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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION ON**  
**THE DRAFT LAW ON THE COURTS**  
**OF BOSNIA AND HERZEGOVINA**

**on the basis of comments by**

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## I. Introduction

1. On 17 April 2013, the Venice Commission received a request from the Ministry of Justice of Bosnia and Herzegovina to provide an opinion on the draft Law on the Courts of Bosnia and Herzegovina (CDL-REF(2013)023).
2. The Venice Commission has invited Ms Veronika Bilkova, Mr James Hamilton, and Mr Konstantin Vardzelashvili to act as rapporteurs for this opinion.
3. This opinion is part of a series of opinions on a number of aspects regarding the structure and functioning of the judiciary in Bosnia and Herzegovina (hereinafter, "BiH"). The latest in this series was the Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, adopted by the Venice Commission in June 2012.<sup>1</sup>
4. The present opinion was prepared after a thorough review of all the input and material submitted by the Ministry of Justice of BiH, the High Judicial and Prosecutorial Council and the Court of BiH.
5. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

## II. General remarks

6. The draft Law on the Courts of Bosnia and Herzegovina (hereinafter, the "draft Law") deals with the courts at the state level of BiH (except for the Constitutional Court of Bosnia and Herzegovina) in a single law. The state-level courts will now include: the Court of Bosnia and Herzegovina (hereinafter, the "State Court") and a new High Court of Bosnia and Herzegovina (hereinafter, the "High Court of BiH"). The Venice Commission understands that the State Court will continue to operate in its current composition, to the extent that it relates to its first instance jurisdiction. This should be clearly stated in Article 54 of the draft Law.
7. This draft Law therefore aims to establish a High Court of BiH, which will serve as a second instance court at the state level and receive cases on appeal from the State Court and also adjudicate on other matters specified in this draft Law (see below).
8. The State Court was created under Article 1 of the Law on the Court of Bosnia and Herzegovina<sup>2</sup> (hereinafter, the "Law of 2000"), introduced by the High Representative on 12 November 2000, in order to ensure the effective exercise of the competencies of the State of BiH and the respect for human rights and the rule of law. The Law of 2000 sets out the jurisdiction of the State Court, which has its seat in Sarajevo<sup>3</sup>.
9. The Venice Commission stated, in its Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina (1998) that the establishment of a judicial

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<sup>1</sup> Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session, CDL-AD(2012)014.

<sup>2</sup> "Official Gazette" of Bosnia and Herzegovina, 29/00; "Official Gazette" of the Federation of Bosnia and Herzegovina, 52/00; "Official Gazette" of the Republika Srpska, 40/00.

<sup>3</sup> See the Law on Court of Bosnia and Herzegovina, Article 1.

institution at the state level was compatible with the Constitution, provided it aimed to satisfy “a specific need, acknowledged in the Constitution itself or in the peace agreements”.<sup>4</sup>

10. Under the Law of 2000, the State Court has an Appellate Division<sup>5</sup>. However, the organisation of this Division had raised questions due to the possibility of appealing judgments made by different sections within the same Court to a different division of that Court. The Venice Commission had said, in its Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, that:

*“The possibility of appealing judgments made by different sections within the same Court to a different division of that Court, if it is in effect separate from the rest of the Court should in itself not be a problem. Although a judge has never been appointed in the Appellate Division for a case he or she had tried at first instance, a separate Court of Appeal would be seen as more independent than a division in an existing court. It would also create more trust in the fairness of its judgments and in the judicial system in general. This is particularly urgent in a country such as BiH.”<sup>6</sup>*

11. The Venice Commission has therefore supported the establishment of a separate court of appeal and the BiH authorities seem to have heeded this recommendation with the suggestion of establishing the High Court of BiH.

12. The Venice Commission also notes that instead of dealing with each of the two state-level courts in a separate law, the national authorities have introduced one law on courts of BiH, in compliance with the recommendation by the Venice Commission in its previous opinion<sup>7</sup>.

13. This draft Law was developed in a procedure where consultations have taken place in the course of its drafting, involving actors from the state level (especially the High Judicial and Prosecutorial Council), actors from the Entities and the Brčko District as well as international actors. Although criticism was made for the alleged limited involvement of the professional legal community in the course of the drafting process, the Venice Commission believes that the draft Law was prepared in a rather inclusive manner. This might substantially increase the acceptability of the Law on the Courts in BiH and of the state-level courts themselves.

