Does B&H Need a Single Supreme Court?
Conclusions of a one-day expert consultations held in Sarajevo on 29. September 2011

Organiser: Public Law Centre

Attending: 55 persons

- *Judicial institutions*: 19 (including: Court of B&H, Supreme Court of FB&H, Constitutional Court of B&H, Constitutional Court of RS, Cantonal Court Sarajevo, Prosecutor's Office of FB&H, and Prosecutor's Office of B&H)

- S*tate institutions:* 12 (Ministry of Justice of B&H, Ministry of Defence, Parliament of FB&H, Parliament of B&H)

- *Academic community:* 6 (Faculty of Law Sarajevo, Faculty of Public Administration Sarajevo, Faculty of Law Zenica, Faculty of Law Union Belgrade, Faculty of Law Leipzig)

- *Embassies:* 2 (Germany, USA)

- *International community:* 6 (OHR, PILPG, COE, OSCE)

- *CJP associates and students:* 8

1. Conclusions

1.1. There is a legal area in the constitutional system of B&H which does not fall under any of the existing jurisdictions, making it necessary to establish a judicial body that will, in it's nature, correspond to a supreme court. The least that this legal area encompasses are areas regulated by state laws.

1.2. Legal principle on freedom of movement of persons, goods, services, and capital under Article I/4 of the Constitution B&H entails the existence of a single supreme court. It provides for a single application of state laws that have been adopted for the purpose of establishing a single economic area: laws on copy rights and related rights, laws on collective exercise of copy and related rights, on stamp, patent, industrial design, consumer protection, and competition. Single application can be ensured only by a single supreme court.

1.3. The obligation to harmonise B&H legal system and organisation of courts with the EU law also demands the establishment of a judicial instance that will control and ensure harmonised application of state laws.

1.4. The Constitutional Court and the Court of B&H cannot meet the above mentioned obligations. They are not an organisational nor jurisdictional substitute for a single supreme court.

1.5. In future discussions it is necessary to differentiate the appellate jurisdiction of the constitutional court and the control function or cassation jurisdiction of a supreme court. Thus, the specific role of the constitutional court (in the area of protection against violation of constitutional rights including also the protection of human rights) would be clearly distinguished from the specific role of a supreme court (in the area of legality control, application of law and issuing general legal opinions).

1.6. There is no explicit constitutional basis for establishing a single supreme court. At the same time, there is no explicit constitutional prohibition against adopting a law on establishment, organisation, and competencies of a single supreme court.

1.7. The existing model of court organisations carries a high risk of developing unharmonised jurisprudence.

1.8. No agreement has been reached on:

- interconnection between the statehood and a single supreme court,

- the name of the judicial instance that would take on a role of a supreme court,

- the standard of organising the judicial authorities, with the supreme court at the tip of the pyramid,

- concrete arguments that differing jurisprudence has been developed which needs to be harmonised,

- the importance of political will in strengthening or relativizing legal standards, and

- organisational model and jurisdiction of the supreme court.

1.9. Professional discussion on this subject needs to be continuing by focusing on the following issues:

- constitutional and legal establishment and the legal basis for establishing a single supreme court, and

- organisational and legal shaping of the supreme court.

2. Opinions: an overview of the leading arguments

2.1. Presenters and participants provide the following arguments *against* establishing a single supreme court in B&H:

- *Comparative law argument*: there is no model in comparative law to which B&H could refer in order to draw a conclusion on a constitutional standard that requires establishing of a single supreme court. Federations are in themselves so specific that there is no general federal standard. Thus, there is no analogous constitutional set up which could be used as a model for B&H court organisation.

- *Political will argument*: The Dayton constitutional model is an expression of a political will that established it. It is a fact that even today there is no political consensus on establishing a single supreme court for B&H. This is why the existing judicial organisation must be kept.

- *Constitutional law argument*: division of jurisdictions according to the current constitution leaves very narrow competencies to the B&H institutions. The structure of judiciary corresponds to such circumstances. Exercising judicial authorities, i.e. establishing a single supreme court at the state level is not provided for in the wording or the implied meaning of the constitution. Any attempt of establishing such court would be contrary to the explicit constitutional provisions under Article III of the Constitution.

