Northern European model, in which the council has extended powers in the area of administration, court management and budgeting.²⁸ The draft Law on the HJPC in BiH combines elements of both models, since the HJPC is to have a role both in ensuring the management of the judiciary and in protecting judicial independence.

23. The draft Law stipulates that the HJPC “shall be independent and autonomous in its operation, and its task shall be to ensure an independent, impartial and professional judiciary” (Article 3). This corresponds to the requirements of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, which states that “Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.”²⁹

24. In its 2012 Opinion, the Venice Commission recommended that “in due course, the HJPC be provided with an explicit constitutional basis”.³⁰ So far, this recommendation has not been heeded. But, BiH is not the only country in which a judicial council has been created by ordinary legislation; this is also the case in, for instance, Denmark and Hungary. **Yet, an explicit constitutional basis would facilitate the role of the HJPC as the guarantor of the independence of the judiciary.**

25. In its Article 2, the draft Law sets out sources of financing for the HJPC. The latter is to be financed by the budget of BiH institutions. This provision is taken over from the 2004 Law. The draft Law newly adds that the HJPC is also entitled to receive funds from international donors. Receiving funds from domestic donors is not allowed, as this could jeopardise the independence and/or the reputation of the HJPC.

C. Composition of the HJPC

26. Under the 2004 Law on the HJPC in BiH, the Council has 15 members recruited among judges (5-6), prosecutors (5-6), and other legal professionals (two attorneys elected by the Bar Associations of the Entities, two members elected by the Parliamentary Assembly of BiH and by the Council of Ministers of BiH). The draft Law increases the number of members to 20, covering judges (nine), prosecutors (nine), and others (two members elected on behalf of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH).

27. Under current international standards, there is no uniform model for the composition of judicial and/or prosecutorial councils. As the Venice Commission has repeatedly stated, “there is no standard model that a democratic country is bound to follow in setting up its

²⁸ See W. Voermans, P. Albers, Councils of the Judiciary in EU Countries, online at www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf (23 December 2013).

²⁹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 26; see also IFES’ Seven International Best Practices for Judicial Councils (2004), under which “Judicial Councils must be independent bodies and operate in a transparent and accountable manner” (Best practice 1) and “the structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence” (Best practice 2).

³⁰ CDL-AD(2012)014, op. cit., paragraph 84.

Supreme Judicial Council so long as the function of such a Council falls within the aim to ensure the proper functioning of an independent judiciary within a democratic State³¹.

28. Several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges. Recommendation CM/Rec(2010)12 sets out that “not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary” (paragraph 27).

29. Although judges do not have a majority in the HJPC, they make up a substantial part of it. Moreover, the new composition grants a parity of the two legal professions, judges and prosecutors, with each of them having nine members in the HJPC. Together, the two legal professions have an absolute majority in the HJPC (18 of 20 members). It is also important to mention that the other non-judicial/non-prosecutorial members have a rather limited role in the appointment of judges and prosecutors as well as in the disciplinary proceedings. **However, there are serious concerns about the manner in which the members of the HJPC are elected (see Sections D and F below).**

30. The membership of two non-judicial/non-prosecutorial members does not pose any problems. It is common practice that “judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sector”³² and the Venice Commission even recommends that a substantial part of the members be non-judicial. The HJPC shall include – in addition to the nine judges and nine prosecutors – one member “on behalf of” the Parliamentary Assembly of BiH and one member “on behalf of” the Council of Ministers of BiH. The draft Law emphasises that these two members shall have relevant qualifications and experience and shall not hold any executive or elected public office. This regulation tries to strike a balance between the need to protect the independence of the HJPC and the interest in ensuring its public control and in preventing corporatist management.

31. Unlike the current composition of the HJPC, the draft Law provides that the HJPC shall not include members of the professional legal community (currently elected by the Bar Associations). The Venice Commission has, in its 2012 Opinion on legal certainty and the independence of the judiciary in BiH, questioned the wisdom of having judges, prosecutors, and legal professionals present in the HJPC, an institution which both determines the criteria for the appointment of judges and prosecutors and then carries out this appointment itself. However, instead of excluding legal professionals altogether, **consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system.**

32. Members of the HJPC need to have high moral, technical and professional standards. The draft Law indicates that the composition of the HJPC needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of “general representativeness” (Article 4.4). **The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible (see below and Sections D and F).** In addition, the Venice Commission has already stated in its Opinion on the Constitutional Situation in

³¹ Report on Judicial Appointments (CDL-AD(2007)028), op. cit., paragraph 28.

³² CDL-AD(2007)028, paragraph 30.

Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004), that **the judiciary should not be organised along ethnic lines**.

33. In that Opinion, the Venice Commission stated in particular that:

“20. (...) While a lack of interethnic trust following a bloody war is not surprising, the various ethnic groups have to live and work together, and not just side-by-side. (...)”

