OVERVIEW OF THE VENICE COMMISSION’S OPINIONS ON BOSNIA AND HERZEGOVINA

Legal Memorandum

November 2013
OVERVIEW OF THE VENICE COMMISSION’S OPINIONS ON BOSNIA AND HERZEGOVINA

Statement of Purpose

The purpose of this memorandum is to provide an overview of the Venice Commission’s opinions on Bosnia and Herzegovina (BiH) from 1996 to 2013.

Introduction

The Council of Europe created the European Commission for Democracy through Law, known as the Venice Commission, in May 1990 to act as an advisory body on state constitutional matters.¹ The Venice Commission is an independent advisory body made up of experts appointed by the Council of Europe’s Member States.² These experts provide advice on constitutional reform to strengthen the legal frameworks of Council of Europe Member States. They also promote human rights and fundamental freedoms by conducting state visits, legal interpretations, and electoral referenda.³

The primary role of the Venice Commission is to determine possible liabilities and inconsistencies relating to constitutional matters and to communicate them in public documents under the form of opinions.⁴ The opinions are legally non-binding,⁵ and every Venice Commission Member State has the liberty to decide whether or not to abide by its recommendations. The Venice Commission’s opinions can be requested by participating states, the Council of Europe, international organizations, or other institutions involved in the Commission’s work.⁶ This study provides an overview of the Venice Commission’s opinions on constitutional matters in BiH.

Summary of Findings

To date, the Venice Commission has issued 44 opinions on constitutional matters in BiH.⁷ The governing authorities in BiH and the international community primarily issued requests for opinions. The Venice Commission’s opinions focused on a variety of human rights protection mechanisms and laws (particularly drafts and amendments) and on and constitutional issues in BiH, such as access to justice, principles of legality, rights of the people, human rights protection, and discrimination. Reflecting upon the State’s unique, post-war constitutional structure, the opinions often address BiH’s complex State apparatuses, weak human rights protection mechanisms, discriminatory electoral law, and controversial laws for constitutional justice. These opinions are not binding, and their main purpose is to assist BiH towards establishing an effective and efficient system as a prerequisite for further development and prosperity. The Venice Commission opinions provide information on elements of the BiH’s human rights and on constitutional structure that require attention and potential reform. A review of the opinions reveals the following general observations:

- Although all opinions are translated into English and French, only five opinions have been translated into BiH languages (Bosnian, Croatian, and Serbian):
  1. Opinion on the constitutionality of international agreements concluded by Bosnia and Herzegovina and/or the Entities;
  2. Opinion on certain issues related to the Ombudsman institutions in Bosnia and Herzegovina and on the interpretation of certain commitments undertaken by Bosnia and Herzegovina upon accession to the Council of Europe;
  3. Opinion on the status and rank of the Human Rights Ombudsman of Bosnia and Herzegovina;
  4. Opinion on the Draft Law on amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina; and
  5. Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative.

- Various BiH government groups and officials, including State and Entity ministers, parliamentary caucuses of peoples, and cantonal governments, have requested the opinions. The European Commission (EC), the Office of the High Representative (OHR), the Organization for Security and Co-operation in Europe (OSCE) Mission to BiH, the Parliamentary Assembly of the Council of Europe (Council of Europe), the Ombudsman Institution of the Federation of BiH (the Federation), and the European Court of Human Rights (ECtHR) have also requested Venice Commission opinions.

⁵ Tanja Kleinorge, COUNCIL OF EUROPE 159 (2010).
The majority of opinions addressed issues concerning the competences of the central government of BiH, or of the Federation and its cantons. Although it has sometimes challenged Venice Commission opinions, the Republika Srpska (RS) has only requested one opinion.8

A number of early decisions related to Entity-level human rights Ombudsman institutions are no longer relevant due to the establishment of the single BiH Ombudsman for Human Rights in 2010.9 BiH unified the Entity-level Ombudsman positions and created a single, independent, State-level Ombudsman based on the Venice Commission’s recommendation regarding the Law on Amendments to the Law of Ombudsman Human Rights, which was drafted in 2006.10 As a result, the Entity-level Ombudsman institutions were unified under State-level Ombudsman position.11

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### Overview of the Venice Commission’s Opinions on Bosnia and Herzegovina

