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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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ANNUAL REPORT OF

ACTIVITIES FOR 1999

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i. Opinion on the compatibility of the death penalty with the Constitution of Albania (CDL-INF (99) 4) adopted by the Commission at its 38th Plenary meeting (Venice, 22-23 March 1999)

INTRODUCTION

On 25 January 1999 the Bureau of the Parliamentary Assembly of the Council of Europe decided to consult the Venice Commission on the compatibility of the death penalty with the Constitution of Albania. The Venice Commission received the request for an opinion by letter of *27 January 1999 from the Clerk of the Assembly, Mr Bruno Haller.*

Mr Malinverni and Ms Suchocka as Rapporteurs submitted their comments and their report was forwarded to the Bureau of the Assembly on 11 February 1999.

This opinion was adopted by the plenary Commission at its 38th meeting in Venice on 22-23 March 1999.

OPINION OF THE VENICE COMMISSION

Subject of the opinion

The Venice Commission has previously examined the question of the death penalty and its application in Albania. In its Opinion on the draft Constitution of Albania submitted for popular approval on 6 November 1994 (see Venice Commission, *Annual Report of Activities for 1994*, p. 23), the Commission criticised the provision in the draft Constitution allowing for the imposition of the death penalty on males over 18 years of age found guilty of the most serious crimes (Article 19 of the draft), referring notably to Protocol No. 6 to the European Convention on Human Rights (hereinafter ECHR). During the drafting of the present Constitution of Albania, the members of the Venice Commission advocated the adoption of a provision specifically abolishing the death penalty. In their opinions on the draft Constitution Parts I and II approved by the Constitutional Commission as at 21 April 1998, Messrs Batliner, Malinverni and Russell pointed out that both variants of Article 7 of Part II of the draft, dealing with the right to life, neither contained an express prohibition of nor gave express permission for capital punishment, and recommended that this position be clarified. (See, respectively, documentsCDL(98)50, 47 rev. and 49.) The question now is to examine the compatibility of the death penalty with the Constitution of Albania, having regard to the Constitution of 21 October 1998.

It is thus propitious to begin by examining, in the context of the Constitution as a whole, the text of the articles relating to the right to life, and notably Article 21.

The Commission further considers that, although it is not required to comment on the commitments undertaken by Albania at its accession to the Council of Europe, these must be taken into account in examining the effect of certain constitutional clauses. This is so not only because of the importance assigned to international law in the Constitution and the provisions made for its direct applicability (Article 122), but also because of the increasing osmosis between internal and international law and the fact that, as far as fundamental human rights are concerned, it is becoming increasingly artificial to draw a distinction between a States obligations under its own constitutional law and under public international law. In the European legal area there is a growing tendency evidenced in the judgments of Constitutional Courts (and their equivalents) published regularly in the Venice Commissions *Bulletin on Constitutional Case-Law* for the review of constitutionality to include and even to overlap with a review of compliance with obligations imposed by treaties.

Article 21

Article 21 of the Constitution of Albania states simply:

The life of a person is protected by law.

This is not so strong a statement of the right to life as that which may be found in other Constitutions, and contains no express prohibition on capital punishment. (See, for example and in contrast, the Constitutions of Croatia (Article 21), Portugal (Article 24), Romania (Article 22), Slovakia (Article 15), Slovenia (Article 17) and the former Yugoslav Republic of Macedonia (Article 10).)

Furthermore, it is not the Constitution but the law which is said to protect the life of a person.

Thus it might be argued that Article 21 of the Albanian Constitution, despite the protection it undoubtedly accords to a persons life, leaves room for the legislature to provide for the death penalty to be imposed in certain cases, provided certain legal protections are ensured.

This article cannot, however, be interpreted in isolation from the rest of the Constitution. Moreover, an examination of the context (both constitutional and in international law, particularly international law applicable in Europe), throws an entirely different light on the interpretation which should be given to the article.

<u>The lack of an express mention of the death penalty in the Constitution of Albania.</u>

Article 21 of the Constitution of Albania closely resembles and may be said to be modelled on the first sentence of Article 2, paragraph 1 of the ECHR, which states, Everyones right to life shall be protected by law. Significantly, however, Article 2, paragraph 1 of the ECHR goes on to deal explicitly with capital punishment and to provide for the (only) circumstances in which a person may be sentenced and put to death, No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Paragraph 2 of the same article provides for certain other cases in which deprivation of life shall not be regarded as having been carried out in contravention of the article.

No such provision is made in the Albanian Constitution, where the protection of life by law is stated without exception. Had the death penalty been contemplated, explicit mention of it should have been made in Article 21 of the Constitution in accordance with Article 2 of the ECHR, on which it is based. This is all the more remarkable in that many of the other rights provided for in Part Two of the Constitution, on fundamental human rights and freedoms, are coupled with extensive exceptions. (See for instance, in the chapter on personal rights and freedoms, the exceptions provided for in Articles 26, 27, 29, 34, 35, 37 and 43.) The fact that no explicit exceptions to the protection of life are provided for in the Constitution whereas many other rights are clearly subject to exceptions is a clear indication that no exception, and in particular the death penalty, is intended to be allowed in the case of the protection of life.

It should finally be noted that a similar structure and logic were used in the drafting of the International Covenant on Civil and

Political Rights (hereinafter ICCPR), to which Albania acceded on 4 October 1991. Here again, after the right to life is stated, express provisions are laid down concerning the death penalty (Article 6 of the ICCPR). This highlights once more the fact that express provision should have been made in the Constitution of Albania had the death penalty been intended to be permitted.

Interpretation of similar constitutional provisions in constitutional case-law

The Constitution of Lithuania contains a provision very similar to that of the Albanian Constitution concerning the right to life. Article 19 of the Constitution of Lithuania states, The right to life of individuals shall be protected by law. This article recently came under scrutiny before the Constitutional Court of Lithuania in case no. 2/98, concerning the compliance with the Constitution of the death penalty provided for under Article 105 of the Criminal Code. A number of other constitutional issues were raised in that case, but in reaching its conclusion that the death penalty provided for was unconstitutional, the Lithuanian Constitutional Court, having examined the other rights and exceptions to rights laid down in the Constitution of Lithuania, concluded that the wording of Article 19 of the Constitution allowed for no exception permitting the deprivation of life on behalf of the State.

Furthermore, in part five of its judgment, dealing specifically with the issue of the protection of life by the law in accordance with Article 19 of the Constitution, the Court noted that it is particularly difficult to sustain the argument that life is protected by the law when the law allows for the deprivation of life. There is always a possibility that a mistake may be made (and mistakes have been made in many States in the imposition of the death penalty), and such a mistake is impossible to rectify once it has been made. As the Court noted, the mere possibility that a person who does not deserve it in accordance with the law or who is innocent may be sentenced to death is not in line with the right to life which is guaranteed by the Constitution.

The same reasoning clearly applies to the protection of life itself that is afforded by Article 21 of the Constitution of Albania. A law allowing for the imposition of capital punishment cannot provide sufficient guarantees to ensure that the life of a person is protected by law in accordance with this article.

It should finally be noted that human life may be protected even in the absence of an explicit constitutional provision to this effect. The Polish Constitutional Tribunal in a recent decision (K 26/96 of 28 May 1997) held that human life was a constitutional value notwithstanding the lack of a constitutional provision in that country directly regarding the protection of life. The Tribunal reasoned that because the principle of the democratic state governed by the rule of law can only be realised as a community of people, whose basic attribute is life, it may be inferred from this principle that the protection of human life is a constitutional value regardless of the fact that this is not explicitly stated in the Constitution of Poland.

The Albanian constitutional context

There is a series of provisions in the Albanian Constitution other than Article 21 that have a close bearing on the right to life. In particular, paragraph 2 of Article 17 states that the limitations on the rights and freedoms provided for in the Constitution may not infringe the essence of the rights and freedoms. The right to life is the most essential of all the rights and freedoms provided for in the Constitution, and indeed may be said to be the very essence of all the other rights and freedoms, for without it, these are worth nothing. The primordial importance of the right to life is recognised in the Albanian Constitution by its position as the first of the personal rights and freedoms guaranteed in Chapter II of Part Two, on the Fundamental Human Rights and Freedoms and by its inclusion in the hard nucleus of rights from which no derogation can be made even in time of war (Article 175). It may thus be asserted that capital punishment, which is the denial of the right to life, cannot be imposed without infringing the essence of the other rights and freedoms provided for in the Constitution of Albania, in conflict with the requirement of Article 17.

Furthermore, the Preamble states that the Constitution is established with the pledge for the protection of human dignity, thus elevating the protection of human dignity to a position of particular importance, as the tenor of this pledge prevails over the entire Constitution. Indeed, the fundamental nature of the pledge is revealed in Article 3, where the dignity of the individual is affirmed as one of the bases of the State. The protection of human dignity is of particular relevance to the application of capital punishment, and is discussed further below.

Article 25 of the Constitution states in its entirety, No one may be subjected to cruel, inhuman or degrading torture, punishment or treatment. The prohibition on such treatment is contained in many international documents, notably in Article 3 of the ECHR and in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, to both of which Albania is a party.

The parallel between the death penalty and the infliction of torture and inhuman or degrading treatment or punishment has frequently been drawn. Indeed, a powerful statement of the inseparable link between the two is to be found in the Constitution of Romania, by their inclusion in the same article (Article 22 on the right to life, to physical and mental integrity), which reads as follows:

1. The right to life, as well as the right to physical and mental integrity of a person are guaranteed.

No one may be subjected to torture or to any kind of inhuman and degrading punishment or treatment.

The death penalty is prohibited.

The reasons behind such a close association between the death penalty and the infliction of cruel, inhuman and degrading treatment as well as the deprivation of dignity were evoked by the South African Constitutional Court in the case of *State v Makwanyane and Mchunu* (Judgment No. CCt/3/94, 6 June 1995, cited with approval by Gleeson CJ of the New South Wales Supreme Court, Court of Criminal Appeal in *R v Boyd* No. 60605/94). As Chaskalson P put it:

Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed persons humanity and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

The Franck report of 15 September 1994 on the abolition of the death penalty, submitted to the Parliamentary Assembly of the Council of Europe (Doc. 7154), evinces the same arguments.

The European Court of Human Rights also examined the question in detail in its *Soering v. UK* judgment (Series A, no. 161), in which it was held that extradition to a country where there was a risk of exposure to the death row phenomenon could constitute a violation of Article 3 of the ECHR. Similar concerns underpin the prohibition of extradition contained in many extradition agreements in circumstances where there is a risk that the extradited person may be exposed to the death penalty and the inevitable suffering it induces.

The underlying concern is that although the internal law of a country may not acknowledge capital punishment to be cruel, inhuman or degrading in and of itself, the reality is quite different. The death penalty exposes those on whom it is imposed to lengthy proceedings, uncertainties, anxieties and torments and eventually deprives them of their very humanity, and these inherent and inevitable conditions and effects may clearly be seen to be prohibited treatment.

In practice, therefore, both Article 25 of the Constitution of Albania and Article 3 of the ECHR to which Albania is a party, leave no room for the execution of the death penalty.

The European constitutional context

Finally, more light may be thrown on the constitutionality of the death penalty in Albania by an examination of the European legal environment in which it figures. Solyom J, in the concurring judgment he delivered as part of decision 23/1990 of the Hungarian Constitutional Court (24 October 1990) on the constitutionality of the death penalty in Hungary, recommended that the present international position regarding capital punishment be taken into account as an objective frame of reference by the Constitutional Court. Similarly, the Constitutional Court of Lithuania examined the European context in its ruling of 9 December 1998, and reached the conclusion that the abolition of the death penalty is becoming a universally recognised norm.

In the context of the Council of Europe, Protocol No. 6 to the ECHR is especially pertinent. Although this is an optional protocol, the intention to ratify it has become a necessary condition for a States accession to the Council of Europe. The Parliamentary Assembly of the Council of Europe, by its Resolution 894 (1988), placed Protocol No. 6 on a list of conventions of which the signature and ratification were to be considered a matter of high priority. It subsequently called unequivocally for the abolition of capital punishment in its Resolution 1044 (1994) an appeal which was reiterated just as unequivocally in its Resolution 1097 (1996). Since Latvias accession to the Council of Europe in 1994, all new member States have undertaken to sign and ratify the

ECHR as well as the protocols thereto, including Protocol No. 6 on the abolition of the death penalty. Albania, when it acceded to the Council of Europe, undertook to sign, ratify and apply Protocol No. 6 in time of peace within three years of accession and to place a moratorium on executions until the total abolition of capital punishment. The Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe (Strasbourg, 11 October 1997) again called for the universal abolition of capital punishment and insisted that existing moratoria be maintained in the meantime. Resolutions 1111 (1997) and 1145 (1998) condemned the violations of these moratoria that had occurred in two member States of the Council of Europe.

The European Court of Human Rights has stressed that safeguarding the right to life is one of the most fundamental of the provisions of the ECHR. The importance of the right to life and the prohibition of torture (Article 3 of the ECHR) was recently reaffirmed by the European Court of Human Rights in its judgment of 9 October 1997 in the case of *Andronicou and Constantinou v. Cyprus* (*Reports* 1997-VI, no. 52, p. 2059 ff., 171), where the Court underlined that:

Article 2 ranks as one of the most fundamental provisions of the Convention... Like Article 3 of the Convention it enshrines one of the basic values of the democratic societies making up the Council of Europe. As such its provisions must be strictly construed. This is particularly true of the exceptions delineated in paragraph 2 of that Article...

See also the judgment in *McCann v. UK* (Series A, no. 324). These preoccupations also underpinned the Courts decision in *Soering*, as discussed above.

It can therefore be asserted, and with confidence, that the national and international dimensions of European law tend both independently and together towards the abolition of capital punishment. The evolution in this direction is clear and is becoming a cornerstone of European public order. The execution of the death penalty is no longer tolerated, and where provision for the imposition of such a sentence still exists, it is only accepted within the strict confines of the logic of transition. The Constitutions of the Council of Europe member States cannot be interpreted in isolation from these considerations.

3. CONCLUSIONS

The Commission finds that the Constitution of Albania contains no provision which either expressly allows for or expressly prohibits or abolishes the death penalty.

It is therefore necessary to examine the question of the constitutionality of the death penalty through an analysis of the relevant provisions of the Constitution read in the light of the Constitution as a whole and taking into account the international commitments that are binding on Albania as well as relevant international developments.

The Commission notes the positions of particular importance in which the Constitution of Albania places the right to life, although the terms in which this right is expressed are not as categorical as they could be, and the protection of human dignity. It also underlines the absolute lack of provision for exceptions to the protection of the right to life, with the strong inference that can be drawn from this, especially in view of the fact that clear exceptions are provided for in the case of other rights and freedoms, that no exception was intended to be provided in the case of the right to life. Moreover, the effect of Article 25 of the Constitution, which lays down a prohibition on torture and other cruel, inhuman or degrading punishment or treatment, combined with the fundamental importance accorded to the dignity of the individual in Article 3 of the Constitution and the pledge to protect it contained in the Preamble, is to make it practically impossible to apply and execute the death penalty without contravening the requirements of the Constitution. Finally it takes note of the fact that the death penalty is now no longer an acceptable punishment in the European legal field, except within the strict confines of the logic of transition, and that its execution is no longer tolerated.

Having regard to:

- the absence of an explicit constitutional basis for allowing the death penalty;

- the absence of an exception (express or implied) to the protection of life provided for in Article 21 of the Constitution, which has incorporated only the general rule of Article 2 of the ECHR (right to life) without also incorporating the exception (death penalty);

- the important position given to the protection of life by its placement at the top of the hierarchy of rights laid down in the Constitution;

- the requirement that any limitations on rights and freedoms laid down in the Constitution may not infringe the essence of these rights and freedoms;

- the fact that the constitutional prohibition of cruel, inhuman or degrading torture, punishment or treatment and the fundamental importance of the dignity of the individual enunciated in Article 3 of the Constitution and its Preamble leave no room, in practice, for imposing and carrying out the death penalty in Albania;

- the evolution of the European public order towards the abolition of the death penalty;

the Commission considers that the death penalty must be deemed to be inconsistent with the Constitution of Albania.

ii. Opinion on the scope of the responsibilities of Bosnia and Herzegovina in the field of immigration and asylum with particular regard to possible involvement of the entities (CDL-INF (99) 6) adopted by the Commission at its 38th Plenary meeting (Venice, 22-23 March 1999)

Introduction

At the 36th Plenary Meeting of the Commission on 16-17 October 1998 the representative of the Office of the High Representative (OHR) asked the Commission to provide an opinion on the legal aspects of the delegation of powers from Bosnia and Herzegovina (BH) to the Entities. In a memorandum dated 3 December 1998 the OHR further explained this request. In fact, the Commission is not invited to adopt a general opinion dealing with all possible cases of delegation of powers, but to provide an opinion on the compatibility of the proposed *Draft Bosnia and Herzegovina Law on Immigration and Asylum* with the constitutional distribution of responsibilities between BH and the Entities, it being understood that similar principles may apply in other fields.

Within the framework of the Sub-Commision on the Federal and Regional State a Working Group with Mr Scholsem in the Chair and Messrs Bartole, Matscher and Tuori as members was entrusted with preparing the opinion. The Working Group met in Paris on 29 January 1998 together with representatives of the OHR. Following the approval of the opinion prepared by the Working Group by the Sub-Commission on 20 March 1999, the present Opinion was adopted at the 38th Plenary Meeting of the Commission on 22 to 23 March 1999.

The Commission underlines that the authoritative interpretation of the Constitution of BH is the prerogative of the Constitutional Court of BH as the sole body able to give a binding interpretation of the provisions of the Constitution. Nevertheless, in view of the request by the OHR and taking into account the need to ensure from the outset that the approach chosen for the drafting of legislation in BH is compatible with the Constitution, it is of the opinion that a non-binding opinion of outside legal experts may be of value for the BH authorities.

General considerations

Under the terms of Article III.1 of the Constitution of Bosnia and Herzegovina:

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

(f) Immigration, refugee and asylum policy and regulation.

The *Draft Law on Immigration and Asylum* regulates in detail questions of immigration and asylum, including in particular the administrative procedures to be followed. It enables the Ministry of Civil Affairs and Communication of BH to specify further rules by way of regulations. No regulatory power is granted to the Entities. However, in many cases the competent authority of an Entity takes the first administrative decision, for example on issuing a residence permit. In these cases an administrative appeal may then be lodged with the Ministry of Civil Affairs and Communication of BH. The question of further appeals to the courts against the final administrative decision is not addressed in the text of the draft law.

The OHR memorandum raises in particular the question whether, and if so under which conditions, it is possible for BH to delegate responsibilities or functions to the Entities in areas within the exclusive constitutional competence of BH. Applied to the present draft law, is it lawful that in many cases an Entity authority takes the first administrative decision?

Legislative and Regulatory Powers

The Commission first of all notes that the draft law is a BH law and that all regulatory powers are reserved to BH institutions. In addition, the draft law clearly tries to give to the administrative authorities a maximum of guidance for the treatment of individual cases. The Commission sees no reason to doubt that this approach is fully in line with the BH Constitution, in particular its Article III.1.(f), which clearly reserves all normative powers in this field to the BH institutions.

Administrative functions

The Constitution of BH is a very short and concise document and it provides extremely few indications with respect to State administration. Some provisions clearly provide that BH is responsible for the day-to-day running of certain institutions, e.g. Article III.1.(h) which makes BH responsible for the *operation* of certain facilities. Article III.1.(f) is less clear by explicitly mentioning only a responsibility for policy and regulation. However, in the Commissions view, this cannot be interpreted as limiting the responsibilities of BH to the normative aspects. The Commission already rejected a similar approach in its *Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina* with respect to customs policy.[1]

The lack of provisions on administration in the Constitution can only be explained by the fact that the Constitution is based on a general parallelism between legislative and executive functions. Unless there is a contrary indication in a specific provision of the text of the Constitution, the basic assumption is that BH is responsible for both legislation and execution. This follows from the general wording of Article III.1 which does not distinguish legislative and administrative powers but assigns responsibility for certain subject matters to the institutions of BH. This interpretation is confirmed by Article V.4.(a) which gives the Council of Ministers the task of carrying out the decisions of BH, inter alia in the fields referred to in Article III.1.

An administrative responsibility of BH seems also indispensable in the field of immigration and asylum (as well as in other fields) to ensure the necessary uniformity of administrative practice. Article I.4 of the Constitution provides for the free movement of persons within BH. Any decision by one Entity on the admission of a person to its territory therefore necessarily has repercussions on the other Entity and a uniform practice throughout BH has to be ensured.

As a point of departure, the Commission therefore notes that BH is responsible also for the carrying out of immigration and asylum policy.

This however does not mean that it may not be justified in some cases to entrust the Entities with certain administrative functions. It only means that the decision on whether to do so is reserved to BH. BH may, in the exercise of its legislative power,

provide that certain functions should be carried out by the Entities. This would be a step in the direction of an executive federalism characteristic of European federal states such as Austria, Germany and Switzerland. Practical considerations make such an approach advisable. The Commission has noted before that BH is an unusually weak federation with only limited responsibilities. The administrative capacity of BH is therefore also limited. If BH is unable to carry out certain functions due to the lack of a sufficiently developed State administration or if it is much more feasible to take certain decisions on the spot, BH may exercise its responsibility partly by asking the Entities to carry out certain administrative functions. This partial devolution of powers may however in no case jeopardise the requirement of a uniform application of the law throughout BH. There is also no reason why such devolution could not be revoked in the future. Legally nothing prevents BH from amending the law and entrusting BH administrative bodies with the respective decisions if the work of the Entity bodies does not give satisfaction.

Applied to the Law on Immigration and Asylum, these considerations confirm the legality of the approach chosen by the draft. As far as is practically possible, the draft ensures a uniform application of the law. It not only provides fairly detailed guidance to the authorities already in its text, to be supplemented by additional regulations to be adopted by a BH ministry, but also ensures full information of the authorities of BH by the requirement to send copies of decisions by Entity authorities to the competent BH Ministry and in particular by providing for an administrative appeal against all decisions taken by authorities of the Entities to the Ministry of Civil Affairs and Communication of BH. The Ministry will have full power to review these decisions, will not be limited to a control of legality but may also control opportunity.

The Commission therefore fully supports the approach taken in the draft law with respect to administrative functions. A problem could only arise if the Entities object to being given additional tasks from BH without the necessary funding to carry them out. While such objections would appear plausible in other federal States, in BH, where the federal state is dependent financially upon the Entities and not the other way round, they seem unlikely to be made. Nevertheless this aspect points to the need to install consultation mechanisms between BH and the Entities on such issues.

Judicial Protection

The initial version of the draft law did not contain any rules on judicial protection. This omission is understandable, taking into account that the BH Constitution does not expressly provide for any BH court apart from the Constitutional Court. It was therefore difficult for the drafters to provide an appropriate solution. To provide for an appeal to the Entity courts would have been contrary to their efforts to ensure uniform application of the law throughout BH.

The Commission in this respect refers to its *Opinion on the Need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina*. In this opinion it found that BH is empowered, and even obliged, to set up a State level court with respect to administrative disputes.[2]

The present draft law provides a perfect illustration of a case in which such a BH court is indispensable. The field of immigration and asylum is a particularly sensitive one with respect to human rights and a constitution as human rights friendly as the BH Constitution clearly requires the possibility of judicial protection against adverse administrative decisions in this field. All final decisions subject to appeal will be taken by a Ministry of BH or even the Council of Ministers of BH and an Entity court has no jurisdiction to annul decisions by a BH Ministry. The possibility for appeals to a BH court still to be established therefore has to be provided and the draft law should be supplemented in this respect or this should be set out in an additional law.

