

# Expert Report on Rule of Law issues in Bosnia and Herzegovina

Brussels, 5 December 2019

## I. General remarks

### Rule of Law – an essential guarantee for citizens’ rights

1. The rule of law is the very basis for citizens to exercise their rights and freedoms. The rule of law provides the value system as well as the legal and institutional environment in which citizens’ rights are guaranteed and can be exercised.
2. The rule of law is one of the basic values on which the European Union is founded (Art. 2 Treaty on European Union, TEU). It is indispensable for the functioning of the Union.<sup>1</sup> To become a member of the Union, a country will have to respect this value and has to be committed to promoting it (Art. 49 TEU). Thus, the rule of law is at the core of the EU enlargement process, as the European Commission (Commission) underlined in its 2018 “Western Balkans Strategy”<sup>2</sup> and, more recently, in its “2019 Communication on EU Enlargement Policy”.<sup>3</sup> However, systemic shortcomings on rule of law issues still exist to varying degrees in all Western Balkan countries.
3. The rule of law is not only a European value, it also is a basic principle of the Constitution of Bosnia and Herzegovina (BiH), which establishes, that BiH “shall be a democratic state, which shall operate under the rule of law...”.<sup>4</sup> However, “the lack of commitment to the rule of law throughout BiH remains a fundamental problem.”<sup>5</sup> In its “Opinion on BiH’s application for membership of the European Union” (EU) of 29. 5.2019<sup>6</sup> the Commission highlights the many remaining shortcomings in the area of rule of law in the country and concludes, that, for the accession negotiations to be opened, BiH will have to achieve “the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria requiring the stability of institutions guaranteeing notably democracy and the rule of law”. The country “will need to fundamentally improve its legislative and institutional framework to ensure it meets” a number of key priorities set out in the Opinion, a considerable number of which intend to improve the overall rule of law situation in the country.<sup>7</sup>
4. Numerous efforts have been undertaken in past years and even decades by the EU, other international organisations as well as EU and non-EU countries to support BiH to address rule of law shortcomings. Within the framework of the Stabilisation and

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<sup>1</sup> COM (2019) 163, 3.4.2019, COM (2019) 343, 17.7.2019.

<sup>2</sup> COM (2018) 450.

<sup>3</sup> COM (2019) 260.

<sup>4</sup> Art. I (2) BiH Constitution.

<sup>5</sup> Statement by the High Representative for Implementation of the Peace Agreement on BiH, in his 56<sup>th</sup> Report to the Secretary General of the UN, 18.10.2019.

<sup>6</sup> COM (2019) 261 and SWD (2019) 222.

<sup>7</sup> These priorities are mentioned in the Annex to this report.

Association Agreement between BiH and the EU, in November 2018, the 3<sup>rd</sup> joint Sub-Committee on Justice, Freedom and Security put forward no less than 154(!) specific recommendations. While these past initiatives have certainly contributed to some progress, a significant breakthrough, enabling the country to adequately meet rule of law standards, has not yet occurred.

### **The EU initiative to enhance the monitoring of the Rule of Law in BiH**

5. In March 2019, the Commission launched the “EU initiative to enhance the monitoring of the Rule of Law in BiH”. This initiative focuses on the root causes of rule of law deficiencies in BiH. It aims to enhance the monitoring of rule of law reforms and their implementation and increase the accountability of the rule of law system in BiH, in full respect of the independence of the judiciary. The initiative covers the entire rule of law system, including courts, prosecutors’ offices and law enforcement agencies.

### **Purpose of this report and method of work**

6. In the context of this initiative, a group of independent senior rule of law experts led by Reinhard Priebe have been tasked to prepare this expert report, within the framework of the Commission’s Opinion. The report is based on the findings of high level missions, during which experts met with representatives of the Constitutional Court, members of the High Judicial and Prosecutorial Council (HJPC), the courts, prosecutors’ offices, law enforcement agencies, Ministries of Justice and Security/Interior, the Presidency office, and other representatives of public authorities at all relevant levels of government, as well as civil society organizations and citizens. The report also incorporates the findings of expert peer-review missions in the areas of asset declarations and disciplinary responsibility of judicial office holders, fight against corruption, organised crime and anti-money laundering, focused trial monitoring and assessment of recently concluded cases. It further takes into account the reports and assessments of various institutions, such as OSCE and the Office of High Representative (OHR). Last but not least, the “Right to Justice” public debate of 20 November 2019 which gathered representatives of the judiciary and other institutions, civil society and academia from across the country provided valuable insights into the rule of law situation in BiH.

7. The experts’ group worked in full independence without receiving instructions from any institution as to the content of the report. This report does not reveal sources of information for each finding. However, the experts are satisfied that each of their findings is based on sufficiently reliable information and material to confirm their accuracy. This report does not deal with individual cases.

8. The report has to be read in the context of recent analyses and recommendations provided by the EU, in particular those set out in the Commission’s Opinion on BiH’s application for membership of the EU and its key priorities, attached to this report. It is by no means the intention of this report to second guess the findings laid down in these documents, to question or substitute the recommendations made, to rank them in terms of importance and urgency or to work out a new agenda for addressing shortcomings.

Rather, by highlighting systemic problems and identifying concrete options for overcoming them, this report should be seen as a – hopefully useful – tool to support the country to work more efficiently through the list of actions needed to make the necessary significant progress in the area of rule of law, as outlined in the Commission’s Opinion.

9. This report will first look into various aspects of the rule of law challenges BiH is currently facing (II). It will then indicate, how the judicial system in the country could better serve the citizens, by enhancing their rights to justice and by creating a safer rule of law environment for them (III). Furthermore, the report will reflect on how the integrity, efficiency and independence of the BiH judiciary should be ensured, in particular by improving judicial self-administration and by introducing efficient integrity checks for judicial officeholders (IV). Finally, it will point out the constitutional weaknesses, which have to be overcome (V).

## **II. BiH Rule of Law Challenges**

10. This report is confined to a limited number of rule of law areas focusing in particular on the functioning of the judiciary system and the citizens’ right to an independent, impartial and accountable justice. This does not imply that shortcomings do not exist elsewhere and that urgent action or reforms are not required in other areas.

### **General and BiH specific rule of law challenges**

11. Western Balkan countries have many rule of law shortcomings in common. Moreover, as recent events have revealed, reaching and maintaining high rule of law standards can be a challenge even for EU member states. Following closely developments in other Western Balkan countries as well as within the EU could contribute to a better understanding of the – common or country-specific - problems at stake and could help to assess objectively what needs to be done. The fact that rule of law challenges have also occurred within the EU, should by no means lead Western Balkans countries to the erroneous conclusion that the EU could lower rule of law standards in the accession process.

12. The complex architecture of the BiH Constitution, adopted as an integral part (Annex IV) of the Dayton General Framework Agreement for Peace, aggravates the rule of law situation in BiH. Institutional fragmentation as well as frequent disputes on the distribution of competences between levels of government have contributed to a difficult situation, not least in the area of rule of law. “Constitutional complications” however cannot be considered as the only cause for rule of law shortcomings in BiH. Many problems are unrelated and could therefore be addressed despite those complications. Frequently, referring to the complex constitutional architecture and the difficulties in revising the constitutional set-up appears to serve as an excuse for not taking action, a pretext to evade difficult debates for finding workable solutions, where necessary through pragmatic compromises.