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<th>Name of Opinion</th>
<th>Year</th>
<th>Summary</th>
<th>Additional Comments</th>
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<tr>
<td>Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms</td>
<td>1996</td>
<td>The Venice Commission issued the opinion upon the request of the President of the Parliamentary Assembly’s Commission on Legal Affairs and Human Rights of the Council of Europe. The opinion included a brief overview of the human rights protection bodies created in BiH under the Dayton Peace Agreement. The opinion also analyzed the jurisdiction of Entity-level constitutions. The Venice Commission found the human rights protection mechanisms in BiH were complex and characterized by contradictory judgments, overlapping jurisdiction, and duplication. The Venice Commission concluded that these issues resulted from BiH’s constitutional order. The Venice Commission recognized the existence of several governing bodies within BiH and the Federation. Although these bodies were competent to deal with human rights concerns; however, at the time of the opinion, many of them were still not fully functional. Therefore, the Venice Commission recommended establishing procedural rules that would prevent overlap of jurisdictions and duplication of decisions. The Venice Commission suggested amendments to the Entities’ constitutions in order to prevent risks that can endanger credibility, peace, and the integration process. The Venice Commission suggested that BiH avoid the duplication of human rights institutions within the Entities. The goal of amending the Entities’ constitutions was to enhance coordination and improve the human rights protection mechanism.</td>
<td>The Venice Commission suggested that the Supreme Court of the RS allow for individual applications to examine whether a law is compatible with human rights guaranteed in the RS Constitution. The Venice Commission also recommended that the RS Constitutional Court discontinue using some practices exercised in former Yugoslavia, such as ex officio proceedings. Moreover, the Venice Commission proposed that RS establish an Ombudsman office, like the one in the Federation. An Ombudsman office would increase the level of human rights protection and help to achieve a more balanced and coherent judicial system at the Entity-level. Moreover, the Venice Commission noted that the RS Ombudsman Institute should represent the three constituent peoples through three different Ombudsman.</td>
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<td>Opinion on the setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina</td>
<td>1997</td>
<td>The Venice Commission issued the opinion upon the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly. The opinion provided a brief analysis of the Washington Agreement (between the Federation and Croatia) and the Dayton Peace Agreement. The opinion noted that the status of human rights protection mechanisms in BiH was already complex due to the co-existence of two human rights jurisdictional bodies: the Human Rights Court of the Federation and the Human Rights Commission. Creating an additional human rights mechanism would make the entire situation less efficient and reduce their effectiveness. Accordingly, the Venice Commission concluded that creating a Human Rights Court at the Federation level is lawful under the Dayton Peace Agreement because the Dayton Peace Agreement and the Washington Agreement do not involve the same parties. The Republic of Bosnia and Herzegovina, the</td>
<td>The Venice Commission asserted that establishing the Human Rights Court of the Federation as an additional human rights protective body would have negative implications for the Human Rights Chamber of BiH. For instance, it would likely lead to discrepancies in case law, which would affect the authority of either court. The Venice Commission suggested that the Federation do away with the Human Rights Court and refer the human rights responsibilities to the Federation Constitutional Court or the Federation Supreme Court. As a result, the Venice Commission recommended merging the Human Rights Court with the BiH Supreme Court or with the Constitutional Court of the Federation.</td>
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<tr>
<td>1997</td>
<td><strong>Opinion of the Venice Commission Working Group on the interpretation of certain provisions of the Constitution of the Republika Srpska</strong>&lt;sup&gt;14&lt;/sup&gt;</td>
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<td>The Venice Commission issued the opinion upon the request of the High Representative of BiH.</td>
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<td>The opinion included a brief overview of the questions posed by the High Representative. The opinion answered three specific questions:</td>
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<td><strong>1) Does the President of the RS have the power to dissolve the National Assembly without first having obtained the opinion of the Prime Minister and the President of the Assembly?</strong></td>
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<td>The Venice Commission recommended that prior to dissolving the National Assembly, the President of the RS should consult with the Prime Minister and the President of the Assembly. However, both the President of the Assembly and the Prime Minister’s opinion would not be final or binding on the RS President.</td>
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<td><strong>2) Does the President of the RS have the authority to appoint a government following dissolution of the National Assembly on the basis of Article 94 of the Constitution?</strong></td>
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<td>The Venice Commission interpreted Article 94 of the RS Constitution as enabling the RS President to propose a candidate for the Prime Minister’s seat. As a result, the RS President does not form a new government after dissolution, but he/she proposes a candidate who must secure the confidence of the Parliament.</td>
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<td><strong>3) Can the Government, pursuant to Article 114 of the Constitution, suspend the decision taken by the President of the RS to dissolve the National Assembly?</strong></td>
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<td>The Venice Commission emphasized that the Government of RS was incapable of suspending the decision of the RS President in regards to the dissolution of the National Assembly on the basis of Article 114 of the RS Constitution.</td>
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<td>1997</td>
<td><strong>Opinion on the competence of the Federation of Bosnia and Herzegovina in criminal law matters</strong>&lt;sup&gt;17&lt;/sup&gt;</td>
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<td>The Venice Commission issued the opinion upon the request of Mr. Mato Tadić, Minister of Justice of the Federation.</td>
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<td>The opinion provided a brief analysis of the Federation’s criminal laws. Additionally, the opinion gave a brief overview of the powers and responsibilities of the criminal justice system as it related to the Federation.</td>
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<td>The Venice Commission recognized that the Federation’s competence in criminal law matters was controversial and complex. Specifically, the Venice Commission emphasized the lack of clarity regarding Federation-level and</td>
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canton-level competences. The Venice Commission concluded that the Constitution of the Federation did not explicitly answer the question of whether either the Federation or its cantons was the competent authority to establish criminal laws. However, under the literal interpretation of the Constitution of the Federation, the Venice Commission said the cantons held this power, because establishing criminal law is a competence neither reserved for the Federation nor shared between the Federation and the cantons.