Conclusion

The Commission fully supports the approach of the *draft Law on Immigration and Asylum* with respect to the distribution of responsibilities between BH and the Entities. The draft strikes a constitutionally sound balance between constitutional requirements, in particular for an equal application of the law throughout Bosnia in this sensitive area, and practical problems due to the weakness of the BH administration. The draft need only be supplemented by additional provisions providing individuals with the possibility to appeal administrative decisions taken by the BH authorities to a BH (administrative) court.

iii. Opinion on responsibilities for the conclusion and implementation of international agreements under the

constitution of Bosnia and Herzegovina (CDL-INF (99) 9) adopted by the Commission at its 39th Plenary meeting (Venice, 18-19 June 1999)

At the 36th plenary meeting of the Commission on 16 to 17 September 1998 the representative of the Office of the High Representative (OHR) informed the Commission that the High Representative wished the Commission to study the issues pertaining to consultation and co-operation between Bosnia and Herzegovina and the two Entities in concluding and implementing international agreements. The Commission decided to first pursue its consideration of a number of specific international agreements submitted to it by the OHR and then come back to the more general questions. Following the adoption of the Commissions opinion on these specific international agreements at the 37th plenary meeting on 11 to 12 December 1998 (documentCDL-INF(98)20), the Sub-commission on the Federal and Regional State asked the working group which had prepared the previous opinion to study the more general questions as well.

The working group, composed of Messrs Bartole, Matscher and Tuori with Mr Scholsem in the chair met in Paris on 29 January 1999 and in Bologna on 19 March 1999 together with OHR representatives. The Sub-commission examined the draft opinion prepared by the Working Group in Bologna on 19 March 1999 and in Venice on 17 June 1999 and, after amending it, submitted it to the Commission for approval. The present text was adopted by the Commission at its 39th plenary meeting in Venice on 18 to 19 June 1999.

The present opinion examines questions of competence of Bosnia and Herzegovina (BH) and the Entities from the point of view of BH constitutional law. It does not address the question whether the treaties concluded by BH are valid under international law.

Nor does the opinion address questions pertaining to agreements on special parallel relationships between Entities and neighbouring States under Article III.2.(a) of the Constitution. These agreements are dealt with in the above-mentioned opinion (CDL-INF(98)20).

While it is not the main object of the opinion to address the division of responsibilities between the various institutions of BH, a few words should be said with respect to the role of the Presidency and the Council of Ministers. Article V.3 of the Constitution gives the Presidency the main role with respect to foreign relations and states in particular that the Presidency negotiates treaties of BH. This does however not mean that this role of the Presidency excludes the Council of Ministers, and it would be appropriate for the Ministry of Foreign Affairs to carry out such negotiations at the practical level on behalf of the Presidency and with its consent. This is in accordance with Article 43 of the Law on the Council of Ministers of BH which provides *The Ministry for Foreign Affairs has responsibility for: foreign policy under the general direction of the presidency. Negotiates treaties and agreements.* This however does not imply that the Minister for Foreign Affairs, as a member of the Council of Ministers, is individually answerable to the Presidency.

I. The conclusion of international agreements by BH and the Entities

The conclusion of certain categories of treaties poses few legal problems. Within areas under the exclusive responsibility of BH at the internal level, such as immigration or asylum, BH may conclude treaties without consulting the Entities. By contrast, the Entities are not competent to conclude any treaties in these fields.

Article III.2.(d) of the Constitution explicitly authorises the Entities to conclude international agreements in other areas, subject to the consent of the BH Parliamentary Assembly. This provision does not explicitly require an early consultation of BH institutions on international agreements Entities wish to conclude. However the Entities would be well advised to consult the BH authorities systematically at an early stage to avoid problems later when the consent of the Parliamentary Assembly is sought. The Commission recommends the establishment of a generally applicable procedure for such consultations.

The main legal issue is whether BH has the power to conclude international agreements in areas which are internally within the exclusive responsibility of the Entities. It is clear that BH may be empowered by the Entities to conclude such agreements. This

corresponds to what is provided for in Art. III.5 of the Constitution and to a practical necessity since it will often be impossible for the Entities to conclude in particular multilateral agreements. For such agreements the Entities remain dependent on the willingness of the BH Presidency to negotiate and conclude international agreements and they have no possibility to oblige the Presidency to conclude such agreements if it does not wish to do so.

The question is however whether BH may act in these areas without the consent of the Entities. With respect to international agreements, two interpretations of the responsibilities of BH may be put forward: either BH may be said to have a general responsibility under the Constitution to conclude any international agreement, or the responsibilities of BH at the external level may be understood as being parallel to the internal responsibilities and limited to areas for which an explicit responsibility is attributed to BH by the Constitution.

This depends in particular on the interpretation of Article III.1.(a) of the Constitution giving BH responsibility for foreign policy. This provision may either be understood as giving BH responsibility for conducting international relations in whatever field and thereby the capacity to conclude any international agreement, or as referring only to foreign relations at the political level and not including agreements of a more technical character or as including agreements for which the political aspects prevail over the technical aspects. To give an example: the accession of BH to the Statute of the Council of Europe would undoubtedly be a political act and could be based on the BH responsibility for foreign policy, whereas accession to the Council of Europe's European Commission for the Protection of Pet Animals would mainly concern areas within the responsibilities of the Entities and might therefore be considered as requiring the consent of the Entities. Of course, the distinction will not always be clear-cut and a treaty which might well be regarded as technical with repect to its substance may become political due to specific considerations, e.g. a crisis in the relations between the States concerned. On the other hand, an eminently political act such as accession to the Council of Europe may also force the Entities to take important measures in their fields of responsibility, especially with respect to the judicial system.

A number of arguments may be advanced in favour of requiring Entity consent for international agreements touching Entity responsibilities at the internal level:

The general distribution of responsibilities as provided for in particular in Art. III.3.(a) heavily favours the Entities and it would seem plausible to have this tendency also reflected at the external level;

The BH Constitution tends to give exclusive responsibilities to the State or to the Entities; it would therefore be appropriate to leave the various fields in their entirety, including their external aspects, within the responsibility of the Entities;

Under Art. III.2.(d) of the Constitution the Entities may conclude international agreements with the consent of the BH Parliamentary Assembly: this shows that international agreements are not exclusively reserved to BH;

The external competence should not be a device enabling BH to encroach upon areas reserved to the Entities;

It will be very difficult for BH to conclude international agreements in areas under the exclusive responsibility of the Entities for which BH will lack the appropriate technical competence;

If the Entities have to implement the Agreement later, they should have a role in the decision on whether the Agreement is concluded.

There are however a number of arguments of equal weight in favour of granting BH a general responsibility to conclude international agreements without prior authorisation by the Entities:

The BH Constitution puts particular emphasis on safeguarding the international position of BH: this is apparent from Art. I.1, from the references to sovereignty, territorial integrity and partly also international personality in the Preamble and Arts. III.2.(a), III.5.(a) and VI.3.(a) and from the numerous references to international aspects throughout the text (e.g.: the first four responsibilities enumerated for the Presidency in Art. V.3.(a) to (d) all concern foreign policy);

The very weakness of BH as a federal State indicates the necessity to safeguard its international position;

Art. III.2.(b) of the Constitution emphasises the primary responsibility of BH for all international obligations;

Granting this possibility does not seem to entail particular risks for the interests of the Entities since, within the institutional set-up of BH, one of the two chambers of the Parliamentary Assembly, the House of Peoples is able to protect the interests of the Entities and to prevent any encroachment of BH on areas of Entity responsibility.

The Commission does not feel called upon to pronounce itself on this important legal question at the present stage. As set out above, arguments of considerable weight may be advanced in favour of either approach and it is up to the organs of BH, in particular to the Constitutional Court, to take the final decision. In addition, instead of a general rule that agreements touching Entity responsibility do or do not require Entity consent, one could also differentiate on the basis of whether elements of foreign policy or elements of a specific subject matter within the responsibility of the Entities prevail. For the moment it seems sufficient to point out the main arguments and a way of proceeding in practice. There are also good reasons in favour of a pragmatic approach based on consultations and co-operation leaving the legal question undecided.

In many areas BH will not be able to conclude meaningful agreements without the co-operation of the Entities. On the other hand, the Entities may not conclude agreements without the consent of the BH Parliamentary Assembly. Co-operation is therefore in the interest of both sides and, indeed, it has already started. In its *Opinion on the constitutionality of international agreements concluded by BH and/or the Entities (* CDL-INF (98) 20 *)* the Commission noted, and approved in principle, the practice of concluding joint agreements to be signed both by BH and an Entity. In a statement of the BH Presidency of 10 March 1997 it is set forth that the Agreements exclusively under the competence of BH shall be signed in accordance with the previously established procedure; the agreements which create commitments and rights for the Entities shall be signed by the authorised member of the BH Presidency and the authorised representative of the Entity. One may well wonder whether such a sweeping statement is really within the powers of the Presidency; nevertheless it has to be noted that the BH Presidency is aware of the need for co-operation with the Entities in this respect.

BH and the Entities therefore seem on the way to finding a pragmatic approach to the question which does not violate any legal principles. The Commission urges them to go further and define a generally applicable consultation procedure for all international agreements touching upon Entity responsibilities. The Commission notes that such a pragmatic approach has precedents. In the Lindau Agreement of 1958 between the Federation and the Lnder in Germany both sides expressly maintain their legal position while agreeing on consultation mechanisms. With respect to European law, the newly worded Article 23 of the Basic Law provides for very developed co-operation mechanisms between the Federation and the Lnder.

In addition, BH would seem well advised to introduce new legislation governing the conclusion and implementation of international agreements. Legislation dating from the period prior to the entry into force of the Constitution is obviously no longer adapted to the unique constitutional situation of the country.

As a conclusion the Commission therefore notes:

International agreements in areas within the responsibility of BH at the internal level may be concluded by BH without consulting the Entities;

The Entities may, with the consent of the BH Parliamentary Assembly, conclude international agreements in their areas of responsibility and would be well advised to enter into early consultations with BH organs when wishing to enter into such agreements;

Consultation mechanisms between BH and the Entities should be established for international agreements to be entered into by BH which concern responsibilities of the Entities at the internal level.

II. The implementation of international agreements

Appropriate early consultations should enable problems to be avoided when international agreements concluded by BH have to be implemented at the Entity level. The Commission underlines in this respect the general obligation of the Entities under Art. III.2.(b) of the Constitution to provide all necessary assistance to the government of BH in order to enable it to honour its international commitments. This is a clearly defined obligation of the Entities which of course implies a general obligation of the Entities to fully implement all international agreements concluded by BH. BH may address the Constitutional Court under Art. VI.3.(a) of the Constitution whenever this obligation is not honoured.

As an additional step one might consider whether BH might substitute Entity action required by an international agreement but not taken by the Entity despite the international commitment. The Austrian Constitution provides an international precedent for responsibility passing in such a situation from an entity to the Federation. Its Art. 16.(4) provides: The *Lnder* are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of international agreements; should a *Land* fail to comply punctually with this obligation, competence for such measures, in particular too for the issue of the necessary laws, passes to the *Bund.* This also corresponds to the practice in Switzerland.

In the absence of an explicit provision to this effect in the BH Constitution the Commission hesitates to affirm that the legal situation in Bosnia is similar to Austria. The proper way to deal with such issues under the BH Constitution is to address the Constitutional Court under Art. VI.3.(a). Nevertheless, if despite a decision of the Constitutional Court an Entity still fails to take the steps necessary to honour an international commitment, it is possible to assume that, in order in particular to avoid becoming responsible for a violation of international law, BH then may take the required measures as part of its foreign policy responsibility under Art. III.1.(a) and as necessary to preserve its sovereignty under Art. III.5.

III. The international agreements listed in Annex I of the BH Constitution

In his request, the Office of the High Representative also refers to the international human rights agreements listed in Annex I to the Constitution, BH is under an obligation by virtue of Art. II.7 of the Constitution to become a Party to them if this is not already the case. It is recalled that the ECHR is not among these conventions. The European Convention is directly applicable in BH under the terms of Article II.2 of the Constitution.

According to the information provided to the Commission, BH is indeed, as a successor State of the former SFRY, a Party to the various UN Conventions listed in this Annex.

The same is not true with respect to the three Council of Europe Conventions:

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Charter for Regional or Minority Languages

The Framework Convention for the Protection of National Minorities.

On 30 September 1996 governmental decrees ratifying these three treaties were published in the Official Gazette of BH. However, no instrument of ratification, approval, acceptance or accession was ever deposited with the Secretary General of the Council of Europe with respect to any of these treaties, although in an Aide-Mmoire of November 1996 the Directorate of Legal Affairs of the Council of Europe drew the attention of the BH authorities to the necessary international procedures. Only on 24 May 1999 the Minister of Foreign Affairs of BH asked the Committee of Ministers of the Council of Europe to invite BH to accede to the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities.

In effect the situation with respect to the three conventions has to be distinguished:

The Committee of Ministers of the Council of Europe may, under the terms of Art. 20 of the *European Charter for Regional or*

Minority Languages, invite a State that is not a member of the Council of Europe to accede to the Charter.

The Committee of Ministers of the Council of Europe may, under the terms of Art. 29 of the *Framework Convention for the Protection of National Minorities,* invite a State that is not a member of the Council of Europe to accede to the Convention.

By contrast, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* is, pending the entry into force of Protocol No. 1 to the Convention, not open to accession by non-member states of the Council of Europe. BH therefore cannot accede at the moment.

BH therefore has now undertaken the steps which are required at the moment. Once the invitations to accede to the Charter and the Framework Convention have been received, the authorities of BH will have the possibility to comply with their constitutional obligation to deposit instruments of accession with respect to these two treaties.

iv. Report of the working group of the Venice Commission and the Directorate of Human Rights on Ombudsman Institutions in Bosnia and Herzegovina (CDL-INF (99) 10) adopted by the Working Group at its meeting in Paris on 11 May 1999 and approved by the Commission at its 39th Plenary meeting (Venice, 18-19 June 1999)

INTRODUCTION

Very soon after the Washington and Dayton peace agreements, the Council of Europe realised the need to define the structure and working methods of the ombudsman institutions in Bosnia and Herzegovina, as bodies responsible for the protection of human rights in that country. In November 1996, at the request of the Parliamentary Assembly of the Council of Europe, the European Commission for Democracy through Law (Venice Commission) adopted its Opinion on the institutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery (CDL-INF(96)9); as a result of this opinion, the Working Group on Ombudsman institutions in Bosnia and Herzegovina was set up in April 1997. It consisted of Mr Jean Claude Scholsem and Ms Maria de Jesus Serra Lopez, members of the Venice Commission for Belgium and Portugal respectively, and MM Alvaro Gil Robles, former Defensor del Pueblo (Spain) and Philippe Bardiaux, Foreign Relations Adviser to the Mdiateur de la Rpublique (France). MM Gerard Batliner and Rune Lavin, members of the Venice Commission for Liechtenstein and Sweden respectively, contributed to the group's work.

The working group wished to involve the authorities concerned in its work. The Ombudsperson for Bosnia and Herzegovina, the staff of this office and the Ombudsmen of the Federation of Bosnia and Herzegovina took an active part in the work concerning them. On two occasions, in Banja Luka, the members of the group met Ms Plavsic and Mr Poplasen, Presidents of the Republika Srpska, and judges of the RS Constitutional Court of the RS to discuss the Ombudsman. Lastly, the Office of the High Representative and the OSCE took an active part in preparing the drafts at every stage.

The group also wishes to thank the French *Mdiateur de la Rpublique* and the Portuguese *Providor de Justia* for all their assistance with its work.

I. FRAMEWORK

The ombudsman institutions now functioning in Bosnia and Herzegovina, namely the Human Rights Ombudsperson for Bosnia and Herzegovina and the Ombudsmen of the Federation of Bosnia and Herzegovina, were established by the peace agreements.

The Constitution of the Federation of Bosnia and Herzegovina (hereinafter "FBH") was drawn up under the terms of the Washington Agreements of March 1994 and provides for the setting up of an ombudsman institution in the FBH. The Dayton Agreements, which came into force on 15 December 1995, established the State of Bosnia and Herzegovina (hereinafter "BH") as the continuation of the Republic of Bosnia and Herzegovina, consisting of two entities, the FBH and the Republika Srpska (hereinafter "RS"). Annex 6 to the agreements provides for the establishment of the Office of the Human Rights Ombudsperson as one of the two components of the Commission on Human Rights, the other being a judicial institution, the Human Rights Chamber.

There is as yet no ombudsman institution in the RS. The idea of setting up such an institution was muted in the above-mentioned Opinion of the Venice Commission on the constitutional situation in Bosnia and Herzegovina, with particular reference to the human rights protection machinery. The working group's first task was to draw up a preliminary draft law on the Ombudsman of the Republika Srpska. The group's work, albeit seriously hampered by the constitutional crisis that shook the RS in summer 1997, nevertheless resulted in the drawing up of a preliminary draft text which was presented to the Venice Commission and approved in March 1998 (CDL(98)12fin). The draft was transmitted to the Office of the High Representative in Bosnia and Herzegovina, the OSCE Mission in Bosnia and Herzegovina and the authorities of the Republika Srpska.

Meanwhile the OSCE Mission in Bosnia and Herzegovina asked the Council of Europe to assist in drawing up a draft organic law for the Ombudsmen of the FBH. The Constitution of the FBH requires a law on the appointment of the Ombudsmen of the FBH to be adopted three years after the entry into force of the Constitution (May 1994). This task was assigned to the working group, which transmitted the requested draft to the OSCE in March 1999, after it had been approved by the Venice Commission.

At the same time, the Ombudsperson for BH asked the working group to look into the distribution of competencies between the ombudsman institutions in BH. An interim report on the subject was adopted by the working group and approved by the Venice Commission in June 1998 (CDL-INF(98)12). On the basis of the conclusions of the interim report, the Ombudsperson asked the working group to draw up a preliminary draft organic law on the functioning of the institution of Ombudsperson for BH after the end of the transitional period provided for by the Dayton Agreements (December 2000). The group completed its preparation of the requested draft in March 1999.

Lastly, the group considered it advisable to revise details of the preliminary draft law on the Ombudsman of the RS in order to bring it into line with the draft laws on the ombudsman institutions of BH and the FBH. The revised draft was transmitted to the OSCE and the authorities of the RS.

II. OMBUDSMAN INSTITUTIONS IN A POST-CONFLICT SOCIETY IN TRANSITION

The operation of an ombudsman institution in Bosnia and Herzegovina is surrounded by not only technical but also conceptual and therefore political difficulties.

The idea that ombudsman institutions are part of human rights protection machinery is now familiar to everyone. It is beyond doubt that alongside highly developed judicial systems for protecting human rights, ombudsman institutions are in a position to provide a parallel, non-judicial form of protection which is equally effective and necessary. Of course, the Ombudsman cannot be a substitute for judicial machinery protecting individual rights. Its contribution to the system for protecting those rights is a consensual rather than conflictual dimension, an authority with a more ethical basis and a set of flexible procedures that can adapt to different situations. The key feature of the Ombudsman's work is that the Ombudsman is not, like the courts, bound by strictly legal considerations but can base its action on considerations of equity; in addition, as a mediator, it has no power to impose the solutions it recommends without the agreement of the parties concerned; its action is thus confined to making recommendations, and its effectiveness depends on the ability to convince and a high degree of moral authority; lastly, unlike the courts, it can suggest amendments to laws and regulations where it considers this appropriate. In other words, the Ombudsman's activity parallels and to some extent complements that of the judicial system.

In societies in transition the Ombudsman's activity is of course much less discreet. Faced with a state apparatus undergoing profound changes, the ombudsman institution's task is not only to deal with cases of maladministration, but to promote or protect the values of society, including human rights, which also mean the rule of law. While targeted in theory at the administration, its activity in the transition process not only parallels that of the judicial system, but may often take the form of judicial action. Its function is then to disseminate a certain legal culture both among the state institutions and among the population. In a transition situation, the Ombudsman's work focuses more on applying the law and the Ombudsman tends to become a fully-fledged player in the judicial system, exercising a quasi-judicial function based on influence. This trend is reflected in the broad scope afforded to ombudsman institutions in several central and east European countries for referring matters to the courts, including the highest courts.

This trend, albeit justified, does have repercussions on the concept of ombudsman. The ombudsman institution may well be viewed as an opponent of the administration, parliament or courts and consequently lose its image as a mediator. Its effectiveness could also be undermined.

Lastly, it is certainly an unusual idea to use an ombudsman-type institution in a society in conflict or post-conflict society where the state machinery is not only new but also - and above all - particularly weak. Many critics in fact describe the ombudsman institution as too sophisticated to perform a stabilising function in a society in conflict. However, some features of the ombudsman institution can be acknowledged to be of great use in a fragile society: an approach free of the constraints imposed by an incomplete or defective legal system, the use of mediating (rather than adversarial) procedures and the structural and operational flexibility of an institution which by definition keeps red tape to a minimum are so many features warranting the setting up of an Ombudsman institution in a society in conflict or post-conflict society.

However, there are major risks. While the ombudsman institution's role in a society in transition is to safeguard or promote values in the face of a changing state apparatus, it could, where the state institutions are weak or lacking, be granted powers enabling it to replace the defective state agency. This could pose problems: firstly, the ombudsman institution would lose its distinctive features and become too similar to the standard institutions of the executive; secondly, the broad scope of its activity could be seen as infringing the separation of powers; its flexibility could be considered arbitrary; and by further relieving the defaulting authorities of the need to take responsibility, its action could undermine the process of setting up effective democratic institutions and introducing the rule of law.

III. CONCEPTUAL PROBLEMS SURROUNDING THE OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina faces a combination of the difficulties described above. Society is both undergoing a transition to a new political, economic and legal system and recovering after a long war. The question is how to define the position of the ombudsman institutions in this context.

The Ombudsmen of the Federation of Bosnia and Herzegovina

Three Ombudsmen - a Bosnian, a Croat and an "other", currently a Serb - have been appointed under the Constitution of the FBH. The Office of the Ombudsmen is an independent agency.

The Ombudsmen are empowered to examine the activities of all institutions of the Federation, cantons and municipalities and all institutions or persons whose dignity, rights and freedoms may be breached, particularly by ethnic cleansing or the preservation of its effects. To perform their task, the Ombudsmen of the Federation are empowered to initiate proceedings before competent courts and to intervene in pending proceedings.

The Constitution of the FBH makes it clear, if only by its structure, that the Ombudsmen are not a supplementary, accessory or parallel institution, but one of the key players in the state. The chapter on the Ombudsmen is strategically placed in the Constitution, immediately after the list of fundamental rights and before any reference to the entity's institutions, whether the President, the Parliament, the Government or the courts. This position reflects the importance assigned by a war-torn society to the ombudsman institution and explains the expectations the latter has aroused. It also explains the institution's distinctive features, including its extensive powers and special relations with the judicial system. This suggests that the purpose of the institution extends well beyond monitoring the functioning of the administration: it is in fact a device for rehabilitating a society in crisis.

The question that arises at the outset is how an ombudsman institution, which by definition lacks means of enforcement, can fulfil this task. On the other hand, if it is granted such means, the question is whether it does not then cease to be an ombudsman institution.

The first few years of operation are fairly indicative of the difficulties encountered by the Ombudsmen of the Federation in the

performance of their duties, due to the conceptual problems outlined above. The Ombudsmen have repeatedly approached the FBH authorities with requests for the adoption of measures.

The US State Department Report on Human Rights for 1995 states that "the Ombudsmen have done some impressive work monitoring the human rights situation and bringing cases of abuse to the Bosnian and Croatian governments. However, the Ombudsmen have no enforcement power and authorities treat them with varying degrees of indifference and hostility. They say that were it not for the international backing, the Federation authorities would disband them immediately". In their annual activity report for 1996, the Ombudsmen state that despite repeated assurances to the contrary, the authorities resisted their efforts to monitor respect for human rights.

The Human Rights Ombudsperson for Bosnia and Herzegovina

The Ombudsperson for Bosnia and Herzegovina, established under Annex 6 of the Dayton Agreements, is a hybrid institution. As indicated above, it is one of the two branches of the Commission on Human Rights (provided for by Article II, para.1 of the Constitution of BH and Annex 6 of the Dayton Agreements, Chapter II, Part A), the other being the Human Rights Chamber. The two institutions are jointly responsible for investigating manifest or alleged violations of human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and its protocols, and instances of discrimination in the exercise of fundamental rights enshrined in other human rights instruments. The Ombudsperson is therefore an institution empowered to receive and investigate complaints and rule on their merits. It draws up a report stating whether there has been a violation of human rights or not, and if so, may make recommendations for securing just satisfaction. If the party at fault fails to reply or refuses to comply with its conclusions, the Ombudsperson transmits its report to the High Representative and the Presidency and may also refer the matter to the Human Rights Chamber.