13. Overall, the current situation in BiH appears to be characterised by a considerable degree of “dysfunctionality” of public institutions at all levels and across the country. Some key actors show no determination to address or overcome dysfunctions through coordination and cooperation. Rather, they seem to do everything to obstruct any change that they consider not to be in their own interest. This attitude negates the laudable attempts of many office holders who try - in their day-to-day work - “to make things function” despite all difficulties and obstacles.

### **Promoting reforms in the interest of BiH citizens**

14. In BiH, important rule of law areas such as the judiciary require systemic reforms. It is essential that everybody understands that such reforms are in the first place in the interest of the country and its citizens. They are crucial to improving their living conditions and, not least, ensuring a stable environment for economic development. Reforms are primarily needed to bring the country forward, to contribute to a better, more reliable and safer life for its citizens and not just to tick the boxes in to-do-lists in the framework of the EU accession process.

15. A common understanding and a common sense of responsibility across levels of government and institutions for overcoming rule of law shortcomings in the country are desperately needed. Each actor has to assume his or her own responsibility to contribute to improvements in the rule of law system. This will in some cases require a change in attitude with a focus on finding solutions rather than setting obstacles, to simplify rather than to complicate, to support reasonable initiatives rather than block them and to be proactive in promoting necessary reforms rather than cultivating a culture of passivity and obedience .

16. A culture of responsibility, accountability and transparency still needs to be fully developed within public institutions. Such a culture is required to promote greater consistency in policy and action and to ensure clarity and foreseeability of law and practice. All public institutions, government and judicial bodies, have to be ambitious in fulfilling their tasks, functions and mandates, as part of a system, without having to fear pressure or intimidation in doing so. Moreover, non-governmental bodies should never be put under pressure or intimidated in the exercise of their role and tasks.

17. Reforms require political and institutional will and determination to be carried out. They should be based on an inclusive, transparent process, which should overcome party, entity or ethnic divisions. A firm commitment at political level in governments and parliaments alike is indispensable for such reforms. In order to be sustainable, reforms also have to come from within. In this sense, ownership is essential. Society as a whole should engage in the reform process. Reforms should build upon objective, unbiased assessments of the current situation and the problems to be addressed, taking into account what has or has not been achieved in the past.

18. Sustainable reforms take time to be properly planned, decided and implemented. However, the desirability of further assessment and consultation should not delay reforms, which are long since overdue and which have already been discussed for years.

Clearly: lost time has to be made up; obstruction should stop.

### **Legislation, implementation and behaviour**

19. Where legislative changes are needed, the legislator, despite all legitimate divides, e.g. between political parties or levels of government, should deal with them in a responsible manner. Beyond all divides, reasonable solutions and compromises need to be sought. Decisions should not be unnecessarily vetoed. Obstacles need to be removed and options explored for realizing the shared goal.

20. However, like in other countries in the region, in BiH the lack of an appropriate regulatory framework is not always the most pressing issue. In many areas, legislation in line with European and other international standards is already in place. Modifications in legislation are not always required to address persistent problems and shortcomings. Instead, there is a considerable gap between legislation and practice which needs to be bridged. There might be different reasons for such a gap. The positivist and formalistic behaviour of many office holders at all levels often appears as a real obstacle to proper implementation. In some cases, this is made worse by an attitude of passivity or even obstruction of office holders. But rule of law is a system: all of its elements need to integrate and work together as distinct parts.

21. Implementation of rule of law is insufficient, often due to poor management of human resources, political interference and a lack of a culture of accountability and transparency. Where changes are decided, their implementation and its regular, systematic monitoring often fall short. It is not sufficient to adopt reforms in regulations and rulebooks. Change needs to be facilitated, accompanied and explained to those who bear the burden of implementing it. And implementation measures need to be assessed, evaluated and reviewed after a certain period.

22. Appointments and promotions in all sectors of public activity must be based on qualification and merit.

### **Rebuilding trust**

23. Trust needs to be rebuilt. There is a widespread perception in the country that in recent years judicial decisions were politicised, that the political parties had taken possession of the state, that office holders had conflicts of interest and mixed up their official mandate with their party/personal agenda. For citizens to regain confidence, all public institutions will have to work only in the public interest, respecting the law and complying with high ethical and other professional standards.

24. The rule of law means that nobody is above the law. All public action has to be accountable; wrongdoings and irregularities need to be met with appropriate remedial action and sanctions. Accountability must be established above all by addressing failure and misbehaviour and fighting impunity.

25. Officials working in public bodies need to have confidence that they can carry out their duties free from direct or indirect pressure. Public decisions have to be predictable. Legal certainty needs to be re-established.

### **III. The judicial system at the service of the citizen**

#### **Guaranteeing human rights and fundamental freedoms**

26. Human dignity, freedom, equality and the respect of human rights are essential values, on which the EU is founded.<sup>8</sup> Basically, these values are also the foundation of BiH. Its Constitution requires the state and the entities to „ensure the highest level of internationally recognized human rights and fundamental freedoms.<sup>9</sup> The rights and freedoms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols apply directly in BiH and “shall have priority over all other law.”<sup>10</sup> Moreover, the BiH Constitution enumerates the human rights and fundamental freedoms that all persons within the territory of BiH shall enjoy.<sup>11</sup>

27. To be effective in reality, citizens’ rights need proper enforcement and sufficient remedies to ensure effective legal protection against violations of such rights. In this context, the BiH Constitutional Court has wide competences, having appellate jurisdiction “over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina” as well as “over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, ...”.<sup>12</sup> Thus, the BiH Constitutional Court, in line with the competences conferred on it in the Constitution, has the potential to play a central role in ensuring high citizens’ rights standards in the country whenever it is called upon to rule on such standards in a specific case. Ultimately, however, it is the duty of all public authorities and all courts to respect and to enforce those standards as interpreted by the Constitutional Court. All law has to be interpreted and applied in such a way as to give effect to the citizens’ rights laid down in the Constitution. BiH authorities and courts should see this as their core task instead of “outsourcing” protection of human rights and fundamental freedoms to international bodies, in particular to the European Court of Human Rights (ECtHR). For the time being, the system has not yet achieved the level of maturity needed to allow it to dispense with the need for international judges, but this must remain the ultimate objective.

28. In past years, the ECtHR as the ultimate instance to interpret the European Convention on Human Rights (ECHR), has been frequently called upon to decide on the respect of human rights and individual freedoms by BiH authorities. Its abundant

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<sup>8</sup> Art. 2 TEU.

<sup>9</sup> Art. II (1) BiH Constitution.

<sup>10</sup> Art. II (2) BiH Constitution.

<sup>11</sup> Art. II (3) BiH Constitution.

<sup>12</sup> Art. VI (3) BiH Constitution.

jurisprudence has considerably contributed to clarifying human rights standards in BiH.<sup>13</sup> Where the ECtHR finds a violation of the ECHR and, as a consequence, imposes obligations on the country (e.g. to modify its legislation or to remedy an individual human rights violation) a speedy and complete implementation of such a decision by the respective competent authority is a binding obligation for a Council of Europe Member State. Political obstacles, practical difficulties or even a lack of funding cannot be excuses for not implementing an ECtHR ruling. Nor are they an acceptable excuse for not implementing any other court judgement. A non-implementation of a ECtHR ruling over a prolonged period is not only a violation of BiH's international obligations, to which its Constitution refers, but also indicates a serious lack of determination of the country to respect the rule of law.