80. (...) While it is a legitimate aim to try to ensure an ethnic balance within Parliament in the interest of peace and stability, this can justify ethnic discrimination only if there are no other means to achieve this goal and if the rights of minorities are adequately respected. (...)”

104. Further constitutional reforms, changing the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the medium and long term. (...).”³³

34. With respect to the organisation and the composition of courts, the Venice Commission had stated that “(...) organising courts along ethnic lines would be wrong, counterproductive and damaging to the credibility of the judicial institutions. Such an approach may also counter Article 14 on the prohibition of discrimination of the European Convention on Human Rights and should therefore be approached with extreme caution.”³⁴

35. In addition, in a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, **an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system.**³⁵

36. Article IX.3 of the Constitution of Bosnia and Herzegovina, which stipulates that "Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina", does not refer to exact quotas, but refers instead to a general representation of the peoples of Bosnia and Herzegovina. The same wording appeared in the previous version of the draft Law and, in the given circumstances, it would be preferable to revert back to that version.

D. Election of the members of the HJPC

37. Under the 2004 Law, the system of elections of the HJPC's members was a decentralised one, with judicial members elected by individual courts, prosecutorial members by prosecutor's offices, professional members by the Bar Associations, and the other two members by Parliament and the Council of Ministers. This system is changed radically by the draft Law, which introduces a centralised system of elections of the members of the HJPC.

38. It is a rather complex system in which each court or group of courts, listed in Article 4 of the draft Law, are assigned either one or two members of the HJPC. The same applies to prosecutors' offices. Where there are 15 or fewer judges or prosecutors, each court or office

³³ The Venice Commission's 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).

³⁴ CDL-AD(2013)015, paragraph 23; see also, CDL-AD(2012)014, paragraph 89.

³⁵ CDL-AD(2012)014, paragraph 89 and the Opinion on the draft Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan (CDL-AD(2011)018).

nominates two persons; where there are more than 15, they nominate three. The actual election and appointment is made by the Parliamentary Assembly of BiH.

39. Effectively, therefore, the judges and prosecutors provide shortlists of two or three persons from whom the Parliamentary Assembly selects one or two as applicable. According to Article 4.11, the 20 members of the HJPC must include at least six members from each of the Constituent Peoples and an appropriate number of members from among Others. In addition, the composition of the HJPC must ensure equal representation of both sexes. It is difficult to see how such an outcome can be achieved in practice by a process which gives the final selection of the members of the HJPC who will be appointed from amongst the nominees to a Parliamentary chamber (see also Sections C, above, and Section F, below).

40. In addition, the House of Representatives of the Parliamentary Assembly is to choose one member and the Council of Ministers another. These members are to have relevant qualifications and experience, but cannot be persons holding a justice office, an executive office at any level or public office in a legislative body. In other words, judges, prosecutors and politicians are excluded. Presumably, it is intended that these two persons will be lawyers or legal academics.

41. Also, according to this system, all 18 judicial and prosecutorial members of the HJPC – as well as its president and two vice-presidents – shall be elected by the Parliamentary Assembly of BiH in a procedure which *is to be determined by a separate regulation* adopted by the Parliamentary Assembly. By leaving the definition of the election procedure to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. It remains undetermined whether, for instance, the elections will require a qualified majority - as would be strongly recommended in order to avoid political appointments and to promote the election of persons with a high reputation acceptable to a wide majority - or whether members of the civil society will have the possibility of participating or overseeing the procedure.

42. This election procedure should be developed in the law and, as stated in Recommendation CM/Rec(2010)12: “Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions.”³⁶

43. The Venice Commission is aware that this system for the election of members of the HJPC is the product of a consensus. It is also aware that the participation of the legislative power in the election of the members of a judicial council is, to an extent, common practice - reflecting the conviction that “in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament”³⁷. However, the Venice Commission is equally aware that the specific situation of the country must be taken into account and that there are – to date – no uniform models with respect to judicial and prosecutorial councils or uniform methods for guaranteeing the independence of the judiciary in all countries. In addition, the involvement of the Parliamentary Assembly is not in line with Recommendation CM/Rec(2010)12, which clearly requires that judges be *chosen* by their peers³⁸ (see Section C, above).

³⁶ Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, paragraph 28.

³⁷ Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania (CDL-INF(1998)009), paragraph 9; Parliaments take part in the election of a judicial council, electing some of its members, in Bulgaria, France, Italy, or Slovenia. In exceptional cases, all members of a council are elected by Parliament – such as in El Salvador or in Romania.

³⁸ Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, paragraph 27.