The Ombudsperson's mandate gives rise to a broad range of interpretations. The institution's powers, tasks and options are in fact sometimes incompatible with one another. Annex 6 does not prevent the Ombudsperson from issuing findings that there have been human rights violations (even without giving reasons) or from frequently exercising the power to make recommendations, which may be coupled with the threat of enforcement by the High Representative. This would make the Ombudsperson's function comparable to that of a powerful executive body, but it seems doubtful whether such an approach is consistent with the institution's stated purpose (to assist the parties in complying with the ECHR).

Here too, difficulties stemming from the conceptual problems surrounding the institution have had to be dealt with during the first few years of its operation. The Office of the Ombudsperson was set up very soon after the conclusion of the peace agreements and was for a long time the only operational institution of those provided for by Annex 6 to the Dayton Agreements[3]; it took on the task of introducing the ECHR into Bosnia and Herzegovina's legal system, precisely to help BH comply with its commitments under the Convention, which is directly applicable in BH. Whatever the authors of Annex 6 had in mind, this task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. Yet this too seems hard to reconcile with the intrinsically non-judicial nature of all ombudsman institutions.

IV. CHANGES IN THE FUNCTIONS OF OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

Despite the social, political and legal difficulties confronting the ombudsman institutions in Bosnia and Herzegovina, the results of their work are becoming increasingly visible. In their activity report for 1997 the Ombudsmen of the Federation note that despite the difficulties encountered, the institution is gaining further recognition every day and its recommendations and requests are increasingly complied with and accepted. The 1998 activity report of the Office of the Human Rights Ombudsperson for Bosnia and Herzegovina shows a spectacular rise in the number of cases in which the authorities have complied with its recommendations.

This development is simply the outcome of changes in the functions of Ombudsman institutions in Bosnia and Herzegovina.

The Ombudsmen of the FBH have exercised the powers conferred on them by the FBH Constitution with welcome caution. The fact that they devote much of their work to dealing with individual applications (an option not expressly provided for by the FBH Constitution, but arising from their status as Ombudsmen) best illustrates their capacity to adapt the institution both to the requirements of the present and to its future in a state governed by the rule of law. Their reports increasingly show a genuine concern to convince - rather than compel - with arguments based on both the values and the provisions of the ECHR.

The Ombudsperson was in a position to increase its non-judicial activity and has indeed done so. The working group indicated in its interim report that the Ombudsperson needed to gear its activities to standard mediation tasks, even before the end of the transitional period. This process is now well under way - a welcome development.

Indisputably, a cautious interpretation of their mandates and an approach based on legal analysis of the cases before them are bound to enhance the ombudsman institutions' prestige and credibility and gradually instil a greater awareness and sense of responsibility into other institutions, including the courts, as to the need for consistent application of the ECHR.

At the end of the day, the key to the success of ombudsman institutions in BH seems to be their ability to adapt to society's expectations and demands. It is essential for them to gear their action and thinking both to changes in society and to the development of other institutions' capacities. The Ombudsmen will make greater use of their extensive and often unusual powers (provisional measures, applications to the Chamber or the Constitutional Court, intervention in pending proceedings) as long as they consider the organs of the state and the entities, including the courts, to be functioning unsatisfactorily. However, as soon as the judicial and administrative systems show signs of being able to function regularly and satisfactorily, in line with the principles of the rule of law, the ombudsman institutions will have to gradually reduce their involvement with the courts and allow the institutions concerned to assume their rightful place and regain the people's trust. Normalisation of the institutional situation in BH necessarily entails a decrease in the Ombudsmen's powers; at the same time, there can be no institutional normalisation as long as the Ombudsmen wield exceptional powers. The success of the reconstruction of institutions governed by the rule of law in BH will depend largely on the Ombudsmen's capacity to gradually adapt their functions to changes in those of the other institutions.

In the draft laws it has drawn up, the working group has tried to avoid hampering this process of change with rigid provisions. As a result, the draft laws place no restrictions on the powers assigned to the ombudsman institutions by the peace agreements, but condition and organise the exercise of those powers while allowing the Ombudsmen broad discretion as to their use.

The draft law on the Ombudsman of the RS takes the same approach. It enables the institution to adapt its functions in the light of the work of the entity's other institutions, but also the activity and especially the experience of the Ombudsmen who have already been operating in BH and the caution and creative sense with which they have carried out their mandates.

The regulations governing relations between the Ombudsmen of the FBH and the courts are a case in point.

The FBH Ombudsmen's relations with the judicial system are one of the thorny issues of the FBH Constitution. The Venice Commission has already expressed its anxiety on this point (see the Commission's opinion on the Washington Constitution in CDL-INF(98)15, pp. 26-29). The working group recognised the importance of the Ombudsman being able to intervene before the courts in the event of manifest injustice. The draft law offers scope for two forms of action consistent with the provisions of the Constitution (assigning the Ombudsman a key role in the matter) and the crucial independence of the courts: the Ombudsman can make recommendations to the administrative departments of the court (or to the Judicial Council of the Federation, when it exists) in cases where the problem concerns the administrative functioning of a court; it can also intervene as a party empowered to appeal when the problem concerns the merits of the case and the Ombudsman considers that this is necessary in order to perform its task of protecting fundamental rights and erasing the consequences of ethnic cleansing. Clearly, the Ombudsman must make use of this possibility in exceptional cases only, before the highest courts of the entity. And in any event it is not for the Ombudsman to make "recommendations" to the courts on the merits of a case or the procedural rights of the parties.

A further example of flexible regulations giving the Ombudsmen substantial room for manoeuvre is the matter of time-limits for lodging applications. The group was in favour of introducing a time-limit for lodging individual applications; this should make the sorting of cases easier, without causing unfair consequences for the applicants or preventing the ombudsman institution, which is empowered to act on its own initiative, from taking up particular cases where it considers that they raise serious problems.

V. INDEPENDENCE AND IMPARTIALITY

The composition of ombudsman institutions must ensure complete independence and impartiality. For the time being, this is achieved by the international community's involvement in the appointment process and by an "international" or multiethnic composition.

International involvement is by nature transitory and the draft laws drawn up by the group include provisions to that effect. In the medium and long term, therefore, the impartiality of the ombudsman institutions will chiefly be guaranteed by their multiethnic composition and the open and balanced nature of the appointment procedures. The provisions included in the draft laws with regard to the composition of the ombudsman institutions and the appointment of Ombudsmen are intended to ensure the broadest possible consensus on the persons concerned. This is the only way of making the institution's impartiality an objective fact, recognisable in the eyes of all citizens.

The individual and institutional independence of the Ombudsmen is also guaranteed by rules on immunity, incompatibilities, staffing and their budgets.

VI. DISTRIBUTION OF COMPETENCIES AND CO-OPERATION BETWEEN OMBUDSMAN INSTITUTIONS IN BOSNIA AND HERZEGOVINA

The group has reached the following conclusions on the distribution of competencies between the ombudsman institutions in BH.

The jurisdiction of the Ombudsperson (henceforth called "State Ombudsman") will in principle be confined to cases concerning the state of Bosnia and Herzegovina and cases simultaneously involving both entities; questions concerning a single entity will, in the medium term, have to fall within the exclusive ambit of the Ombudsmen of the entities. In the interim, however, the Ombudsperson will have to have parallel competencies to those of the Ombudsmen of the entities.

While the Ombudsperson must concentrate more on the area of mediation, it must for some time retain the possibility of referring cases to the highest judicial authority competent to deal with human rights issues, where circumstances so require.

There will be no hierarchical relationship between the three ombudsman institutions in Bosnia and Herzegovina; each will function independently. In particular, there must be no possibility of appealing to the Ombudsperson against the decisions of an entity Ombudsman. The Ombudsperson must be empowered to organise co-operation and consultation between the institutions and to represent the ombudsman institutions of BH in the international arena.

VII. IN THE LONGER TERM

Lastly, the group wishes to emphasise that it has not been asked to give an opinion on the question of whether it might be possible to consider setting up a single ombudsman institution for the entire administration of Bosnia and Herzegovina and its entities, instead of three separate institutions. It notes that this question is not currently on the agenda, particularly because the two ombudsman institutions set up in BH a few years ago are operating satisfactorily. However, the question might arise in the longer term.

v. Preliminary proposal for the restructuring of human rights protection mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12) adopted by the Commission at its 39th Plenary meeting (Venice, 18-19 June 1999)

On 7 July 1998, the Office of the High Representative requested the Venice Commission to draw a report on a possible re-structuring of the human rights protection mechanisms in Bosnia and Herzegovina after the end of the five year transitional period provided for in the Dayton Peace Agreements. The Commission set up a working group composed of Messrs Helgesen, Jambrek, Malinverni and Matscher, who had already acted as Rapporteurs for its Opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms to consider this topic and report to it. It further asked Messrs Malinverni and Matscher to act as Rapporteurs. The Working Group met in Paris on 25-26 February and 11 June 1999 and considered the question on the basis of a working document prepared by the Secretariat upon instruction by the Rapporteurs. Ms Michle Picard, President of the Human Rights Chamber of Bosnia and Herzegovina, Mr

Ph. Bardiaux and Ms C. Nix, experts from the Office of the French Mdiateur de la Rpublique and the State Department, USA, Mr J. Van Lamoen, Deputy High Representative for Legal Affairs, I. Martin, Deputy High Representative for Human Rights, Ms L. Hastings, Mr M. Kngeter and Mr E. Strauss of the OSCE Mission in Bosnia and Herzegovina, Mr C. Harland and Mr A. Nicholas of the Office of the High Representative, Mr N. Maziaux, Legal Counsel at the Constitutional Court of Bosnia and Herzegovina participated in the meetings. Following the meeting the Rapporteurs prepared a report which was submitted to the *Venice* Commission.

At its 39 th Plenary Meeting (Venice, 18-19 June 1999) the Commission adopted this proposal, drawn up on the basis of the above-mentioned report.

* * *

Introduction

In its *Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms* (adopted on 15-16 November 1996,CDL-INF(96)9 and CDL-INF (98) 15 pp. 31), the Commission underlined that protection of human rights is not only a constitutional requirement but also a prerequisite and an instrument for long-standing peace in the country. Its effectiveness depends on the coherence of the protection machinery and on the credibility of the bodies which will monitor human rights implementation throughout the country. Conflicts of competence between bodies entrusted with protection of human rights should in principle be avoided, as well as situations whereby two highest judicial bodies may give contradictory answers to the same legal problem. Such situations, which are undesirable in general, could, in the circumstances of this country, affect the very essence of the constitutional order and thus the State as such.

The human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

In order to cope with this unusual complexity, the Commission suggested that interpretation of the constitutional instruments in force should be very careful. The newly created institutions of Bosnia and Herzegovina, when deciding which case falls within their competence, should take into account not only laws and regulations but also the case-law of other institutions. Co-ordination of their practice by disseminating information on the cases which have been introduced, or are pending before, or which have been decided by either institution is of utmost importance and should have been ensured even in the first months of operation of the institutions concerned.

But interpretation has its limits. The Commission notes several elements likely to affect the coherence of the actual structure of human rights protection mechanisms:

The Constitutional regime in Bosnia and Herzegovina makes no clear choice between a system of concentrated control of constitutionality (by constitutional courts) and diffuse constitutional control (by all courts). It creates an important and unusual network of legal avenues for claiming violations of fundamental rights whose length and complexity may rather affect the effectiveness of the protection afforded.

The position of the non-judicial institutions for protection of human rights, namely the Ombudsman institutions at the level of the State and in the Federation, is also unusual, since these institutions have very large powers to perform quasi-judicial functions and to initiate or intervene in pending proceedings. In the face of these powers the independence of the judiciary can only be fully safeguarded through a very selective and careful practice by the Ombuds-institutions.

The Commission understands that the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina. Respect for human rights is the cornerstone of the Dayton and Washington peace agreements. However, duplication should be avoided since it may be detrimental to the effectiveness of human rights protection. In particular, it may be advisable to proceed with constitutional amendments where the creation of specific human rights bodies may appear unnecessary or no longer necessary from a legal point of view.

Similarly, important disparities in the human rights protection systems of the two entities may also be detrimental to the effectiveness of protection. Ensuring a balanced and coherent judicial system for the protection of human rights in B.H. in its entirety may require a certain parallelism in the protection afforded under the legal orders of the two entities and possibly the establishment of equivalent bodies.

Finally, the Commission indicated that the integration of Bosnia and Herzegovina, the normalisation of its constitutional situation and the effective development and functioning of its constitutional institutions probably requires that, in the not too distant future, human rights protection be entirely entrusted to the Constitutional Court of the State.

In view of the above considerations and for other reasons indicated in the report, the Commission considers that action will be required also in the normative field.

The present report aims at outlining a tentative proposal for re-structuring the human rights protection mechanisms in Bosnia and Herzegovina and the entities in accordance with the above considerations and findings of the Venice Commission. The Commission has taken into account the experience from the functioning of the institutions since their creation. It is also aware that some of the proposals may require new legislation, amendments to the Constitutions of Bosnia and Herzegovina and its entities, or memoranda of understanding, where appropriate. Pursuant to the Dayton Peace Agreement, by the end of 2000, responsibility for the continuing operation of several human rights institutions will be transferred to the Government of Bosnia and Herzegovina. This might be the appropriate time for the re-structuring operation. In this context one should also bear in mind that Bosnia and Herzegovina has applied for accession to the Council of Europe and may, following accession, become a Party to the European Convention on Human Rights.

1. INSTITUTIONS OF THE STATE OF BOSNIA AND HERZEGOVINA

Merger of the Human Rights Chamber and the Constitutional Court

The Commission has found that the Human Rights Chamber, because of its origin and tasks pursuant to the Dayton Peace Agreement, is a provisional, sui generis *institution which should cease to exist after the accession of Bosnia and Herzegovina* to the Council of *Europe* and ratification of the European Convention of Human Rights.

In its above-mentioned opinion on the Constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection instruments, the Venice Commission found that the fields of respective competencies of the Constitutional Court and the Human Rights Chamber were partially overlapping. The Venice Commission noted:

Among other competencies, the Constitutional Court is to have jurisdiction over issues referred by any court in the country, on whether a law on whose validity its decision depends is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)). It shall also have appellate jurisdiction over constitutionality issues arising out of a judgement of any other court in Bosnia and Herzegovina (Article VI para 3 (b). It follows from the latter provision that the Constitutional Court may receive appeals against decisions from any court whereby it is alleged that they violate the Constitution, including the provisions on Human Rights (cf. Article II). In accordance with Article VI para 4 of the Constitution of BH, the decisions of the Constitutional Court "are final and binding".

Similarly, the Commission of Human Rights - and in particular the Human Rights Chamber -has jurisdiction to receive applications concerning violations of human rights. The decisions of the Chamber are also "final and binding".

Whatever the intention of the drafters of the Constitution may have been, there is an overlapping between the competencies of the Constitutional Court and those of the Commission of Human Rights. Both shall deal with human rights issues, mainly under the European Convention on Human Rights.

This partial overlapping proved to be one of the most difficult problems in the judicial system of Bosnia and Herzegovina and will

be one of the most important reasons of dysfunction if the situation remains unchanged. Indeed, the distribution of competencies between the two highest jurisdictions is very unclear and it seems almost impossible to establish any hierarchy between two highest courts both giving final and binding judgements. In a further opinion issued on the occasion of an appeal from the Chamber to the Constitutional Court (*Opinion on the admissibility of appeals against decisions of the Human Rights Chamber, 16-17 October 1998*,CDL-INF(98)18), the Commission declared the following:

Article II of the Constitution of Bosnia and Herzegovina provides that *the rights and freedoms as set forth in the European Convention on Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina* . These shall have priority over all other law . This provision would lose most of its meaning if the list of rights alone, and not the monitoring mechanism, were to apply in BH. However, the ECHR monitoring machinery is only open to States which are parties to this convention and BH is not one of them, since only member States of the Council of Europe can become parties to the ECHR. It is therefore necessary, pending the accession of BH to the Council of Europe and the ratification of the ECHR by it, to provide for a provisional monitoring mechanism reproducing in BH the Strasbourg bodies (the European Commission and Court of Human Rights).

The idea of a transitional international human rights protection mechanism was already expressed in Resolution (93) 6 of the Committee of Ministers of the Council of Europe, and Annex 6 to the Dayton Agreements, establishing the Human Rights Chamber, expressly refers to this Resolution.

The international elements in the composition of the Human Rights Commission (the Ombudsperson and the majority of the Human Rights Chamber are not nationals of Bosnia and Herzegovina) underline this specific role of the bodies established under Annex 6. The Human Rights Commission appears as a quasi-international *sui generis* body integrated into the legal order of Bosnia and Herzegovina for a transitional period, until the effective integration of this State has been achieved and it has acceded to the Council of Europe, ratified the European Convention on Human Rights and recognised the human rights protection mechanism of the Strasbourg organs. The transitional (provisional) character of the mechanism is also indicated in Annex 6 , which is scheduled to last for five years after the entry into force of the Dayton Agreement. After that period of time, the responsibility for the continued operation of the Commission of Human Rights is to be transferred to the institutions of Bosnia and Herzegovina, unless otherwise agreed. This provision has to be read in conjunction with Article 5 of Resolution (93) 6 which provides that the arrangements for a transitional human rights control mechanism integrated in the internal legal order of European States which are not yet members of the Council of Europe, shall cease once the requesting state has become a member of the Council of Europe, except as otherwise agreed.

The provisions on jurisdiction of the Human Rights Commission further underline this quasi-international *(sui generis)* character of the mechanism established under Annex 6. Article 2 of Annex 6 states that the Commission on Human Rights is established to assist the parties (namely the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in honouring their obligations to secure to all persons within their jurisdiction the highest level of internationally recognised human rights standards. Therefore, the State of Bosnia and Herzegovina is also a party to proceedings before the Human Rights Commission in its capacity as a party to an international agreement.

For all the above reasons it seems both logical and desirable to opt for the transferring of competence on all final appeals in human rights cases to a single jurisdictional body at the state level, as is the case in most modern continental constitutional systems in Europe. However, the many procedural, administrative, financial, political and other differences between the Chamber and the Constitutional Court should be carefully reviewed to assess how such a transfer should be structured without resulting in a diminution in the judicial protection of human rights in *Bosnia and Herzegovina* .

It is well known that the Chamber is a relatively well-funded institution that benefits from the expertise on its bench of a majority of international judges, experts in human rights law. It has issued written opinions covering over 100 cases on a broad range of topics falling within the ambit of the ECHR. Over 2000 cases have been filed to date with the Chamber. In contrast, the Constitutional Court , which suffers from a tremendous lack of funding, has for a variety of reasons only rendered a final decision in a single case out of the less than ten that have been filed with the Court, and its appellate jurisdiction has yet to be tested. Furthermore, in addition to these institutional differences, the rules of procedure, including admissibility criteria for appellate cases and in particular the right of individuals to file a case, differ between the two bodies or are as yet untested in the Constitutional Court.

In the light of these and other differences, in practice, such a transfer will require a general restructuring of the Constitutional Court and it is highly advisable that this transfer takes the form of a merger of the *Constitutional Court* with the Human Rights Chamber*. Indeed, entrusting the Constitutional Court* with the task of dealing with individual human rights applications requires a simultaneous transfer of expertise, experience, resources, procedural and other capacities, which can best be achieving by the proposed merger. One way of realising the transfer may be to establish a separate human rights section within the *Constitutional Court* . This merger will also ensure continuity in the Chambers case-law and contribute to achieving the

legal security and stability which the legal order of *Bosnia and Herzegovina* so much needs.

Naturally, this proposal is based on the premise that the many differences between these two bodies will be carefully addressed and reconciled, as appropriate, in order to ensure that the domestic protection of human rights afforded by the Human Rights Chamber is preserved and that the international obligations entered into by the parties under the peace agreements are taken into account. To that end, procedural issues such as the prerequisites for individual applications to the Constitutional Court, including exhaustion of other effective remedies, applications by the Ombudsman (see below), effects of judgements, power to grant compensation and other such matters must be regulated by a law (possibly constitutional law) to be adopted by the BH Parliament. The law should also contain transitional provisions concerning the transitional role of the international members of the Court and international administration, and indicating that once the merger has occurred, the Human Rights Chamber shall no longer be competent to deal with new cases or with cases pending at the Chamber on which the Chamber has not yet initiated proceedings.

The law shall further indicate the time at which the merger shall become effective. In this respect the transfer provision of Article XIV of Annex 6, as well as the possible/future accession of Bosnia and Herzegovina to the Council of Europe and ratification of the ECHR should be taken into consideration.

The Commission is ready to consider further the legal and practical modalities of this proposal, if the Office of the High Representative so requests. In particular, in the light of the above-mentioned complexities, as well as the need to ensure the preservation of human rights protection through the proposed merger of the Human Rights Chamber and the Constitutional Court, the Venice Commission believes that the modalities of such a merger must be carefully considered. The Rapporteurs suggest that a working group composed of international legal and administrative experts operating under the auspices of or reporting to the Venice Commission and/or the OHR should investigate the procedural, administrative, financial and other practical issues involved and make recommendations. The Venice Commission will consider these recommendations and detail further the steps necessary to achieve the suggested merger.

Creation of special courts at the level of the State of Bosnia and Herzegovina

Electoral jurisdiction

In its *Opinion on the competence of BH in electoral matters* (CDL (98) 16), the Commission held that, with regard to disputes concerning elections to BH institutions, it was necessary to assign appellate jurisdiction to a court at state level. Indeed, the democratic nature of BH (which is enshrined in the preamble to its Constitution) and, above all, the requirement that BH (and the entities) organise "free and fair elections" (Article I, paragraph 1 of Annex 3 to the Dayton Agreements) make it mandatory that any electoral dispute be dealt with by an independent judicial institution. BH is therefore bound both by the Peace Agreements and by its own Constitution to refer such disputes to a judicial institution.

In its *Opinion on the need for a judicial institution at the level of the State of Bosnia and Herzegovina* (issued on 16-17 October 1998,CDL(98)17), the Commission stated that

the choice of institution is left to the state legislature, which might envisage giving jurisdiction in such matters to a special division of the Constitutional Court or might establish a separate court Whatever solution is adopted by the legislature, it will necessarily entail an addendum to the BH Constitution, which makes no provision either for the constitutional court to have jurisdiction in electoral matters or for the establishment of a separate court. This does not mean that the Constitution will not be observed, since, as we have seen, the existence of such an institution is a requirement of the Constitution itself.

The Commission has taken into account the wide competencies this court will have (it will have to deal with all kinds of electoral disputes at State, entity and cantonal level), the specific nature of the issues involved and the urgency of most of the decisions in the matter. It further finds that electoral litigation would be a heavy burden for the Constitutional Court of BH, whose case-list of case will inevitably and dramatically increase after its merger with the Human Rights Chamber. The Commission is therefore of the opinion that competence in the field of electoral disputes all over the country should be entrusted to a special permanent electoral jurisdiction. Of course, the Constitutional Court will have appellate jurisdiction over constitutional issues arising out of the decisions of this electoral jurisdiction.

Administrative court

In its above-mentioned opinion on the need for a judicial institution at the level of the State of BH (CDL (98) 17), the Commission found that under the Constitution of BH, the State of BH is empowered to establish state-level courts, which should be specific, in the sense that they should have special and not general jurisdiction, and be created in response to an established constitutional need. Moreover, as regards administrative disputes, BH is empowered, and even obliged, to set up a state-level court (the Administrative Court of BH) for the following reasons:

The general principle that administrative authorities must abide by the law as well as the principle of the rule of law, on which the BH Constitution is founded (Article I, paragraph 2), require that administrative decisions be subject to judicial review.

This general requirement takes an even more definite form in cases where administrative decisions affect individual rights. In such cases the requirement that administrative decisions be subject to judicial review comes within the ambit of respect for fundamental rights.