29. The failure to comply with the ECtHR's more than ten years (!) old *Sejdić-Finci* case law has deprived citizens of their rights only because of not belonging to the "right group" or residing in the "wrong part" of the country. The court's decision touches upon fundamental democratic and human rights principles, including non-discrimination. Fundamental rights, as guaranteed by the ECtHR, "constitute general principles of the Union's law"<sup>14</sup> and "have priority over all other law"<sup>15</sup> according to the BiH Constitution. Thus, not taking or not even attempting to take any serious action to urgently comply with this case law will, as a result of this single issue only, put BiH at a high risk of being criticised for seriously obstructing rule of law principles and for not being really committed to promoting the rule of law. It means that BiH does not take its membership in the Council of Europe seriously, a community of States that must share the same values of democracy and fundamental rights. It also jeopardizes any chance of accession to the EU; thus, a solution must be found. Likewise, it is unacceptable that in Mostar, no local elections have been held for 10 years. The recent decision of the ECtHR on Mostar, resulting from the complaint filed by Irma Baralija, is an opportunity for the Parliamentary Assembly of BiH and the BiH Constitutional Court to implement it on time and close this infamous chapter. This opportunity must not be missed, and elections must take place in 2020. Mostar itself applied to become the European Capital of Culture with the impressive slogan "everything is bridgeable". This motto should apply to any area where discrimination and separation occur, not least to those areas where courts have already ruled against such practices and their decisions await implementation.

### **Enhancing citizens' rights to justice**

30. In the current rule of law discussion between the EU (and the broader international community) and BiH, as with other Western Balkan countries, significant focus is placed on criminal justice matters. This is indeed an important area, which is particularly sensitive in terms of human rights and where many shortcomings still have to be

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<sup>13</sup> See most notably, prohibition of discrimination: *Sejdic and Finci v. BiH*, *Zornic v. BiH*, *Pilav v. BiH*, *Baralija v. BiH*; property rights: *Suljagic v. BiH*, *Djokic v. BiH*, *Orlovic and others v. BiH*; "no punishment without law": *Maktouf and Damjanovic v. BiH*; right to liberty and security *Al Husin v. BiH*; right to fair trial: *Jelicic v. BiH*, *Colic v. BiH*, *Djuric v. BiH*.

<sup>14</sup> Art. 6 (3) TEU.

<sup>15</sup> Art. II (2) BiH Constitution.

overcome. Nevertheless, the effective functioning of the civil justice system is equally important. Efficient legal protection by a properly functioning civil (including commercial) judiciary is essential for the day to day lives of citizens and their overall trust in the judiciary and also important for the economic development of a country. Moreover, citizens can expect that judicial remedies are available against any decision of a public authority concerning them.

31. Citizens must enjoy equal access to justice, irrespective of their income and residence. To this aim, legal aid legislation must be harmonised and legal aid services need to be ensured across the country, and extended beyond criminal cases. Appropriate resources must be allocated to ensure the proper functioning of the system.

### ***The civil justice system***

32. Civil justice proceedings are laborious, complex and formalistic and take an excessive amount of time. This significantly limits the citizens' right to effective judicial protection in civil matters and leads to increased legal uncertainty.

33. The civil judiciary is overburdened by an untenable backlog of over 1.9 million cases relating to unpaid utility bills. Obtaining court judgements on outstanding utility bills is pursued as means to justify the unsustainable debts of public utility companies, largely owned by entity/cantonal and Brčko District governments. The outdated enforcement system, the lack of data on utility service users, including debtor's registry per income category further aggravate the problem. Action plans to reduce the backlog and legislative initiatives have not yet materialised. The legislator must take urgent action to unburden the courts from cases relating to unpaid utility bills, in particular by modernising procedural laws, including enforcement, and improving the corporate governance of publicly owned companies.<sup>16</sup> In order to enable the civil judiciary to focus its limited resources on serious matters courts must be relieved of the cases relating to enforcement of uncontested small debts.

34. Another major source of citizens' dissatisfaction with the civil justice system is the excessive length of court proceedings. The BiH Constitutional Court has found violations of the reasonable time clause, guaranteed by the BiH Constitution and the ECHR, in hundreds of cases.<sup>17</sup>

35. Legislation and implementing measures need to be adopted urgently to address the excessive length of proceedings. A legal remedy against violations of the right to reasonable time of proceedings should be considered. The use of alternative dispute resolution methods in civil matters, including commercial, labour and consumer related disputes, and effective enforcement of resulting agreements must be facilitated. The long awaited implementation of the electronic communication laws in judicial proceedings

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<sup>16</sup> See Commission recommendations (2019).

<sup>17</sup> See e.g., "Gabriela Banovic" case, Decision on merits, AP-1062/15, 17.05.2017 (Official Gazette of BiH, no. 40/17, from 02.06.2017) which also covered 120 other identic appellations. According to the Court such excessive length of judicial proceedings is a consequence of systemic shortcomings in the organisation of the judiciary.

must start immediately.

36. Judges must manage trial proceedings efficiently and ensure full respect of procedural discipline. The weak trial management and lenient enforcement of procedural discipline by judges further contribute to lengthy proceedings. Procedural terms are not strictly enforced, hearings are scheduled in an irregular manner over a long period of time and extension of deadlines is often permitted without serious justification. A strong commitment and empowerment of judges is necessary to facilitate delivery of justice within reasonable time.

37. Efficiency of courts in business related matters, in particular in the areas of contract enforcement and bankruptcy must be significantly improved. Timely adjudication in these matters is essential to support a healthy business environment, investment and economic growth. Courts should take full advantage of the judicial IT infrastructure to raise efficiency in commercial matters in particular in non-contentious cases. Easy access to court and related registers, in particular by electronic means must be ensured without further delay. Legislation to enable electronic filing must be urgently adopted and enforced.

38. The High Judicial and Prosecutorial Council (HJPC) and Ministries of Justice must coordinate necessary actions to ensure the correct implementation of all the above measures.

### ***Legal protection against administrative decisions***

39. Effective administrative and judicial remedy against violations of rights by any public authority is essential to safeguard citizens' rights. Remedies of this kind exist in BiH. However, generally applicable administrative rules and procedures often do not seem to be respected. It is essential, that citizens' rights, and in particular their right to good administration, which includes the right to be heard, the right to access to his/her own file and the duty to state reasons, are fully taken into account at all stages of administrative procedures. This is particularly important where far-reaching administrative decisions in matters that may adversely affect their rights are to be prepared, such as decisions related to urban planning. Administrative procedures should be carried out within a reasonable time. Obviously, they should be handled in the same way for all citizens, without discrimination. Ultimately, any administrative decision should be open to effective judicial review, at the request of those affected by a decision.

40. More specifically, administrative justice is not efficient in protecting the individual rights of citizens against decisions or the failure to act of public authorities. A particular problem persists at the level of the Supreme Court of FBiH which is facing an important backlog of cases relating to protection of veterans' rights and risks being unable to deliver judgements within a reasonable time. Moreover, there is no right to appeal in these cases. The legislator must urgently enact legislation to address this situation, including by considering the transfer of competence to cantonal courts in these matters.