### **III. Draft Law on the Courts of Bosnia and Herzegovina**

14. The draft Law has two main objectives: (1) setting up a new court of appeal i.e. the High Court of BiH, and (2) addressing a number of issues, notably the jurisdiction of the State Court, which remained partially unclear under the original Law of 2000 and successive amendments.

#### **A. Articles 1 (subject matter) and 2 (objective)**

15. These two Articles set out the scope of the draft Law and refer to the “courts of Bosnia and Herzegovina”. Yet, since the draft Law relates solely to the courts operating at the state level, it would be appropriate to clearly set this out in Articles 1 and/or 2.

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<sup>4</sup> See Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina, adopted by the Venice Commission, at its 36<sup>th</sup> Plenary Session (3 November 1998), CDL-INF(1998)017, p.3.

<sup>5</sup> See the Law on Court of Bosnia and Herzegovina, Articles 19, 23, 26, 30, 37-38, 58 and notably Articles 61-64.

<sup>6</sup> See Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session, CDL-AD(2012)014, paragraph 62.

<sup>7</sup> Ibid, paragraph 63.

16. Article 2(2) states that *“the Court and the High Court (...) shall be founded and terminated by law”*. It is clear that the main purpose of the draft Law is to reform the state-level judiciary through the establishment of a new High Court of BiH, which mirrors the jurisdiction of the State Court of BiH. The latter remains to serve as a first instance court.

17. It seems that the draft Law has opted for an appointment procedure for all judges that are to sit on the new High Court of BiH. Such an option is within the margin of appreciation of the legislator. However, in light of the importance of this issue, clearer provisions should be provided.

#### **B. Article 3 (seat and seal)**

18. This provision suggests that while the seat of the State Court will be in Sarajevo, the High Court of BiH could have its seat elsewhere. It seems that Banja Luka, East Sarajevo and Pale have been discussed as potential candidates.

19. The decision is to be made by the national authorities, as there are no international standards relating to the seats of highest judicial institutions, but the seat of such an important state institution should be settled by law.

#### **C. Article 4 (composition and number of judges)**

20. This Article sets out the composition of the two Courts. This matter, as rightly recalled in the comments by the HJPC and by the Ministry of Justice, falls within the competence of the HJPC (Law on the HJPC, Article 17 paragraph 25). The Law on the HJPC (Article 23) regulates the current State Court's composition. However, the proposed text overlaps with the Law on the HJPC, thus creating a conflict of competence. The Venice Commission believes that it should be ensured that there is no overlap between the draft Law and the Law on the HJPC, without the draft Law going beyond what is already provided for by the Law on HJPC.

21. Article 4(2) provides that *“the High Court shall have an equal number of judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others”*. The Venice Commission understands that this provision aims to ensure the equitable representation of various peoples living in the territory of BiH. While such an effort is legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. The judiciary is not a representative institution. Here, the principle of independence and impartiality of individual judges should prevail over other considerations.

22. The Venice Commission has stated in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative adopted in 2005 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. (...).”<sup>8</sup>*

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<sup>8</sup> Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative adopted by the Venice Commission, at its 62<sup>nd</sup> Plenary Session, (Venice, 11-12 March 2005), CDL-AD(2005)004.

23. However, 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. In addition, Article IX.3 of the BiH Constitution merely provides that *“Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina”*.<sup>9</sup>

24. The Venice Commission therefore strongly recommends that **Article 4(1) and Article 4(2) of the draft Law be deleted.**

25. Article 4(3) reads: *“The total number of judges for each court shall be determined by the HJPC, on the elaborated proposal of the President of the Court and the express consent of the Ministry of Justice”*. While the first part of the provision (which empowers the HJPC to determine the overall number of judges for each court) is logical and not objectionable, it is less clear (1) why the proposal should be submitted by the President of the Court, and (2) when this should be done. It seems that since the total number of judges is to be determined for each Court, the President of each Court should make a proposal, but this needs to be clarified. Equally problematic is the requirement of the express consent of the Minister of Justice of BiH. The draft Law does not provide details on whether and in what case the Minister of Justice may refuse consent or what is to happen in such an eventuality, which has the potential to lead to deadlock.

26. The Venice Commission recommends that **Article 4(3) of the draft Law be revised to read, “The total number of judges for each court shall be determined by the HJPC”**.

#### **D. Article 6 (accountability)**

27. Article 6 deals with the accountability of judges and the state and gives rise to a few questions.

28. The issue of the personal liability of judges was raised by the Committee of Ministers in its Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities:

*“66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.*

...