44. The Venice Commission stated, in its Opinion for BiH of 2012, that the independence of the judiciary can be seen as having two forms, one is institutional and refers to the separation of powers in the state and the ability of the judiciary to act free of any pressure from the legislature or the executive. The other is individual independence and refers to the ability of individual judges to decide cases in the absence of political or other pressure.³⁹ In the context of BiH it is **crucial that a clear separation of state powers be maintained to ensure the independence of the judiciary – especially - on the institutional level**, because institutions such as the HJPC are not (yet) provided with an explicit constitutional basis. For this reason, the Venice Commission is convinced that, **in the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.**

45. It is recommended that a substantial element or a majority of the members of the HJPC be *elected* by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications.⁴⁰ **In the proposed system, the Parliamentary Assembly's role seems much too broad.** This role should be limited in order to avoid politicisation, especially as regards the election of judges and prosecutors as members.

46. The Venice Commission would therefore like to **recommend that BiH consider limiting the involvement of the legislative power to the election process of non-judicial/prosecutorial members of the HJPC, whereas a majority of the HJPC members should be elected by their peers.**

E. Election and dismissal of the President and Vice-Presidents of the HJPC

47. Article 8 of the draft Law provides that the Parliamentary Assembly is to elect a President and two Vice Presidents of the HJPC who are to rotate their offices every 16 months during the four-year term of the HJPC. Essentially, they are supposed to act as a *troika*. These three officers cannot be from the same Constituent People or from among Others. For the same reason as under Section D above (election of the members of the HJPC) with respect to the composition of the HJPC, **it is not appropriate for the President and the Vice Presidents of the HJPC to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC.**

48. Article 10.4 sets out that “the term of office of the President and Vice Presidents of the Council may cease by resignation or by decision of the Parliamentary Assembly. Resignation as the President or Vice President of the Council shall not terminate the term as a member of the Council.” For the purpose of clarity, it is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and vice-president, but retaining membership in the HJPC. **There should be input from an expert body before Parliament takes a decision.** In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, **in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered.**

³⁹ CDL-AD(2012)014, op. cit., paragraph 75.

⁴⁰ CDL-AD(2007)028, op. cit. paragraph 50.

F. Term of office of the HJPC members

49. Under the draft Law, members of the HJPC shall serve a term of four years and may be re-elected once (Article 9). No one may be elected for more than two consecutive terms (Article 3.7). The length of the term of office is a standard one, as in most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in “the former Yugoslav Republic of Macedonia” etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate.

50. The provisions at the end of Article 9.3 of the draft Law need to be clarified: it is not clear in the English text whether a person elected to fill a vacancy on the HJPC gets a full four-year term or merely the unexpired residue of the term of the person being replaced.

51. Article 10 of the draft Law foresees several situations in which the term of office of a member of the HJPC shall cease. These situations are very similar to those under the 2004 Law. Paragraph f) refers to a member committing an act due to which he or she “no longer merits to perform the duties on the Council”. This is presumably a reference to Article 4.10, which provides that a member is to be a person of high moral, technical and professional qualities. In other words, it seems to mean that a person can be removed from the HJPC for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

52. Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member’s status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

53. In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

54. In particular, according to the Article 10.3, the Parliamentary Assembly is empowered to dismiss the member of the HJPC where “the member fails to perform his/her duties in a proper, effective or impartial manner” (as defined in Article 10.1.d). However, it is not clear how the effective and proper performance of the HJPC member will be evaluated and what the procedures for such an evaluation are. This needs to be reconsidered.

55. Article 10.1.e sets out that dismissal may arise “if the member fails to fulfil the obligations arising from the function he/she performs due to illness or for other reasons”. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

56. **All these provisions should be much more precise and decisions on cessation/dismissal should not be left to the Parliamentary Assembly.**

57. The HJPC is empowered to set up commissions which can make decisions and perform tasks on its behalf (Article 17 of the draft Law). This is a valuable provision given the wide

range of functions proposed to be assigned to the HJPC. However, decisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession.

G. HJPC's sub-councils

58. The 2004 Law created the HJPC as a single and uniform body. Although this is not entirely unusual⁴¹, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

59. However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. The Venice Commission's requirement is that: "If prosecutorial and judicial councils are a single body, it should be ensured that judges and 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."⁴²

60. The recommendation to create two sub-councils was endorsed by the Venice Commission in its 2012 Opinion, which qualifies the creation of two sub-councils as "a reasonable initiative that might make the two legal professions less dependent on each other without depriving them of a common platform."⁴³

61. The Venice Commission therefore welcomes the establishment by the draft Law of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.

62. Each sub-council shall have 11 members – nine members elected from among judges or prosecutors and two members elected on behalf of the legislative and executive powers. The sub-councils nominate judges and prosecutors, assess their performance, and decide on the status of individual judges and prosecutors (temporary assignment, disciplinary proceedings, termination of the terms of office, etc.). Neither judges nor prosecutors should have any influence over each other's disciplinary issues or appointments. Although all members of the HJPC have a vote, and therefore the non-judge members are in a position to influence the vote, the requirement that a candidate for judicial office be supported by seven of the nine judge members makes it impossible for a candidate to succeed without the judges' support and unlikely that a candidate with the necessary judicial support will be defeated.