41. Although not being a court, the Institution of the Ombudsman for Human Rights has a clear rule of law mission. It is an essential oversight body tasked with keeping public authorities accountable to citizens, in particular in the area of non-discrimination and access to information. However, the Ombudsman is deeply politicised and lacks independence. Taking into account its broad competence, it should be more proactive in carrying out its mandate and fully using its powers, based on a non-ethnic approach. In particular, the Ombudsman should use its competence to initiate or intervene in judicial proceedings, which may result in legally binding decisions of the court. It should not limit itself to issuing primarily non-binding recommendations.

## **A safe rule of law environment for citizens**

### ***The criminal justice system***

42. The criminal justice system in BiH is failing to combat serious crime and corruption. None of the four existing criminal justice jurisdictions is adequately functioning.

43. The BiH Court has jurisdiction, under certain conditions, over criminal offences prescribed in the criminal legislation of the entities and Brčko District, but this power has not been exercised in recent years. This jurisdiction needs to be properly defined and exercised, in line with the recommendations of the European Commission and of the Venice Commission.

44. Cooperation between state, entities/district and cantonal jurisdictions is extremely weak. The lack of coordination and cooperation among the participants of the criminal justice system (i.e. law enforcement bodies, prosecutor's offices and related courts on all levels of authority in BiH) inevitably creates conditions for serious dysfunctionality and lack of efficiency.

45. The relationship between prosecutors and police is far from clear or effective in tackling crime. The police are not directly responsible to the prosecutor, though the latter is the leader of investigations, as stipulated in the criminal procedure codes. Law enforcement agencies are largely passive and do not always follow the orders of the prosecutors. According to the criminal procedure codes, it is the function of the prosecutor alone to lead the investigation and to detect and prosecute offenders. This is frequently used by the law enforcement agencies as an excuse for the complete lack of a proactive approach in investigations.

46. The deep fragmentation of law enforcement agencies across BiH significantly affects their overall capacity to fight and prevent crime. Inter-agency cooperation and exchange of information is patchy and generally not satisfactory. Such fragmentation and lack of cooperation has a strong negative impact both on the capacity and efficiency of law enforcement, especially in cases of high-level corruption. Co-operation between law enforcement agencies needs to be strengthened and where necessary to operate across boundaries in order to effectively address crime. The use of joint investigation teams should be strengthened.

47. Prosecutors are failing to lead crime policy as well as criminal investigations. A systematic approach is lacking at the level of prosecutors' offices. In particular, initiatives to put in place action plans that would facilitate pro-active cooperation with police officers and attempt to achieve acceptable results are generally not present. In failing to do so, prosecutors neglect the use of all existing investigation tools, in particular, special investigative measures.

48. The quality of many criminal investigations is very low. In some cases, prosecutors do not prosecute even when there is evidence to do so. Failure to take obvious investigative steps has been observed, without due justification, particularly in cases dealing with high-level crime or involving 'high level persons'.

49. Perhaps the most serious problem identified relates to the receptiveness of prosecutors to undue influence and lack of individual independence. The excessively hierarchical structure, the absence of any adequate independence safeguards and of a system of accountability are noteworthy. Interference in ongoing cases, pressure, threats and intimidation of prosecutors, but also of judges, have been observed and are a cause of grave concern.

50. The Federation's lack of political will to establish specialised and independent departments for fight against corruption and organised crime within the FBiH Prosecutor's Office and FBiH Supreme Court is evident. Nevertheless, such specialised departments are essential in complex corruption cases. The special departments at the BiH Prosecutor's Office and Prosecutor's Office in the Republika Srpska entity exist but did not achieve any results in high-level cases.

51. Like civil proceedings, criminal trials are excessively lengthy, cumbersome and inefficient. Judges are too lenient in the management of trials, allowing for lengthy gaps between hearings and frequent routine postponements with little or no justification. The prosecutor has no right to appeal these decisions. There is a practice of summoning too few witnesses on trial days, who even when summoned frequently fail to appear before the court. There seem to be no adverse consequences when this happens. In the trials monitored, no attempt was made to verify the causes of absence of witnesses. Trials should be organised on the principle that once started a trial should continue on successive court days, until hearings are concluded, unless there is good reason to depart from this principle. In order to make this mandatory, the criminal procedure codes should be amended to reflect this principle.

52. Some judges appear unwilling or unable to enforce the rule of law in the face of determined opposition from persons charged with serious criminal offences. The failure of some defendants to turn up in court is alarming. It seems almost as if a criminal trial is optional for the accused.

### ***Fight against corruption and serious crime***

53. The operational inefficiency in cases of corruption, complex financial crime and organised crime are a cause of particular concern. In these cases the judicial system is

clearly not functioning, which leads to impunity and lack of trust on the part of the citizens. Legal fragmentation and competence arguments are frequently used to justify inaction or to undermine an investigation.

54. Widespread corruption in the public sphere and its strong link to organised crime is worrying. The courage and professionalism of a few members of the judiciary, prosecutors and law enforcement officers has been observed. However much more effort, courage, responsibility and higher ethical standards are needed to make a decisive difference and eradicate the deep-rooted corruption.

55. In cases of high-level corruption unexplainable professional and legal mistakes, negligence, abuse of procedures and questionable court decisions have been observed. Furthermore, there seems to be no accountability for such mistakes.

56. The few cases of corruption that were prosecuted and resulted in final convictions, largely relate to petty corruption. However, even in these cases the sanctions do not have a deterrent effect.

57. Investigations in corruption cases are, as a rule, limited in scope and fail to reveal the full personal, territorial or financial extent of the offence. Financial and forensic methods of investigation and anti-money laundering tools are under-developed. Recovery or confiscation of illegal wealth resulting from acts of corruption and related crime are not adequately used.

58. The same operational insufficiency was observed in the preventive tools. The specialised anti-corruption bodies are scattered throughout all levels of government, and the overall system remains deeply fragmented and inefficient. The Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIK) failed to become visible and vocal. It missed a number of important occasions to place itself at the heart of the fight against corruption, including in the area of whistle-blowers' protection. Although the APIK has sufficient material and human resources to properly function and deliver tangible results it largely failed to do so. Equally, the cantonal level specialised anti-corruption bodies cannot be seen as independent. These have no permanent mandate, are understaffed and are subordinated to the cantonal government time in office.

59. The Sarajevo canton specialised anti-corruption body stands out as a good example. Since 2015, the Office for Combating Corruption and Quality Management of the Sarajevo canton processed nearly 500 reports of cases of corruption, out of which half were directed to the competent authorities for further investigation and action. The lack of any meaningful follow-up in 47 cases submitted to the cantonal prosecutor's office is worrisome.

60. Whistle-blower protection is an essential tool in combatting corruption. Although there is legislation on the protection of whistle-blowers at State level, Republika Srpska entity and Brčko District concrete results are less than modest. There is a need to adopt legislation on whistle-blower protection at the FBiH entity level and expand the scope of existing legislation to the private sector. There is also an acute need for more effective

application of the laws in practice, and for continuing monitoring of their effectiveness and a willingness to amend them where weaknesses become apparent.

61. All aforementioned dysfunctions lead to an enormous distrust of the citizens in the criminal justice system and to huge losses for the public budgets. An immediate and serious response from the law enforcement bodies, the prosecutor's offices and the judiciary is needed. Specialised departments in prosecutor's offices must start to deal effectively with high-level corruption cases and their independence must be strongly safeguarded. Concrete results should be the top-priority of prosecutor's offices and specialised departments therein, which should be held accountable for their results or lack thereof. Additionally, a thorough audit of the failed cases is strongly recommended to identify the systemic problems and come up with a remedial action plan with a strict timeline.