*70. Judges should not be personally accountable where their decision is overruled or modified on appeal.”<sup>10</sup>*

29. According to Article 6(3): *“Bosnia and Herzegovina shall be accountable for any damages a judge may cause to a citizen or legal person due to the illegal or improper discharge of judicial duties”*. While Article 6(4) further states that in the event that *“Bosnia and Herzegovina pays out damages (...) the judge may be asked to compensate the amount paid in the event that damages were caused either intentionally or due to gross negligence”*. These paragraphs touch upon an important and sensitive issue of the civil liability of judges.

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<sup>9</sup> The General Framework Agreement, Annex 4 - Constitution of Bosnia and Herzegovina, [http://www.ohr.int/dpa/?content\\_id=372](http://www.ohr.int/dpa/?content_id=372)

<sup>10</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

Therefore, it is extremely important that every aspect for determining the compensation basis be clearly defined by the law. As the Venice Commission said in its Opinion on the draft amendments to laws on the judiciary of Serbia in 2013, “*While imposing civil liability on a judge is a possibility, the grounds for the compensation of damage should be considered with great caution, as this may have a negative impact on the work of the judiciary as a whole. It could **limit the discretion of an individual judge to interpret and apply the law.***”<sup>11</sup> Therefore, any decision to request a judge to compensate the amount paid by the state must be applied with great caution.

30. The draft Law does not indicate which institution will deal with this issue and what procedure will define whether a judge of the courts has acted illegally, improperly, intentionally or with gross negligence. The draft Law should either narrowly define these issues or at least include the reference to the law that defines the applicable procedure and the grounds for civil liability. Apart from that, “*improper discharge*” of the functions (Article 6(3)) seems to be a vague term and it also discords with the terms “*intentionally or due to gross negligence*” used in Article 6(4). In effect, paragraphs (3) and (4) apply different tests.

31. There seems to be a mistake in the draft Law in Article 6(4), where the first sentence refers to “*...pays out damages in accordance with paragraph (1)...*”, this should read “*paragraph (3)*”.

#### **E. Article 7 (Protection of Rights)**

32. Article 7 (2) reads oddly. It is, in large part, a paraphrase of the first part of Article 6(1) of the European Convention on Human Rights. What would be more useful would be a provision requiring the State Court and the High Court of BiH established under the draft Law (not “*an independent and impartial court*” in general terms) to hold a hearing and to give judgment within a reasonable time. The provision as drafted is more appropriate to the constitutional level than to a law establishing a court or courts.

#### **F. Article 9 (Transparency)**

33. If there are to be exceptions to the principle of open court hearings these should be stated in the draft Law itself. Article 9(1) should provide that the work of the Courts shall be open “*except as hereinafter provided.*”

34. The conditions for holding closed hearings set out in Article 9(3) are too wide in some respects and too vague in others. Preserving morality or integrity should not be a reason for closed hearings “*Protecting other separate interests of an individual or the community*” is far too general and vague. The exceptions to open court hearings should follow those provided in the Criminal Procedure Code of BiH and Article 6 of the European Convention on Human Rights.

#### **G. Article 13 (Signs of Affiliation)**

35. This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to “*signs*” and to “*such insignia*” suggest that it is only physical emblems which are covered. **The prohibition should also extend to conduct such as praying or religious gestures or utterances.**

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<sup>11</sup> See Opinion on the draft amendments to laws on the judiciary of Serbia, adopted by the Venice Commission at its 94<sup>th</sup> Plenary Session (Venice, 8-9 March 2013), CDL-AD(2013)005, paragraph 19.

## H. Article 14 (Co-operation and Legal Aid)

36. Article 14(1) requires that the courts co-operate with each other and with other courts and authorities in BiH. It is important to **ensure that the requirement to co-operate is combined with a reciprocal duty to do so for the other courts in BiH.**

37. The reference in Paragraph (2) to "*legal aid*" should presumably be to "*legal assistance*".

38. Article 14(4) needs to be clarified. The types of cases in which the courts are required to inform the Attorney's Office of BiH, that "*measures must be undertaken in order to protect the rights and interests of Bosnia and Herzegovina or other entities*" should be defined more precisely.