However, the Venice Commission concluded that the Federation was also competent in criminal law matters. It gave two reasons. First, Article III-1-f of the Federation Constitution granted the Federation criminal law authority over particularly serious crimes and in situations where individual cantons had no authority, such as inter-canton crime. Second, under Article III-1-c of the Federation Constitution, the Federation may define and punish any act it has established as an offence as an exercise of its “powers and responsibilities.” The cantons, on the other hand, remained competent to exercise criminal law through the residual powers granted to them under Art. III-4.

**Opinion on the competence of Bosnia and Herzegovina in electoral matters**

1998

The Venice Commission issued the opinion upon the request of the OHR. The opinion provided a brief overview of the legislative powers of the BiH central government. The Venice Commission concluded that the State maintained legislative competency over electoral matters. BiH’s role is to establish uniform rules and procedures that can be implemented at all levels of government.

Nevertheless, the Venice Commission noted that the Entities also have powers and responsibilities in electoral matters, particularly in Entity-level elections. For instance, Entity courts have jurisdiction over Entity-level electoral disputes. At the State-level, however, the legislature, namely the Parliamentary Assembly, decides which court would have jurisdiction or whether to establish a new chamber to resolve the dispute.

**Opinion on the constitutionality of international agreements concluded by Bosnia and Herzegovina and/or the Entities**

1998

The Venice Commission suggested that the Preliminary Agreement on the Establishment of a Confederation between the Federation and the Republic of Croatia and the Draft Agreement on Special Parallel Relations between the FRY and the RS were unconstitutional because the agreements endangered the sovereignty and territorial integrity of BiH.

The Venice Commission said that the Preliminary Agreement on the Establishment of a Confederation between the Federation and the Republic of Croatia unconstitutionally tried to establish a confederation between an Entity and another state. Establishing this type of special relationship was not legitimate under the BiH Constitution. The BiH Constitution provides an alternative solution to conclude special parallel relationship agreements.

The most problematic provisions in the Draft Agreement on Special

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**Notes:**


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<td>Opinion on responsibilities for the conclusion and implementation of international agreements under the Constitution of Bosnia and Herzegovina&lt;sup&gt;20&lt;/sup&gt;</td>
<td>1999</td>
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<td>Opinion on locus standi of the Ombudsman of the Federation of Bosnia and Herzegovina before the Constitutional Court of the Federation of Bosnia and Herzegovina&lt;sup&gt;22&lt;/sup&gt;</td>
<td>2000</td>
<td>Document(s) currently unavailable.</td>
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<td>Opinion on freedom of expression and freedom of access to information as guaranteed in the Constitution of Bosnia and Herzegovina&lt;sup&gt;23&lt;/sup&gt;</td>
<td>2000</td>
<td>Document(s) currently unavailable.</td>
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| Opinion on the Electoral Law of Bosnia and Herzegovina | 2001 | The Venice Commission issued the opinion upon the request of the Legal Affairs Committee of the Parliamentary Assembly.  
The opinion focused on the relationship between the ECHR and the Electoral Law of BiH.  
The Venice Commission declared that it is important for the Electoral Law to comply with the ECHR’s provisions regarding electoral rights. All citizens should be eligible to vote, participate in elections, and have an equal chance to be elected.  
The Venice Commission referred to Article 18.16 of the Electoral Law and concluded that the territorial and ethnic principles within the Law are interlinked. Because Entity and ethnicity are interlinked, “only Serbs from RS and Croats and Bosniacs from the Federation may be elected” and the Law establishes a proportional representation for each ethnicity. Therefore, the Electoral Law’s provisions regarding the BiH Presidency and BiH House of Peoples are discriminatory towards people who “identify themselves as neither Bosniac nor Croat nor Serb, as they are excluded from the right to be elected.” |
| Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the “Constituent Peoples” | 2001 | The Venice Commission issued the opinion upon the request of the Chairman of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.  
The opinion provided an analysis of the Partial Decision III’s implications on the State and the Entity levels. The Partial Decision III is one-fourth of a BiH Constitutional Court decision that addressed a request a former BiH President made to analyze the constitutionality of articles in both Entity constitutions. In Partial Decision III, the BiH Constitutional Court declared two articles in the Entity constitutions to be unconstitutional because they did not equally address the constituent peoples. Although a task force was organized to implement these recommendations by December 2001, the RS had not agreed on a single amendment. Although the Federation had agreed to a set of draft amendments, it refused to implement those amendments until the RS moved forward. In 2002, the High Representative ultimately imposed the revisions on the Entities’ constitutions. These amendments gave Bosniaks and Croats proportional representation in all levels of RS government, as well as proportional representation for Serbs in all levels of the Federation government. |