62. A strict implementation and monitoring of the above recommendations will give the main actors of the criminal justice system and BiH authorities the opportunity to prove their serious commitment to real progress in fighting crime and corruption.

### ***War Crimes***

63. Twenty-five years after the war, rendering justice to the victims remains incomplete and has not lost its urgency. Although having a better record than some other countries in the region on dealing with war crimes, BiH struggles with serious delays internally, in particular regarding the most complex cases. A renewed impetus is needed to ensure that the mere passing of time does not lead to impunity for perpetrators. On this, political authorities are expected to lead by example, in particular by adopting the revised National War Crimes Strategy without delay. There is no place for glorification of war criminals from any side. Denial or revisionism contradict fundamental universal values, and prevent any attempt at internal reconciliation. Laws at all levels in BiH should properly criminalise such behaviour, as has already been done in the Criminal Code of the FBiH. War crime convictions, including after sentences have been served, should also be considered as grounds for ineligibility for political office. These convictions, including those by ICTY and its successors, must be entered into domestic criminal records.

## **IV. Ensuring the independence, integrity and efficiency of the judiciary**

### **Judicial self-administration**

64. The High Judicial and Prosecutorial Council (HJPC) is the single self-management body for the entire judiciary and a central institution in the BiH ruled of law area. Its mandate covers all four judicial systems and is intended primarily to shield the judiciary from political influence and interference, guarantee the proper functioning of all judicial systems and act as the driver of judicial reform. The HJPC selects, appoints and promotes judicial office holders and managers and exercises disciplinary powers. Furthermore, the HJPC by-laws apply in all four judicial systems, which is an important element for the

coherence and consistency of judicial policy. These broad competences make the HJPC a powerful institution. It is therefore essential that the institution embodies the values and principles that it is intended to guarantee and that it leads the process by example with efficiency, responsibility and integrity.

65. Over the last years, the HJPC has itself become part of the problem. Serious miscarriages of justice have become apparent due to lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organization, insufficient outreach and transparency, and, finally, its failure to implement reforms.

66. Public opinion was particularly shaken by corruption allegations against the HJPC President and alleged manipulations of appointment and disciplinary procedures. Taking into account the seriousness of the allegations the reaction of the President as well as the unanimous support for his actions by the HJPC members does not appear to be appropriate bearing in mind the importance of this institution. No substantive disciplinary investigation has taken place. An important chance to set a precedent of integrity was lost. This created deep reputational damage to the institution. Numerous interventions at the public debate “Right to Justice” have demonstrated that this incident remains an issue of deep concern in professional circles and among the broad public of the country.

67. In the current BiH judicial order, the HJPC is indispensable. However the HJPC needs serious reform and a radical change of behaviour. The legitimacy of the Transfer Agreement upon which the HJPC is based should not be questioned and it cannot be undone unilaterally. Despite a number of practical improvements adopted on the basis of expert peer review missions supported by the Commission, the HJPC did not manage to assert itself as an institution at the service of the judiciary. Attempts to reform the HJPC Law have been obstructed by politicians for almost a decade. The most recent HJPC initiative for a new HJPC Law has not resulted in any concrete action by the BiH Ministry of Justice since July 2018. A Working Group, established for this purpose never met.

68. The lack of trust in the judiciary is particularly acute with regard to the HJPC. The HJPC is often perceived by citizens and even by members of judicial community as a centre of unaccountable power in the hands of persons serving the interests of a network of political patronage and influence. This has raised the question: How can the trust in the HJPC be rebuilt? And how can one avoid the HJPC members being perceived as “the Untouchables” and above the law?

69. The procedure for the election of the HJPC members must be revised. Currently the election of the HJPC members relies on a complex system of ethnic and gender quotas as well as on representation of different branches and levels of the judiciary from all parts of the country. It includes members appointed by the executive, legislature and bar chambers. These requirements limit open peer election by reducing the number of eligible candidates. This makes elections to HJPC vulnerable to political pressure.

70. The disciplinary procedures and bodies within HJPC must be radically reformed. While the professionalism and courage of disciplinary prosecutors of the Office of the Disciplinary Counsel (ODC) merit mention, it is highly problematic that disciplinary

panels which take the decisions, contain a majority or are completely composed of HJPC members. This is particularly unacceptable where other HJPC members or the President are themselves subject to disciplinary procedures.

71. Appointments, promotions and career advancement of judges and prosecutors by the HJPC should primarily follow a non-ethnic approach and be based on merit. The problem of ethnic approach in the ranking lists is particularly acute in the case of court presidents and chief prosecutors. While general representation of constituent peoples and others is a constitutional principle, the prevailing standard for judicial appointment should be that of merit. Ethnic affiliation should be considered only at the very end of any selection, if there is a choice between two equally ranked candidates. Appointment decisions need to be more thoroughly motivated, according to predetermined criteria. This is only one example where improvements can be made immediately. Although the decisions need to be open to judicial review, this is not yet possible under the current legislation.

72. All judges and prosecutors in the four systems need to be subject to performance appraisal. Objections to it have been settled by the Constitutional Court.<sup>18</sup> There are evident difficulties with the transition towards a more quality-based system of evaluation of judges and prosecutors. The previous system was over-reliant on quantitative criteria and statistics, which has shown to lead to distorted incentives for both judges and prosecutors. A reform has been adopted introducing new criteria for performance evaluation in line with Commission recommendations. The reform puts much more emphasis on genuine quality, which is balanced against quantity. Taking into consideration the enormous backlogs of cases, any demand to further reduce quotas should be examined with extreme caution. The “obsession” over quota-reduction does not appear justified as in practice the vast majority of judges and prosecutors fulfil or even exceed their 100% quota.

73. Furthermore, the HJPC’s initiatives to improve the quality of justice must be consolidated and expanded. The HJPC initiative to introduce mentorship in courts and prosecutor’s offices by senior judicial office holders must continue. The recently adopted performance evaluation criteria seeking to raise the quality of judicial decisions must be carefully monitored and improvements made where necessary.<sup>19</sup>

74. The HJPC members must lead by example. All four permanent HJPC members need to carry out their duties on a full-time basis. HJPC work is a priority even for part-time members. Postponement of important decisions due to repeated absence of members from office, including the leadership and full time members, and deferral of HJPC duties in favour of other activities is not acceptable.

75. The work of the HJPC requires a significant increase in transparency and outreach. The HJPC decisions regarding judicial reforms or new practices need to be widely discussed with the judicial community and better explained. The HJPC should adopt a

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<sup>18</sup> Constitutional Court BIH, Decision U-4/19, 05.07.2019.

<sup>19</sup> See European Commission for the Efficiency of Justice (CEPEJ) “Measuring the quality of justice”, Document no. (2016)12, as adopted on 7 December 2016, at the 28th plenary meeting of the CEPEJ.

communication strategy and guidelines on relations with media as a matter of urgency, in order to bridge the gap with judicial office holders and citizens. Clear rules to communicate the HJPC activities should be adopted and applied consistently. The recent practice of visiting courts and organising regular roundtables must continue.

76. The HJPC Secretariat, as the permanent structure, is tasked to support the HJPC. It implements the HJPC decisions. Almost half of its staff serve on projects supported by international donors, in particular by the EU. It is essential that the Secretariat keeps focusing on judicial reform priorities, as laid down in the Commission's Opinion, also when coordinating projects of international donors. In this context, the ongoing restructuring of the Secretariat is welcome.