Article II of the BH Constitution provides that "the highest level of internationally recognised human rights and fundamental freedoms" shall be ensured in BH and that a Human Rights Commission shall be set up to that end, in accordance with Annex 6 to the peace agreements. The first article of Annex 6 itself makes reference to the European Convention on Human Rights, Article 6, paragraph 1 of which provides, inter alia, "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". (Also see Article II, paragraph 3 (e) of the BH Constitution). According to the established case-law of the European Court and the European Commission of Human Rights, the notions of "civil rights and obligations" and "criminal charges" are autonomous ones, specific to the ECHR, which are not to be interpreted by reference to the domestic law of the states bound by this convention. The European Court of Human Rights has consistently held that it is sufficient that the outcome of a dispute should be decisive for civil rights, that is to say that the rights in issue should be personal and economic rights of one of the parties to the proceedings. Disputes in fields traditionally governed by administrative law of member states have thus been regarded, in the context of the convention, as disputes over civil rights. Examples are disputes over the refusal of certain tax advantages (Editions Priscope v. France judgement of 26 March 1992, Series A No. 234-B); over entitlement to social security benefits (Deumeland v. Federal Republic of Germany judgement of 29 May 1986, Series A No. 100); over entitlement to a civil service pension (Lombardo v. Italy judgements of 26 November 1992, Series A Nos. 249-B and 249-C); and over the right to compensation for unlawful administrative acts (Tomasi v. France judgement of 27 August 1992, Series A No. 241-A). Similarly, certain administrative proceedings have been considered to involve a "criminal charge". Examples are cases concerning penalties imposed in economic matters (Deweer v. Belgium judgement of 27 February 1980, Series A No. 35); in tax matters (Commission report in the Sydow v. Sweden case); and for road traffic offences (zturk v. Federal Republic of Germany judgement of 21 February 1984).

There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.

The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act).

The Commission further notes that such a court could have broader jurisdiction than that imposed by the requirements of Article 6 ECHR: other administrative disputes could also be brought before this body.

Special (high) criminal court

In the same opinion, the Commission held that although offences perpetrated by BH public officials can be tried by the entities'

criminal courts according to the rules of jurisdiction laid down by BH law, several offences provided for in criminal legislation (e.g. high treason) committed by persons appointed to government or political office (members of the presidency, ministers, members of the Constitutional Court, etc.) in the exercise of their functions cannot be tried by entity courts. As in many other European states, special rules of substance and procedure must be issued concerning such offences.

The Commission considered whether competence in this field could be given to the constitutional court. It tends to exclude this possibility since the Constitutional courts competencies are already quite extensive. The Commission would suggest that competence in this field could be given to another new state level court (the high criminal court of BH). This position is also supported by the conclusions of the Madrid Peace Implementation Council.

The exact scope of the *ratione personae* and *ratione materiae* competence and the composition of this court should be determined in a law to be adopted by the State legislator. In this respect, the requirements of Article 2 of Protocol No 7 to the ECHR should be taken into consideration. This provision reads:

Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal (). This right may be subject to exceptions in cases in which the person concerned was tried in the first instance by the highest tribunal

To sum up, the Commission is currently considering, together with experts appointed by the Directorate of Legal Affairs of the Council of Europe, the legal and practical modalities of the proposals in section 1.2 of the present report with a view to creating either specific courts or a single court with several chambers at the level of BH, at the request of the Office of the High Representative.

1.3. A new concept for the Human Rights Ombudsman (Ombudsperson) of Bosnia an Herzegovina

It is envisaged to re-define the operation of the Ombudsperson of BH as regards in particular its functions as a classical Ombuds-institution; its relations with the highest judicial authorities of the State (i.e. the Constitutional Court); and the definition of its field of activities.

The Commission stated in its *Interim Report on the distribution of competencies and structural and operational relations in the Ombudsman institutions in BH* (adopted on 12-13 June 1998) that the Ombudsperson of Bosnia and Herzegovina is a hybrid institution. Set up very shortly after the peace agreement, the Office of the Ombudsperson was for a long time the only institution responsible for introducing the European Human Rights Convention into the legal system in Bosnia and Herzegovina. This task has been carried out successfully, with the result that the institution has acquired a quasi-judicial status. The Ombudsperson thus ruled on the admissibility of the complaints it received, sought a friendly solution, investigated and communicated its findings to the party allegedly at fault and, if it were not satisfied with that partys response, referred the matter to the Human Rights Chamber. At the same time, at the hub of the human rights machinery provided for in Annex 6, the Ombudsperson has a non-judicial activity when it decides, *ex officio*, to conduct investigations and draw up special reports.

However, a structural reorganisation of its *modus operandi* must be undertaken. The quasi-judicial sorting role performed by the Office of the Ombudsperson should in fact be taken over by the judicial body responsible for protecting human rights. The Ombudsperson could then concentrate more on its more conventional mediation functions, without so many procedural constraints (application deadlines, exhaustion of other remedies), that are uncharacteristic of the ombudsmans work.

This should not prevent the Ombudsperson from referring cases to the highest judicial authority competent to deal in human rights matters, i.e. the Constitutional Court of Bosnia and Herzegovina, if the proposal under 1.1 is accepted.

The competence of the Ombudsperson should also be confined to matters concerning the State of Bosnia and Herzegovina, cases which simultaneously concern the two entities (inter-entity cases) and entity cases whose outcome is of importance for the whole of Bosnia and Herzegovina. Clearly as the state institutions are gradually set in motion and begin effectively to exercise their powers under the Constitution of Bosnia and Herzegovina, the citizens will be increasingly concerned by the decisions of those institutions. Similarly, the co-operation required in numerous areas under the Dayton Agreement -between the entities themselves or between the entities and the state - seems to point to a likely increase in the number of cases involving both entities. It is in this field that the Ombudsperson will have to develop its activities, while in the medium term questions concerning issues of

concern to only one entity should generally fall within the ambit of the Ombudsmen of the entities[4].

It goes of course without saying that as long as the RS Ombudsman is not created, the Ombudsperson shall be competent to deal with all cases concerning RS.

The reform outlined above requires the amendment of the fundamental texts of the institutional apparatus in Annex 6. As responsibility for the continuing operation of the Office of the Ombudsperson will lie, after December 2000, with the institutions of Bosnia and Herzegovina, it seems that the most appropriate means of carrying out the reform would be an organic Law to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina. The Working Group on the Ombudsman institutions in BH, set up by the Venice Commission and the Human Rights Directorate of the Council of *Europe drafted such an organic law, at the request of the Ombudsperson.*

Moreover, the Ombudspersons power to refer cases to the Constitutional Court should be reflected in the Constitution of BH. This will be part of the reform concerning the competencies of the Constitutional Court of BH.

1.4. The relations between the Constitutional Court and Annex 7 Commission

The Commission has noted in its above-mentioned Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms, that a certain conflict of competencies could arise in the relations of the Human Rights Chamber and the Annex 7 Commission, when they are both dealing with property protection cases. After the proposed merger of the Chamber and the Constitutional Court , the same conflict will appear in regard to the *Constitutional Court* . It is to be noted in this respect that both bodies are expected to give final and binding decisions.

In the Commissions view, Annex 7 Commission is a specific sui generis body, provided for by the Peace Agreements. The rationale for its existence lies in the struggle to achieve a certain security as to the property regime in BH, within a short time period, and thus allow economic development and consolidate peace. Its operation appears as an exception to the legal order of BH, which, through Article 6 of the ECHR, requires that disputes over civil rights and obligations be decided by tribunals established by law, after fair and public hearings. It should be regarded as a provisional institution. If its functioning is to continue after 2000 this shall be effected by virtue of an agreement of the parties to the Annex 7 to the Peace Agreement (as provided in Annex 7, Article XVI). It will not be possible to integrate this Commission in the legal order of BH without subjecting its decisions to judicial or, at least, constitutional control.

The Venice Commission would be ready to pursue the consideration of issues related to the functioning of Annex 7 after the end of the transitional period, in co-operation with the Annex 7 Commission, if the Office of the High Representative so requests.

2. INSTITUTIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

2.1. The Human Rights Court of the Federation

The Commission has on several occasions stated that the setting up of the Human Rights Court of the federation was unnecessary and should therefore be avoided. The reasons for this position of the Commission were explained in the Commissions *Opinion on the establishment of a human rights Court in FBH* (issued on 20-21 June 1997,CDL-INF(98)15, p. 77 ff):

The co-existence of two human rights jurisdictional bodies (the Human Rights Court of F.B.H. and the Human Rights Commission provided for in the Dayton Agreements) may create certain problems.

First, the exhaustion of domestic remedies available to a citizen of F.B.H. becomes extremely lengthy. It involves the (eventual) excessive intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court (with a possible intervention of the Constitutional Court of F.B.H.) and then of the Ombudsman of B.H. before reaching, finally, the Constitutional Court of B.H. or the Human Rights chamber (first a Panel and then the Plenum). This long process of exhaustion of domestic

remedies may also discourage citizens from F.B.H. from applying to the European Commission in Strasbourg when B.H. becomes party to the European Convention on Human Rights."

In addition, it cannot be excluded that possible discrepancies in the case-law of the Human Rights Court of F.B.H. and of the Human Rights chamber of B.H. (both composed of a majority of international judges) might affect the authority of those courts.

Obviously these problems, linked to the establishment and the functioning of the Human Rights Court of F.B.H., jeopardise the efficiency of the human rights control mechanism both in that entity and in B.H. as a whole.

As a possible solution to these problems, the Venice Commission has recommended amending the FBH Constitution so as to do away with the Human Rights Court of the Federation.

The Commission has now examined whether there are reasons for setting up of the Human Rights Court of the Federation having regard to the judicial system of the Federation and to the envisaged changes in the institutional set-up at the level of the State.

It recalls in this respect:

that the Supreme Court of FBH, as all other courts in the FBH, directly apply the human rights provisions of the Constitution of FBH and of BH, the ECHR and the other international human rights instruments listed in the annexes to the Washington and Dayton Agreements;

the Constitutional Court of BH has appellate jurisdiction over decisions of any court in BH on constitutional issues, including human rights ; if the reform envisaged under point 1.1 above is accepted, this competence will be further developed ;

the Supreme Court of FBH (or a cantonal court) have an obligation to submit any doubt as to whether an applicable law is compatible with the FBH Constitution to the FBH Constitutional Court.

Under these circumstances it does not seem that the setting up of the Human Rights Court of the Federation corresponds to any pressing need. On the contrary, establishing the Human Rights Court would unnecessarily complicate the judicial system of both the Federation and the State. Further, it is suggested that the provisions on the Human Rights Court of the Federation in the Constitution of this entity have become inoperative or obsolete by the provisions on the Human Rights Commission of the Dayton Peace Agreement.

The Commission is ready to further elaborate this proposal, considering also the possibility of creating a human rights section within the Supreme Court of FBH, which would not, however, take over the jurisdiction of the unformed Human Rights Court. The creation of such a section may be justified in view of the Supreme Courts competence to deal *in concreto* with human rights issues. It may be also justified by the Supreme Courts power to refer to the Constitutional Court of BH questions as to whether a law is compatible with the human rights provisions of the BH Constitution or the ECHR (see below).

2.2. The Constitutional Court of the Federation

The primary functions of the Constitutional Court are to resolve disputes between Cantons; between any Canton and the Federation Government; between any Municipality and its Canton or the Federation Government; and between or within any of the institutions of the Federation Government. The Court also determines, on request, whether a law or a regulation is in accordance with the Constitution of the Federation. The Supreme Court and cantonal courts have an obligation to submit doubts as to whether an applicable law is constitutional to the Constitutional Court.

If the Human Rights Court of the Federation is not set up, as suggested in paragraph 2.1. above, the question might be raised

whether the competence of the Constitutional Court of FBH should comprise human rights issues. Having regard to the need to have a coherent human rights policy and practice all over Bosnia and Herzegovina, it is preferable that human rights issues be directly referred to the Constitutional Court of BH. This appears as an interesting shortcut accelerating the procedure. Of course, this would mean that mandatory referral to the Constitutional Court of FBH would not comprise human rights issues, and may require amending the Constitution of FBH to remove the current mandatory referral of constitutional questions to the Constitutional Court of FBH.

2.3. The Federation Ombudsman

The Office of the Federation Ombudsman is an independent agency. The Ombudsman have the power to examine the activities of any institution of the Federation, a canton, or a municipality as well as of any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects. In so doing, the Ombudsman must have access to all official documents, including confidential ones. Pursuant to the FBH Constitution the Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings. The Commission has considered these powers of the Ombudsman with some scepticism. In its opinion on certain constitutional aspects of the situation in Bosnia and Herzegovina (opinion on the Washington Agreements), issued in September 1994, it stated :

Intervention by the ombudsman in the course of a trial should be exceptional, or at least subject to extreme caution. His role should in fact be to intervene before the institution of judicial proceedings. Intervention during a trial should have no other purpose than to bring about a friendly settlement. Any other kind of intervention would be contrary to the principle of the separation of powers, the independence of the judiciary and equality of arms.

The draft organic law for the Federation Ombudsman, prepared by the Working Group on the Ombudsman institutions in Bosnia and Herzegovina, deals with this problem. Without limiting the constitutional powers of the FBH Ombudsman, the draft law provides that the Ombudsman intervene before courts only when they consider this to be strictly necessary for the effective performance of their duties under the Constitution.

3. INSTITUTIONS OF THE REPUBLIKA SRPSKA

3.1. The judiciary : Constitutional Court, Supreme Court and other courts of law

The Constitutional Court of the RS has competence to decide on conformity of laws, other regulations and general enactments with the Constitution; conformity of regulations and general enactments with the law; conflict of jurisdiction between agencies of legislative, executive and judicial authorities; conflict of jurisdiction between agencies of the Republic, region, city and municipality; conformity of programmes, statutes and other general enactments of political organisations with the Constitution and the law. In accordance with amendment XLII (Article 115 *in fine*), the Constitutional Court monitors constitutionality and legality by providing the constitutional bodies with opinions and proposals for enacting laws to ensure "protection of freedoms and rights of citizens".

Proceedings before the Constitutional Court can be instituted by the President of the Republic, by the National Assembly and by the government. The Constitution enables the legislator to authorise other bodies or organs of the State to bring a case before the Court. The Constitutional Court may itself initiate proceedings on constitutionality and legality.

There is no individual application before the Constitutional Court but anyone "can give an initiative" for constitutional proceedings. Apparently, in practice, many cases brought before the Constitutional court have their origin in individual initiatives.

The Constitution of the Republika Srpska contains no provision as to the place of international human rights instruments in the hierarchy of norms. However, the international human rights instruments listed in the Dayton Agreement, including the ECHR, should apply directly in the Republika Srpska (Article II paras 1 and 6 of the Constitution of B.H.: *Bosnia and Herzegovina and both Entities, all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights referred to in the Constitution*).

The system provided for in the law of RS is a classical system where judicial protection of human rights is afforded by ordinary

courts. The Supreme Court of RS is the main instrument for human rights protection since all types of litigation (civil, criminal and administrative) will be brought before it, whereby the Court shall "protect human rights and freedoms" in accordance with Article 121 of the Constitution. The Constitutional Court will examine the compatibility of a law or a regulation with the human rights guaranteed in the Constitution *in abstracto*, at the request of other State organs or at its own initiative.

In its *Opinion on the constitutional situation in BH with particular regard to human rights protection mechanisms*, the Commission has expressed the view that

having regard to the importance of human rights protection in Bosnia and Herzegovina, one could expect a system of individual applications to be established (in the Republika Srpska), giving the individual *locus standi* before the Constitutional Court in addition to or in substitution for the system of "individual initiatives". At the same time, some remnants of the constitutional order of the former Yugoslavia, such as the capacity to initiate proceedings ex officio and the competence to make "proposals", could be abandoned. This would strengthen the judicial character of the Court and bring the system closer to the recent evolution in several new democracies in Europe.

Taking into account the envisaged merger of the Human Rights Chamber with the Constitutional Court of BH and the need to preserve a parallelism in the two entities, the Commission considers that the institution of individual application to the Constitutional Court of the RS is not necessary. Furthermore, the Constitutional Courts capacity to initiate proceedings *ex officio* does not affect the human rights protection system and is not therefore discussed in the present report.

However, the possibility of a referral to the Constitutional Court of BH of questions as to the compatibility of laws and regulations with human rights provisions should be envisaged (see below).

3.2. Creation of an Ombudsman institution in the RS

In the above-mentioned opinion, the Commission stated :

The creation of an institution of Ombudsmen should be envisaged. The establishment of such an institution, analogous to the Ombudsmen operating in the F.B.H., will not only improve the human rights protection machinery in the RS but also contribute towards the establishment of a balanced and coherent system of judicial protection of human rights in B.H. in its entirety. The RS Ombudsmen will be able to submit cases of human rights violations to the Human Rights Chamber, through the Office of the Ombudsman of B.H.

The Commission further stated that in order to ensure the necessary impartiality of the institution in a post conflict situation, one should consider that the RS Ombudsmen should be three in number, belonging to the three ethnic groups, and that the international community be involved in their nomination and operation.

The Working Group on the Ombuds-institutions in Bosnia and Herzegovina has prepared a preliminary draft law on the Ombudsman of the RS in accordance with the above suggestion and has forwarded it to the competent RS authorities. The RS Ombudsman, as envisaged in the draft law, has similar compositions, powers and functions with the FBH Ombudsman. However, the RS Ombudsman does not have the power to intervene before ordinary courts in the Republika Srpska.

The recent Madrid Peace Implementation Conference supported the draft law.

4. RELATIONS BETWEEN THE INSTITUTIONS OF THE ENTITIES AND THE INSTITUTIONS OF THE STATE

4.1. Referral of cases to the highest judicial authority of the State competent to deal with human rights cases by the entities Ombudsmen

The working group on the Ombuds-institutions in BH suggested in its interim report and in the draft laws prepared for the

entities Ombudsman that the latter should be given the possibility to bring cases to the highest judicial authority of the State competent to deal with human rights cases (i.e., in accordance with the suggestion in point 1.1 of this report, the Constitutional Court).

The working Group suggests in its report to allow the Ombudsmen of the entities access to the Constitutional Court through the Ombudsman of Bosnia and Herzegovina. The latter shall make sure that the position of the entities Ombudsman is adequately presented to the Constitutional Court[5]

4.2. Scope of the jurisdiction of the Constitutional Court

The Constitutional system of Bosnia and Herzegovina allows for two different legal orders (those of the two entities) to co-exist. The only common area of these two different entities legal orders and of the legal order of the State of *Bosnia and Herzegovina* is human rights. It is to be expected that human rights will be the topic, that will allow for the State judiciary, i.e. the *Constitutional Court* , to exercise a control over the judiciary of the entities and to ensure a minimum of common interpretation.

Appeals against decisions of Supreme and ordinary courts

The Constitution (Article VI, para 3 b) already allows for appeals from any other court in Bosnia and Herzegovina over issues arising under the Constitution. Most human rights cases will be brought before the Constitutional Court under this provision (which should be construed in such a way as to comprise all human rights cases previously dealt with by the Human Rights Chamber). Exhaustion of effective remedies in the entities legal order should be set out as a procedural requirement for appeals to the Constitutional Court.

Appeals against decisions of the entities constitutional Courts

The Commission has indicated in its above-mentioned opinion :

The simultaneous existence of three Constitutional courts should not raise particular problems, since each one of them functions within the framework of a specific Constitution. Thus, the Constitutional Court of F.B.H. is competent for the examination of constitutional issues under the Constitution of F.B.H., while the Constitutional Court of RS shall deal with constitutional questions under the Constitution of RS. The Constitutional Court of B.H. is competent inter alia to decide the question of compatibility of an Entity's Constitution with the Constitution of B.H. (Article VI, para 3 a), which takes precedence over the Constitutions of the Entities. The provisions in the Constitutions of the Entities providing that judgements of their highest courts are "binding and final" should be either revised or interpreted in such a way as to mean "binding and final in the legal order of the Entity, as long as it is not declared inconsistent with the Constitution of B.H.

It is clear that issues under the Constitutions of the entities will not fall within the jurisdiction of the BH Constitutional Court.

In contrast, whenever the entities constitutional courts decisions directly or indirectly concern the constitutional order as set out in the BH Constitution, including its human rights provisions and guarantees, it must be accepted that appeals to this Court are allowed, under Article VI para 3 b or, of course, under Article VI para 3 a.

Referral from other courts in Bosnia and Herzegovina

Article VI para 3 c. allows referral to the Constitutional Courts of issues concerning the compatibility of any laws with the Constitution of BH, the ECHR and the laws of BH.

The Commission is of the opinion that the referral mechanism provided for in the BH Constitution is an important element for the cohesion of the constitutional order of this State. However, referral should be regulated in order to avoid procedural abuses likely

to complicate rather than facilitate the smooth progress of proceedings. Since individuals, parties to court proceedings, or the Ombudsman have the power to introduce cases before the Constitutional Court, after exhaustion of other remedies, referral at an earlier stage should not occur whenever parties so request but only when a court finds it necessary.

It is suggested that courts in Bosnia and Herzegovina, including Constitutional Courts of the entities, refer constitutionality questions to the Constitutional Court of BH, whenever they find that a law (on whose validity their decision depends) is incompatible with the BH Constitution and the ECHR.

It is highly advisable that the Constitutional Court style='mso-bidi-font-size:12.0pt;font-family:Palatino'> be empowered to refuse referral whenever it finds that the issue referred has been already dealt with or is manifestly unfounded. The Court should also be empowered to refer cases or questions to other courts if these would be better forums for resolving the issues raised.

The Commission is ready to further elaborate this proposal in the context of the general re-organisation of constitutional control in Bosnia and Herzegovina, if the Office of the High Representative so requests.

vi. Opinion on the reform of the judicial protection of human rights in the federation of Bosnia and Herzegovina (CDL-INF (99) 16) adopted by the Commission at its 41st Plenary Meeting (Venice, 10-11 December 1999)

On 7 July 1998, the Office of the High Representative requested the Venice Commission to draw up a report on a possible restructuring of the human rights protection mechanisms in Bosnia and Herzegovina after the end of the five-year transitional period provided for in the Dayton Peace Agreements. The Commission set up a working group to consider this question and report to it; it further designated Messrs Malivenerni, Matscher and Jambrek to act as Rapporteurs on the question. At its 39th Plenary Meeting (Venice, 18-19 June 1999) the Commission, on the basis of the Rapporteurs' report, adopted its Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina (CDL-INF (99) 12). The working group met in Salzburg on 20 September 1999 to consider on the basis of this proposal the specific question of the future of the Human Rights Court of the Federation of Bosnia and Herzegovina, at the request of the Office of the High Representative. Messrs Chris Harland, Gianni La Ferrara and Alex Nicholas, of the Office of the High Representative, participated in the meeting. Subsequent meetings were held in Sarajevo on 15 and 16 November 1999 with Mr Edah Becirbegovic, Mr Demin Malbasic and Ms Mirjana Jaksic-Hadjikaric, the three local judges appointed to the (non-functioning) Human Rights Court, Messrs Johan van Lamoen, Alex Nicholas and Chris Harland of the Office of the High Representative, Mr Colak, Minister of Justice of FBH and Mr Mutapcic, Deputy Minister of Justice of FBH, Ms Katarina Mandic, President of the Consitutional Court of the Federation of Bosnia and Herzegovina, Mr Hajdarevic, Vice-President of the Supreme Court of FBH and with Ms Lynn Hastings and Mr Ekkehard Strauss of the OSCE Mission in Bosnia and Herzegovina.

At its 41st Plenary Meeting (Venice, 11-12 December 1999), the Commission adopted the present report.

INTRODUCTION

In its *Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms* (CDL-INF (96) 9 and CDL (98) 15 pp. 30 ff.), the Commission underlined that the protection of human rights in Bosnia and Herzegovina is not only a constitutional requirement but also a prerequisite and an instrument for longstanding peace in the country. The effectiveness of the human rights protection provided depends both on the coherence of the protection machinery and on the credibility of the bodies entrusted with the task of human rights protection. To this end, it is important to avoid conflicts of competence between such bodies as well as situations where two highest judicial bodies would give conflicting answers to the same legal problem. Such situations, which are undesirable in general, could, in the particular circumstances of this country, affect the very essence of the constitutional order and thus the state as such.

As the Commission indicated in its *Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina* (CDL-INF (99) 12), the machinery provided for in the legal order of Bosnia and Herzegovina for the protection of human rights presents an unusual degree of complexity. Jurisdictional bodies entrusted specifically with the task of protecting human rights co-exist with other such bodies that are expected to deal with allegations of human rights violations that arise in the context of the cases brought before them, inevitably leading to a certain degree of duplication.