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<th>Opinion on the draft law on the rights of ethnic and national communities and minorities in Bosnia and Herzegovina</th>
<th>2001</th>
<th>The Venice Commission issued the opinion upon the request of the OHR. The opinion provided a brief overview of a draft law focusing on minorities in BiH. The Venice Commission considered the draft law to be incomplete and incapable of bringing any change regarding the position of ethnic minorities in BiH. Furthermore, due to the lack of funds for implementation, the Venice Commission opined that the current status of BiH’s minorities would remain unchanged.</th>
<th>The Venice Commission noted that the law lacked an explanation on how particular provisions would be regulated. For instance, Article 7 mentioned that local authorities would be granted discretion in prescribing the name of geographical locations to reflect a minority’s presence in the area. However, the law failed to address how the minorities’ right to use their minority language in public and in private would be implemented and regulated. The ambiguity of provisions was another concern. For instance, Article 6 did not specify whether the right to education included the right to education in a minority language “at an institution where general education is not in that minority language.” It also failed to explain whether public authorities had to finance minority language education.</th>
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<td>Opinion on the Draft Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service</td>
<td>2001</td>
<td>It is unclear who requested the opinion. The opinion represented a brief analysis of the constitutional issues with the Draft Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service. The Venice Commission focused on Article 2 of this Draft Law, which noted that the Intelligence and Security Service represented an independent Federation institution. The Venice Commission said that the draft law seemed to exclude government involvement for specific activities. The draft only addressed the government’s rule-making authority regarding the general operation of the institution. For instance, although the Federation President appointed specific executive organs, he was not given the power to appoint members of the Intelligence and Security Service offices. The Venice Commission noted that the Director and the Deputy Director of the Security Service enjoyed more power than the Prime Minister and that the drafters had ensured that the Intelligence and Security Service did not have day-to-day control by another official. The Venice Commission added that some of the draft provisions were unclear. For instance, it did not specify whether the Deputy Director can veto the Director’s decisions, or how the Rules of Work would be passed through the</td>
<td>The Venice Commission asserted that the Intelligence and Security Service should act independently from the government, similar to the institutions in the United States. This would allow it to function more effectively and efficiently.</td>
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<th>Opinion</th>
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<td>Opinion on the Draft Law on the Agency of</td>
<td>2002</td>
<td>The Venice Commission issued the opinion upon the request of the OHR. The opinion focused on the structure of the Agency of BiH for Information and Protection and how its competences related to BiH’s competences. According to the opinion, the Agency is obliged to implement BiH Constitutional provisions, which empower the State to control the actions of the Agency. The opinion noted the imbalance between the Entities and the State in terms of the Law of the Intelligence and Security Service. For instance, RS had a law regarding intelligence and security service, while the law in the Federation was under development. BiH had a draft law on the Agency for Information and Protection, which was significantly shorter than the law of the RS and the draft law of the Federation. Consequently, the Venice Commission suggested a parallel exercise of competences in order to avoid encroachments on the Entities’ competencies.</td>
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<td>Opinion on the Draft Law on the Agency of</td>
<td>2002</td>
<td>The opinion does not specify who requested it. The opinion addressed the “independence” of the Agency of BiH for Information and Protection and whether this independence conflicted with principles of democratic accountability. Under the BiH Constitution, the BiH President and the Council of Ministers maintained only limited control over the Agency because the President and Council had only general regulatory and oversight authorities and no authority to direct the Agency’s specific day-to-day activities of the Agency. The opinion also focused on specific articles within the draft law that seemed incomplete, since they did not describe the role and responsibilities of the Entities or oblige the Agency to report to the Parliamentary Assembly.</td>
<td>This is the second Venice Commission opinion on this topic. The Venice Commission said that the first opinion failed to address human rights concerns regarding the protection of information. The Venice Commission concluded that the protection of information is a human rights issue that should be laid out through legislation, not executive order.</td>