63. The Venice Commission acknowledges that **the HJPC remains a single and uniform body** and that this structure was expressly foreseen by the Transfer Agreement. It can therefore not be changed without a prior modification of this Agreement. Even though the Venice Commission has repeatedly expressed concerns about systems with such mixed councils, it is of the opinion that - in the particular context of BiH - such a system is appropriate, provided that the two sub-councils in the HJPC are afforded a maximum amount of autonomy.

⁴¹ For instance, the High Council for Judges and Prosecutors of Turkey.

⁴² CDL-AD(2010)040, op. cit., paragraph 66.

⁴³ CDL-AD(2012)014, op. cit., paragraph 93.

64. The Venice Commission recalls that **the structure of the HJPC as a single and uniform body was expressly foreseen by the Transfer Agreement** and that it can therefore not be changed without a prior modification of this Agreement. Even though **the Venice Commission** has repeatedly expressed concerns about systems with such mixed councils, **it is of the opinion that - in the particular context of BiH - such a system is appropriate, provided that the two sub-councils in the HJPC are afforded a maximum amount of autonomy.**

H. Competences of the HJPC

65. The HJPC has broad competences under both the 2004 Law and the draft Law: it appoints judges and prosecutors (but see Section D, above), decides on the suspension of judges, determines criteria for the assessment of judges and prosecutors, decides on the appeals in disciplinary proceedings, gives its views on the annual budget for courts and prosecutors' offices, gives its opinions on draft laws and regulations concerning the judiciary etc. In the hands of an active council, there is considerable scope for using these powers to carry out a comprehensive reform of the judicial and prosecution systems.

66. Article 24 of the draft Law gives the HJPC power to require courts, prosecutors' offices and state authorities, as well as judges and prosecutors to provide it with information, documents and other materials in connection with the exercise of its competencies. It can also have access to all premises of courts and prosecutors' offices and their records. Such competences confirm that the HJPC is the central organ within the judiciary.

67. Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors' offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brčko).

68. The extent of the competences seems to be in line with European standards⁴⁴, with the exception of the reservations made under Sections D, E and F above.

I. Reporting obligations of the HJPC

69. According to the Article 25.2, "not later than 01 May each year, the Council shall prepare an annual report listing its activities and describing the state of the judiciary and prosecution, including recommendations for improvement. The annual report of the Council shall be open to public."

70. Article 25.3 adds that "at the invitation of the Parliamentary Assembly or another body referred to under the preceding Paragraph, the President or any other authorized representative of the Council will attend a session and directly explain the report and answer any questions of parliamentary representatives or members of the other body. Discussion of the report and conclusions may result in assessments, suggestions and proposals which do not challenge the independence of the Council."

⁴⁴ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Chapter IV; Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society; Report in Judicial Appointments (CDL-AD(2007)028), paragraphs 18-26; Report on the Independence of the Judicial System Part I: the Independence of Judges (CDL-AD(2010)004), paragraph 32; IFES Seven International Best Practices for Judicial Councils (2004), Best practice 6.

71. The work of the HJPC should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

72. In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly “may remove the Presidency or a member of the Presidency from the Council.” This provision should be deleted. On the other hand, it should be a right, not a duty of the President of the HJPC to attend the Parliamentary Assembly’s session and/or engage in the discussion of the report.

J. Appointment of judges and prosecutors

73. The draft Law, under Chapter IV, sets out general requirements that persons wishing to be appointed as judges or prosecutors need to satisfy, as well as requirements for the appointments to the different courts and prosecutor’s offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards.

74. In addition to judges and prosecutors, the draft Law also allows the HJPC to appoint reserve judges, lay judges, senior professional associates, professional associates, and professional advisors. Article 40 of the draft Law gives the HJPC competence in relation to expert associates and advisers. It is not clear from the draft Law what the functions of these officials are.

75. The appointment of judges and prosecutors is a comprehensive process. The main principles applicable to this process are defined in Chapter V of the draft Law, but the details are left to the Rules of Procedure of the HJPC. The Venice Commission recalls in this context that the Rules of Procedure, as a regulation of an inferior legal force, need to be in line with the provisions of the draft Law as well as any other laws or treaties binding on BiH. The text of the draft Law is not clear as to whether the appointment is a two-step process in which individuals first become judges or prosecutors and later are appointed to a concrete judicial or prosecutorial organ; or a one-step process, in which becoming a judge and being appointed to a court or a prosecutor’s office goes hand in hand. This should be explicitly stated in the draft Law.

76. The appointment process starts with a public announcement of vacancies that must be well-publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the HJPC for nominations for vacancies in the different courts and prosecutors’ offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process.