## I. Article 15 (criminal jurisdiction)

39. The Law of 2000 contains several provisions on criminal jurisdiction that were already unclear and/or controversial in the original version of the Law and notably Article 13(2) of the original version of the Law<sup>12</sup> (Article 7(2) of the amended version<sup>13</sup>). The constitutionality of this provision was challenged in 2009 in the Constitutional Court of BiH by Mr Milorad Živković, the first deputy chair of the House of Representatives of the Parliamentary Assembly of BiH.<sup>14</sup> The applicant claimed that Article 13(2) was in breach of the principle of legal certainty, as it "*created a wide space for manipulation and even for political processes*"<sup>15</sup> due to its vague and imprecise wording. In its decision adopted in March 2009, the Constitutional Court of BiH found the provision consistent with the Constitution. Consensus on the need to revise the wording of Article 15 of the draft Law was reached in the framework of the EU-BiH Structured Dialogue on Justice<sup>16</sup>. These calls have now been heeded. However, the wording of the provision on criminal jurisdiction (Article 15 of the draft Law), is still unclear in certain important respects.

40. It is also important to note that the Law of 2000 did not include the current State Court's extended criminal jurisdiction e.g. the possibility of the State Court to have jurisdiction over

<sup>12</sup> "Article 13 - Criminal Jurisdiction – (...) The Court shall further be competent to:

a) take a final and legally binding position on the implementation of State Laws and international treaties on request by any court of the Entities or any court of the Brčko district entrusted to implement State Law;  
 b) decide any issue relating to International and inter-Entity criminal law enforcement, including relations with Interpol and other international police institutions, such as decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign States or International Courts or Tribunals;  
 c) decide any conflict of jurisdiction between the courts of the Entities, and between the Courts of the Entities and the Courts of the Brčko district;  
 d) decide on the reopening of criminal proceedings for crimes defined in the Laws of the State of Bosnia and Herzegovina."

<sup>13</sup> Law on Court of Bosnia and Herzegovina – consolidated version – "Official Gazette" of Bosnia and Herzegovina, 49/90:

"Article 7 - Criminal Jurisdiction

(...)

(2) The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences:

endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;

may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina."

<sup>14</sup> Case No. U 16/08, 28 March 2009.

<sup>15</sup> Ibid, paragraph 12.

<sup>16</sup> Third meeting of the "Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina", <http://www.delbih.ec.europa.eu/News.aspx?newsid=5389&lang=EN>



crimes covered by Entity and Brčko District criminal codes. This was done later, with the entry into force of the BiH Criminal Code in 2003, which regulates criminal offences that can be prosecuted at the state level through provisions introduced by amendments from the High Representative.

41. Article 15(1) confers upon the State Court jurisdiction at first instance for criminal offences listed in the Criminal Code of BiH and other laws of BiH and calls for no particular comments.

42. However, a certain number of problems start arising in the wording of the following provisions. Article 15(2) sets out the criminal jurisdiction of the State Court. The wording "*further jurisdiction*", may imply additional rather than appellate jurisdiction, however, keeping in mind that Article 15(1) explicitly defines cases in which the State Court should act as a first instance court, clarifications in this regard would be recommended.

43. Article 15(2) consists of three sub-paragraphs:

- Article 15(2)(a) confers upon the Court the jurisdiction over criminal offences that "*endanger the sovereignty, territorial integrity, political independence, national security or international personality of BiH*". The Venice Commission understands this provision as providing the State Court with a very broad jurisdiction.
- Article 15(2)(b) should be reworded by removing the reference to "*social values*", as it is unclear what is meant by these. While it is positive that the provision now refers to damage that has already been incurred (the previous version spoke about offences which may have certain repercussions), it remains difficult to foresee when such a situation would materialise. In addition, "*damage has been made outside of the territory of Bosnia and Herzegovina*" should be moved to Article 15(2)(c).
- Article 15(2)(c) was newly introduced into the draft Law to cover instances of organised or common crime committed across BiH. The inclusion of this provision is motivated by practical difficulties as well as legal intricacies faced by Entity level or Brčko District institutions when confronted with inter-Entities/Brčko District cases. The need for such a regulation seems to be generally accepted. It is clear that if serious organised crime is to be tackled effectively, this must be done at the State level rather than the level of the entity or even the canton. The idea of conferring State jurisdiction where the elements of the crime or its perpetrators or witnesses are to be found in more than one place, or where its effects are not confined to a single place, seems to be a good approach. However, there appear to be some provisions, at least in the English text, that are not entirely clear and the text needs some further clarification. What does it mean to say that individuals are "from" a particular territory? Does it refer to place of birth or residence, to domicile or to nationality? Criminal law has to be precise on such issues. What does being "*from the territory of the whole of Bosnia and Herzegovina*" mean? How can offences be committed throughout the whole of the territory of a place? If there were separate provisions dealing with individuals and with organised groups the provision might be easier to understand. Finally, there needs to be a definition of or reference to a law defining "*organised group*".