- *Constitutional Court argument*: the Constitutional Court of B&H can, within its appellate jurisdiction, decide on cases of non-harmonised application of law and protect the equality of citizens before courts. The establishment of a new supreme court is therefore not necessary. In practice so far the Constitutional Court reviewed verdicts of supreme courts with regards to the obvious arbitrariness or discriminatory application of law or on vague and imprecise reasoning of verdicts (according to Articles I and II of the Rulebook of Constitutional Court). This means that the Constitutional Court adequately substitutes a single supreme court and that it can correct institutional weakness (the lack of a single supreme court) within its jurisdiction. The decisions of the Constitutional Court and the High Representative do not represent a legal basis for establishing a single supreme court. The Court of B&H was established because there was a need to ensure the rule of law and legal certainty. The existence of four legal systems in B&H does not prove in itself that the principles of rule of law and legal certainty are violated.

- *The established organisations of courts argument*: The existing organisation rests on autonomous and encompassed legal systems of entities and Brčko District of B&H. They function without any deficiencies or difficulties. The introduction of a new court instance represents encroachment into the established judicial model and threatens the well-established decision-making mechanisms. Since the organisation of courts is in the reform process since 2003, any radical move, such as introduction of a single supreme court, introduces "reforms into reform". This would cause general confusion, which would have a negative impact on judiciary as a whole. The existing system needs to be stabilised within constitutional framework, and the introduction of a new court instance does not contribute to that.

- *Jurisprudence argument*: It is unclear what harmonisation of jurisprudence is and what it entails. What is particularly unclear is whose jurisprudence such court would harmonise. If the aim is to harmonise jurisprudence of all courts, then the entity courts would have to apply state laws. That would, in turn, demand a fundamental change in jurisdictions, the amending of procedural laws and organisational regulations. Finally, "the harmonisation of jurisprudence" represents a legal platitude: neither interpretations, nor opinions, nor even the opinions of higher courts create obligations with regards to the lower courts judges – they are independent in rendering verdicts. Holding joint meetings of supreme courts of entities and the Appellate Court of BDB&H compensates for the lack of a single supreme court. These meetings serve for exchange of experience and developing of a harmonised jurisprudence.

2.2. Presenters and participants provide the following elements *in favour of* establishing a single supreme court in B&H:

- *Comparative law argument*: Although there is no adequate and universally accepted model and standard in comparative law, there is a European legal circle of states that B&H is integrated into. Since B&H is the only one in this legal circle without a single supreme court, this deficiency must be removed. Thus, the judiciary in B&H would be organised as a third authority/power.

- *The statehood* a*rgument*: Legal shaping of the country entails a defined (encompassing) judicial authority. Only with a single supreme court at the tip of the hierarchical pyramid of courts can legal and constitutional principles of division of authority, social state and legal unity be achieved. A single supreme court is immanent to the statehood.

- *Political will argument*: The Dayton constitutional construct is vague. This is the result of its original purpose – establishing peace. Since it is a dictated constitution making, which in practice turned out to be inefficient, the "political will" of the original framers of the Constitution must be ignored because, outside establishing peace as the basic purpose of the Constitution, it is irrelevant.

- *Constitutional law argument*: The Constitution neither prohibits nor prescribes the establishment of a single supreme court in B&H. Constitutional basis in accordance with the Decision of the Constitutional Court of B&H U-26/01 (28 September 2001, the continuality of the Law on the Court of B&H) stems from the systematic connection of Article III/1 in conjunction with Articles III/5m, II/1, II/2, and IV/4(a) of the Constitution. Article III/1 in conjunction with Article III/5 because the issues listed here are not under the exclusive jurisdiction of entities. Furthermore, Articles II/1 and II/2 in terms of requirements to ensure the highest level of protection of human rights. This will be achieved by establishing a single supreme court as an institution that will ensure that judicial institutions act in accordance with the rule of law and meet requirements of the ECHR in respect to fair trial and effective remedies. Finally, Article IV/4(a) as a regulation that authorises the Parliamentary Assembly to legally establish, within its competencies, this court and defines its competencies. These regulations are concretely setting the constitutional principles of rule of law and democracy. Besides, the

constitutional principle of integrity which requires from the state to establish a single supreme court is immanent to the codified constitutional law.