77. To address the above shortcomings the new HJPC law, which generally follows the Commission's recommendations and the recommendations of the Venice Commission,<sup>20</sup> must be adopted to ensure that matters concerning judges and prosecutors in their specific functions are dealt with by separate HJPC sub-councils; that the final decisions of HJPC are subject to judicial review; that disciplinary procedures and bodies enjoy stronger independence guarantees from the HJPC itself and the disciplinary oversight fully includes the President and HJPC members, without their fellow members taking the final decisions. The new law on HJPC should also provide for greater representativeness of all HJPC members by open peer election at the same moment and on a wider basis. The election of HJPC members should be conducted according to a system of proportional representation which could make the artificial establishment of quotas redundant.<sup>21</sup> It is recommended that the final draft law should be subject to the Opinion of the Venice Commission before adoption.

### **Integrity checks**

78. Accountability is essential and holding a public office in the judicial system at any level requires that the judicial office holder strictly respects the law and ethical requirements, acts within his/her mandate and in the public interest. Citizens do not trust the judiciary because of perceived corruption and conflict of interests. Such behaviour, especially at the top of the justice system, gives a bad example and also spreads a climate of insecurity and frustration among the citizens. Judicial leadership has a particular responsibility to set a good example in terms of integrity and ethical behaviour and in applying the highest standards to itself.

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<sup>20</sup> Recommendations of the Venice Commission (2012 and 2014); the adoption of a new Law on HJPC is also part of the Recommendations of Commission's Opinion and the Analytical Report.

<sup>21</sup> The Single Transferable Vote system still used in Ireland and in Malta for parliamentary elections and in Northern Ireland for Local Assembly elections could be particularly suitable in order to ensure a fair representation in a society whose politics largely reflects ethno-religious divides. The system works as follows: each voter marks a ballot paper by placing the figure "1" opposite his preferred choice, "2" opposite his second, and so on until the choices are exhausted. The first preferences of all papers are counted. A "quota" is established. This is the minimum number of votes which only the number of candidates to be elected can achieve. As well as ensuring a relatively proportional result, the system also encourages cooperation across party lines since an ability to achieve high preferences from candidates associated with other fractions improves the candidate's chances of election.

79. Numerous complaints have been made in particular during the public debate “Right to Justice”, that individual judicial office holders, sometimes in key positions, do not behave in line with these requirements.

80. In order to regain the trust of the population, the judiciary needs to immediately show full transparency and determination to establish a rigorous and credible system of checks of asset declarations of judicial office holders. These asset declarations should be submitted and processed on an annual basis. They should also be made public. Inexplicable wealth should be thoroughly investigated and, if found unjustified, appropriate sanctions should be applied, which ultimately could lead to dismissal from the judicial profession. The legislator should consider the introduction of a specific criminal offence regarding illicit enrichment of all public officials.<sup>22</sup>

81. The current system of just gathering asset declarations by judicial office holders on paper without carrying out any checks is pointless. There is an urgent need to step it up, as one element of a broader integrity check. This was the purpose of a new Rulebook on the declaration of financial assets adopted by HJPC in 2018. However, the application of the new Rulebook has been objected to by the Data Protection Agency upon a complaint by judges from the Court of BiH and subsequently suspended by the HJPC. A revised Rulebook has been drafted by the HJPC and positively assessed by the Commission.<sup>23</sup> However, recent events<sup>24</sup> call for a strengthening of the revised Rulebook to allow for its full application to all judicial office holders without exception and to all judicial management positions. In addition, a functionally and financially independent structure within the HJPC Secretariat should be entrusted with the verification of asset declarations. The body must be able to seek information from all competent authorities in BiH and establish specialised teams in charge of conducting necessary checks of the information contained in the asset declarations. In case important discrepancies are detected that amount to a disciplinary case,<sup>25</sup> the file has to be passed over to the ODC for further investigation. The Rulebook should be in place so that the process can be initiated for all judges and prosecutors as of 1 January 2020. As a matter of priority, the asset declarations of management position judicial office holders, in particular of the president and members of the HJPC, the court presidents and chief prosecutors must be submitted and processed before the end of the first semester of 2020.

82. To ensure its credibility the process must be subject to close external monitoring, including the possibility of international monitoring of its functioning and enforcement. Together with reinforced transparency through publication, such monitoring should alleviate concerns about potential abuse and manipulations.

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<sup>22</sup> Such a criminal offence is recommended by Art. 20 UN Convention against Corruption – UNCAC, for intentional “illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”. ([https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)).

<sup>23</sup> See Commission recommendations (2019).

<sup>24</sup> See paragraphs 65-66 above.

<sup>25</sup> See in particular Art. 56 (23) and 57 (23) of the Law on the HJPC (2004).

83. In the aftermath of the public debate “Right to Justice” civil society organisations in BiH have publicly called for vetting of judicial office holders.<sup>26</sup> At this stage the experts group does not suggest vetting. Such a vetting is a measure of last resort and requires very specific conditions, as explained by the Venice Commission.<sup>27</sup>

84. This revised system of asset declarations, will be essential for ensuring the integrity of judicial office holders. Should the new system of asset declarations and its implementation not achieve its objective, the pressure for vetting might become difficult to resist.

## **Education and Training**

85. Although compulsory, the quality and the duration of the initial training programme for newly appointed judges and prosecutors are inadequate. This significantly affects the quality of justice. Appointments to the judicial office are organised based on ad-hoc selection procedures and are not sufficiently based on merit.

86. The annual judicial recruitment examination should be organised as the only entry point to the judicial office.<sup>28</sup> The access to this examination should be conditional on the completion of a preparatory programme, which needs to be urgently established, for law graduates who have passed the bar examination. A comprehensive and standardised curriculum for this preparatory programme leading to the judicial entry examination should create equal opportunities, ensure a merit-based access to profession and establish common standards for candidates. This preparatory programme should include amongst others, courses on ethics and national and international human rights law. Such a programme could, in the short run, be organised in the form of a rigorous course held by a consortium of selected Law Faculties, and, in the long run, lead to a permanent educational structure, drawing from the successful experience in other countries, most notably North Macedonia. The preparatory programme is also an opportunity for setting countrywide quality standards.

87. The quality of the current initial training of the newly appointed judicial office holders should be significantly improved. The two entity Judicial and Prosecutorial Training Centres should intensively cooperate under the oversight of HJPC to this aim.<sup>29</sup> The quality of trainers needs to be thoroughly assessed and the criteria for selecting trainers revised and strictly respected.

88. Continuous professional training activities for judges and prosecutors are overwhelmingly funded by international donors and the EU. There is need for more ownership, better planning and coordination based on current needs to be performed by HJPC together with the entity Training Centres, in accordance with the law. Training is often no more than an occasion for tourism and leisure rather than for building-up

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<sup>26</sup> See <https://ti-bih.org/obracanje-organizacija-civilnog-drustva-iz-bih-povodom-pripreme-izvjestaja-o-stanju-u-pravosudju/>

<sup>27</sup> See CDL-AD(2015)045, in particular paragraphs 97-100.

<sup>28</sup> See Commission recommendations (2016).

<sup>29</sup> See Commission recommendations (2017).

knowledge. All study trips should be well-motivated, and their organisation and feedback more transparent.