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<td>Opinion on certain issues related to the</td>
<td>2002</td>
<td>The Venice Commission issued the opinion upon the request of the OSCE Mission to BiH. The Venice Commission discussed the Assembly Opinion on the Ombudsman institutions, which stressed the need for a unified Human Rights Ombudsman. Although the Venice Commission favored the existence of the Ombudsman institutions both at the Entity and the State levels, it also agreed that a unified institution would be more efficient. The Venice Commission recommended that BiH consider establishing a State-level Ombudsman institution in the future. In the meantime, the Venice Commission suggested that BiH focus more on the enhancing cooperation and coordination between the existing institutions.</td>
<td>In 2004, BiH created a State-level Ombudsman institution. The Ombudsman Institute promptly initiated requests for the Venice Commission’s opinion on human rights matters.</td>
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<th>Opinion on the status and rank of Bosnia and of the Ombudsman institution in the Federation Herzegovina</th>
<th>2002</th>
<th>The Venice Commission issued the opinion upon the request of the Ombudsmen of the Federation regarding the status, rank, and salary level of the Ombudsman position. The opinion provided a brief overview of the Ombudsman’s status in the Federation. The Venice Commission compared the status of the Ombudsman in the Federation to the status of the Ombudsman in Council of Europe Member States. It further concluded that the position’s status, rank, and salary level are determined differently, but that the status of the Ombudsman in the Federation was in line with European standards. The Venice Commission concluded that the Constitution of the Federation and the Memorandum of Understanding provided a sufficient legal basis to equate the salaries of the Ombudsman of the Federation with those of ordinary court judges.</th>
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<td>Opinion on the transfer of responsibility in the field of higher education within the Federation of Bosnia and Herzegovina</td>
<td>2003</td>
<td>The Venice Commission issued the opinion upon the request from the Minister for Civil Affairs of BiH. The opinion focused on the transfer of responsibilities for higher education from the cantons to the Federation. The Venice Commission said that the Federation’s Constitution clearly granted the cantons’ responsibility over education, since education was not specified under the jurisdiction of the Federation. The Venice Commission suggested two possible solutions for the transfer. The first solution was a voluntary transfer from the cantons based on the current Federation Constitution. This solution would be complicated, because it required the ten cantons to act in the same manner to transfer education powers to the Federation. Also, the Venice Commission noted that the terms of the transfer were ambiguous. The transfer of responsibilities or exercise of responsibilities was also not clear. The second solution would be to revise the Federation Constitution to transfer education responsibilities to the Federation. The Venice Commission recommended an amendment to the Federation Constitution would be more clear, unambiguous, and irreversible. The transfer of responsibility in the field of higher education is complex because the ten cantons have defined higher education and the responsibilities differently. Therefore, all ten cantons would first have to agree to the responsibilities and powers to relinquish. Then the cantons would have to act in unison in order to put this decision in effect.</td>
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<td>Opinion on the new draft amendments to the Constitution of the Federation of Bosnia and Herzegovina concerning local government</td>
<td>2004</td>
<td>The Venice Commission issued the opinion upon the request of the Presidents of the Constitutional Commission and the Commission for Local Self-Government of the House of Representatives of the Parliament of The Federation. The Presidents of the Constitutional Commission and the Commission for Local Self-Government of the House of Representatives of the Parliament of the Federation proposed various constitutional amendments to the Federation Constitution in the area of local self-governance. Under the draft law, a municipality is a unit of government that is entitled to exercise self-government regarding issues of local character. A city is defined as a unit composed of two or more municipalities that create a “single urban, cultural, economic and administrative territorial entity linked with the daily needs of citizens.” Under the draft law, cities were entitled to local financing and tax policies, joint infrastructure, public transport, and other duties and responsibilities entrusted to the city by the canton or municipalities.</td>
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| Opinion on the Draft Law on amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina | 2004 | The Venice Commission issued the opinion upon the request of Mr. Dragan Ćović, Chairman of the Presidency of BiH.