The Commission therefore suggested in its above-mentioned opinion that the constitutional instruments in force should be interpreted in a very careful manner, with the institutions in question taking into account, when deciding whether they are competent to examine a case, not only laws and regulations but also the case-law of other institutions. Coordination of their practice by disseminating information on the cases introduced or pending before or decided by the institutions concerned, as well as careful drafting of their rules of procedure, are of the utmost importance and should indeed have been ensured from the first.

However, as the Commission noted in its preliminary proposal, interpretation has its limits. The Commission indicated several elements likely to affect the coherence of the actual structure of human rights protection mechanisms, of which the following are of particular relevance to the judicial protection of human rights in the Federation of Bosnia and Herzegovina:

the constitutional regime in Bosnia and Herzegovina creates an unusually large network of legal avenues for claiming violations of fundamental rights, the length and complexity of which may adversely affect the effectiveness of the protection afforded;

the creation of specific human rights bodies is an important step in the consolidation of peace in Bosnia and Herzegovina, as respect for human rights is the cornerstone of the Dayton and Washington peace agreements. Nonetheless, duplication of bodies and competences should be avoided since it may in the end be detrimental to human rights protection. With this in mind, it may be advisable to undertake constitutional amendments where the creation of specific human rights bodies may appear unnecessary or no longer necessary from a legal standpoint;

the effectiveness of human rights protection may also be adversely affected by important disparities in the human rights protection systems of the two entities. A certain parallelism in the protection afforded under the legal orders of the two entities may be required to ensure that there exists a balanced and coherent judicial system for the protection of human rights in Bosnia and Herzegovina in its entirety;

finally, the integration of Bosnia and Herzegovina as a state, the consolidation of its constitutional situation and the effective development and functioning of its constitutional institutions may require that human rights protection be entrusted progressively, if not entirely, to the Constitutional Court of Bosnia and Herzegovina.

This opinion sets out a proposal for the future judicial protection of human rights in the Federation of Bosnia and Herzegovina in the light of the considerations outlined above. In reaching its conclusions the Commission has taken account of the experience gained from the functioning of the institutions concerned since their creation. It is also aware that amendments to legislation and to the Constitution of the Federation of Bosnia and Herzegovina may be required to bring this proposal into effect. A list of the constitutional provisions affected is appended.

JUDICIAL PROTECTION OF HUMAN RIGHTS IN THE FEDERATION OF BOSNIA AND HERZEGOVINA UNDER THE CONSTITUTIONAL REGIME IN FORCE

Judicial protection of human rights under the Constitution of the Federation of Bosnia and Herzegovina

The Constitution of the Federation of Bosnia and Herzegovina provides for three courts to be created at the level of the Federation: the Constitutional Court, the Supreme Court and the Human Rights Court (Article IV.C.1.1). Under Chapter IV.C of the Constitution, the composition and distribution of competences between these courts is as outlined below.

a) Constitutional Court

The Constitutional Court is composed of nine members: six nationals and three internationals. The primary functions of the Constitutional Court are to resolve disputes between cantons; between any canton and the Federation Government; between any municipality and the canton of which it is a part or the Federation Government; and between or within any of the institutions of the Federation Government. The Court also determines, at the request of one of the applicants specified under Article IV.C.3.10(2) of the Constitution, whether a law or a regulation is in conformity with the Constitution of the Federation. The Supreme Court, the Human Rights Court or a cantonal court have an obligation to refer any doubt as to whether an applicable law is in conformity with the Constitution to the Constitutional Court. Its decisions are final and binding.

Since the Court became operational in January 1996, it has received a total of 77 applications. Of these, 69 have been resolved. 17 were decided on the merits, 1 was withdrawn and 51 applications were held to be inadmissible (submitted by an unauthorised applicant or not within the jurisdiction of the Court).

b) Supreme Court

The Supreme Court is composed of a minimum of nine judges, although this number may be increased by legislation, and is the highest court of appeals of the Federation of Bosnia and Herzegovina. Under the Constitution it can hear appeals from cantonal courts in respect of matters involving questions concerning the Constitution, laws or regulations of the Federation and concerning other matters as provided for in Federation legislation, except those within the jurisdiction of the Constitutional Court or of the Human Rights Court. It also has original jurisdiction under Federation legislation over cases involving international and inter-cantonal crimes, including terrorism, drug trafficking and organised crime. The decisions of the Supreme Court are final and binding.

The number of judges of the Supreme Court is currently set at 21. However, 6 positions are vacant at present.

c) Human Rights Court

The competence of the Human Rights Court extends to any question concerning a constitutional or other legal provision relating to human rights or fundamental freedoms or to any of the instruments listed in the Annex to the Constitution of the Federation of Bosnia and Herzegovina. The Court has jurisdiction over cases commenced after 1 January 1991.

Any party to an appeal in which the Constitutional Court, the Supreme Court or a cantonal court has pronounced a judgment that is not subject to any other appeal may lodge an appeal with the Human Rights Court on the basis of any question within its competence. An appeal may also be lodged with the Human Rights Court if proceedings are pending for an unduly long time before any cantonal court, the Constitutional Court or the Supreme Court. Finally, the Constitutional Court, the Supreme Court and any cantonal court may, on the request of one of the parties or of its own motion, refer questions on matters falling with the competence of the Human Rights Court to that Court for a binding opinion.

Under the transitional provisions of the Constitution (Article IX.9) the Human Rights Court shall initially consist of seven judges, three of whom are to be appointed by Federation authorities and four of whom shall be foreigners appointed by the Committee of Ministers of the Council of Europe in accordance with its Resolution (93) 6. To date, the four foreign judges have not been appointed and the Court has not commenced functioning.

Relations between the three courts of the Federation

Certain features of the system of courts of the Federation are particularly striking. In particular, all three courts hand down final and binding decisions, and the distribution of competencies between the courts is unusual. It is especially difficult to distinguish between constitutional questions and human rights questions in the context of an entity where human rights are an integral part of the constitution, and this difficulty may discourage the Constitutional Court from using its possibility of referring human rights questions to the Human Rights Court. Similarly, the Supreme Court or a cantonal court may have difficulty deciding whether a preliminary question involving human rights issues should be referred to the Constitutional Court or the Human Rights Court. In such a case they would be obliged to refer the question to the Constitutional Court, as they are required under Article IV.C.3.11 of the Constitution to refer to that court any question of compatibility with the Constitution of an applicable law, whereas no such obligation exists with regard to the Human Rights Court.

Judicial protection of human rights in the Federation of Bosnia and Herzegovina in the context of the Dayton Agreement

In accordance with the transitional provisions of the Constitution of the Federation of Bosnia and Herzegovina (Article IX.9.d) the Human Rights Court is to operate within the framework of Resolution (93) 6 of the Committee of Ministers of the Council of Europe as long as that resolution remains applicable to the Federation - that is, until Bosnia and Herzegovina becomes a member state of the Council of Europe or until otherwise agreed between Bosnia and Herzegovina and the Council of Europe. As indicated in the Commission's *Opinion on the Establishment of a Human Rights Court of the Federation of Bosnia and Herzegovina* (CDL (97) 21 and CDL-INF (98) 15 pp. 76 ff.), the Committee of Ministers has already appointed members to the Human Rights Chamber in Bosnia and Herzegovina, as provided for in Annex VI to the Dayton Agreements, under its Resolution (96) 8. In these circumstances, the Committee of Ministers could decide not to proceed with the appointment of judges to the Human Rights Court of the Federation of Bosnia and Herzegovina if it believes that the aims of Resolution (93) 6 would not be served by the setting up of a second control body within the same state. As noted above (para. 13), the Committee of Ministers has not yet decided to proceed with these appointments.

The Venice Commission examined in detail the implications of the simultaneous functioning of two international human rights jurisdictional bodies in its *Opinion on the constitutional situation in Bosnia and Herzegovina* with particular regard to human rights protection mechanisms (CDL-INF (96) 9; CDL-INF (98) 15 pp. 30 ff.). It pointed to the length and complexity of the process of exhaustion of domestic remedies for victims of human rights violations, with the possible intervention of a municipal court, a cantonal court, the Supreme Court, the Human Rights Court as well as the Constitutional Court of the Federation, followed by the Human Rights Ombudsperson of Bosnia and Herzegovina and then, finally, the Constitutional Court of Bosnia and Herzegovina or the Human Rights Chamber. This excessively long process as well as the sheer complexity created by the proliferation of bodies entrusted with the task of human rights protection may not only be detrimental to victims' rights in itself but it may also discourage individuals from the Federation of Bosnia and Herzegovina from applying for relief to the European Court of Human Rights when this becomes possible. Simplification of this scheme is thus clearly desirable.

For these reasons, concerning the protection of individual victims of human rights violations within the Federation of Bosnia and Herzegovina and the coherence of human rights protection in Bosnia and Herzegovina as a whole, the Venice Commission has consistently advocated that the Human Rights Court of the Federation of Bosnia and Herzegovina should not be created (see the Commission's opinions cited above and the *Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina* (CDL-INF (99) 12)).

The Commission maintains its opinion that this court should not be created, as its creation does not correspond to any pressing need, is unlikely to improve the protection of human rights within the Federation of Bosnia and Herzegovina and may indeed rather hinder the process. The remainder of this opinion therefore deals with the future system of judicial protection of human rights in the Federation of Bosnia and Herzegovina in the absence of the Human Rights Court.

style='mso-bidi-font-size:12.0pt;font-family:Palatino'>JUDICIAL PROTECTION OF HUMAN RIGHTS IN THE FEDERATION OF BOSNIA AND HERZEGOVINA IN THE ABSENCE OF THE HUMAN RIGHTS COURT

Situation if no amendments are made to the Constitution of the Federation of Bosnia and Herzegovina

The Commission has previously considered the question of the form that judicial protection of human rights will take in the Federation of Bosnia and Herzegovina in the absence of the Human Rights Court. It has noted that although the Dayton Agreement and the Washington Agreement neither have the same parties nor cover the same area of jurisdiction and therefore the formal or legal validity of the provisions on the Human Rights Court of the Federation of Bosnia and Herzegovina has not been affected (CDL (97) 21), the effect of Annex VI to the Dayton Agreement, providing for a human rights control body to be set up at the level of the state by the Committee of Ministers of the Council of Europe acting under the Resolution (93) 6 mechanism, is to render inoperative or obsolete the provisions on the Human Rights Court of the Federation of Bosnia and Herzegovina (CDL-INF (99) 12).

It should be borne in mind that the Constitution of Bosnia and Herzegovina (Annex IV to the Dayton Agreement) provides that the rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina, and further, that they shall have priority over all other law. There is thus an obligation for all courts operating at all levels in Bosnia and Herzegovina (whether at the level of the state or within the entities) to apply the provisions of this Convention directly (*in concreto*) in the context of the cases arising before them. This includes violations of human rights committed by administrative bodies.

Several implications flow from this. First, this obligation, although important, is of limited effect with respect to the Constitutional Court in the exercise of its primary functions, as only a limited number of individuals or legal entities can lodge cases with it under the provisions of Article IV.C.3.10 of the Constitution of the Federation. However, with respect to any questions referred to it by the Supreme Court or a cantonal court of the Federation under the mandatory referral provisions of Article IV.C.3.11, the Constitutional Court has an obligation to apply the rights and freedoms of the European Convention on Human Rights and its Protocols directly whenever it undertakes a review of constitutionality. Likewise, the Supreme Court, in any case that comes before it, not only can but must ensure that these rights and freedoms are applied.

Furthermore, the Constitutional Court cannot find a disputed legal provision to be in conformity with the Federation Constitution if the provision conflicts with any of the human rights instruments incorporated into it by the Annex to the Constitution. Thus a large part of the appellate jurisdiction of the Human Rights Court falls within the jurisdiction of the two other courts of the Federation, with the Supreme Court undertaking concrete review of human rights questions on the basis of the European Convention of Human Rights and its Protocols in the appeals and first instance cases before it, and the Constitutional Court undertaking concrete and abstract review of human rights issues in the questions referred to it by other courts and abstract review of human rights issues when it deals with cases involving abstract constitutional review. Indeed these overlaps in competencies, combined with the unusual existence of three highest jurisdictions within a single entity, are an essential part of the complexity and confusion that made the creation of the Human Rights Court undesirable even before the Dayton Agreement came into effect.

Certain aspects of the jurisdiction of the Human Rights Court as laid down in the Constitution do not overlap with the competencies of the other courts of the Federation: specifically, the possibility for parties to lodge an appeal with the Human Rights Court if proceedings are pending for an unduly long time before another court of the Federation or a cantonal court. This possibility, however, also falls within the jurisdiction of the Human Rights Chamber or of the Constitutional Court of Bosnia and Herzegovina if the two are merged. In the absence of the Human Rights Court, applicants may directly address the Human Rights Chamber, which, in keeping with Strasbourg case-law, may deem a case admissible when all effective remedies are exhausted as determined by the facts. Naturally, particular care should be taken by state institutions when examining cases from the Federation to ensure, where there are differences between the human rights instruments applicable at the Federation and the state level, that the human rights standards applied are not lower than those applicable in the Federation.

The right of complainants to appeal to the Constitutional Court of Bosnia and Herzegovina or the Human Rights Chamber on other grounds will of course remain unchanged under this arrangement. The final domestic instance of review of human rights questions arising in the Federation of Bosnia and Herzegovina will continue to be a body at the level of the state. When Bosnia and Herzegovina ratifies the European Convention on Human Rights, victims will be able to petition the European Court of Human Rights once all domestic remedies have been exhausted.

Such a solution may not, however, be obvious to victims of human rights violations and it would be advisable to proceed with constitutional amendments at some point so as to ensure that the Constitution of the Federation reflects clearly the structure of human rights protection guaranteed within the Federation, in the context of the protection mechanisms available in Bosnia and Herzegovina, so that the avenues of appeal that may be explored by victims of human rights violations within the Federation and their lawyers are clear to the very people that need to use them.

Amendment of the Constitution of the Federation of Bosnia and Herzegovina so as to eliminate the Human Rights Court

It will be noted that the above proposal, although minimalist, would nevertheless require some amendments to the Constitution of the Federation of Bosnia and Herzegovina in order best to protect persons complaining of human rights violations. The Commission is of the opinion that in such circumstances it would be best to proceed with constitutional changes sooner rather than later in order to ensure that the highest standards and most rational system of judicial protection of human rights possible are provided to complainants. In particular, in order to avoid encumbering the Constitutional Court of the Federation with questions of minor importance, it is suggested that the referral of constitutional questions to the Constitutional Court of the Federation should no longer be obligatory but should be made at the discretion of the judge concerned.

The Commission thus recommends that the Constitution of the Federation be amended as soon as possible, not only in order to eliminate all references to the Human Rights Court, but also, by making the mandatory referrals provided for under Article IV.C.3.11 of the Constitution of the Federation optional. Concretely, this means replacing the word "shall" with "may" in the above-mentioned Article, so as to simplify the system, thereby increasing both its clarity and its effectiveness in protecting and affording remedies to aggrieved persons. The Commission proposes that:

in accordance with their obligations under the Constitution of Bosnia and Herzegovina, all courts in the Federation shall continue to apply directly the provisions of the European Convention of Human Rights and its Protocols;

any human rights issues raised before the cantonal courts or the Supreme Court of the Federation may be referred by this court to the Constitutional Court of the Federation or the Constitutional Court of Bosnia and Herzegovina, as the court sees fit;

the decision of the Constitutional Court of the Federation on an issue referred to it under the above procedure should be binding on the parties and on all courts in the Federation in subsequent proceedings on the same case;

- the judgment of the cantonal court or Supreme Court may be subject to an appeal on constitutional or human rights grounds by one of the parties to the Human Rights Chamber or the Constitutional Court of Bosnia and Herzegovina as appropriate, and this judgment shall be final and binding;

- given that individual complaints may be made to the institutions set up under the Dayton Agreement, the possiblity of making individual complaints to the Constitutional Court of the Federation should not be introduced;

in the interests of coherent human rights protection in Bosnia and Herzegovina, the appropriate forum for individual complaints on human rights matters will be the forum competent in such matters at the level of the state (the Human Rights Chamber or the Constitutional Court of Bosnia and Herzegovina if the two are merged as proposed by the Venice Commission in its *Preliminary Proposal on the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina* (CDL-INF (99) 12));

- the competence of the Human Rights Court to hear appeals on cases pending for an unduly long time should not be transferred to another court within the Federation, since such matters already fall within the competence of the Ombudsman of the Federation as well as that of the Ombudsperson, the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina under Article 6 of the European Convention on Human Rights.

Several observations should be made. First, this scheme, although greatly reducing the overall number of avenues to be explored by applicants and thereby reducing the complexity of the scheme and the probable length of proceedings, will no doubt lead to an increase in the number of cases lodged with the Constitutional Court of the Federation. It may be advisable to amend the rules of procedure of this court in order to allow it to filter cases effectively and to provide shorter judgments on simpler questions where established case-law already exists, so as to avoid being overburdened. Other courts of the Federation may also apply the human rights case-law of the Constitutional Court directly where clear case-law exists, without referral. Applicants who feel their rights have been violated by the failure of a court in the Federation to refer a human rights question to the Constitutional Court of the Federation appropriately may of course appeal the judgment of this court to the Human Rights Chamber or the Constitutional Court of Bosnia and Herzegovina.

Second, although this model would theoretically allow applicants to raise several human rights questions at various times during proceedings even before the same court provided that those questions raise different human rights issues, it will in practice very quickly become apparent that it is in applicants' interest to raise all human rights questions relevant to their case at the same time so as to avoid the unnecessary expense and delay involved in repeated proceedings before the Constitutional Court of the Federation. If necessary, appropriate provisions could also be made in the rules of procedure of this Court to enable it to deal with vexatious litigants.

Third, the probable increase in the workload of the Constitutional Court of the Federation may mean that an increase in the means at the disposal of the Court will be required. In any case it would be advisable for the composition of both the Supreme Court and the Constitutional Court to include a certain number of judges with particular expertise in human rights so as to enable them to assume authoritatively their increased competence in human rights. This will be particulary important in the early days after amending the Constitution and until a certain core body of jurisprudence in human rights matters is established within the Federation.

Finally, as wide-reaching changes are also envisaged amongst the institutions at the level of the state that are competent in human rights matters, careful coordination will be needed to ensure that the overall structure of human rights protection in Bosnia and Herzegovina remains clear, coherent and effective.

CONCLUSIONS

The Commission finds that:

in order to reduce the complexity of the system of judicial protection of human rights in the Federation of Bosnia and Herzegovina and to avoid duplication of bodies and competences within Bosnia and Herzegovina, the Human Rights Court of the Federation of Bosnia and Herzegovina should not be created;

the provisions of the Constitution of the Federation on the Human Rights Court have in any case been rendered inoperative by the entry into force of the Dayton Agreement;

much of the jurisdiction of the Human Rights Court as provided for under the Constitution of the Federation of Bosnia and Herzegovina already falls within the jurisdiction of either the Constitutional Court or the Supreme Court, and the remainder falls within the jurisdiction of the Human Rights Chamber and can be assumed by it without creating a conflict with the Constitution of the Federation and without requiring any amendments to the Constitution;

- it would nonetheless be advisable to amend the Constitution in order to make its operation clearer to applicants, and in this case, broader amendment of the Constitution should be considered in order to ensure that a streamlined, effective scheme of judicial protection of human rights exists, taking into account the legal avenues available to applicants for claiming violations of human rights not only within the Federation but also at the level of the state;

this scheme should be based on the principle of referral to the Constitutional Court of the Federation or the Constitutional Court of Bosnia and Herzegovina, as the referring court deems appropriate, of human rights issues raised before cantonal courts or the Supreme Court, with individual complaints on human rights issues being available only before the institutions at the state level, as described in part 2.2 above. The complexity of the current constitutional scheme would thereby be drastically reduced, providing a clearer, more streamlined system in the interests of more effective protection of human rights;

- in order to cope with the probable increase in the workload of the Court, the means available to the Constitutional Court of the Federation may need to be increased; in any case, the composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights, especially in the early stages of implementation of these constitutional changes, where a core body of case-law on such issues is being established.

The Commission remains at the disposal of interested parties and the Office of the High Representative, should they so request, to collaborate in the implementation of the proposed changes.

APPENDIX

Constitutional changes necessary to give effect to the Venice Commission's proposals for the future protection of human rights in the Federation of Bosnia and Herzegovina

The following articles of the Constitution of the Federation of Bosnia and Herzegovina, which make express reference to the Human Rights Court, will need to be deleted or amended as follows in accordance with the proposal contained in part 2.1:

Article II.A.6

delete last sentence

Article II.B.2.6(1)

delete ", including any in the Human Rights Court "

Article IV.C.1.1(2)

amend to read as follows:

The Courts of the Federation shall be:

(a) The Constitutional Court; and

The Supreme Court.

Article IV.C.3.10(3)

delete "or the Human Rights Court "

Article IV.C.3.11

delete ", the Human Rights Court "

Article IV.C.4.15(1)

delete "or of the Human Rights Court "

Articles IV.C.5.18-23

delete

Article IX.9

delete ss 9(d)(i)-(iii)

A further constitutional change as described in para. 27 (in addition to those listed above) will be required in order to give effect to the proposals contained in part 2.2:

Article IV.C.3.11

replace "shall" with "may"

Finally, the Law on the Human Rights Court of the Federation of Bosnia and Herzegovina will need to be repealed.

vii. Opinion on the draft Civil Service Act of the Republic of Bulgaria (CDL (99) 14) adopted by the Commission at its 38th Plenary meeting (Venice, 22-23 March 1999)

I. Introduction

The Council of Europe Parliamentary Assembly asked the European Commission for Democracy Through Law (Venice Commission) to give an opinion on the Civil Service Act of the Republic of Bulgaria. At its 37th plenary meeting in December 1998, the Venice Commission held an exchange of views on the bill, based on preliminary opinions given by the rapporteurs.

After further information had been received, the rapporteurs resumed their work on the basis of a new draft forwarded by the Bulgarian authorities.

The present opinion was drawn up on the basis of the text supplied by the Bulgarian parliament in January 1999. The bill submitted to the National Assembly for a second reading differed in some respects from the version initially submitted to the Venice Commission.

This opinion incorporates the rapporteurs main comments. A more technical analysis of the text of the Civil Service Act is given in their individual opinions, which are appended to the present opinion.

II. General comments on the text as a whole

1. The text outlines the general structure of the civil service, lays down the main organisational rules and establishes a status for civil servants, including rules for their appointment.

Firstly, it should be noted that the main rules applicable to the Bulgarian civil service are dispersed in various laws and regulations which partially overlap.

For example, the basic principles governing the civil service are laid down in Section 2 (1) of the Administration Act, and reproduced in almost identical terms in Section 19 of the bill, which deals with the duties of civil servants. The same applies to the provisions concerning the power to appoint civil servants (Section 9 (2)), their responsibilities (Section 2 (5)) and the different positions available (Section 12 (1)).

2. Organisational and operational rules are set out in the Organisational Codes adopted by the Council of Ministers for each ministry, but there is no basic text defining the concepts used.

According to the text of the bill, Bulgaria intends to establish a civil servant status; it must make a definite choice between a career-based system and a post-based system. It is not clear from the text of the bill which of these the Bulgarian legislature has selected. Although the draft appears to favour a career-based system, concepts such as civil servants, categories, ranks, groups and positions are not defined clearly enough to avoid confusion with a post-based system.

3. The draft fails to strike a balance between general provisions such as basic principles to be observed by civil servants and very detailed technical provisions on their economic and social rights.

The Act should normally be confined to basic rights and principles, leaving it to a regulation-making body such as the Council of Ministers to adopt detailed implementing measures. This is simply a question of efficiency: it should be possible to adjust the arrangements for application of a law easily and quickly without any need for legislative intervention.

III. Problems raised by specific sections of the Act

4. The bill divides civil servants into two categories - directing servants and experts (Section 5). The legal significance of such a distinction is unclear. Section 2 (2) requires the Council of Ministers to determine job titles for different civil service positions and to divide them into groups and ranks. The question arises as to whether the groups refer to the categories mentioned in Section 5.