77. There is a written qualifying exam for the appointment as a judge, prosecutor or an associate or expert (Article 45 of the draft Law). The introduction of such an exam, recommended by the Venice Commission in its 2012 Opinion,⁴⁵ is to be welcomed. Candidates who pass the written exam are then called for an interview conducted by the departments who are responsible for rating the candidates. The department is required to assess the candidate’s motivation to work in the judiciary in the position applied for, ability to

⁴⁵ CDL-AD(2012)014, op. cit., paragraph 91.

perform the function responsibly, independently and impartially, understanding of the importance of judicial and prosecutorial ethics, communication and presentation skills, analytical capabilities and the ability to solve legal problems. The interviews and written qualifying exams are to be audio visually recorded for the purpose of any subsequent appeal. The sub-councils then make a list of successful candidates with the nomination of candidates for appointment which they then submit to the HJPC. The candidates with the highest scores are appointed to relevant courts or prosecutor's offices and take office after swearing an oath. It is not entirely clear how and on what basis candidates are allocated to courts and prosecutors' offices, especially at a lower level.

78. Under Article 51 of the draft Law, detailed rules are set out to ensure the proper representation of the Constituent Peoples and Others amongst courts, court presidents and prosecutors. The HJPC is required to make a written reasoned decision on appointment of a candidate for a president of a court, a judge or a prosecutor. The Article also provides for an appeal to the HJPC. It is not clear how this can work, since the HJPC is both the body making the decision and hearing the appeal. **There does not appear to be any provision for an appeal to a court of law, which should be added.**

79. In the case of the Chief Prosecutor, the duty of the HJPC is to define a list of successful candidates together with the nomination of a candidate for appointment and deliver the list to the competent government or executive authority which, in turn, is to submit the list with its nominated candidate to the competent legislative body. It seems that only one nomination for appointment is envisaged. The Venice Commission had doubts on whether Article 52 of the draft Law envisages that the legislative body can refuse to make the appointment sought, but was informed that this was not the case.

80. A more serious concern, however, is the introduction of what seems to be a transfer of competences from the HJPC down to Entity parliaments in the appointment of prosecutors. Such a transfer cannot be introduced without a prior modification of the Transfer Agreement. This would involve a cumbersome (and seemingly untested) procedure, involving the Entities' governments and parliaments, the Parliamentary Assembly of BiH and the Constitutional Court of BiH. In any case, **in a system that is as fragmented as Bosnia and Herzegovina, it would be very unhelpful and not recommended that the appointment competence be moved from the State level (the HJPC) to the Entity level (the parliaments). This would increase the risk of politicisation and should be avoided.**

81. An additional problem is that Article 53 of the draft Law empowers the Chief Prosecutor to select deputy chief prosecutors from among the appointed prosecutors in the office who satisfied the necessary requirements. He or she then notifies the decision to the HJPC. It seems these appointments are entirely in the hands of the Chief Prosecutor. In a hierarchical system such as that of BiH, giving so much power over appointments to a single individual especially without any requirement to consult with anybody else, could be a recipe for the Chief Prosecutor to select deputies chosen for their compliance and lacking the necessary independence of thought necessary in a good prosecutor.

82. Judges and prosecutors are mostly appointed for an indefinite term. The mandate of the presidents of courts and of the chief prosecutor and the deputy chief prosecutor are limited to four years. In addition to the expiry of the latter period, the term of office may cease in the situations enumerated in Article 95 of the draft Law. A judge or prosecutor may also be suspended from their duty in cases enumerated in Articles 83-84 of the draft Law. The grounds for both the cessation of duty and the suspension from duty do not seem to give rise to controversies.

K. Assessment procedure

83. Article 63 of the draft Law provides for an assessment of judges and prosecutors at least once every two years in accordance with criteria defined by the HJPC. The assessment is carried out by presidents of courts, the chief prosecutor or another person determined by the draft Law. The criteria for the assessment are to be determined by the HJPC. Since the performance is one of the criteria in the appointment and, since, moreover, negligence or carelessness in the performance constitutes a disciplinary offence, it would be important to have at least the basic criteria of the assessment stated expressly in the draft Law.

84. In addition, since the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. A similar point may be made about the power of the Chief Prosecutor to assess the performance of all the subordinate prosecutors. There is, however, an appeal to the relevant sub-council.

85. Article 63 needs to be clarified. According to Article 63.1 "Judges and prosecutors shall be assessed at least once every two years based on their performance, in accordance with criteria defined by the Council", while Article 63.2 states that "the decision assessing the performance of a judge shall be made by the president of the court". In other words, it is up to the President of the court to define the exact time for an assessment of a judge, provided that such assessment takes place at least once every two years.

86. However, this also means that the President of the court may order more frequent assessments of a judge where he or she decides that it is necessary. It is not clear why the President of the court should be deciding on the timing and frequency of the assessment. He or she may have the power to signal the need for an assessment or request for a disciplinary investigation. However, it should not be the President's responsibility to make decisions on those issues.

