

Comments made by the OHR Legal Department concerning request for evaluation of constitutionality of the HR's Decision 162/02, Case number U-56/02

Constitutional Court of Bosnia and Herzegovina

Case number U -56/02

Request for evaluation of constitutionality of the Decision of the High Representative 162/02

Comments made by the Legal Department of the Office of the High Representative

1. In May 2002, three High Judicial and Prosecutorial Councils were established by Law, namely, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina n° 15/02, 26/02, 35/02, the Federation of Bosnia and Herzegovina n° 29/02, 47/02, 62/02, the Republika Srpska n° 40/02, 58/02, 77/02, Brcko District 12/02), the High Judicial and Prosecutorial Council of Republika Srpska (Official Gazette of the Republika Srpska, n° 31/02, 55/02), and the High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, n° 22/02, 42/02).

Their establishment responded, *inter alia*, to the need to secure a high degree of political independence to the Judiciary of Bosnia and Herzegovina and is in line with international standard contained in the "Basic Principles of Court Independence" of the United Nations of 1985, the Council of Europe Recommendation n° R (94) 12 of the Committee of Ministers on the "Independence, Efficiency and the Role of Judges," and the Council of Europe's European Charter on the "Statute for Judges". These Councils ensure that a professional, efficient and impartial selection and appointment process of Judges and Prosecutors is conducted pursuant to similar principles across Bosnia and Herzegovina.

2. In order to achieve that crucial goal, it was necessary to incorporate the role played by these new independent bodies in the respective entity constitutions and to delete the provisions related to the role of the political authorities in the selection and appointment of judges and prosecutors. It goes without saying that the need to guarantee the independence of the judicial and prosecutorial services can best be achieved through constitutional provisions. Accordingly, two Decisions of the High Representative of Bosnia and Herzegovina amended the Entity Constitutions in that respect^[1].

3. The Office of the High Representative has been invited to participate, as *amicus curiae*, to the adjudication of the case brought by 49 representatives of the National Assembly of the Republika Srpska against the Decision of the High Representative n°162/02 of 23 May 2002. The delegates further request interim measures which would postpone enactment of the disputed Decision No. 162/02 of 23 May ("Official Gazette of the Republika Srpska", No. 31/02) until adoption of a final decision of the Constitutional Court of Bosnia and Herzegovina.

4. The present opinion concentrates on the Decision of the High Representative which is *sub judice*. Although it incidentally touches upon other decisions that were adopted simultaneously^[2] in order to complete the legal framework necessary for the establishment of the High Judicial and Prosecutorial Councils in Bosnia and Herzegovina, its main focus remains the amendments made to the Constitution of the Republika Srpska. Should the Constitutional Court of Bosnia and Herzegovina deem it necessary, the Office of the High Representative stands ready to provide further information with regard to those decisions.

5. The Decision n° 162/02 amending the Constitution of the Republika Srpska reads as follows:

Amendment XCIII

Item 3 of Paragraph 1 of Article 80 is amended to read:

"3. nominate to the National Assembly candidates for the president and judges of the Constitutional Court upon proposal by the High Judicial and Prosecutorial Council;"

Amendment XCIV

After Article 121, a new Article 121.a is added and reads:

"The Judiciary is autonomous and independent from the executive and legislative powers of Republika Srpska.

The High Judicial and Prosecutorial Council of Republika Srpska shall ensure the autonomy, independence, impartiality, competence and efficiency of the Republika Srpska judiciary and of the prosecutorial service. The responsibilities of the High Judicial Council shall include, but shall not be limited to, the appointment, discipline and removal of judges, apart from the Judges of the Constitutional Court of the Republika Srpska, and shall also include public prosecutors and deputy public prosecutors in the Republika Srpska. The composition and additional responsibilities of the High Judicial and Prosecutorial Council shall be defined by law."

Amendment XCV

In Article 126 after the word "responsible" the words: "in criminal or civil procedure" shall be inserted and after the words "after the approval of the" the words "National Assembly" are replaced by the words "High Judicial and Prosecutorial Council".

Amendment XCVI

Article 127 is amended to read:

"Judges, apart from reserve judges, shall, save as hereinafter set out, be appointed for life subject to resignation, retirement or removal for cause by the High Judicial and Prosecutorial Council in accordance with the law. Judges may likewise exceptionally cease to hold office pursuant to a selection process following court restructuring during the transitional period to be defined in the Law establishing the High Judicial and Prosecutorial Council. The mandatory age for judges shall be determined by Law. Terms of service, including immunity of judges shall be determined by law. The salary and other emoluments of a judge may not be diminished during the period of his/her judicial office except as a result of disciplinary proceedings in accordance with law.