There does not seem to be any justification for the fact that the principles to be observed by civil servants in the course of their duties are divided between Sections 4 and 19. Moreover, these sections simply echo the provisions of Section 2 (1) of the Administration Act. The bill would be more homogeneous if all these provisions were brought together in a single chapter on the duties of civil servants.

5. It is unfortunate that the new version of the bill does not retain the principles of accessibility and openness contained in the previous version. In the new text, they are replaced by the principle of stability. This might weaken the position of citizens vis--vis the administration, particularly since the right of access to information is guaranteed by Article 41 (2) of the Bulgarian Constitution.

The omission of these principles may even give rise to a violation of that constitutional rule. Section 25 (1) requires civil servants to respect the principle of confidentiality. However, the appointing authority determines which information is to be considered confidential (Section 25 (2)). It is therefore left entirely up to the authorities to decide whether information is confidential; this is contrary to the logic of the constitutional rule[6].

6. A serious problem arises in relation to Chapter 10 concerning monitoring of the proper application of civil servant status. This chapter sets up an internal monitoring body within the government: the State Administrative Commission.

According to Section 128, this body exercises its powers in conjunction with the Council of Ministers, which determines its membership on the proposal of the Minister for State Administration. The appointment of its members consequently appears to be a highly political process. Given that its structure and activities are also determined by a Council of Ministers regulation, it is doubtful whether this body enjoys the necessary independence from the political authorities. Its precise role and the scope of its powers are not clear from Section 131.

Section 135 also gives this body the power to issue instructions and orders to the appointing authorities; this may result in a politicised civil service.

In this connection, a monitoring institution similar to that of the ombudsman would be more appropriate than the Administrative Commission as presented in the text under discussion.

viii. Opinion on the reform of the judiciary in Bulgaria (CDL-INF (99) 5) adopted by the Commission at its 38th Plenary meeting (Venice, 22-23 March 1999)

Introduction

The Monitoring Committee of the Parliamentary Assembly of the Council of Europe decided to request from the Venice Commission a legal opinion on the draft law amending and supplementing the Bulgarian Law on the Judiciary. The Commission was informed of this request by letter of 25 September 1998 by Mr Bruno Haller, Clerk of the Assembly.

At its 37th Plenary Meeting, on 11-12 December 1998 the Commission held an exchange of Views on the judicial reform in Bulgaria with Messrs Gotsev, Minister of Justice, and Toshev, Chairman of the Bulgarian Delegation to the Parliamentary Assembly of the Council of Europe (CDL (98) PV 37). In particular, the Commission was informed that the draft law had already entered into force and that it had been challenged before the Constitutional Court. The Commission set up a working group on the reform of the judicial system in Bulgaria consisting of Messrs Hamilton, Lopez Guerra and Said Pullicino, Ms Suchocka and Mr Svoboda. In order not to interfere with the case pending before the Bulgarian Constitutional Court, the Commission asked its working group to visit Bulgaria once the Court would have handed down its decision. The Constitutional Court delivered its decision on 14 January 1999 (CDL (99) 12). On 18-21 February 1999, Messrs Hamilton, Lopez Guerra and Said Pullicino made a visit to Bulgaria in order to assess the impact of the reform and to hold an exchange of views with the different interested parties, including the parliamentary opposition (see also memorandaCDL(99)16).

The present opinion is based on the comments of Messrs. Hamilton, Lopez Guerra and Said Pullicino (CDL (99) 21, 11 and 10) and was adopted by the Commission at its 38th Plenary Meeting (Venice, 22-23 March 1999).

Constitutional and legal situation

2.1 Constitutional basis for the judicial system

The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of Government shall be independent (Article 117.2 of the Constitution) and that the judicial branch of Government shall have an independent budget (Article 117.3 of the Constitution). The judicial branch of Government has three parts (a) the courts (b) the prosecutors office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.

Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes, courts martial and district courts. Specialised courts may be set up by virtue of a law, but extraordinary courts are prohibited (Article 119 of the Constitution).

Justices, prosecutors and investigating magistrates are elected, promoted, demoted, reassigned and dismissed by the Supreme Judicial Council which consists of 25 members. There are 3 *ex officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the Chief Prosecutor. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judicial branch. All 22 elected members must be practising lawyers of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister for Justice, who shall not be entitled to a vote (Article 130 of the Constitution).

Justices, prosecutors and investigating magistrates, become unsubstitutable upon completing a third year in the respective office. They may be dismissed only upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime, or upon lasting actual disability to perform their functions over more than one year (Article 129.3 of the Constitution). They enjoy the same immunity as the members of the National Assembly (Articles 132.1 and 70 of the Constitution). Therefore, they are immune from detention or criminal prosecution but can be detained in the course of committing a grave crime. The immunity of a justice, prosecutor or investigating magistrate may be lifted by the Supreme Judicial Council only in the circumstances established by the law (Article 132.2 of the Constitution).

The organisation and the activity of the Supreme Judicial Council, of the courts, the prosecution and the investigation, the status of the justices, prosecutors and investigating magistrates, the conditions and the procedure for the appointment and dismissal of justices, court assessors, prosecutors and investigating magistrates and the materialisation of their liability are to be established by a law (Article 133 of the Constitution). This law is the Judicial System Act of the Republic of Bulgaria which was enacted in

1994 and has been amended in 1994, 1996, 1997 and 1998.

2.2 The Act constituting an amendment to the Judicial System Act of the Republic of Bulgaria

The specific remit of the Commission was to report concerning the law on amendments of the Judicial System Act of Bulgaria which was promulgated in the State Gazette no. 133 of 11 November 1998 and entered into force on 15 November 1998 (CDL (98) 87). The text of the Act as finally enacted (seeCDL(98)93 rev.) differs from that which was introduced both because the President of the Republic of Bulgaria referred the Act to the National Assembly for further debate, as a result of which a number of provisions were not proceeded with, and because a number of the provisions of the Act were successfully challenged before the Constitutional Court of Bulgaria in an application brought by the Prosecutor General and a number of Deputies of the National Assembly. While the request from the Monitoring Committee of the Parliamentary Assembly was specifically directed to the last amendment to this Act which in the meantime already had entered into force, the Venice Commission felt obliged to address some aspects of the Act as a whole.

Arising out of the Constitutional Courts verdict of 14 January 1999 (CDL (99) 12) a number of provisions of the Act as enacted were struck down as unconstitutional, including changes in procedures for the budget of the judicial system, which were held to be an interference with the autonomous budget of the Constitution; a proposal to impose disciplinary sanctions on judges and prosecutors for breach of the Oath of Office, which was held to be impermissibly vague; a proposal to extend to the Chairman of the Supreme Court of Cassation, the Supreme Court of Appeal and the Minister for Justice and European Legal Integration the right to request the Supreme Judicial Council to divest a judge, prosecutor or investigator of immunity and temporarily remove him from Office (the Court held that only the prosecutor could make such a proposal); and the right of the Supreme Judicial Council to appoint a prosecutor in cases involving disciplinary cases against members of the Judiciary. The Constitutional Court also rejected a proposal that appeals from the disciplinary panel of the Supreme Judicial Council should be to a mixed court staffed from the Supreme Court of Cassation and the Supreme Administrative Court. As a result such appeals lie only to the Supreme Administrative Court. It is unnecessary for the Commission to give any further consideration to these aspects of the amendments to the Judicial System Act which, having been rejected by the Constitutional Court, are no longer in force.

The Venice Commission has absolutely no reason to doubt that the Constitutional Court reached its decision, after due deliberation, free from any undue influence. That judgment determines the constitutionality of the amendments according to the Bulgarian Constitution. Any observations on the judgment itself would not only be outside the scope of the Commissions mandate but would also be improper since the opinion sought of the Venice Commission was limited to an examination on whether the Judicial System Act, as amended, satisfied the required standard for an independent Judiciary and adequately guarantees the basic requirements of a democratic society.

The principal issues dealt with in this opinion are the following:

the election of a new Supreme Judicial Council before the five year mandate of the previous Council had elapsed (point 3.1 below);

the composition of the Supreme Judicial Council (point 3.2 below);

provisions which strengthen the powers of the Minister for Justice and European Legal Integration both generally and within the Supreme Judicial Council, and particularly in relation to the appointment, disciplining and dismissal of judges and prosecutors (point 3.3 below);

warnings to the courts by the Minister of Justice (point 3.4 below);

the disciplinary sanction of transferring a magistrate to another district (point 3.5 below);

the authorisation of leaves by the Minister of Justice (point 3.6 below);

changes in the qualifications which are required for judges (point 3.7 below);

a rule preventing prosecutors from withdrawing cases without the consent of the court (point 3.8 below);

immunity of magistrates (point 3.9 below).

2.3 The justifications advanced for the introduction of the amending Act

The *rapporteurs* discussed the amending Act with a wide range of interests in Bulgaria. These included the Minister for Justice and European Legal Integration, the newly appointed Prosecutor General, the *juge rapporteur* of the Constitutional Court who dealt with the constitutional case in which the Act was impugned, the President of the Supreme Administrative Court, the President of the Bulgarian Bar Association, the President of the Bulgarian Judges Association, the Chief Prosecutor, the Chairman of the Legal Affairs Committee of Parliament, representatives of political parties, including the principal governing party, the Union of Democratic Forces, and the two principal opposition parties, the Democratic Left (Bulgarian Socialist Party) and the Euro left party, and a group of judges, prosecutors and investigators based in Plovdiv, the second city of Bulgaria.

Supporters of the amending Act justified its enactment by reference to serious problems concerning the judicial system in Bulgaria in dealing with crime. In many cases, criminals were released shortly after their arrest and their cases never came to trial. The *rapporteurs* were informed that corruption amongst prosecutors is believed to be widespread. There have, however, been no cases where such corruption has been proved.

There were serious delays in cases coming to court. The large majority of the judges had been appointed under the former communist regime prior to democratisation, and whilst these judges had been de-politicised and guaranteed security of tenure inefficiencies within the judicial system remained. It was necessary, therefore, to take steps to ensure that disciplinary procedures functioned effectively in cases where improper behaviour on the part of prosecutors could be shown or where judges were incompetent.

In addition to this, a number of important new courts intended to be established under the Constitution adopted in 1991 had been brought into being only within the recent past, although under the Constitution they should have been established within one year of its enactment. These included the new courts of appeal which had been established only in 1998. In the view of supporters of the amending Act, the need to properly represent the judges on the Supreme Judicial Council justified interrupting the five year term of office of the Supreme Judicial Council, which is guaranteed under the Constitution, notwithstanding that less than two years of its term of office had run. This reasoning had been accepted by the Constitutional Court in its decision.

2.4 The Objections to the Act

The most serious objections which the *rapporteurs* heard to the amendments to the Judicial System Act were made by the two opposition political parties (see alsoCDL(99)16). Their spokesmen expressed fears that the amendments would in effect result in the total control of the Judiciary by the Executive. Very often therefore, the representations of Opposition parties were directed not at the text of the law itself but at the way in which it was being or was expected to be implemented. They voiced the fear that the changes in disciplinary procedure for judges and prosecutors would lead to widespread dismissal of existing judges and would threaten and undermine judicial independence.

Some of the opposition spokespersons, though not all, argued that the new Supreme Judicial Council was a highly politicised body. It was pointed out that the parliamentary component of the Council had been elected only with the votes of the current majority in Parliament. (The Government sides contention was that this was because the opposition deputies had declined to participate). Opposition Deputies did not accept the *bona fides* of the decision to replace the old Supreme Judicial Council.

Objections were also raised to the strengthening of the Minister for Justice and European Legal Integrations powers on the grounds that they infringed on the independence of the Judiciary. While opposition representatives did not dispute that a serious problem in relation to the prosecution of crime existed, they doubted that the proposals in the amendment to the Judicial System Act were the correct way to tackle the problems.

The *rapporteurs* also heard a number of other objections from different sources. These included the relaxation in qualifications for appointment as a judge or prosecutor and the idea that Parliament should elect part of the Supreme Judicial Council at all.

Opinion of the Venice Commission

This opinion of the Venice Commission takes into account all views submitted to it, giving due weight to the submissions of opposition parties. It should not be construed as being critical of the Bulgarian legislator or of the judicial authorities in a negative sense. This opinion is being offered in a spirit of co-operation and is meant as an objective independent assessment of a legal document that could contribute to a better understanding of those areas which have provoked controversy and that need to be addressed to ensure a proper functioning of the Act.

In considering the various objections made to the Act, it is important to note at the outset it is not part of the Commissions functions to express any view in relation to the compliance of the amendments to the Judiciary System Act with the Constitution of Bulgaria. That question is one solely for the Constitutional Court of Bulgaria. The Commissions function is confined to an examination of the Bulgarian law in the light of international standards in the field of democracy, human rights and the rule of law. The criteria for the evaluation of these amendments are taken from the requirements concerning the independence of the Judiciary included in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other related international documents (including Article 6.1 ECHR, Article 10 of the Universal Declaration of Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights). The comments will refer not only to the amendments strict conformity with the international requirements concerning the independence of the Judiciary, but also to considerations on the suitability of these amendments from the standpoint of improving the conditions for guaranteeing that independence. Consequently, this opinion does not confine itself to suggest amendments to the Judiciary System Act but equally points out provisions of the Constitution itself which might be re-examined.

3.1 The suspension of the existing Supreme Judicial Council

The Bulgarian authorities faced a choice between replacing the existing Supreme Judicial Council with a new one, even though less than two years of its five year term of office provided for under the Constitution had elapsed, or leaving important elements of the Bulgarian Judiciary unrepresented on the Council because courts of which they are members had not been established at the time of the election of the previous Council notwithstanding the requirement that those Courts should be established within one year of coming into force of the Constitution. The Constitutional Court of Bulgaria has held that the procedures which were adopted are in conformity with the Constitution of Bulgaria and this finding must be respected by the Venice Commission. The Commission does not consider that any question of fundamental rights arises from the choice made as to which of two conflicting provisions in the Constitution of Bulgaria should have prevailed in these circumstances.

Obviously, transitional clause number 4 of the Constitution cannot be interpreted as allowing the dismissal of the Supreme Judicial Council and the election of a new Council every time in future when new structural and procedural laws which implement constitutional mandates are enacted. Such an interpretation would allow any new parliamentary majority to introduce new procedural laws to implement the Constitution and thus alter the composition of the Council to adapt it to the new organization of the Judiciary. Consequently, this transitional clause must not be invoked again.

The transitory nature of the choice made and the fact that this decision was based on the interpretation of conflicting provisions in the Constitution would not justify any further comment by the Venice Commission except the general consideration that lack of consensus between the major political forces before such a decision was taken, inevitably contributed to the aura of suspicion and mistrust surrounding the Supreme Judicial Council since its inception.

3.2 The composition of the Supreme Judicial Council

There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content

of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

Given that the Bulgarian legislator has opted for a Supreme Judicial Council that includes direct participation of the legislative branch through the election of a number of its members by Parliament and of the Executive through the chairmanship of the Minister of Justice and European Legal Integration, the composition of the Council becomes an important and determining element that has to be examined. The provision that eleven of the twenty five members of the Supreme Judicial Council are elected by Parliament is contained in the Constitution itself. Under the Constitution, all the elected members of the Council, including this parliamentary component, must consist of practising lawyers of high professional and moral integrity with at least fifteen years of professional experience. Nine of the eleven members of the recently elected parliamentary component of the council are judges. The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament.

The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above the conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.

The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component was elected exclusively by representatives of the governing parties.

A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.

3.3 The strengthened powers of the Minister for Justice and European Legal Integration

The presence of the Minister of Justice in the Council, in the capacity of Council President as provided for in Article 130.5 of the Constitution, does not seem, in itself, to impair the independence of the Council. Moreover, in those countries that have adopted similar institutions, the presence of members of the Executive Power in the Councils of the Judiciary is not infrequent. Thus, the Italian Constitution establishes that the President of the Republic shall preside the Council of the Judiciary and the French Constitution makes the President of the Republic President of the Council. Furthermore, in France the Minister of Justice is the *ex officio* Vice President of the Council as well as its President, in the absence of the President of the Republic.

The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (*Sramek v Austria*, 22.10.1984, no. 84 of Series A of the Publications of the Court). In the Bulgarian system, notwithstanding the Ministers power to make proposals, the actual decision to appoint or to dismiss is made by the Supreme Judicial Council, on which the judicial branch has a majority representation. This decision follows a hearing before a disciplinary panel composed of five members drawn by lot. Furthermore, decisions of the Supreme Judicial Council, being administrative decisions, are subject to review by the Supreme Administrative Court in relation to procedural, though not substantive reasons. Under the Constitution, the Supreme Judicial Council is chaired by the Minister for Justice and European Legal Integration. He does not chair the disciplinary panel.

There is, however, a case to be made that when the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it. It might have been desirable that the increase in the Ministers powers to put proposals to the Supreme Judicial Council would have been balanced by a provision that in such cases some other person of standing (perhaps the President of the Constitutional Court) would preside over the meeting. It is appreciated, however, that any such change could not formally be made without an amendment to the Constitution of Bulgaria.

Given that that Parliament appoints eleven of its members by a simple majority vote it might be preferable to grant the power to advise the initiation of disciplinary proceedings to the Inspectorate in order to suppress any direct interference of the Government in disciplinary proceedings. Although appointed by the Minister of Justice and European Legal Integration, inspectors must have the approval of the Council to be appointed (Article 36.a of the Judicial System Act), and therefore, they offer a greater guarantee of impartiality.

3.4 Warnings to the courts by the Minister of Justice (Article 172 of the Judicial System Act)

Article 172 of the Judicial System Act (amended) grants the Minister of Justice and European Legal Integration the power to bring to the attention of regional, district and appellate judges (...) what appear to the Minister to be irregularities in their work of initiating and processing certain cases.... In order to avoid undue influences on the courts in taking their decisions on the cases subject to their jurisdiction, this provision has to be strictly interpreted to refer only to administrative irregularities. If there are, or seem to be, irregularities in the Courts substantive handling of a case, it is the task of the parties to the proceedings, including the prosecutor, to denounce these irregularities to the competent higher court, using the appropriate legal remedies.

3.5 Disciplinary sanction of transferring a magistrate to another district (Article 169.5 of the Judicial System Act)

Article 169.5 of the Judicial System Act will now permit, as a disciplinary sanction, relocation of a judge, prosecutor or investigator to another court region for up to three years. The use of relocation as a disciplinary sanction is open to objection, not least from the point of view of the citizens in the region to which a disciplined judge, prosecutor or investigator is to be transferred.

3.6 Authorisation of leave (Article 190.2 of the Judicial System Act)

Article 190.2 of the Act regulates the authorisation of judges', prosecutors' and investigators' leave. Its subparagraph 4 establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.

3.7 Qualifications for judicial officer (Article 127 of the Judicial System Act)

The amended Judicial System Act provides for a relaxation in the qualifications required for appointment to judicial office (Article 127). In particular, the occupations recognised as constituting a record of service at all levels in the Judiciary have been extended to include government agent, subagent and judicial candidate. While the Venice Commission is conscious of the practical difficulties facing any country in transition from a communist system to democracy in finding suitable candidates for judicial office, care needs to be taken to ensure that any relaxation of necessary qualifications does not lead to a reduction in the professional calibre of the Judiciary.

3.8 Requirement of court consent to withdraw a prosecution

The Venice Commission considers that a rule requiring a prosecutor to have the consent of the court before withdrawing a case is a proportionate response to a perception of fraud among elements of the prosecution service since it makes it difficult for the prosecutor to make such a decision which is without objective justification.

3.9 Immunity of judges and prosecutors

As already noted, under the Constitution judges, prosecutors and investigators have the same immunity from detention or criminal prosecution as legislators (Article 132.1 of the Constitution). This immunity can be set aside only by the Supreme Judicial Council. The Constitution confers no immunity from criminal investigation. While no doubt immunity could be justified if it were necessary to prevent judges or prosecutors from interference from vexatious proceedings it ought not to operate to place judges and prosecutors above the law. Were it to do so it would infringe the basic principle that no person is above the law. Despite the widespread belief that there is corruption within the prosecution service, the Venice Commission notes that no cases of corruption have been proved. This could be due to lack of evidence; if there were evidence in an appropriate case the Supreme Judicial Council should not hesitate to withdraw immunity to enable court proceedings to take place. It would be important that the requirement to waive immunity before a prosecution could take place could not operate so as to prevent investigations in cases where there was a reasonable ground to suspect a crime had been committed by judges or prosecutors.

Conclusion

Taken individually it seems possible to justify most of the measures in the amended Judicial System Act which have been impugned, nevertheless the measure taken as a whole represents a significant increase in the power of the parliamentary majority and of the executive. While the justification for this development is the serious problem relating to crime and the criminal justice system in Bulgaria, and while in a democracy the democratically elected Government and the responsible Minister must in the last analysis be accountable for the proper functioning of the judicial system, it would be desirable if in the longer term Bulgaria were to be able to move towards a system where the judges themselves, and the prosecutors, would be able to assume a greater responsibility for the proper functioning of the judicial and prosecutorial system and the executive would be able to step back from it. Although the new powers assumed by the Executive by virtue of the reform of the Judicial System Act are not incompatible with European standards concerning judicial independence, a judicious and restrained use of these new powers would be highly recommended.

If the judicial system is to function properly, it is essential that the political culture develop in such a way that the judicial system is not the subject of party political controversy and that respect for judicial independence becomes imbued in this culture. Wide political consensus is essential if the Supreme Judicial Council is to be effective. That consensus seems unfortunately to be lacking. It is not up to the Venice Commission to find fault or identify responsibilities. While in the last analysis it may be necessary to ensure that a parliamentary minority cannot block the election of the members of the Supreme Judicial Council to be chosen by the Parliament, it would nonetheless be desirable to seek the highest degree of consensus possible in the election process.

The Venice Commission wishes to thank all Bulgarian interlocutors who met their *rapporteurs* for the frank and very informative discussions which enabled them to assess the situation of the Judiciary in Bulgaria in a spirit of genuine co-operation.

ix. Opinion on the questions raised concerning the conformity of the laws of the Republic of Moldova on local administration and administrative and territorial organisation to current legislation governing certain minorities (CDL -INF (99) 14 adopted by the Commission at its 40th Plenary meeting (Venice, 15-16 October 1999)

In their report on the honouring of the commitments entered into by Moldova on its accession to the Council of Europe, Mr Columberg and Ms Durrieu questioned whether the laws on local administration of 1998 and administrative and territorial organisation as adopted by the Moldovan Parliament were compatible with the Moldovan Constitution and the Organic Law on the Status of Gagauzia (para. 102 of Document AS/Mon (1998) 52 rev. 2 of 14 January 1992), and thought an opinion should be requested from the Venice Commission on this matter.

In March 1999 the Venice Commission prepared a preliminary memorandum on this issue for the attention of the Parliamentary Assembly (DocCDL(99)5). Following this, Mr Tuori and representatives of the Secretariat travelled to Moldova on 22-26 May to meet the Moldovan authorities and representatives of the Bulgarian and Gagauz minorities. The Venice Commission delegation met Mr Vartik, Head of the Local Affairs Unit of the State Chancellery of Moldova, Mrs Stoyanov, Director of the National Relations Department, MM Solonari and Chobanu, members of Moldovan Parliament, Mr Cretu and Ms Poaleloungi, Deputy Ministers of Justice and MM Tabunschik, Head of the Executive of Gagauzia, and Pashali, President of the Popular Assembly of Gagauzia. Unfortunately, representatives of the Venice Commission did not meet representatives of the Bulgarian minority.

The Commission examined the subject during its 39th plenary meeting in June 1999 and, owing to the importance of the issue, decided to extend the delay for the examination of this question by the rapporteurs. In the meantime a delegation from the Congress of Local and Regional Authorities visited Moldova. After an exchange of views between the Commission Secretariat and the Congress, it was considered expedient take note of the information collected by the latter, as will be seen from the following document. This opinion was drawn up by the rapporteurs during their meeting on 21 September 1999, at the Austrian Human Rights Institute in Salzburg. It was adopted at the 40th plenary meeting of the Venice Commission (Venice, 15 16 October 1999).

Some remarks and additional clarifications given during the adoption of the present opinion appear in the Appendix to this document.