87. It is also unjustified to provide the President of the Superior Court with the power to make a decision on the needs for an assessment of the President of a lower court (as defined by Article 63.2). If there are concrete problems in a given case, a disciplinary procedure should be started with the necessary guarantees.

88. It is also not clear whether a decision regarding the assessment of the President of one of the top courts (the Court of BiH) should be made by the judicial sub-council and whether it is empowered to order an assessment more frequently than once every two years.

89. The consequences of the assessment should also be clearly set out. For instance, Article 63.8 stipulates that "the assessment of performance of holders of justice offices shall be taken into consideration when making appointments to senior positions, when renewing terms of office of reserve judges, and when establishing disciplinary responsibility". Apart from that, the President of the court may be dismissed from office if he or she "was given one of the lowest two performance rates in accordance with criteria defined by the Council" (Article 63.9).

90. **Without clearly established, transparent and unambiguous criteria of assessment, published in advance, the possibility of removing a judge, let alone a President of the court, from office may be open to politically or personally motivated manipulations.**

91. It is not clear whether this is the only result of the performance assessment and whether there are any consequences other than those defined in Article 63.8 and Article 63.9.

92. The performance of the Presidents of the most senior courts and the Chief Prosecutor are assessed by the relevant sub-council. It seems appropriate that assessments of judges take place at every level. There is an appeal to the HJPC itself. Assessment of performance is to be taken into account when making appointments to senior positions. In addition, where the President of a court or the Chief Prosecutor receives one of the two lowest assessments he or she loses office. Given the importance of these assessments the specific statement that the appeal to the HJPC is final and no remedies shall be available seems difficult to justify. **An appeal should lie to a court of law.**

93. While the draft Law provides that the criteria for assessment are to be established by the HJPC, no detail is provided as to how the assessments are to be actually carried out. It may be that some specialised sub body or bodies of the HJPC need to be established in order to perform this function. The power to appoint commissions is in point here. The method of the composition of such commissions has to ensure that they are balanced and should exclude that *ad hoc* commissions are established to “deal” with a particular judge.

L. Disciplinary Procedure

94. Chapter VI of the draft Law deals with the disciplinary responsibility of judges and prosecutors. Disciplinary proceedings are to be conducted by a first instance disciplinary commission with an appeal to a second instance disciplinary commission. Initially, three first instance and two second instance commissions are to be appointed for judges’ disciplinary proceedings and the same number for prosecutors, making 10 in all. Each disciplinary commission is to consist of three members, one who is a member of the competent sub-council, while the other two are to be appointed from a list of judges and prosecutors to be drawn up by the competent sub-council, following nominations from each court and prosecutor’s office. At least one member in each disciplinary commission must be a judge of the same or higher rank as the person accused. No member is to be from the same court or prosecutors’ office as the accused person.

95. Judges and prosecutors may be held disciplinary responsible for “statutory offences committed intentionally or negligently” (Article 64). The list of such offences is contained in Articles 66 and 67 of the draft Law. Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. Proceedings may result in a sanction ranging from a written reprimand to dismissal.

96. Article 66 of the draft Law deals with disciplinary offences of judges. In general, these provisions seem appropriate. Under paragraph e) there is a ban on accepting gifts or remuneration “intended to improperly influence decisions or actions of a judge”. This is defined to include cases where such gifts or remuneration only create the appearance of improper influence.

97. The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a judge’s or prosecutor’s position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the judge or prosecutor is engaged in academic work, it would be unreasonable to demand from the judge or prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest.

98. Article 66.h refers to the “negligence or carelessness in the performance of official duties” as a ground for the disciplinary offense”. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁴⁶ According to Recommendation (2010)12 “it should be emphasized that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases, should not give rise to disciplinary liability, except in cases of malice and gross negligence.”⁴⁷

99. As a result, a lower limit of wrongful conduct may give rise to disciplinary sanctions against judges, at least regarding adjudication and the interpretation of the law and the facts of a case. This limit is drawn between failures caused by negligent conduct and failures caused by gross negligence.

100. Article 66.i makes it a disciplinary offence for a judge to make decisions which are in ‘patent violation’ of the law or in ‘persistent and unjustified violation’ of the rules of procedure. These terms should be revised to refer to judgments made in *bad faith* or as a result of repeated *gross negligence*. In all other cases it is best to confine such matters to the appellate process. Judges must be free in interpreting the law and, as such, the fact that a judgment was overturned on appeal cannot lead to disciplinary measures against the lower instance judge.

101. Article 66.j defines as a disciplinary offense as “unjustified delays in making decisions or other actions in connection with the performance of the duties of a judge or any other repeated disregard of the duties of a judge”. Due to a lack of clarity and the ability to foresee consequences of one’s own actions, this paragraph should also be revised. The wording such as “other actions in connection with performance of the duties” or “repeated disregard of duties” should be more detailed and clarified. The draft Law should stipulate more specifically what types of duties and actions may result in disciplinary proceedings.