A judge may not hold a public office or pursue any form of gainful employment defined by law as incompatible with the judicial function."

Amendment XCVII

Article 129 is amended to read:

"Public Prosecutors and Deputy Public Prosecutors shall be appointed for such period as may be determined by Law subject to resignation, retirement or removal for cause by the High Judicial and Prosecutorial Council in accordance with the law. Public Prosecutors and Deputy Public Prosecutors may exceptionally cease to hold office pursuant to a selection process following restructuring of Public Prosecutor's Offices in the transitional period to be defined in the Law establishing the High Judicial and Prosecutorial Council. The mandatory age for public prosecutors and deputy public prosecutors shall be defined by Law. Terms of service, including immunity of public prosecutors and deputy public prosecutors shall be determined by law.

A Public Prosecutor or a deputy public prosecutor may not hold any office or pursue any form of gainful employment defined by law as incompatible with his function."

Amendment XCVIII

Article 130 is amended to read:

"Judges, including the Court Presidents, public prosecutors and deputy public prosecutors are selected, appointed, disciplined and removed by the High Judicial Council in accordance with the law."

6. Following the above changes the High Representative by his Decision No. 168/02 of 23 May 2002 enacted the Law on the High Judicial and Prosecutorial Council of the Republika Srpska, which regulates, *inter alia*, the competence of the High Judicial and Prosecutorial Council of Republika Srpska:

Article 18

Competence

The Council shall have the following competence:

- 1. selection and appointment of judges, lay judges, reserve judges, public prosecutors and deputy public prosecutors;*
- 2. appointment of the presidents of the courts;*
- 3. proposing candidates for appointment by the relevant constitutional authority to the Constitutional Court of Republika Srpska and the Constitutional Court of Bosnia and Herzegovina;*
- 4. supervising the advanced professional training of judges and public prosecutors and advising the Center for Judicial and Prosecutorial Training of Republika Srpska in its adoption of programs of advanced professional training for judges and public prosecutors;*
- 5. determining the minimum amount of advanced professional training to be undertaken by every judge and public prosecutor each year;..."*

7. Furthermore, the High Representative enacted the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, 23 May 2002. The Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina provides the competences and authority of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which reads, in relevant parts, as follows:

Article 17

Competence

The Council shall have the following competence:

- 1. selection and appointment of judges including Presidents of the Court of Bosnia and Herzegovina, of the Appellate Court of Brcko District and of the Basic Court of Brcko District.;*
- 2. selection and appointment of the Prosecutor and deputy prosecutors of Prosecutor's Office of Brcko District;*
- 3. co-ordinating the co-operation of High Judicial and Prosecutorial Councils of the Entities and the Judicial Commission of Brcko District;*
- 4. organisation of training of judges and prosecutors as referred to in Items 1 and 2 of this Paragraph;*
- 5. co-ordinating with the Boards of the Judicial and Prosecutorial Training Centres of the Federation of Bosnia and Herzegovina and of Republika Srpska and the corresponding institution of the Brcko District on planning a program for compulsory initial training of candidates for the function of judge or public prosecutor throughout Bosnia and Herzegovina;*
- 6. co-ordinating the continuing training of judges and prosecutors, and consulting with the Boards of the Judicial and Prosecutorial Training Centers of the Federation of Bosnia and Herzegovina and of Republika Srpska and the corresponding body of the Brcko District prior to the adoption of programs of training;*

...

8. When passing the Decision Enacting Amendments to the Constitution of Republika Srpska, the High Representative was substituting himself for the National Assembly of Republika Srpska. As noted by the Constitutional Court in its Decision U 9/00 of 3 November 2000, the High Representative *has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative – whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court – intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.* It clearly follows from the above that the Constitutional Court should be considered competent to control the substantive contents of the enacted amendments and their conformity with the Constitution whereas the powers of the High Representative and their exercise fall outside the scope of the review of the Court.