I. The Law on Local Public Administration in the Republic of Moldova

1. The Law on Local Public Administration in the Republic of Moldova was adopted on *6 November 1998* . It sets out the general framework for the organisation of local authorities and their interaction with the central authorities through representatives in the regions (counties) and municipalities.

*2. Regarding the Gagauz region, the Law on Local Public Administration in the Republic of Moldova is liable to clash with the Law on the Special Status of Gagauzia of 1994 and the Legal Code of Gagauzia adopted in July 1998 by the People's Assembly of Gagauzia. The Law on the Special Status of Gagauzia and the Law on Local Public Administration are both organic laws. They differ in that the Law of 1994 can only be amended by a 3/5 majority of members of Parliament (Article 111 (2) of the Constitution of the Republic of Moldova) whereas the Law of 1998 can be amended according to the normal procedure prescribed for any organic law, ie by simple majority. The Legal Code of Gagauzia amounts to a constitution for the autonomous region**[7]**, but it is difficult to determine its position in the hierarchy of Moldovan norms. In any case, the lack of a clear hierarchical relationship between these prescriptive texts is a problem, which was already noted by the Venice* Commission in its opinion on the Legal Code of Gagauzia [CDL (98) 41]. During the visit of the *Venice* Commission delegation to *Moldova*, the central authorities as well as representatives of the local authorities of Gagauzia acknowledged the existence of this lack of clarity which may give rise to ambiguities.

3. Article 2 of the Law on the Special Status of Gagauzia of 23 December 1994 stipulates that "*the administration in Gagauzia shall operate on the basis of the Constitution of the Republic of Moldova, the present Law and the legislation of the Republic of Moldova (except where otherwise provided in the present Law) and in conformity with the Legal Code of Gagauzia and the decisions of the People's Assembly*".

4. Article 2 para. 2 of the Law on Local Public Administration provides that "*the organisation and operation of local administration in the autonomous territorial entities shall be determined by the Law on the status of the corresponding region and the present Law*".

5. These above-mentioned provisions would suggest that the two laws are complementary.

6. The Gagauzians consider that the Law on the special status of Gagauzia has priority over the Law on Local Public Administration. During the meeting at the Ministry of Justice of Moldova on 24 May 1999, Mr Cretu and Mrs Polelunzh, Deputy Ministers of Justice, suggested that their institution considered that in legal terms, the Law on the special status of Gagauzia, being a lex specialis*, had priority over the law on local public administration, and consequently there were no contradictions between these two laws. A fairly similar view is taken by Mr Solonari, Chairman of the Committee on National Minorities of the Parliament, and Mr Chobanu, Vice-Chairman of the Committee on Legal Affairs.*

7. The Venice Commission considers that the provisions of the two laws could conflict with each other. Article 107 of the Law on Local Public Administration designates the *prefect* as the representative of the central authorities in the regions, including the autonomous entities. The Law on the Status of Gagauzia does not provide for any central authority representative. Moreover, Articles 21, 22, 23 and 24 of the Law on the Status of Gagauzia lays down that the heads of the prokuratura, the department of justice, the department of national security and the police exercising their functions in the autonomous regions shall be appointed by the corresponding Moldovan ministers, with the agreement of the People's Assembly, whereas Article 110 of the Law on Local Public Administration stipulates that the *prefect* must nominate candidates for these functions and ensure the smooth operation of the departments in question. Furthermore, the Law on the Status of Gagauzia stipulates that the *Bashkan* is the supreme authority of the executive in Gagauzia (Art. 14 para. 1); again, the Law on Local Organisation does not specify the relationship between the *prefect*'s powers and the rather similar powers of the *Bashkan*. This being so, Articles 113, 114 and 115 of the Law on Local Public Administration are likely to clash with Article 14 paras. 6, 7 and 8 of the Law on the Status of Gagauzia.

8. Article 12 of the Law on Local Public Administration provides that the prefect shall be appointed by decree of the Government of Moldova and shall represent the central authorities at local level. This text contains no specific provisions on Gagauzia, and so the prefect of this autonomous entity is vested with the same powers as his opposite numbers in the other regions (counties). At the same time, the *Bashkan* is established in his functions by the President of the Republic of Moldova and is a member of the Government of Moldova (Article 14 para. 4 of the Law on the Status of Gagauzia). According to the Law on the Status of Gagauzia, the Bashkan has an important, specific position in the executive hierarchy, unparalleled in ordinary local administration in the country; he also takes part in the appointment of *prefects* as a member of the Government of Moldova. This situation, which is linked to the *Bashkan's* special position, is apparently not taken into account in the Law on Local Public Administration, Article 109 para. 2 of which lays down that there are no subordinate relations between the *prefect* and the local authority bodies.

9. A comparison between the Law on Local Public Administration and the Legal Code of Gagauzia highlights even more obvious contradictions.

10. The first question to be considered is that of the relations between, on the one hand, the *prefects* and *sub-prefects* provided for in the Law on Local Public Administration and, on the other, the heads of local administration provided for in the Legal Code of Gagauzia (Article 82). The Legal Code describes the latter as local civil servants, since their powers are determined by local legislation (Article 82 para. 2).

11. Furthermore, the fact that the Law on Local Public Administration contains no specific provision on Gagauzia (which is for the moment the only autonomous territory with a reasonably well defined status) raises a problem vis--vis interpretation of the provisions of the Law on the Status of Gagauzia and the Legal Code of Gagauzia. For instance, it is uncertain whether and to what extent the provisions of the Law on Local Public Administration will affect the powers of the People's Assembly and what will be the position of the Court of Gagauzia in the Moldovan judicial system (especially as regards its powers to interpret legal rules adopted by local authorities).

12. Another question concerns the provisions of the Legal Code, their "exclusive" legal force in the territory of Gagauzia (Article 2) and the People's Assembly's power to set aside any decisions by the "*public authorities of Gagauzia that are contrary to the provisions of the Legal Code*" (Article 51 para. 9). In view of the fact that the Legal Code of Gagauzia devotes a whole chapter to human rights protection, it is arguable whether and how the aforementioned powers of the People's Assembly and the exclusivity of the provisions of the Legal Code of Gagauzia can be reconciled with the prefect's powers, particularly those based on Article 111 (d) of the Law on Local Public Administration, to the effect that "*the prefect can order the public authorities to take the requisite measures to prevent offences/crimes and ensure respect for human rights*".

13. The problems of possible clashes described above could be solved by interpreting the Law on Local Public Administration in such a way that its provisions would be inapplicable where contrary to those of the Law on the Status of Gagauzia. Two legal interpretations could justify this approach. Indeed, the Law of 1994 can be regarded either as *lex superior* with respect to the Law on Local Public Administration, or as *lex specialis*.

14. According to Article 111 par. 2 of the Constitution of Moldova, the Law on the special status of Gagauzia can only be modified by a majority vote of 3/5 of members of the parliament. The Law on Local Public Administration of 1998 can be changed according to the normal procedure. This difference could mean that the law of 1994 is superior to that of 1998 (*lex superior*). The flaw in this interpretation is that the constitutional doctrine of Moldova does not seem to recognise any difference of rank between organic laws. Representatives of the Parliament and the Ministry of Justice have underlined on several occasions that both laws have the same legal value. The Constitution, in article 72, does not make a distinction between different types of organic laws[8]. Under present conditions the rapporteurs are of the opinion that it would be more prudent to apply the principle of *lex specialis*.

15. The Law of 1994 can indeed be accepted as a *lex specialis* as compared with the Law on Local Public Administration, which is a *lex generalis*. Such an interpretation may be based on Article 111 of the Moldovan Constitution, which authorises the granting of autonomy status to certain regions in southern Moldova on the basis of an organic law, such as the 1994 Law on the Status of Gagauzia. This interpretation also derives from the fact that the new Law indirectly but indisputably recognises the existence and validity of the 1994 Law on the Status of Gagauzia, because Article 2 para. 2 of the Law on Local Public Administration reads: "*The organisation and operation of local authority bodies in an autonomous territorial unit with special status shall be regulated by the law on the status of the said unit and the present law".*

16. The Venice Commission delegation noted during its visit to Moldova that there are certain positive developments suggesting a concrete solution to the problem of compatibility between certain dispositions of the laws in question. During the meeting of the Venice Commission delegation and the Congress of Local and Regional Authorities with the Deputy Ministers of Justice (para. 5 of this opinion), Mr Cretu and Ms Polelunzh intimated that the Law on the special status of Gagauzia has priority over the Law on local public administration mentioned in the previous paragraph, and further that other provisions of this Law which are contrary to the Law of 1994 do not apply to Gagauzia. The role of *prefect* in Gagauzia will be limited to the representation of the interests of the central Government. According to the information received from the Moldovan authorities the Law on administrative disputes[9], which is to be discussed by the Parliament, will define the procedure to follow in cases where the *prefect* finds a violation of the Moldovan legislation by any Act adopted by the local authorities, including those passed by the Popular Assembly of Gagauzia. The Commission considers that the application of the *lex specialis* principle allows the conflict between the provisions of the two laws to be settled.

However, since this issue is highly complex and any uncertainty about the scope of the autonomy of the region in question must be eliminated, it would no doubt have been better to include details, in the provisions of the new Law, on how and to what extent the adoption and enforcement of the latter would affect the provisions of the Law on the Status of Gagauzia, notably by making an explicit reference to Gagauz autonomy in Article 2 (2) of the Law.

Finally, there is still the problem of hierarchy of norms regarding the autonomous status of Gagauzia, already identified by the Venice Commission (Doc.CDL(98)41) and Congress of Local and Regional Authorities of Europe. The Law on local public administration only accentuates the problems noted earlier, all the more so since the Popular Assembly of Gagaouzia seems to have adopted recently a local law on public administration in Gagauzia (see Appendix).

II. The Law on Administrative and Territorial Organisation in the Republic of Moldova

19. The Law on Administrative and Territorial Organisation in the Republic of Moldova was adopted on 12 November 1998. Article 4 para. 2 of the Law recognises the specificity of "*a number of areas in the south of the Republic which constitute territorial administrative units with special status defined by organic laws*"[10], and we might suppose that this applies to Gagauzia, according to the Law on the Status of Gagauzia. Article 8 para. 1 lists the towns and cities with municipality status, and includes Komrat, the administrative centre of Gagauzia. Annex 3 to this Law lists the towns and villages belonging to the autonomous territorial unit of Gagauzia. Its territory is also split into three counties.

20. A reading of the text does not reveal any obvious contradictions with current legislation on Gagauzia. However, it should be noted that the new Law empowers the Moldovan Parliament to vote to change the administrative boundaries of the regions, whereas the Legal Code of Gagauzia assigns the People's Assembly of Gagauzia the task of holding referendums on such matters and validating the results (Art. 8 paras. 7-9). During the visit to Moldova, the representatives of the Gagauz minority shared with the delegation of the Venice Commission their concern over the latest amendments to the Electoral Code introducing the rule imposing a 120 day ban on local referendums before and after local elections. Apparently the Gagauzians were interested in organising a referendum to attach two localities to the autonomous entity of Gagauzia, but the Central Electoral Committee of *Moldova* refused it. Under these circumstances, the problem of the legislation to be implemented for the organisation of local referendums in Gagauzia was evident in practice. Recently the situation seems to have changed. In fact, according to the information received during the 40th plenary session of the *Venice* Commission, central authorities seem to have recognised the competence of Gagauzia in the area of organisation of local referendums on the question of administrative borders of the region.

21. Apparently some of the provisions of the Law on Administrative and Territorial Organisation in the Republic of Moldova are not sufficiently clear. In particular, Articles 18 and 19 stipulate that the Moldovan Parliament is responsible for changing the status of a given administrative entity, on a motion from the Government and the local authorities and "*after consulting the citizens*"[11]. This is also an obligation that follows from article 5 of the European Charter on Local Self-Government. Nevertheless, the law does not go into detail on the procedure for the said consultation.

22. The conflict between the ethnic Bulgarian minority in the Taracliya region and the Moldovan central authorities over the provisions of this Law was brought to the Commissions attention. The minority in question reportedly objects that the Law on Administrative and Territorial Organisation has changed administrative boundaries in such a way as to integrate the Taracliya region into a larger administrative unit (*judet*), thus reducing the proportion of the minority population in the region. At the same time, in a letter addressed to the Committee of Ministers of the Council of Europe in February 1999, representatives of the Bulgarian minority complain that the population of Taracliya was not consulted on this issue, in breach of international obligations of Moldova.

23. The Commission notes that Moldova is a Contracting Party to the Framework Convention for the Protection of National Minorities (1 February 1995). Article 16 of this Convention lays down that "*the Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention*".

24. Furthermore, the Commission points out that on its accession to the Council of Europe, Moldova agreed to base its policy concerning minorities on the principles set out in Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe. Article 11 of the draft Protocol appended to this recommendation provides that "*in the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state".* In interpreting this provision, the Commission has pointed out that it is "*necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies"* (Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe,CDL-INF(96)4).

25. It is important to mention in this context that the initial Government bill for the law on territorial administrative organisation of Moldova proposed *inter alia* to retain Taracliya as a separate territorial entity. President Lucinschi supported this solution. In spite of this fact, the final text includes Taracliya in Cahul *judet*. The President sent the law back to the Parliament in November 1998 proposing to revise articles of the law concerning Taracliya, but the Parliament refused to maintain Taracliya as a separate entity. As a consequence part of Taracliyas population boycotted local elections on 23 May 1999.

26. Even though it is difficult to imagine all the direct consequences of enforcing the Law in question, there is no doubt that it will have an impact on the proportion of the minority population in the region, and that the manner in which its provisions are interpreted and applied could significantly affect the rights of persons belonging to minorities. Consequently, it is vital that the Moldovan authorities ensure that the rights secured for persons belonging to the ethnic Bulgarian minority under the Framework Convention and the principles of Recommendation 1201 are fully respected and not jeopardised by the implementation of the provisions of the Law in question. The practical implementation of certain aspects of the local autonomy through laws on administrative disputes, local finances and municipal budgets will be of great importance in this context[12].

III. Conclusions

27. Both laws examined by the Venice Commission are part of the administrative and territorial reform in Moldova, and according to the Government they will be followed by other legislation aimed at decentralising administrative management. Therefore it is very important that these new acts are coherent and respect minority rights, in conformity with laws defining the status of minorities and with international instruments of protection of minorities ratified by Moldova.

28. Contradictions between the law on the special status of Gagauzia and the law on local public administration are eased or settled if the principle of either *lex superior* or of *lex specialis* is applied. Article 2 (2) of the Law on local public administration enables this solution to be applied without bringing the provisions of this law into question and endangering administrative reform. At the same time it would be advisable for the Moldovan authorities to define more precisely to what extent the Law on local public administration is applicable to Gagauzia.

29. Contradictions between the Law on local public administration and the Legal Code of Gagauzia are due to the fact that this Code includes a series of provisions that are in apparent conflict with the Law on special status of Gagauzia and other Moldovan laws. In order to resolve this conflict, the Code could be revised to make it compatible with Moldovan legislation in force. The government together with the Gagauzian authorities, given the fact that both sides expressed their readiness to find a solution acceptable to everybody, could fulfil this task jointly.

30. The Commission has not received any information to the effect that violation of the cultural and language rights of the minority of Bulgarian origin would be a consequence of the administrative reform, and of the integration of the former Taracliya district in the Cahul *judet*. The Commission recalls that the provisions of the Framework Convention on National Minorities and Recommendation 1201 should be fully respected in the implementation of the reform.

A P P E N D I X

ADDITIONAL INFORMATION

During its 40 th plenary meeting on 15 and 16 October 1999, Mr Solonari, member of the Venice Commission for Moldova and Mr De Bruycker, expert from the Congress of Local and Regional Authorities of Europe (CPLRE) informed the Venice Commission about the latest important developments in the field examined by the experts of the Venice Commission:

1. The central authorities recognised that Gagauzie has the competence to organise local referendums on the attachment of neighbouring localities to autonomy in conformity with the provisions of the law on special status of Gagauzia;

2. A special commission, which was created in order to follow the latest developments in Taracliya, proposed to the Moldovan parliament the creation of a separate *judet* for the district of Taracliya (with a local administration adapted to the size of this territorial unit, i.e. with less officials in the administration);

3. The Popular Assembly of Gagauzia adopted a law on public administration in Gagaouzia.

x. Interim report on the constitutional reform in the Republic of Moldova (CDL (99) 88) adopted by the Commission at its 41st Plenary meeting (Venice, 10-11 December 1999)

Introduction

1. In April 1999 the Council of Europe Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States decided to have the constitutional developments in the Republic of Moldova monitored by the Venice Commission, which was notified of the decision by letter of 3 May 1999. In addition, on 25 May 1999 the question of the constitutional reform was referred to the Commission by the Parliament of Moldova, which presented the Venice Commission with a draft constitutional revision prepared by 39 of its members.

2. This draft was the subject of a preliminary discussion at the plenary meeting of the Venice Commission from 16 to 18 June 1999 in the light of a report by Mr Moreira (CDL (99) 32 rev,). The Commission's rapporteur regarded the proposal by 39 parliamentarians as complying with European democratic standards.

3. On 1 July 1999,following a consultative referendum on possible amendment of the Constitution, the President of the Republic

of Moldova, Mr Lucinschi, signed a decree setting up a National Committee to draft a law for amending the Constitution of the Republic of Moldova (Constitutional Committee).

4. Since September 1999 the Venice Commission has arranged co-operation with the Moldovan Constitutional Committee mandated by the President of the Republic to draw up a scheme of constitutional reform. A delegation of the Venice Commission visited Chisinau on 18 and 19 September 1999 for talks with the Constitutional Committee and the Parliament. This initial encounter was followed by two planning meetings in Venice on 18 October and in Strasbourg on 5 November 1999[13] attended by representatives of the Moldovan Parliament and the Constitutional Committee.

5. In the course of this co-operation, a number of criticised items of the draft reform have been amended by the Moldovan authorities having regard to the recommendations made by the Venice Commission's experts. This particularly concerns the Parliament's budgetary powers and the provisions which could possibly have affected the independence of justice.

6. However, the Commission feels that the draft as it now stands still retains a number of elements which preclude declaring it consistent with European democratic standards.[14]

7. This opinion concerns the drafts for legislation to amend the present Constitution, prepared by the Constitutional Committee and submitted to the Venice Commission during its visit to Moldova on 18 September 1999, as well as the draft amendments proposed by 39 members of the Moldovan Parliament in April 1999.

I. The procedure for amending the Constitution of the Republic of Moldova

8. The Parliamentary Assembly's request that the Venice Commission monitor constitutional developments in the Republic of Moldova came at a time when the President of the Republic of was staging a consultative referendum on the introduction of presidential government in Moldova. The constitutional reform process was then in its early stages and the procedure to be followed unclear, as it still is.

9. The President of the Republic considered himself authorised by Articles 75 and 78 f. of the Constitution to avail himself of his right to call a referendum on a question of national importance, in this case the amendment of the Constitution. Nonetheless, this interpretation seemed to override the provisions of the present Constitution on constitutional amendment. Article 143 paragraph 1 of the Constitution in fact provides *"Parliament has the right to adopt a law for revising the Constitution after no less than 6 months from the date when the revising initiative was submitted. The law shall be passed by a two-thirds majority".*

10. On 3 November 1999 the Constitutional Court delivered a judgment interpreting Articles 75, 141 paragraph 2 and 143 of the Constitution. The Court confirmed that all constitutional amendments must be made according to the procedure prescribed by Articles 141 and 143 of the Constitution.

II. The draft law for revising the Constitution of the Republic of Moldova put forward by the Constitutional Committee on **29 October 1999**

11. The draft put forward by the Moldovan Constitutional Committee on 29 October 1999 is intended to establish a presidential system.

12. It should be noted at the outset that this is the fourth version of the draft examined by the Venice Commission. Since September 1999 the Constitutional Committee has been co-operating closely with the Venice Commission, and several meetings have brought together the drafters and the Commission experts. The Commission welcomes the fact that a number of preliminary observations made by it's experts have been taken into account by the authors of the proposed reform. However, several disputable points singled out by the experts from the start of he co-operation are still present in the text of the proposed constitutional reform.

13. While emphasising its constant position that choosing the form of government is the Moldovan people's sovereign right, the

Venice Commission regards the system set out in the text of 29 October as a mix of the different presidential and semi-presidential systems existing in the democratic countries which is likely to bring the powers of the President, the Government and the Parliament into conflict and offend against the principle of separation of powers.

A. General comments

14. The scheme of reform under discussion institutes a presidential system more assertively than the earlier texts. The President heads the executive; the Government acting as an assistant to the President (Articles 82, 83); Parliament cannot be dissolved (Article 85 being excluded from the text of the project); the sphere of the various types of laws is established by and their approval rests with the Parliament (Article 72); provisions with force of law within the law sphere (see para.20 below), adopted by the Government must be passed by the Parliament. The Commission is pleased to note the introduction of the independent institution of Advocate of the People and the maintenance of the Parliament's budgetary power.

15. At several points in the discussions between the Venice Commission's experts and the Constitutional Committee's representatives, the latter stressed that the amendment of the present Constitution was aimed at transforming the semi-presidential system under the present Constitution into a wholly presidential one. According to the Constitutional Committee, a reform along these lines is imperative following the consultative referendum of 23 May 1999 in which the people came out in favour of strengthening the President's powers.

16. The Commission observes that by comparison with the orthodox presidential system as established in the United States, the Constitutional Committee's draft displays substantial differences: calling of referendums on the President's initiative (Article 75); limited involvement of the Parliament in the sphere of treaties and foreign policy, and especially in the appointment of certain senior officials (Articles 66 and 88); commitment of the Government's political responsibility solely on its own initiative (see para. 18 below). Furthermore, the procedure for committing the Government's responsibility in connection with the passage of draft legislation may significantly restrict the Parliament's legislative power (Article 106). All the above differences indicate that the draft under consideration institutes a remarkably strong presidential system.

B. Comments on the specific provisions of the draft

17. Article 61 concerning election of the members of Parliament is amended in the sense of introducing a composite electoral system. This is used by several democratic states and technically this aspect raises no problem. However, for greater surety of political pluralism in the Parliament, it would be advisable to specify that the election of 31 members in multi-seat constituencies shall be conducted by proportional representation.

18. Article 72 paragraph 6 of the draft enables Parliament to adopt a motion of censure against the Government but not, it should be observed, of its own motion. The Government can declare itself accountable (Article 106 paragraph 1 of the draft) and, should the Parliament withhold its approval of a programme or bill proposed by the Government and adopt a motion of censure, the Prime Minister is required to tender the Government's resignation (paragraph 2 (b)). In point of fact, giving the sole authority to the Government to hold itself accountable to Parliament would seem to diverge from the constitutional practice of European democracies.

19. In the same context, another problem arises regarding the appointment of the Prime Minister and the Government. Under Article 82 paragraph 1 of the draft, the President appoints the Prime Minister after consulting the parliamentary majority. It is further stipulated in this article that the members of the Government are appointed by the President at the Prime Minister's proposal (paragraphs 1 and 4). There is no provision requiring the latter to represent the parliamentary majority, in consequence of which the Government can have no real foundation on the political forces in the Parliament. The Government has every appearance of a body exclusively controlled by and wholly answerable to the President under the terms of Article 82 paragraph 3, except in the event of its deciding to accept responsibility before the Parliament. Plainly, there is no link between the Parliament's legislative activity and the Government's executive power.

20. Article 72 paragraph 3 of the new draft lists the areas in which laws are enacted. This is an uncommon practice in modern constitutional systems. Normally the Parliament, except in the special cases prescribed by the Constitution (for example under the procedure for delegation of authority to legislate) is the sole legislative body and as such empowered to legislate in all areas. Listing the areas is apt to limit this power, which scarcely seems justified.

21. All the political forces in Moldova do indeed seem to agree that the constitutional reform should seek to strengthen the executive power. Instituting a more effective role for the executive in the passage of the State's legislative acts meets the requirements of rationalisation accepted by several present-day democracies. It is perfectly normal for the executive to call for urgent procedure and to set priorities for its legislative bills. This procedure is very highly developed in the French system, for instance; Article 44 of the French Constitution prescribes the procedure of a vote restricted to the text proposed by the Government while Article 49 makes it possible to commit the Government's responsibility in respect of a bill, in which case the text is regarded as carried without a vote unless the National Assembly passes a motion of censure against the Government. If, however, the French National Assembly objects to the Government's policy, it may at any time and on its own initiative pass a motion of censure against the Government. This ensures the democratic functioning of the institutions as the system includes controls and countervailing powers. But the Commission observes that the Moldovan Constitutional Committee's text affords no such controls and countervailing powers.