102. Article 66.l makes it a disciplinary offence to enable persons who are not authorised by law to serve as judges. It is not clear what this means or in what circumstances a judge could do such a thing. Similar observations arise in relation to disciplinary offences by prosecutors.

103. Similarly, without providing any guidance or reference to the meaning of “inappropriate contact with a party to the proceedings or his/her representative”, Article 66.k may potentially result in an overbroad interpretation. Is a meeting with either or both parties always inappropriate? Do judges have clear guidance with regard to the actions that are inappropriate?

104. According to Article 66.m “interfering with actions of judges or prosecutors with the intent to obstruct or demean their activities” is defined as a disciplinary offence. Since this provision refers to the disciplinary offences committed by a judge, it needs to clarify what is meant by an “obstruction” for the purposes of this draft Law. In which case do actions of a judge qualify as an interference or obstruction of the work of a prosecutor? Clearly not all actions that may be perceived as interferences should be classified as disciplinary offences. This should only apply to unlawful interference and obstruction.

105. Article 66.n, which makes it a disciplinary offense for a judge to make - “any comments while the case is deliberated in court, which may be reasonably expected to interfere with or harm the equitable proceedings or trial, or failing to take appropriate steps to ensure that

⁴⁶ See the United Nations Basic Principles on the Independence of the Judiciary, paragraph 18.

⁴⁷ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraphs 68 - 69.

court employees subordinated to him/her also refrain from making comments” - also seems to be vague and may result in a disproportionate response. It is not clear if this restriction applies to all judges or only to those who are in the process of deliberation. A judge, while making certain public comments or statements during the deliberation may indeed harm the reputation and credibility of the court. It would, however, be unreasonable to punish a judge where a court employee, who is subordinated to him or her, fails to refrain from making similar comments. It is not immediately clear from the draft Law in what circumstances the disciplinary committee may decide that a judge failed “to take appropriate steps to ensure that court employees refrain from making comments” on the case being deliberated.

106. For prosecutors, it is an offence to fail to comply with instructions of a superior prosecutor, unless such compliance would constitute a violation of law or of the provisions of Article 67 of the draft Law. This does not seem to be in compliance with paragraph 10 of Recommendation Rec(2000)19 which provides that: “All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.”⁴⁸ Even this safeguard is not sufficient. In cases of illegal instructions, the prosecutor should have the possibility of making an appeal to an independent body, e.g. the prosecutorial council. A simple replacement of the prosecutor does not prevent an illegal instruction from being carried out.⁴⁹

107. Furthermore, paragraphs 24-36 of Recommendation Rec(2000)19 provide for a number of important duties of the public prosecutor towards individuals. Quite a number of these are not referred to at all in the draft Law, such as the duty not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded⁵⁰, not to present evidence that they know or believe on reasonable grounds was obtained illegally⁵¹, and to disclose to the other parties (meaning primarily the accused) “any information which they possess that may affect the justice of the proceedings.”⁵²

108. Article 68.3 of the draft Law provides that “All rights and privileges arising from employment as a judge (...) or prosecutor who was dismissed on the basis of disciplinary proceedings, shall cease with the dismissal.” It should be clarified whether this includes the right to a pension.

109. Article 69.2 stipulates that “the disciplinary measure of dismissal shall be imposed only in cases in which a serious disciplinary offense has been established, and the severity of the offense clearly shows that the offender is unfit or unworthy of continuing to perform his/her duty.” However, the draft Law does not contain any indication which offences may qualify as “serious”.

110. There is a provision in the draft Law for an appeal to the HJPC against the decisions of the disciplinary commission. However, there seems to be no provision for an appeal to a court of law. **Given the power of the disciplinary commissions to dismiss a judge or prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed.**

111. Article 71.4 of the draft Law provides for random assignment of cases in a manner pre-selected by an HJPC decision. It needs to be made clear that this has to be subject to the

⁴⁸ Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, paragraph 10.

⁴⁹ Joint Opinion on the draft Law on the Public Prosecutor's Office of Ukraine (CDL-AD(2013)025), paragraph 13.

⁵⁰ Recommendation Rec(2000)19, paragraph 27.

⁵¹ Ibid., paragraph 28.

⁵² Ibid., paragraph 29.

obligation to provide a commission which does not contain persons from the same court or prosecution office as the accused and which contains persons of appropriate rank. The mechanics of achieving this are not clear.

112. Article 72.1 stipulates that “the Office of the Disciplinary Counsel, an Office within the Council, shall act as prosecutor in connection with allegations concerning violations of the duty of a judge or prosecutor, in accordance with this Law and the Regulation on Disciplinary Responsibility.” Taking into account that this office is part of the institution responsible for considering and applying disciplinary penalties, it is crucial to ensure that there is no institutional or personal interference of the members of the HJPC in the work of the Office of the Disciplinary Counsel.