44. The Venice Commission therefore recommends that **Article 15(2)(b) and Article 15(2)(c) of the draft Law be revised accordingly.**

45. Article 15(3)(a), which deals with the jurisdiction of the State Court in the area of international and inter-entity co-operation and the Venice Commission recommends that its wording stay as it is.

46. Article 15(3)(b) permits the State Court to reopen criminal proceedings that have been concluded with a legally binding decision of the Court. This provision is too wide in its current form and would permit the Court to reopen an acquittal in breach of the rule against double jeopardy. The circumstances in which a legally binding decision can be revisited need to be set out. This issue is settled by the Code of Criminal Procedure of BiH<sup>17</sup> and a cross-reference to this Code should therefore be made.

#### **J. Articles 16 (civil jurisdiction) and 17 (Administrative jurisdiction)**

47. The Venice Commission welcomes the separate regulation of the two types of jurisdiction (civil and the administrative).

48. Article 16 (b) refers to “*property-related disputes stemming from damages that were created due to the performance*” of officials or official bodies. Even if one reads this as “*damage that was created*” it is not clear what is covered by the provision which needs to be more specific.

49. One can conclude from Article 17(c) that the State Court acts as a first instance court in case of administrative disputes with the institutions of BiH as well as the Brčko District. However, it is not clear if the State Court will also act as a first instance court for the administrative disputes from the Brčko District.

50. In addition, Article 17(b) should be corrected as it refers to paragraph 1,<sup>18</sup> when there is no such paragraph in Article 17. Presumably the text should instead refer to Article 17(a), which mentions “*institution of Bosnia and Herzegovina or one of its bodies, public agencies, public corporations, institutions of the Brčko District or any other organisation as determined with the laws of the State of Bosnia and Herzegovina*”.

51. Article 17(b), according to which the Court is competent to “*assess the legality of final administrative acts adopted (...) by the authorities of government of Bosnia and Herzegovina (...) for which judicial protections are not provided outside of an administrative dispute*” would benefit from further clarification.

52. Article 17(c) stipulates that the Court of BiH can “*decide on requests for the protection of freedoms and rights as guaranteed with the Constitution of Bosnia and Herzegovina, in the event they are violated due to a final individual act or action by an official of an institution of Bosnia and Herzegovina or one of its bodies, an institution of the Brčko District or any other organisation as determined with the laws of Bosnia and Herzegovina, while exercising public authorities*”. There are a number of uncertainties that surface from this wording. For instance, what are the differences between the cases with which the Court will deal under Article 17(a) and Article 17(c)? There is also an issue with the terminology used in all three paragraphs: final administrative acts by an institution of BiH, final administrative acts adopted in accordance with the laws of BiH and final individual act or action by an official of an institution of BiH or (etc.) – are these all different categories of acts or is this simply due to the translation?

#### **K. Article 18 (subject matter jurisdiction)**

53. According to the draft Law, the High Court of BiH has an appellate jurisdiction over the decisions of the State Court, but in some cases it acts as a court of first instance. In addition, the draft Law (Article 18(1)(b)) states that the High Court of BiH shall have jurisdiction to

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<sup>17</sup> Chapter XXIV, Extraordinary Legal Remedy, Repeating the criminal proceedings, Articles 324-333.

<sup>18</sup> “*final administrative acts adopted by (...) the authorities of government of Bosnia and Herzegovina listed in paragraph 1 of the Article, for which judicial protections are not provided outside of an administrative dispute.*”

decide on “*legal remedies against decisions of its panels unless determined otherwise with the law*”, thus potentially establishing an appellate panel within the appellate court. According to the draft Law, the High Court of BiH should provide legal remedies in case a decision of one of its panels is challenged; however, it is unclear which department/panel of the High Court of BiH will deal with such challenges. In addition, it was the Venice Commission’s understanding that the High Court of BiH would be introduced to replace the appellate jurisdiction at the State Court and form a separate court of appeal. It is therefore unfortunate that the same structure that currently exists in the State Court is being copied in this new Court. Article 18(1)(b) should therefore be removed. The High Court should act as a single last instance (with the exception of the appeals to the Constitutional Court of BiH).