The opinion addressed the conclusions of the meeting on April 19, 2004, which represented the framework for the reform the Ombudsmen institutions within BiH.

In general, the Venice Commission was satisfied with the improvements to the Draft Law. The Commission specifically welcomed the establishment of a single Ombudsman institution.

Nevertheless, the Venice Commission suggested that BiH needed to further clarify the election system for ombudsmen and their deputies to enable others to be appointed by the Parliamentary Assembly to those positions.

The Venice Commission welcomed equating the salaries of the Ombudsman and the deputies with the salaries of the BiH Constitutional Court judges, but cautioned that the salaries should remain at a high level to ensure independence and compliance with the European standards.

Additionally, the Venice Commission was dissatisfied with the provision regulating the relationship between the Ombudsman and his/her deputies. The Venice Commission recommended that this provision be clarified. For instance, although these provisions obliged the deputy ombudsmen to provide written opinions when so requested by the ombudsman, the Venice Commission suggested that there may be cases where such written opinions may not be reasonable. The Venice Commission also noted that the eight-day time period for submitting written opinions should be more flexible. |

| Opinion on the status and rank of the Human Rights Ombudsman of Bosnia and Herzegovina | 2004 | The Venice Commission issued the opinion upon the request of the Human Rights Ombudsman of BiH.

The opinion addressed the issue of whether the status of the BiH Ombudsman |

| The Venice Commission noted that there are overlapping responsibilities between municipalities and cities, such as spatial planning, education, and tourism. The Venice Commission determined that a dividing line of responsibilities would avoid conflict between municipalities and cities regarding overlapping responsibilities. |
The Venice Commission’s Opinions on Bosnia and Herzegovina, November 2013

institution should be at the same level as a high judicial authority, rather than on the level of a senior civil servant.

According to the Venice Commission, the Ombudsman institution at the State-level should already enjoy a high rank, and in case the institution seeks to enhance its status, the status of other institutions at similar levels should be increased as well. The Venice Commission asserted that the difference in remuneration would decrease the level of co-operation between the institutions and their credibility would decline as well.

Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative

The Venice Commission issued the opinion upon the request of the Parliamentary Assembly of the Council of Europe (PACE).

PACE adopted Resolution 1384 “Strengthening of democratic institutions in Bosnia and Herzegovina,” requesting the Venice Commission to issue an opinion regarding several constitutional issues. In Paragraph 13 of the resolution, the Assembly asked the Venice Commission to examine provisions in the BiH Constitution and its compliance with the basic principles of the Council of Europe. Additionally, it asked the Venice Commission to ensure that the powers vested in the OHR were actually in accordance with international human rights standards and fundamental freedoms.

The opinion focused on the basis for and the implications of the constitutional situation in BiH. The Venice Commission analyzed the constitutional order of the Entities and the State, depicting the entire structure as complex. The Venice Commission recommended that the constitutional order be reformed to create a more efficient and effective system.

The Venice Commission asserted that an effective solution would be to abolish the Entities and to transfer the competences to the State. However, the Commission was aware that this was impossible due to RS political parties’ strong opposition. Accordingly, the Venice Commission proposed constitutional reform at the State-level so that the State-level competences could be extended.

The Venice Commission also concluded that BiH’s new constitution would have to be based on the equality of citizens, rather than the equality of its constituent peoples.

The Venice Commission was surprised to hear that people in the Federation sought constitutional reform.

The Venice Commission concluded that BiH’s current structure of governance was both ineffective and expensive due to the large number of bureaucrats and officials.

The Venice Commission also emphasized that one of the main obstacles to effective and efficient decision making is the veto that can be used whenever a constituent people believes that its vital national interest is endangered. The Venice Commission noted that there should be a clear definition of a vital national interest to prevent abuse of the veto power.

* Notably, this is the only opinion on the Venice Commission’s official website that is translated into Bosnian.

Amicus curiae opinion (proceedings before the European Court of Human Rights) on the nature of the proceedings before the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina

The ECtHR asked the Venice Commission to issue an opinion regarding Article 36(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms in the proceedings pending before it in the case Jeličić v. BiH.