- *Constitutional court argument*: The Constitutional Court is not the court of the third instance and its role is not to check whether the courts have correctly interpreted and applied the law. Its role is to check whether, in a concrete case, a violation of the Constitution of B&H and constitutional law have occurred. For this reason, it is legally and technically incorrect and contrary to the nature of the constitutional judiciary to associate competencies of a supreme court with the Constitutional Court of B&H. It is necessary to separate the appellate and cassation jurisdiction and ensure it through organisational and technical set up of the judiciary.

- *Jurisprudence argument*: There is a real possibility that a different jurisprudence will develop in entities and BDB&H. This is pronounced in the area of criminal law because three different criminal codes are applied. It is to be expected that different judicial and the standards of criminal prosecution will develop. It is sufficient for a potential danger to exist for developing different standards in order to develop different jurisprudence. A single supreme court shall decide upon principle issues of legal importance, it shall review the legality of court decisions and harmonise jurisprudence. Of special importance is the monitoring of application of laws in B&H in the civil law area and civil proceedings. A single supreme court is needed to ensure that in case of a dispute there is a control over application of the state legislation and harmonisation of the application standards. The joint regular meetings of the entities Supreme Courts and the Appellate Court of Brčko District B&H have no any legal force neither they create any obligation nor grounds for parties to refer to in court proceedings. Also, when rendering decisions judges are not obliged to take into consideration positions taken at the regular meetings.

- *EU integrations accession argument*: The accession to European integrations is legally and technically impossible or structurally more difficult without a single supreme court. The EU aim of establishing a single economic space is equivalent to the constitutional goal under Article I/4. The state has the duty to ensure harmonised application of the state laws which were adopted in order to establish a single economic space in B&H. Their application ensures the access to the single economic area of EU. Lack of a single supreme court makes this task impossible to fulfil. The capacity of transposition of the EU law is significantly limited by the constitutional division of regulatory competencies between the state and the entities. The judicial power is responsible for the efficient implementation of the EU law. Efficient and harmonised application of the state legislation by which the EU *acquis* will be transposed into national legislation will not be possible without a single supreme court. The structural weaknesses are reflected in the preliminary rulings (Article 267 TFEU). The national courts in this proceeding, each time as the courts of the last instance, may fulfil the aim contained in the decision of the European Court only at one part of the state territory (in entities and BDB&H). The requirements of the EC and the SAA suggest that a single supreme court will be a condition for the EU accession as a way to neutralise these structural weaknesses.

- *The international obligations argument*: All the representatives of international organisations demand the establishment of a court instance that would, in its nature, correspond to a supreme

court. The SAA, in particular its Article 70, obliges B&H to harmonise the existing laws with the *acquis communautaire* and thus ensure the application and implementation of the existing and future legislation. This provision defines the criteria based on which the EC demands the establishment of a single supreme court.

3. General impressions

3.1. It is obvious that the *professional community in the narrow sense* (judges, prosecutors, lawyers, and state administration employees) have concrete and clearly identifiable opinions regarding organisation of the judiciary. It is also obvious that the *wider professional community* (academic community) uses somewhat general and principle-oriented opinions regarding organisation of the judiciary. So far, they did not have an opportunity to express and explain their opinions from their professional experience point of view.

3.2. It is noticeable that there is no clear distinction between the appellate and cassation jurisdiction of supreme courts. Thus, it is considered that supreme courts have the task to control the violations of human rights while at the same time the control role of the constitutional court is considered to entail control over concrete application of law.

3.3. It is generally difficult to focus the discussion of the participants to one issue or a set of related issues. As a rule, the participants are concentrated on their own theories and do not discuss by use of arguments in adversary process. In the course of exchange of arguments the progress towards the idea of a single supreme court was noticeable.

3.4. It is noticeable that the presenters and participants who acted in support of preserving the existing setup and argued against a single supreme court, at the end of discussion were relativising their initial positions. The argumentative position towards one court instance which could be established as a traditional supreme court or in some similar form is evident.

3.5. The discussion only sporadically introduced the issue of a particular model for establishing a single supreme court in B&H.

(President of FCJP, Edin Šarčević, PhD, University Professor)