54. Article 18(3)(a) stipulates that the High Court of BiH shall also have jurisdiction to “*take legal positions and opinions regarding the implementation of the laws of Bosnia and Herzegovina and international treaties on request by any court of the entities or any court of the Brčko District of Bosnia and Herzegovina (hereinafter: Brčko District) entrusted to implement the laws of Bosnia and Herzegovina*”. It should be ensured that there is no overlap with the jurisdiction of the Constitutional Court of BiH as described in Article IV. 3 “c”: “*The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.*”

55. Apart from that, it should be clarified what the legal consequences of the “positions and opinions” taken by the High Court of BiH are. It is important that the High Court of BiH decide disputes and not become an advisory organ.

56. Article 18(2) states that “*A judge who has participated in the decision making process pursuant to an appeal shall not participate in proceedings deciding in extraordinary legal remedies*”. The draft Law does not contain a similar provision prohibiting judges from adjudicating cases in which they participated in the first instance. Provided that it is expected that judges of the High Court of BiH will regularly be selected from among the judges of the State Court, such a situation may occur and there is thus need to explicitly regulate it.

#### **L. Article 20 (organisation)**

57. Article 20(2) sets out that there should be at least six judges in each section of the criminal departments of the State Court and the High Court of BiH, but contains no guidance with regard to administrative or civil sections and departments of the courts.

58. The *rationale* for allocating the same amount of judges to the first instance court and to the appellate level also raises questions, unless there is serious reason to presume that most of the judgments will be challenged. Such a provision should also not be understood as deviating from the HJPC’s prerogative (see comments on Article 4(3) above).

#### **M. Article 21 (work methodology)**

59. Article 21(2) states that “*The composition of the panels shall be determined with the laws*”, without naming or referring to the particular legislative acts. If the composition of the panels is to be regulated under the law (i.e. not by the court’s internal rules), then it would be reasonable for it to be regulated by this draft Law, in order to avoid similar issues being dispersed across different laws.

60. However, it would be preferable to leave the composition of the panels to the rules of procedure.

**N. Article 23 (Collegiums)**

61. It is unclear what is meant by saying that the Courts may prescribe certain matters “*through an internal document*”. Who gets to write such a document - in other words, who decides? The President or the judges acting in a plenum of the Court in question?

**O. Article 28 (implementation of court function)**

62. If this Article is maintained in the draft Law, the various groups of individuals performing tasks within the jurisdiction of the two Courts should be set out more clearly. In its current wording, the draft Law mentions, in addition to the president and the judges, the professional staff and other officers of the courts. Yet, these latter terms are not used anywhere else in the draft Law and it is therefore not clear who they cover.

**P. Article 29 (Court President)**

63. It is not clear what is meant by being responsible for the management of the “*comprehensive performance*” of the Court and its administration. This may be a translation problem, but the powers and responsibilities of Court Presidents need to be very clearly defined.

**Q. Article 31 (terms for appointment to High Court)**

64. According to this Article, the candidate for judgeship should have “*at least eight (8) years of experience as a judge, of which at least five (5) years as a judge of the Court or another second instance or third instance court, or prosecutors, attorneys, general attorneys, agents for representation before the European Court of Human Rights in Strasbourg or other relevant post Bar exam legal experience.*”

65. This Article aims to define that legal professionals with extensive experience may qualify as candidates. Though this is an attempt to establish a comprehensive list, it may turn out to be unnecessarily exclusive. For instance, judges of the European Court of Human Rights or other international judicial or quasi-judicial bodies may not meet the requirements set in this Article unless they served as judges in the courts of BiH for at least five years.

66. The wording of the English version of the draft Law also requires clarification. The first part of the sentence sets a requirement of at “*least eight (8) years of experience as a judge, of which at least five (5) years as a judge of the Court or another second instance or third instance court...*”. However, the remaining part of the sentence should be understood as providing an alternative, i.e. allowing candidates to apply who have acquired a different type of experience such as, as a prosecutor, or as attorneys or as general attorneys, etc. But this does not sit well with the overall requirement of eight years’ experience as a judge. In any case, this should not be dealt with by the draft Law, but by the HJPC.

**R. Article 32 (evaluation)**

67. Article 32(1) stipulates that the “*performance of the judges and of the Presidents of the Courts shall be evaluated in accordance with the criteria as determined by the High Judicial and Prosecutorial Council*”. Article 32(2) also stipulates that the “*performance evaluation of the judges shall be carried out by the president of the respective court together with the express opinion of the president of the department (...)*”. This provision looks problematic as it defines the President of the Court as a central figure in the process of the evaluation of

judges. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges.