22. Their absence from the draft also works the other way. Under the Constitutional Committee's proposals (the exclusion in Article 85 of "Dissolution of Parliament" from the Constitution in force), the executive no longer has any means of countering a motion of censure without the right to dissolve Parliament, and this excludes parity between executive and legislature in the exercise of their right to legislative initiative.

23. Article 73 paragraph 2 on legislative initiative, which provides that legislative proposals by members of Parliament shall be placed on the Parliament's agenda with the approval of the Government, is contrary to the principle of the independence of the legislature. Granted, the process of drafting laws in Parliament is lengthy and the Government may wish to limit debate on legislative proposals not relating to priority matters, but restrictions on Parliament's right freely to legislated cannot be imposed by the executive.[15] Admittedly, certain countries have arrangements whereby the Government may secure the power to legislate in a number of areas clearly defined by Parliament in order to respond promptly to situations that demand immediate action. For example, according to Article 38 of the French Constitution, *"the Government may, in order to carry out its programme, ask Parliament to authorise it, for a limited period, to take by ordinance measures normally within the legislative sphere"*; however, Parliament retains control over the process by a mechanism that renders the ordinances null and void if a bill for their ratification is not tabled in the Assembly before the date set by the enabling act. Another factor conducive to parliament-government balance of powers is that the French Government is drawn from the parliamentary majority (which indisputably aids speedier consideration by parliament of proposed laws considered high-priority by the Government). As stated above (para. 18), such is not the case in the system which the Constitutional Committee's draft revision purports to institute.

24. Article 75 of the draft concerning referendum is also liable to interfere with the Parliament's power to legislate. It specifies three types of referendum: constitutional, legislative and consultative. The right to initiate referendums belongs to the citizens, to Parliament and to the President of the Republic. Paragraph 2 of the draft article gives the Parliament and the President of the Republic the right to proclaim referendums. In these circumstances, where the Government, which under the system advocated by the draft is accountable to the President alone (except where it commits its own responsibility before the Parliament), does not succeed in compelling the Parliament to pass a law, it may ask the President to have the law approved by citizen vote. Here, it should be emphasised that any law approved at referendum may only be amended by the same procedure (paragraph 4 of the draft article). The Venice Commisison considers that referendum is a democratic instrument which is used by many European democracies, but in the text of the draft presented for examination, and taking into account the other provisions of the law for constitutional revision, this rule which establishes a sort of democracy by referendum, is of concern to the Commission. Indeed, it is open to question whether such a system enabling the executive to take the legislative process out of the Parliament's hands may not gravely infringe the principle of separation of powers.

25. In adopting the position stated above (especially in paragraphs 23 and 24), the Commission would no means cast doubt on the executive's ability to generate legislation, which is often necessary and moreover commonplace. Nonetheless, it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive's legislative output and to decide on the extent of its powers in that respect. The restrictions generally placed on the regulatory function of the President and the executive under presidential systems (*executive orders*, etc.) is an expression of this principle.

26. The chapter on the judiciary in the Constitutional Committee's draft raises no criticism. However, Article 88 indent "m" entitles the President to confer senior ranks on judges. It would be more prudent to vest this authority in the Supreme Council of the Judiciary to avert any risk of the executive influencing judges.

III. The draft proposed by 39 members of the Parliament of the Republic of Moldova

27. The project of constitutional reform that has been presented by the Parliament of the Republic of Moldova aims at the strengthening of the constitutional position of the executive. The innovations that are sought after are four:

(i) The government gets the power to establish priority for the parliamentary discussion of the governmental projects of legislation, or of other projects laid before parliament which it is interested in, as well as the adoption of an urgent procedure for the parliamentary discussion thereof (art. 74 of the Constitution).

(ii) The government may engage its own responsibility before parliament by the way of the presentation of a political programme, a declaration of general political importance or most importance of all a project of legislation, which shall be considered as adopted unless a vote of no confidence is approved by parliament (art. 106^1);

(iii) The government may legislate through "ordinances", providing that it gets previously a legislative delegation from parliament (art. 106^2);

At last, no piece of parliamentary legislation shall be adopted by parliament when it implies the increase of the budget expenses or the decrease of budget revenues without the consent of the government.

28. All of the proposed changes to the Moldavian Constitution have their source in the democratic European constitutions, specifically the French Constitution of 1958. But this circumstance does not spare the necessary study of each one of the proposed changes.

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29. The power of the government to establish priorities for the projects it is interested in upon the parliamentary agenda comes from art. 48 of the French Constitution. It states that the agenda of both chambers of parliament shall give priority, according to the preferences of the government, to the projects presented by itself or to the projects of the members of parliament that are accepted by the government.

30. There is no reason to think that such an executive privilege runs against the essential rules of parliamentary democracy. Of course provisions should be taken in order that this prerogative of the executive does not eliminate altogether the autonomy of parliament to set its own agenda and to discuss legislative projects other than those presented or supported by the executive, specifically those that are tabled by the opposition parties. But apart from that prevention, one should accept that the government, which has been approved by parliament, is entitled to the actual means that it feels to be necessary to implement its legislative program.

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31. The new article 106.1. has its recognisable source in the French Constitution too (article 39, 1 and 3). According to it, the government may decide to engage its own political responsibility before parliament upon a political program or declaration or upon a project of law. In that case those documents are considered to have been approved by parliament unless a vote of no confidence is proposed by a certain number of members of parliament and approved against the government.

32. The peculiarities of these rules are twofold: first, the government wins an implicit vote of confidence inasmuch as there is no actual vote of confidence but only the absence of a vote of no confidence; second, this "negative" vote of confidence may involve the automatic approval of a project of law without an actual discussion and vote of it by parliament. This scheme amounts to giving to the government a speedy way of forcing the approval of legislation that otherwise could meet the disapproval of parliament.

33. It is not difficult to raise a few objections against this rule that allows the government to pass important legislation without the need of an explicit approval by the representative assembly. May be that in this we are touching the very frontiers of the

parliamentary prerogatives in a representative democracy. But the objections should not be overestimated. The French experience shows that this is not an unbearable sacrifice of parliamentary privilege.

4

34. The delegation of legislative powers by parliament upon the government is nowadays a very common feature of parliamentary democracies.

35. Typically we find two main ways of government legislation. One is the delegation of legislative powers by parliament, for a certain issue and on a temporary basis, and usually without the need for the parliamentary ratification of the law issued by the government. The other sources of government legislation are the situations of urgent necessity, in which there is no previous delegation, but that require parliamentary ratification within a short period of time. This is the system that is adopted for example by the Italian and the Spanish constitutions.

36. The Moldavian project is a very cautious one. The delegation should require:

(i) A request by the government regarding the implementation of its own program of activities (which is submitted to parliament when the government is appointed);

(ii) The approval of the delegation by parliament through an "organic law", that means a law approved according to the specific procedure of article 74(1) of the Constitution, which requires a double vote of the majority of the members of parliament.

(iii) The identification of the subject of the would-be "ordinance" of the government, as well as the time in which the government enjoys the delegated legislative powers;

(iv) The eventual ratification of the ordinance by parliament.

37. Again, the main source of this constitutional proposition is the French Constitution (article 38). Nevertheless one should bear in mind that in France there is a separation between the domain of parliamentary law (art. 34) and the domain of the government regulation (art. 37), in which the government enjoys real primary normative powers, with no need of parliamentary delegation. On the contrary, in the domain of the government regulation parliament is not allowed to legislate. This is not the case in Moldova, where the government has no such para-legislative powers of its own, and where the regulation powers of the executive are meant only for the implementation of the parliamentary laws. In Moldova every issue belongs to the domain of parliamentary law. Thus, the proposal of constitutional change should be rephrased in order to take account of the different constitutional framework.

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38. The prohibition of the adoption by parliament of legislation that could involve an increase in the government expenditure or the decrease of the government revenue is also very common nowadays in several constitutions of parliamentary democracies. Constitutional provisions to that effect may be found, for example, in the German Grundgesetz of 1949 (article 113) or the Spanish constitution of 1978 (article 134(6)). But the immediate source of the Moldovan project is once again the wording of the French Constitution (art. 40). This limitation of the parliamentary prerogative is not incompatible with parliamentary democracy. It may be a necessary condition for the ability of the government to get along with its policies, especially under conditions of budget constrictions. There are no reasons whatsoever to condemn this solution.

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39. The aim of the proposed constitutional changes in Moldova is confessedly the strengthening of the executive position in the

framework of the constitutional system of government.

40. A strong executive is not necessarily against parliamentary democracy. On the contrary, it is weak executives and government instability that are very often a threat to parliamentary democracy.

41. A fair balance between parliamentary sovereignty and government strength is the main concern of the so called "rationalised parliamentarism" (*parlementarisme rationnalis*) since the earlier decades of this century, which has been the remedy indicated for the weaknesses of traditional parliamentarism in continental Europe, mainly the political instability brought about by the excessive dependence of the executive from parliament.

42. It needs no emphasis the assertion that parliamentary democracy should "deliver the goods" in order to ascertain its own legitimacy and acceptance. That means essentially to ensure efficient and stable governance of the polity. The "excess of parliament" is very seldom a virtue. Provided that the government remains accountable before parliament and cannot act against its will, parliamentary democracy leaves enough ground for a vast array of provisions with the aim of strengthening the constitutional and political position of the executive within the system of government.

43. No wonder that the changes which are being discussed in Moldova have their main source of inspiration in the French Constitution of 1958, which is without doubt where the executive enjoys the strongest position vis--vis the parliament.

44. A final remark is necessary to call the attention to the fact that the Moldovan Constitution, although belonging to the family of the parliamentary forms of government, has a few peculiar features that present some similarities with the French *semi-prsidentialisme*.

45. It is indeed a parliamentary system of government. There is the political fiduciary relationship between parliament and the executive. The government is appointed according to the parliamentary majority (if there is one). The government needs a parliamentary vote of confidence to be confirmed in office, once appointed by the President of the Republic. Afterwards it can be sent away be the means of a vote of no confidence. On the other hand the President of the Republic may dissolve parliament if it becomes impossible to form an executive within the framework of the existing composition of the assembly or if there is a deadlock concerning the approval of important legislation that could affect the functioning of the State. All these are typical features of the parliamentary system of government.

46. But there is more to it. The President of the Republic is elected by direct popular vote and has a number of important powers of its own, which he can exercise without the need of ministerial countersignature. Among these powers may be counted those indicated in articles 83-88 of the Constitution. Most of these are not common in traditional parliamentary forms of government, where the chief of State, be it a king or a president, has mainly a representative role, not an actual intervention in the political process.

47. Thus, in Moldova (as well as in other European parliamentary democracies like Finland, Austria, Portugal, Ireland, Iceland, etc.) parliament is not the only constitutional organ of the State to represent directly the people. In Moldova, as well as in France, the executive power belongs not only to the government but also to the President. On the other hand the government is not only accountable before parliament but also, in a certain way, before the President.

48. This is an additional reason why the proposed changes to the Constitution of Moldova do fit with the character of the constitutional system of government.

Conclusions

The Venice Commission regrets that the Moldovan authorities have not been able to reach agreement on a single draft for amendment of the Constitution, or on the substance of the reform.

It again points out that the procedure for adoption of constitutional amendments must abide by the provisions of the Constitution in force, as interpreted by the Moldovan Constitutional Court and in accordance with the procedure established by Articles 141 and 142 of the Constitution.

The draft amendment submitted by the Constitutional Committee still contains a number of provisions which, in the framework of a presidential system of government, are prejudicial to compliance with the principle of separation of powers. In particular, the Commission expresses its concern over the provisions in the draft whereby:

a) any legislative initiative by the members of Parliament must be approved by the Government prior to its inclusion in the agenda of the legislative body;[16]

b) the President may bypass the normal legislative procedure through the expedient of submitting a proposed law to referendum;

c) the procedure for constituting the Government raises difficulties as regards its interaction with the Parliament, there being no connection between the Government and the majority in the Parliament.

In general, it seems apparent from the text of the Constitutional Committee's draft that the countervailing powers available to the Parliament against the powers of the President are too weak.

On the other hand, the draft submitted by 39 members of Parliament which is discussed in part III of this opinion could certainly be instrumental in strengthening the Government while raising no substantial criticism as to its consistency with democratic standards.

xi. Opinion on the draft law on the organisation of the judicial system of Ukraine (CDL-INF (2000) 5) drawn up by the Secretariat on the basis of the rapporteurs comments

INTRODUCTION

The Parliamentary Assembly of the Council of Europe asked, on 1 February 1999, the European Commission for Democracy through Law to give an opinion on the draft Ukrainian laws on the judicial system and the public prosecutors office. The draft law on the public prosecutors office is still at an early stage of its consideration within the Ukrainian Verkhovna Rada and no text has yet been made available to the Commission. By contrast, the Commission received in October 1999 an English translation of the draft Law of Ukraine on the Judicial System (documentCDL(99)64).

The Commissions rapporteurs (Ms Suchocka and Messrs Said Pullicino and Torfason) provided written comments on this draft (see Appendices I to III of the present document). At its 41st plenary session in Venice on 10 to 11 December 1999 the Commission endorsed the comments made by the rapporteurs and asked the Secretariat to prepare in co-operation with the rapporteurs a summary opinion, on the basis of the main comments made by the rapporteurs and of the discussions at the meeting in particular with respect to the military courts. The individual opinions should be appended to the summary opinion and the whole document then be forwarded to the Parliamentary Assembly.

The present document contains the summary opinion and the individual comments by the rapporteurs.

PRELIMINARY REMARKS

The Commission notes that the adoption of a new law on the organisation of the judiciary is of the highest importance for the establishment and consolidation of the rule of law in Ukraine. The importance of this law is reflected in the Joint Programme of co-operation between Ukraine and the Council of Europe and the European Commission which provides for Council of Europe assistance for the drafting of this and other related laws. The Commission notes that hitherto the Ukrainian authorities have not had recourse to Council of Europe assistance for the draft.

The present opinion was drafted at the request of the Parliamentary Assembly and the Commissions rapporteurs have not had the benefit of direct contacts with the authors of the text. Under these conditions many aspects of the draft have remained difficult to understand for foreign lawyers. For a more detailed opinion direct contacts with the authors of the draft would appear indispensable. The present opinion therefore has a summary character and the individual comments by the rapporteurs are to be considered as provisional. The rapporteurs would be available to develop them further on the basis of discussions with their Ukrainian colleagues.

A particular difficulty for the rapporteurs was that the text does not give a comprehensive picture of the judicial system of Ukraine but can only be understood in the context of the procedural codes and some other laws such as the law on the status of judges. While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary. By contrast, the draft refers for many such questions to other laws. It seems overburdened with administrative detail not requiring regulation by statute while not being precise enough in dealing with questions of substance. For example, the provisions on specialised courts in Articles 32 and 33 provide little guidance as to the jurisdiction of these courts. In this respect it would seem inter alia desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system.

The present summary opinion is limited to draw attention to major concerns the draft raises in particular with respect to the independence of the judiciary. More detailed and technical comments appear in the appended individual opinions.

GENERAL COMMENTS

The principle of judicial independence

The Constitution of Ukraine, in particular its Articles 126 and 129, guarantees the independence of judges. It is to be welcomed that this principle is clearly restated in Article 4 of the draft. The detailed provisions of the draft however often do not seem conducive to its implementation in practice. In a country lacking a tradition of judicial independence it would by contrast appear particularly important to devise particularly strict rules guaranteeing judicial independence in practice.

The appointment of judges

According to Act. 128 of the Ukrainian Constitution judges are first appointed for a five-year term by the President of Ukraine and then elected for a permanent term by the Verkhovna Rada by the procedure established by law. It follows presumably that it was not possible for the drafters of the law to entrust this function directly to the High Council of Justice set up in accordance with Art. 131 of the Constitution.

In the light of Art. 131, one would expect that the High Council of Justice should have a dominant or central role in the selection of judges for appointment. However, the draft law does not seem to explain this role very clearly, and it also appears to assign a central function to the Supreme Court of Ukraine and the Chief judge of that Court and of the supreme specialised courts (cf. Art. 70(1) and (2) and Art. 59 (1), subpara. 6 of the present text). The draft law also does not seem to explain how the proposals for appointment are presented to the Verkhovna Rada, i.e. whether the proposals are forwarded to the Assembly by the President of the Republic or directly by the judicial bodies, and whether there will be a proposal of one candidate for each judicial seat to be

filled or a proposal involving the Assembly in a selection between more than one candidate. Perhaps the Law on the Status of Judges is designed to provide the answers, but we understand that this Law still is due to be revised. Accordingly, the point must be raised whether these matters are being provided for with sufficient clarity and with sufficient emphasis on judicial independence.

Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are according to the draft elected by the Verkhovna Rada for a five-year term. This solution has no basis in the Constitution and is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

Territorial organisation

It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of Ukraine, both as regards the local general courts of first instance and the establishment of a court of appeal in each oblast. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle. In a new democracy such as Ukraine it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts.

According to the Concluding and Transitional Provisions of the draft law, it would seem that the first step in establishing a court structure under the new Constitution will be to legitimise the existing local and appeal courts and permit them to carry on their functions more or less as presently constituted. At the same time, it is difficult to determine from the said provisions and the text of the draft law itself what further reform is intended.

Establishment of a strictly hierarchical system of courts

Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches.

The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts recommendations/explanations on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors.

Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.

The military courts

Another major concern is the system of military courts established by the draft. According to the text there will be courts martial of garrisons (Art. 20), military courts of appeal (Art. 25) and a military division of the Supreme Court (art. 52). Even the judges within the military division of the Supreme Court will have military ranks (see Art. 59.1.12)! Therefore this division of the Supreme Court will also have the character of a military court.

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory.

The extent of jurisdiction of the military courts is not defined in the draft but according to information given to the rapporteurs such courts are competent in cases involving soldiers having no relation with their military duties such as the divorce of a military serviceman. Such a definition of competence *ratione personae* and not *ratione materiae* would seem incompatible with Article 125 of the Ukrainian Constitution according to which the courts of general jurisdiction are based on the territorial principle and the principle of specialisation and extraordinary and special courts shall not be permitted. Furthermore the Commission draws the attention of the Ukrainian authorities to the case law of the European Court of Human Rights, in particular the judgment of 9 June 1998 in the case of Incal v. Turkey. According to this case law even the legitimate fear that a military judge may be influenced in a case by undue considerations is sufficient to constitute a violation of the right to an independent and impartial judge. A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law of Ukraine On Universal Conscription and Military Service. The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

The system of economic (arbitration) courts

The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which inter-enterprise relations are governed by private law. Under these circumstances the maintenance of the old system appears excessively conservative and the transfer of these cases to economic divisions of the ordinary courts as e.g. in Poland would have given a much clearer signal of the willingness to reform.

The administrative role of the courts

The system of court administration provided for in the draft seems complex and unusual. The draft law (Arts. 79 et seq.) sets up a State Court Administration of Ukraine to perform the tasks traditionally carried out by government departments of justice. Most of these tasks are carried out by the Head of the State Court Administration (Art. 80.1). The draft law does not deal with the relationship in these and other respects between the judiciary and the Ministry of Justice, which is not mentioned in the text. It seems that the Ministry is not intended to have a role in the organisation of the courts, and the extent of its political accountability in relation to the functioning of the court system is not clear. In any case it seems necessary to define the mutual relation between the Minister of Justice and the State Court Administration.

On the other hand the Supreme Court (Art. 50) and particularly the Chief Judge of the Supreme Court (Art. 59) are entrusted with important administrative functions concerning the courts in general which may be regarded as an excessive administrative burden for the judges concerned. The relations between State Court Administration and Supreme Court do not appear particularly clear. The Head of the State Court Administration is answerable to the Head of the Supreme Court of Ukraine and accountable to the Council of Judges of Ukraine. The relations between other courts and the State Court Administration are not defined.

The general impression is one of an excessively complex and top-heavy administrative system which lacks transparency.

Another important deficiency is the absence of provisions regarding the establishment of self-governing authorities and the relationship between such bodies and individual presiding justices. The precise specification of such mutual rights and responsibilities is crucial for the proper operation of courts. Striking a balance between the jurisdiction of presiding justices and judicial governing authorities is fundamental in order to distinguish between purely judicial and administrative functions. The absence of clear provisions on this issue in the submitted draft may lead in the future to disputes regarding the interpretation of the scope of power exercised by the head of the court and the self-government. It may also mean that, as a matter of fact, it intends to imitate the solutions adopted in the previous system, which do not comply with current European standards.

CONCLUSION

The Commission welcomes that the authors of the draft have undertaken to establish a judicial system based on the principle of the independence of the judiciary from the executive as stated in the Constitution of Ukraine. However it is of the opinion that this goal has not yet been achieved by the draft submitted to its consideration and that a thorough review of the text seems necessary.

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[1] The Commission stated that: The Working Party was reticent to accept this distinction between customs policy and implementation. At B.H. level it may of course be decided in the future to entrust implementation of the customs policy to the Entities. In the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. It is essential that customs rules are uniformly applied throughout B.H. since merchandise can then freely circulate within B.H. The lack of other resources of B.H. (see above) is also an argument in favour of B.H. collecting the customs duties on its own behalf.

[2] The Commission stated : There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.

The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act).

[3] The Human Rights Chamber gave its first judgment on 11 July 1997, whereas the Ombudsperson issued its first decision on 3 May 1996. By the end of 1997 the Human Rights Chamber had given 19 judgments, as against more than 300 decisions issued by the Ombudsperson.

[4] See in this respect the Report of the Working Group of the Venice Commission and the Directorate of Human Rights of the Council of Europe on the Ombudsman Institutions in Bosnia and Herzegovina (CDL(99)27) and the draft lawon the State Ombudsman of Bosnia and Herzegovina prepared by the same Working Group (CDL(99)28).

[5] See the Report of the Working Group on the Ombudsman institution in Bosnia and Herzegovina (CDL(99)27).

[6] This situation might be remedied by the adoption of a specific Information Act.

[7] The 1994 Lawon the special status of Gagauzia mentions the Legal Code on three occasions in articles 2, 11 and 12 without, however, determining its legal nature.

[8] Both laws (of 1994 and of 1998) are part of the organic legislation mentioned in par. (f) of Article 72 of the Constitution .

[9] According to information received by the Venice Commission from the Moldovan authorities, the administrative reform includes in addition to the two laws examined by the Commission, laws on administrative disputes, local finances and municipal budgets.

[10] The same approach is adopted in Article 4 par. 3, which apparently refers to Transnistria in the following terms: "a number of areas on the left bank of the Dniestr".

[11] It is interesting to note here that the legislation in force when the lawin question was adopted provided for consulting the population concerned before any move to change any region's administrative boundaries (Rules on matters relating to the territorial and administrative organisation of the Republic of Moldova, enforced under Law741-XIII of 20 February 1996).

[12] During the 40th plenary session, the Commission received the information that central authorities have established a special body to followthe developments in Taracliya and suggested to the Parliament to create a separate judet for Taracliya.

[13] In the space of two months the Constitutional Committee has presented the Venice Commission with 4 successive versions of the draft constitutional amendments, each aimed at instituting a presidential system of government in Moldova

[14] By an information note dated 19 November 1999 (document CDL(99)73), the Constitutional Commission informed the Venice Commission that articles 72, 73(2) and 82 (3) were changed followed the experts observations. Article 73(2) was modified considerably and no longer creates any problem, however, articles 72 and 82(3) were not significantly changed.

[15] According to information recently received by the Venice Commission, the latest version of article 73(3) has been modified to read that only propositions by deputies which entail the increase or reduction of the budgets financial resources are including in the Parliaments agenda with the Governments approval. This is a positive change.

[11]*ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ï¿½ It is interesting to note here that the legislation in force when the lawin question was adopted provided for consulting the population concerned before any move to change any region's administrative boundaries (Rules on matters relating to the territorial and administrative organisation of the Republic of Moldova, enforced under Law741-XIII of 20 February 1996).*

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