### **Management of courts and professional associations**

89. The managerial role of Court Presidents and Chief Prosecutors must be proactively used to ensure a more effective functioning of an independent judiciary and an enhanced quality of justice.

90. Court Presidents must take an active role in the management of their offices to enhance court performance and improve the quality of justice for citizens, without interfering in the independence of justice. Court Presidents should in particular ensure the provision of necessary physical and human resources, identify and solve systemic problems in co-operation with other Court Presidents across jurisdictions, and develop a serious strategic planning in which the challenges affecting the overall judiciary and their individual court are addressed, but also where well-defined goals are included. Court Presidents must also promote the quality and consistency of judicial decisions in their court. Through co-operation and interaction with other courts, Court Presidents should share experiences and identify best practices of court administration. It would be desirable that such co-operation be established between the BiH courts across jurisdictions. In so doing, Court Presidents should engage in reform processes in coordination with the HJPC. The same goes for Chief Prosecutors. In performing their judicial management tasks, Court Presidents and Chief Prosecutors should be held accountable.

91. Associations of judges and prosecutors should play a more constructive role in the judicial reform process. Their members should feel free to express their concerns and to proactively formulate proposals. Yet, some of their recent controversial positions at critical moments, by taking sides along entity or even ethnic lines, or by opposing stronger integrity standards in line with European recommendations, have suggested their vulnerability to external influence, hence their lack of independence. This is not the way to serve the general interest of the judiciary.

### **Transparency**

92. The culture of transparency and accountability is under-developed. Judges and prosecutors do not always act with sufficient transparency. Judgments are not sufficiently reasoned. The judicial proceedings as well as judicial institutions are not sufficiently open to the public and media. The long-awaited communication strategy should be urgently finalised, adopted and implemented.

93. Access to court judgements and other legal materials plays a vital role in ensuring consistency and legal certainty. Many final judgements are not publicly available, and many courts still do not have case law departments. The Supreme Court of FBiH does not publish its main judgments although they have the capacity to do so. It is important that judicial office holders, lawyers and the wider public have full access to final judgments,

including summaries of leading cases. Public access to final judgements must be urgently ensured by the HJPC acting in close cooperation with the courts.

## **V. Overcoming constitutional weaknesses**

94. Discussions about reforming the BiH constitutional set-up have been ongoing for years, in fact for decades. Many proposals have been put forward to amend the BiH state and entity Constitutions, in order to overcome dysfunctionalities and fragmentation of the country, to clarify vague or unclear constitutional concepts and – not the least - to take into account the country's development since 1995 as well as its aspiration for Euro-Atlantic integration. Many elements of this debate relate to rule of law issues. Up to now, the various initiatives to address constitutional shortcomings have not resulted in any significant reform.

95. The Venice Commission's statement, made as early as 2005, that a constitutional reform in the country "is indispensable since present arrangements are neither efficient nor rational and lack democratic content," is as valid today as it was then. So is its assessment, that "it seems questionable whether any of the three Constitutions provides a sound basis for the future". If in 2005, i.e. ten years after the adoption of the BiH constitution, the Venice Commission considered that "time seems to be ripe to start a process of reconsideration of the present constitutional arrangements in BiH", time for such a process is more than "overripe" now - nearly 25 years after Dayton. Clearly, the present BiH Constitution as well as the entity constitutions adopted according to this framework are not suitable to bring the country forward on its way to European integration and – independently from this – to enable it to progress further in consolidating as a stable democracy based on highest human rights standards and to enhance sound economic development.

96. The unquestionable political difficulties to amend or reform the BiH state and entity constitutions have to be overcome. The international community should continue to insist. There does not yet appear to be any strong feeling in the wider BiH public, that replacing an "imposed" constitution annexed to a peace agreement by a new constitution resulting from a democratic process and thus achieving entire democratic legitimacy, would as such be an enormous achievement and a huge step forward for BiH to respect, commit and to promote values on which the EU is founded, and this not the least with regard to the rule of law. Postponing constitutional reforms and working on second best solutions under the current constitutional set-up only will not be sustainable in the long run. At the end, such "solutions" will not suffice. Therefore, serious work on reforming the constitutional framework of the country has to start without any further delay. Discussions on constitutional reforms should involve all parts of the society. Where needed, the process should benefit from intensive support from the international community.

97. In parallel to working on constitutional reforms, every possible effort should be made immediately to address shortcomings within the current constitutional framework.

No doubt, a lot can already be achieved in following this path. At the end, it is a question of political will and “interpretative courage” to exploit all possibilities already available under the current constitutional framework, to carry out necessary reforms to overcome the country’s obvious dysfunctionalities. This will, in the first place, require political determination “to make things work despite all the difficulties and obstacles.” Also, at times, in interpreting existing rules some “legal originality” rather than “legalistic formalism” could contribute to find viable solutions. The BiH Constitution, in many of its parts, remains general and – sometimes – vague, and thus is open to interpretation, which can evolve over time – as is the case with all constitutions.

98. The references in the Constitution to international instruments, in particular in relation to human rights and freedoms,<sup>30</sup> not only allow and require BiH to attain highest human rights standards, but also builds into the Constitution a certain dynamism enabling BiH to follow the development of human rights standards at international level. The article “Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities,”<sup>31</sup> is probably a main source of the dysfunctionality of the country. Nevertheless, the Constitution explicitly provides for the facilitation of inter-entity coordination on matters not within the responsibilities of the state<sup>32</sup> and, more importantly, opens the door for conferring under certain conditions additional responsibilities from the entities to the state level.<sup>33</sup> Even additional institutions may be necessary for carrying out such responsibilities. With regard to the serious challenges, not the least in relation to the rule of law, there are good reasons for assuming that for certain responsibilities the state level would be more appropriate than the entity level according to the principle of subsidiarity and the efficient management of functions. Greater and institutionalised cooperation may be a way to avoid centralisation, but only if it delivers equivalent results. At least, a serious and open discussion on eventual transfers must not be excluded from the outset. In the rule of law area, the transfer agreement regarding HJPC and the additional state competences for the BiH Court and BiH Prosecutor’s Office, have proven to be without alternative for the functioning of the comprehensive judicial system; there is no reason to review those decisions.

99. A small country of less than four million inhabitants with 14 different legal jurisdictions comprising the state itself, the two entities of the Federation Bosnia-Herzegovina and the Republika Srpska, the Brčko District and the 10 cantons in the Federation, suffers from what has been once called “institutional overkill”. Obviously, such a set of legal jurisdictions would have difficulties in functioning effectively, even if there were the closest possible alignment between the legal systems themselves as well as a high degree of cooperation. Unfortunately, at present neither of these conditions exist.

100. Moreover, to ensure legal certainty and a unified interpretation of the law throughout various jurisdictions, most countries have a supreme court with countrywide

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<sup>30</sup> Art. II BiH Constitution.

<sup>31</sup> Art. III BiH Constitution.

<sup>32</sup> Art. III (4) BiH Constitution.

<sup>33</sup> Art. III (5) BiH Constitution.

jurisdiction. The peculiar structure of BiH with four judicial systems requires the establishment of a judicial body for this purpose. The Venice Commission recommended the establishment of a supreme court as far back as 2012.<sup>34</sup> This is only one of the many Venice Commission recommendations, which BiH has not followed up so far.