113. According to the Article 72.3, the HJPC appoints the Chief Disciplinary Counsel, who is not a member of the HJPC. The draft Law defines basic requirements (such as experience in legal matters, high moral character, etc.), which the person should satisfy in order to be appointed Chief Disciplinary Counsel. The draft Law provides no details on the selection/appointment procedure of the Chief Disciplinary Counsel who becomes one of the central figures during the disciplinary proceedings. However, the Venice Commission was informed that this is covered by the Law on Civil Service in the Institutions of Bosnia and Herzegovina.

114. The draft Law also provides that Chief Disciplinary Counsel will be assisted by the “prosecutors and investigators in his/her office”, but the draft Law contains no requirements that should be satisfied in order to become prosecutor/investigator of this Office. And it also contains no provisions indicating who will be responsible for their selection/appointment and through what procedure. However, the Venice Commission was informed that this is covered by the Law on Civil Service in the Institutions of Bosnia and Herzegovina.

115. Article 89.3 of the draft Law provides that judges and prosecutors may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges and prosecutors being adherents of or practising such religions.

116. Article 90.2 of the draft Law prohibits judges and prosecutors from carrying out various sorts of paid work, permits involvement in academic, teaching or similar activities to educate the public and permits remuneration for that type of work. This provision should perhaps set out that any such activity is subject to the proper performance of their function as judges or as prosecutors.

117. Article 90.3 of the draft Law would prohibit the judge and prosecutor from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations.

118. Article 92 of the draft Law requires a judge and prosecutor to seek the opinion of the HJPC on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the judge or prosecutor has reason to have at least a doubt about the issue.

119. According to the Article 92, “The Council's response delivered in accordance with provisions of this Paragraph shall be binding.” Although the wording of this sentence may imply that this response is also “binding” for the Office of the Disciplinary Counsel, it is recommended to clarify that where the Council advises a judge/prosecutor that his or her

actions do not conflict with their duties, this will overrule the possibility of launching a disciplinary investigation at a later stage.

120. Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries.

121. In Article 94.2 of the draft Law it is not clear what is meant by proceedings “that are underway”, which in the English language implies some prior process. This may be a linguistic problem. The provision should simply cover all proceedings that are lawfully brought.

122. According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease “if he/she was sentenced to prison by a final verdict”. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office.

123. Article 95.3 sets out that “when a judge or a prosecutor reaches the mandatory retirement age, his/her term shall automatically cease”. It is recommended to provide more flexibility by allowing a judge to finish considering/deliberating a case or else retirement could disrupt the work of the court, which may result in the re-hearing of a case.

IV. Conclusions

124. The draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina is a carefully drafted instrument that takes into account international standards as well as the previous opinions of the Venice Commission.

125. The Venice Commission welcomes, in particular, the creation of two sub-councils within the single structure of the HJPC: one for judges and one for prosecutors. Even though it has repeatedly expressed concerns about systems with such mixed councils, the Venice Commission is of the opinion that - in the particular context of BiH - such a system is appropriate, provided that the two sub-councils are afforded a maximum amount of autonomy.

126. There are, however, a number of recommendations that the Venice Commission would like to make, which include to consider:

- a) limiting the involvement of the legislative power to the election process of non-judicial/prosecutorial members of the HJPC and having a substantial element or a majority of the HJPC members elected by their peers;
- b) avoiding what seems to be a transfer of competences from the HJPC down to Entity parliaments in the appointment of prosecutors, not only because it would involve a cumbersome amendment procedure of the Transfer Agreement, but also – and more importantly - because it would lead to an increased risk of politicisation of the appointment procedure;
- c) adding members on behalf of the professional community would not excessively broaden the size of the HJPC and would ensure the representation of the users of the judicial system (rather than exclude them altogether);
- d) removing the power of the Parliamentary Assembly to dismiss members of the HJPC (including the President and the Vice Presidents);

- e) avoiding setting quotas along ethnic lines as they may undermine the effective functioning of the system (for a country the size of BiH) and since it is important that the judiciary not be organised along ethnic lines;
- f) introducing a right to appeal to a court of law for HJPC's written decisions regarding appointments and for assessments of judges and prosecutors as well as for decisions of the disciplinary commission (that can be appealed to the HJPC) – at least for cases where a serious penalty was imposed.

127. The Venice Commission will continue to recommend that the HJPC be provided with an explicit constitutional basis, because it believes that this would facilitate the role of the HJPC as the guarantor of the independence of the judiciary of Bosnia and Herzegovina.

128. The Venice Commission remains at the disposal of the authorities of Bosnia and Herzegovina for any further assistance they may need.