9. Having in mind the substantive content of the amendments to the Constitution of Republika Srpska, the Office of the High Representative is of the opinion that the High Representative Decision 162/02 of 23 May 2002 does not violate the Constitution of Bosnia and Herzegovina. Even though this Decision put in place new procedures to select, appoint and discipline judges and prosecutors in the Republika Srpska, the High Judicial Council of the Republika Srpska, which is entrusted with these responsibilities, is an Entity body operating under the Constitution of the Republika Srpska, as well as the Law on the High Judicial and Prosecutorial Council of the Republika Srpska. The challenged Decision does not in any way alter the organization of the Judiciary in Bosnia and Herzegovina, which remains a responsibility of the Entities and/or the Cantons, save the organization of the Court of Bosnia and Herzegovina.

10. The applicants also allege that the said Decision contravenes article III, 1 of the Constitution of Bosnia and Herzegovina. Article III.1 defines the responsibilities of the Institutions of Bosnia and Herzegovina. Article III.1 of the Constitution provides that the following matters are the responsibility of the institutions of Bosnia and Herzegovina: foreign policy, foreign trade policy, customs policy, monetary policy as provided in Article VII, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee, and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-Entity transportation and air traffic control. In accordance with article III, 3 of the Constitution of Bosnia and Herzegovina, all powers not expressly assigned to the institutions of Bosnia and Herzegovina shall be those of the Entities. Even if the challenge brought by the delegates of the RSNA would be directed against the establishment of a new body at BH level with responsibility over the Court of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina already ruled – in a case related to the Law on Court of Bosnia and Herzegovina^[3] – that Bosnia and Herzegovina, functioning as a democratic state, was authorised to establish, in the areas under its responsibility, other mechanisms, besides those provided in the Constitution, and additional institutions that were necessary for the exercise of its responsibilities, including the setting up of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention on Human Rights.

11. The challenged Decision, along with those put in place concomitantly, clearly divide the competencies of the three High Judicial and Prosecutorial Councils, each of them having an exclusive role with regard to judicial and prosecutorial selection, appointment and discipline in its respective sphere of constitutional responsibility. The only role given to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina with regard to the judiciary in the Republika Srpska is one of coordination. Pursuant to article 17, item 3 of the Law on the High Judicial and Prosecutorial Councils of Bosnia and Herzegovina, coordination of the co-operation between the High Judicial and Prosecutorial Councils of the Entities and the Judicial Commission of Brcko District falls under the mandate of the Council of Bosnia and Herzegovina. In accordance with the same article, item 5 and 6, the Council of Bosnia and Herzegovina coordinates with the Boards of the Judicial and Prosecutorial Training Centers of the Federation of Bosnia and Herzegovina and of Republika Srpska and the corresponding institution of the Brcko District training programs for the judges and prosecutors. As noted earlier, this function responds to a need to ensure that similar standards of training are applied throughout the country.

In regard to the interim measures requested by the claimants, the Office of the High Representative is of the opinion that the prerequisites for temporary measures, i.e. an impending irreparable harm and the likelihood of success on the merits, were not satisfied. In regard to the first prerequisite, it is worth noting that the High Judicial and Prosecutorial Councils started their work on 2 September 2002. Since then, the courts and prosecutors' offices of Republika Srpska are being restructured in order to reduce significantly (approximately 25-30%) the number of

positions in the judiciary and to implement a decision of the Constitutional Court of BiH which touches upon constituent peoples' representation in government structures (Decision U5/98, Partial III of 1 July 2000). In line with this restructuring, all judicial and prosecutorial posts, except those already filled in the constitutional courts, are now subject to an open competition. Current judges and prosecutors and other legal professionals are encouraged to apply for these posts. Successful applicants will be appointed directly to office without the involvement of national parliaments or other political bodies.

Notes:

[1] Decision number 162/02 of 23 May 2002 which amends the Constitution of the Republika Srpska, (Official Gazette of the Republika Srpska, No. 31/02, Official Gazette of Bosnia and Herzegovina, No. 13/02) and Decision number 161/02 of 23 May 2002 which amends the Constitution of the Federation of Bosnia and Herzegovina, (Official Gazette of the Federation of Bosnia and Herzegovina, No. 22/02, Official Gazette of Bosnia and Herzegovina, No. 13/02).

[2] In particular, Decision n° 168/02 of 23 May 2002 **Enacting the Law on the High Judicial and Prosecutorial Council of the Republika Srpska**, Decision n° 169/02 of 23 May 2002 **Enacting the Law on the High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina**, Decision n° 167/02 of 23 May 2002 **Enacting the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina**

[3] Decision U 26/01 of the Constitutional Court of Bosnia and Herzegovina, 28 September 2001.