68. In its Report on Judicial Appointments, the Venice Commission has dealt with this issue:

*“42. The main idea is to exclude the factors that could challenge the impartiality of judges: ‘despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value’.”<sup>19</sup>*

69. The draft Law contains no details with regard to the procedure and frequency of the evaluation as well as the consequences of such an evaluation. Although the draft Law provides that the HJPC is authorised to adopt evaluation criteria, it is crucial for the criteria, procedure and consequences to be clearly formulated, easily accessible and foreseeable. It is important that the evaluation system be neither used nor seen to be used as a mechanism to subordinate or influence judges.

#### **S. Article 34 (regulations on court operations)**

70. According to Article 34(1) *“The High Judicial and Prosecutorial Council shall, in cooperation with the Ministry of Justice, render the regulations on court operations that regulate the internal operations of the respective court and its organisational units.”*

71. It would be desirable to avoid extensive involvement of the executive (Ministry of Justice) in adopting court rules for internal operation and procedure and delegate the adoption of the internal regulation and rules of procedure to the courts, within the limits set by the laws.

72. In any case, the Venice Commission recommends that the draft Law maintain continuous compatibility with and not deviate from the Law on the HJPC.

#### **T. Article 35 (legal associates and legal advisors)**

73. Article 35(4) stipulates that *“Legal associates, senior legal associates and legal advisors shall be appointed by the High Judicial and Prosecutorial Council.”* As far as legal associates and legal advisors shall assist a judge in their work, it may be advisable to allow the involvement of the Court and the judges in the selection process. The advisors shall closely work with judges and the operation of the Court may be more efficient if the judges have a say in the selection of their advisors.

#### **U. Article 37 (Court employees - administrative tasks)**

74. According to Article 37(4) the Presidents of the Courts *“shall send the documents”* related to *“the criteria for determining the required number of employees”* (paragraph 2) as well as *“number of employees, the terms of reference for each employee, their authorities and responsibilities”* (paragraph 3), together with the “express opinion” of the Ministry of Justice of BiH, for confirmation to the HJPC.

75. The role of the Ministry of Justice in this process raises questions. In addition, the need and the meaning for the “*express opinion*” from the executive are also not clear. The draft is also silent with regard to the effect of such an “*express opinion*”. What happens if the opinion

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<sup>19</sup> See Report on Judicial Appointments, CDL-AD(2007)028, paragraph 42.

from the Ministry of Justice is negative? It seems that without such an opinion (which in fact looks more like an approval) from the Ministry of Justice, the HJPC may refuse to consider the request on a formal basis.

76. Even if the involvement of the Ministry of Justice were limited to solely an advisory function in relation to the issues of funding and/or infrastructure, it would be recommended to relieve the President of the Court from the obligation to seek such an opinion from the executive. The HJPC may be better placed to deal with all related issues, including communication with the executive.

77. According to the recommendations of the Committee of Ministers, “*without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts.....*”.<sup>20</sup> While determining the issues such as financing or infrastructural projects, judicial authorities should be expected to co-operate with the relevant public authorities. This co-operation should be regulated by clear procedures.

#### V. Article 42 (authorised representatives)

78. According to Article 42(2) “*The Courts may, on a case by case basis, allow actions before the respective court for an authorised representative*” who fails to meet the requirements stated in Article 42(1), i.e. is not listed in the Attorney Directory of the Bar Association in BiH.

79. This provision is too vague. There might be different reasons for allowing an “*unauthorized*” representative to litigate and such decisions may indeed be taken on a case-by-case basis, but obviously the draft Law should avoid the possibility of arbitrary decisions. Therefore, the **Venice Commission recommends that some guidance be provided to the Courts, defining certain aspects, which could be taken into account by the court and/or clearly indicate what the purpose for such an exception is.**

#### W. Article 48 (budget)

80. According to Article 48(2), the HJPC delivers a budget proposal to the Ministry of Justice. However, the draft Law contains no further details regarding the role of the Ministry of Justice after it receives the budget proposal. Does the Ministry of Justice have a final say in approving the proposal before it is submitted to the government or does it simply act as an intermediary?

81. It should be mentioned that, in general for certain cases, this draft Law assigns the Ministry of Justice an intensive role in the process of administrative decision-making. This may be due to the fact that the Ministry of Justice has to play a pivotal role in the reform of the judiciary, however, the drafters should be careful to avoid an excessive involvement of the Ministry of Justice in the work of the courts.

82. According to Article 48(5), “*At the end of each budget year, the Presidents of the Courts shall inform the Parliamentary Assembly of Bosnia and Herzegovina on the execution of the budget of the respective court*”. The rationale for such a procedure is questionable, and it may also have a negative impact on the independence of the judiciary. The President of the Court should be relieved from such a legal obligation and, at the same time, the highest possible standards of transparency for budgetary expenditures made by the courts should be provided.