## VI. Concluding remarks

101. This report is confined to a limited number of rule of law areas, mainly the judiciary and related institutions. It does not cover other areas, which obviously are essential for the functioning of the rule of law. Systemic rule of law problems do not only occur within the judiciary, they also affect these other areas. For society to be successful at curbing corruption a culture of integrity is needed. As an important component of the rule of law system, existing oversight and preventive bodies must perform their duties with determination and responsibility. Moreover, civil society and media play an important role in reinforcing the rule of law, as has been impressively demonstrated at the public debate “Right to Justice.”

102. In its Opinion on BiH’s application for membership of the EU, the European Commission has set out key priorities for the country to work on without further delay. The group hopes, that the analysis carried out in this report shall contribute to raise awareness in the general public in the country on those key priorities and will – furthermore – enable the institutions, each of them within their competences, to focus on implementing necessary reforms.

103. This report forms part on the “EU initiative to enhance the monitoring of the Rule of Law in BiH”, which – with its various components – will continue to support the country in its efforts to address rule of law shortcomings. Nevertheless, such an initiative cannot substitute the will and engagement of domestic actors at all levels of the institutions across the country.

104. Progress is desperately needed in the interest of the country and its citizens. Looking back and stating that “it has not worked in the past”, will not help to make such progress. Nothing suggested in this report appears to the group as unrealistic or unfeasible.

105. Addressing rule of law shortcomings in BiH, remains a huge challenge. As the group has pointed out in particular:

- *Trust needs to be rebuilt.*

To overcome current dysfunctionalities, systemic reforms in important rule of law areas, such as the judiciary, are required.

- *Human rights and fundamental freedoms must be guaranteed.*

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<sup>34</sup> CDL-AD(2012)014.

Proper enforcement and sufficient remedies are needed to ensure effective legal protection against violations of such rights. In particular, the failure to comply with the ECtHR's case law is unacceptable.

- *Justice must better serve citizens.*

Important improvements in the civil and criminal justice systems are required. They have to deliver results. Civil justice proceedings are too laborious, complex and formalistic, and take an excessive amount of time. The criminal justice system in Bosnia and Herzegovina is failing to combat serious crime and corruption.

- *The HJPC needs a fundamental reform and a radical change of behavior.*

The HJPC is widely perceived as an unaccountable power in the hands of persons serving the interests of a network of political patronage and influence. As the central institution to ensure the independence and the functioning of the BiH judiciary the HJPC's legal framework and its functioning need to be significantly improved, to better serve the interests of the judiciary and the citizens.

- *Integrity of judicial office holders must be ensured.*

The current system of just gathering asset declarations on paper without carrying out any checks is pointless and needs to be stepped up. It must be subject to close external monitoring. Should the new system and its implementation not achieve its objective, the pressure for vetting might become difficult to resist.

- *The untenable constitutional weaknesses need to be overcome.*

The present BiH Constitution as well as the entity constitutions need fundamental reforms, in particular to overcome the "institutional overkill". They are not suitable to bring the country forward on its way to European integration and to enable it to progress further in consolidating as a stable democracy based on the rule of law, highest human rights standards and to enhance sound economic development. In parallel to working on constitutional reforms, every possible effort should be made to address shortcomings within the current constitutional framework. The common interest should prevail, and not the ethnic approach.

- *Politicians must act constructively and not obstruct.*

106. The group has chosen to criticise – even strongly – the current situation, because it deems it necessary to say things clearly and in a manner which leaves no room for doubt as to the group's message. On the positive side, the group warmly welcomes the fact that there also exists – within the judicial system as well as among the broad public – a strong desire to overcome difficulties and to make things turn out for the better. In this context, the open and positive statements at the public debate "Right to Justice" favouring a strengthening of the rule of law in Bosnia and Herzegovina and a willingness to work towards that end give rise to optimism for the future of the country.

## **Annex**

### **Key priorities of the Commission's Opinion**

#### *Democracy / Functionality*

1. Ensure that elections are conducted in line with European standards by implementing OSCE/ODIHR and relevant Venice Commission recommendations, ensuring transparency of political party financing, and holding municipal elections in Mostar.
2. Ensure a track record in the functioning at all levels of the coordination mechanism on EU matters including by developing and adopting a national programme for the adoption of the EU *acquis*.
3. Ensure the proper functioning of the Stabilisation and Association Parliamentary Committee.
4. Fundamentally improve the institutional framework, including at constitutional level, in order to:
  - a) Ensure legal certainty on the distribution of competences across levels of government;
  - b) Introduce a substitution clause to allow the State upon accession to temporarily exercise competences of other levels of government to prevent and remedy breaches of EU law;
  - c) Guarantee the independence of the judiciary, including its self-governance institution (HJPC);
  - d) Reform the Constitutional Court, including addressing the issue of international judges, and ensure enforcement of its decisions;
  - e) Guarantee legal certainty, including by establishing a judicial body entrusted with ensuring the consistent interpretation of the law throughout Bosnia and Herzegovina;
  - f) Ensure equality and non-discrimination of citizens, notably by addressing the *Sejdić-Finci* ECtHR case law;
  - g) Ensure that all administrative bodies entrusted with implementing the *acquis* are based only upon professionalism and eliminate veto rights in their decision-making, in compliance with the *acquis*.
5. Take concrete steps to promote an environment conducive to reconciliation in order to overcome the legacies of the war.

#### *Rule of Law*

6. Improve the functioning of the judiciary by adopting new legislation on the High Judicial and Prosecutorial Council and of the Courts of Bosnia and Herzegovina in line with European standards.
7. Strengthen the prevention and fight against corruption and organised crime, including money laundering and terrorism, notably by:
  - a) adopting and implementing legislation on conflict of interest and whistle-blowers' protection;
  - b) ensuring the effective functioning and coordination of anti-corruption bodies;
  - c) align the legislation and strengthen capacities on public procurement;
  - d) ensuring effective cooperation among law enforcement bodies and with prosecutors' offices;

- e) demonstrating progress towards establishing a track record of proactive investigations, confirmed indictments, prosecutions and final convictions against organised crime and corruption, including at high-level;
  - f) de-politicising and restructuring public enterprises and ensuring transparency of privatisation processes.
8. Ensuring effective coordination, at all levels, of border management and migration management capacity, as well as ensuring the functioning of the asylum system.

#### *Fundamental Rights*

9. Strengthen the protection of the rights of all citizens, notably by ensuring the implementation of the legislation on non-discrimination and on gender equality.
10. Ensure the right to life and prohibition of torture, notably by (a) abolishing the reference to death penalty in the Constitution of the *Republika Srpska* entity and (b) designate a national preventive mechanism against torture and ill-treatment.
11. Ensure an enabling environment for civil society, notably by upholding European standards on freedom of association and freedom of assembly.
12. Guarantee freedom of expression and of the media and the protection of journalists, notably by (a) ensuring the appropriate judicial follow-up to cases of threats and violence against journalists and media workers, and (b) ensuring the financial sustainability of the public broadcasting system.
13. Improve the protection and inclusion of vulnerable groups, in particular persons with disabilities, children, LGBTI persons, members of the Roma community, detainees, migrants and asylum seekers, as well as displaced persons and refugees in line with the objective of closure of Annex VII of the Dayton Peace Agreement.

#### *Public Administration Reform*

14. Complete essential steps in public administration reform towards improving the overall functioning of the public administration by ensuring a professional and depoliticised civil service and a coordinated countrywide approach to policy making.