In the opinion, the Venice Commission provided answers to three questions:

1) Are Annexes 4 and 6 to the 1995 General Framework Agreement for Peace in BiH unilateral undertakings given by BiH or are they international treaties?
2) Were proceedings before the Human Rights Chamber “domestic” within the

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<td>Opinions on different proposals for the election</td>
<td>2006</td>
<td>The Venice Commission believed that no single proposal addressed every</td>
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| **Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina** | 2005 | The Venice Commission issued the opinion upon the request of Mr. d’Aoust, the Head the Department for Legal Affairs of the High Representative in BiH.  
The Venice Commission addressed a proposed voting rule for BiH’s Constitutional Court. The proposed voting rules suggested that the Constitutional Court’s judgment would only be valid if at least one judge from each constituent people supported it.  
The Venice Commission opposed the proposal as contradicting the European standard that a court cannot refuse a judgment. The Venice Commission noted that requiring a specific majority for a judgment would mean that if there was not a majority decision, then there would be no judgment.  
The Venice Commission concluded that basing the proposed voting rules on a judge’s identification with a constituent people would lead judges to become biased in their rulings. The Venice Commission said that the proposed voting rule promoted the current state structure based on constituent peoples rather than a structure based on its citizens.  
BiH’s Constitutional Court cannot refuse to give a decision; however, in the absence of a majority, it may reject an appeal. This inability to refuse a decision has various implications. For instance “if one institution of the State brings a claim against another, the plaintiff would lose.” The Venice Commission depicted this situation as manipulative and subjective. |
| **Opinion on a possible solution to the issue of decertification of police officers in Bosnia and Herzegovina** | 2005 | The Venice Commission issued the opinion upon the request of Mr. Adnan Terzić, Prime Minister of BiH.  
The Venice Commission stressed the issue of decertification of police officers, which in most cases has a significant impact on their reputations and careers. Due to these implications, the Venice Commission suggested that the United Nations should review the decertification proceedings, as BiH courts and authorities were not competent to review them. |

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of the Presidency of Bosnia and Herzegovina

Tihić, the Chairman of the Presidency of BiH.

The Venice Commission analyzed three different proposals, each of which included a three-member Presidency. The first proposal sought to preserve the status quo of election rules and the structure of the Presidency. The first proposal excluded Others, Bosniaks, and Croats from the RS and Serbs from the Federation from being elected to the Presidency. The Venice Commission rejected the first proposal because it contradicted Protocol No. 12 of the ECHR. Protocol No. 12 reaffirmed a general prohibition of discrimination by public authorities.

The Venice Commission identified some improvements in the second proposal. For instance, the members of the Presidency were to be directly elected, and were not elected on the basis of their ethnicity. The second proposal also included the rotation of the Presidency every 16 months. Nevertheless, the Venice Commission noted that the proposal contained many limitations. For instance, it prohibited a member of the Presidency from simultaneously being a leader of a political party. As a result, the Venice Commission concluded that the proposal was inconsistent with the aim of strengthening BiH and transferring power to the Council of Ministers.

The Venice Commission opined that no single proposal was perfect. Nevertheless, the Venice Commission favored the third proposal and suggested that, if it was adjusted, it would be an acceptable solution for the first phase of constitutional reform. The Venice Commission favored the third proposal because it included indirect presidential elections and moved the elections to the BiH Parliament level. The Venice Commission also regarded the third proposal as strengthening the Council of Ministers and reducing the powers of the Presidency.

Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina

2006

The Venice Commission issued the opinion upon the request of Mr. Sulejman Tihić, the Chairman of the Presidency of BiH.

The Venice Commission argued that constitutional reform was vital for BiH to become an EU Member State and to progress in the development of its statehood.

The Venice Commission suggested that the constitutional order should be reorganized and that BiH should remove the multiple layers of government to increase the powers of the State. The Venice Commission stressed the importance of having a specified catalogue of competences, as well as a catalogue of human rights. However, it noted that constitutional reform would be a long and complex process that demanded consensus and coordination in order to succeed.

Joint opinion on amendments to the Election Law of Bosnia and Herzegovina

2008

It is not clear who requested the opinion.

The Venice Commission said that someone in the profession of a notary could not be a candidate until that person resigned from his/her position.