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<sup>20</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

## **X. Article 53 (termination of specific provisions)**

83. The Venice Commission understands that this provision was included as an attempt to bring the new court into existence as soon as possible, without waiting for the adoption of the amendments to the Law on the HJPC. Yet, such an approach is legally problematic as well as unnecessarily cumbersome. As stated above, the Law on the HJPC shall regulate all issues pertaining to the composition of courts and to the appointment of judges exclusively. No exceptions, even temporary ones, to this rule shall be made, especially when taking into account the risk of such temporary exceptions turning into permanent rules.

84. Moreover, the Venice Commission is not persuaded that there is a need to opt for such a two-stage approach. Provided there is a consensus on the regulation of the composition of the two courts, there is no reason why this consensus could not find its expression in the Law on the HJPC instead of the draft Law.

## **IV. Conclusions**

85. The draft Law on the Courts of Bosnia and Herzegovina establishes a new court at the state level: the High Court of BiH. This Court will serve as a second instance court at the state level and will, *inter alia*, receive cases on appeal from the State Court.

86. The Venice Commission understands that the State Court will continue to operate in its current structure and composition, to the extent that it relates to its first instance jurisdiction. In this respect, Article 54 of the draft Law should be revisited.

87. In its Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, the Venice Commission has supported the establishment of a separate court of appeal<sup>21</sup> and the BiH authorities seem to have heeded this recommendation with the suggestion of establishing this High Court of BiH.

88. This draft Law brings together the courts at the state level (except for the Constitutional Court of BiH), in compliance with the recommendation by the Venice Commission in its previous opinion<sup>22</sup>, instead of dealing with each of the two state-level courts in separate laws.

89. However there are some outstanding issues that should be dealt with, and among these are the following:

- 1) Since the draft Law only deals with the courts that operate at the state level, it would be appropriate to set this out in Articles 1 and/or 2.
- 2) Article 4 on the composition and number of judges of the High Court of BiH - the drafters should ensure that there is no overlapping between the draft Law and the Law on the HJPC.
- 3) Article 4(2) aims to ensure the equitable representation of various peoples living in the territory of BiH. While such an effort is legitimate in the political sphere, it would be highly problematic to apply it within the judiciary. Here, the principle of independence and impartiality of individual judges should prevail over other considerations. The Venice Commission therefore recommends that Article 4(2) of the draft Law be deleted.

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<sup>21</sup> See Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, adopted by the Venice Commission, at its 91<sup>st</sup> Plenary Session, (Venice, 15-16 June 2012), CDL-AD(2012)014, paragraph 62.

<sup>22</sup> *Ibid*, paragraph 63.

- 4) Article 4(3) on the total number of judges for each court should be revised to read, "*The total number of judges for each court shall be determined by the HJPC*".
  - 5) Article 7(2) should be replaced by a provision that requires the State Court and the High Court of BiH established under the draft Law (not "*an independent and impartial court*" in general) to hold a hearing and to give judgment within a reasonable period of time.
  - 6) Article 13 - the prohibition on judges showing any signs of religious, political, ethnic or other affiliation should also extend to conduct such as praying or religious gestures or utterances.
  - 7) Article 15(2) – such an important provision on criminal jurisdiction should be clearly formulated so as to leave no room for ambiguities.
  - 8) In Article 15(2)(b) the reference to "*social values*" should be removed as it is unclear what is meant by these. While it is positive that the provision now refers to damage that has already been incurred, it remains difficult to foresee when such a situation would materialise. In addition, "*damage has been made outside of the territory of Bosnia and Herzegovina*" should be moved to Article 15(2)(c). The Venice Commission therefore recommends that Article 15(2)(b) and Article 15(2)(c) of the draft Law be revised accordingly.
  - 9) Article 32 (evaluation of judges and Presidents of the Courts) - the criteria, procedure and consequences of such an evaluation should be clearly formulated, easily accessible and foreseeable.
  - 10) Article 37 – (on Court employees - administrative tasks) the role of the Ministry of Justice in this process raises questions. It is recommended that the President of the Court be relieved from the obligation to seek an opinion from the Ministry of Justice. The HJPC may be better placed to deal with all related issues, including communication with the executive.
90. On the whole, the draft Law should seek to be compatible with the Law on the HJPC.
91. The Venice Commission is ready to provide any further assistance to the BiH authorities, should they request it.