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<table>
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<tr>
<th>Opinion on the Law on the Financing of Political Parties of Bosnia and Herzegovina</th>
<th>2008</th>
<th>The Venice Commission issued the opinion upon the request of the Central Election Commission (CEC) of BiH, represented by Mr. Stjepan Mikić as President of the CEC, together with the Head of the OSCE Mission to BiH, Ambassador Douglas Davidson. The Venice Commission addressed three issues: (1) external donations, (2) the exclusion of political parties from elections, and (3) the range of fines to be paid in case of a violation of the Law on the Financing of Political Parties of BiH. The Venice Commission argued that all three issues should be regulated in accordance to the ECHR and the ECtHR. Although the Venice Commission did not review the legislation regarding notaries, it recommended that BiH consider whether this is a reasonable restriction on the right to be elected. The Venice Commission failed to address issues concerning local elections systems, the right to candidacy in elections, and the manner in which electoral dispute proceedings should be handled.</th>
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<tr>
<td>Opinion on the Law on Conflict of Interest in governmental institutions of Bosnia and Herzegovina</td>
<td>2008</td>
<td>The Venice Commission issued the opinion upon the request of the CEC, represented by Mr. Stjepan Mikić as President of the CEC, together with the Head of the OSCE Mission to BiH, Ambassador Douglas Davidson. The Venice Commission recommended that managing conflicts of interest was important to ensure that public services function were performed “effectively, legally, impartially, objectively and in a transparent manner, and in order to avoid corruption.” The Venice Commission suggested: (1) involvement of close relatives of public officials should be treated on a case-by-case basis; (2) the definition of “gifts” should be specified; (3) the movement of public officials to the private sector should be limited; (4) financial information of public officials should be available; (5) co-operation with the CEC should be emphasized as a duty of public officials; and (6) there should be a list of available sanctions. In addition, the Venice Commission addressed the issue of the Entities arguing that the State is unable to control officers because competencies have not been transferred to the State-level. As a result, the Venice Commission suggested the</td>
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| Opinion on the draft amendments to the Constitution of Republika Srpska | 2008 | The Venice Commission issued the opinion upon the request of RS Prime Minister Milorad Dodik and President Kuzmanović.  
The opinion addressed the main drawbacks of the draft amendments, such as the lack of harmonization with the BiH Constitution in the field of human rights and the complicated procedure of transferring competences from the Entity to the State level.  
The Venice Commission also addressed other, more progressive, amendments that are likely to improve the situation in the RS, and in BiH as a whole. | The Venice Commission concluded that some of the amendments to the RS Constitution would need to be improved in order to better address human rights issues. For instance, Amendment CXXVIII to Article 13 of the RS Constitution was unacceptable because “human dignity, physical and spiritual dignity” cannot be subject to restrictions under ECHR Article 8(2). This Article improperly puts rights not subject to Article 8 restrictions on the same level as rights subject to those restrictions. Article 8 addresses the right to respect for private and family life, and provides that public authorities will not interfere with this right unless interference is in accordance with law, in the interest of national security or public safety, or the economic well being of the state. |
|---|---|---|
| Opinion on the draft Law on the Prevention of Conflict of Interest in the institutions of Bosnia and Herzegovina | 2009 | The Venice Commission issued the opinion upon the request of the House of Representatives of the Parliamentary Assembly of BiH.  
The opinion represented a follow up to the previous opinion on the Law on Conflict of Interest in Governmental Institutions of BiH. The Venice Commission argued that even though their previous proposals have been implemented, for instance the draft law included a clear definition of a “gift,” some provisions remained problematic.  
The Venice Commission suggested that there should be a clear division between general incompatibilities and case-by-case conflicts of interest. It also recommended establishing clear rules of conduct for officials, clarifying the provision on the limited movement of elected officials, executive officers, and advisors between the public and private sectors. The law also introduced a new provision on reviewing financial declarations. | The Venice Commission concluded that the political situation at the time of adoption should be taken into consideration when interpreting the Election Law of BiH. |
| Amicus curiae brief in the cases of Sejdic and Finci v. Bosnia and Herzegovina pending before the European Court of Human Rights | 2008 | The Venice Commission asked for permission to intervene as a third party in the proceedings before the ECtHR in the case of Sejdic and Finci v. BiH.  
The opinion addressed the issue of non-constituent people being deprived of the right to stand for election to the Presidency or to the House of Peoples of the Parliamentary Assembly of BiH. The Venice Commission addressed whether or not this provision complies with Article 14 of the ECHR when read in conjunction with Article 3 of Protocol No. 1 to the Convention and Article 1 of the Protocol No. 12 to the Convention. The Venice Commission concluded that exclusion of non-constituent peoples is discriminatory and was therefore inconsistent with the ECHR. | The opinion represented a follow up to the previous opinion on the European Commission's Opinions on the Draft Law on the Prevention of Conflict of Interest in the Institutions. The opinion was also consistent with the Venice Commission's previous work on the subject. The Commission concluded that some of the amendments to the RS Constitution would need to be improved in order to better address human rights issues. For instance, Amendment CXXVIII to Article 13 of the RS Constitution was unacceptable because “human dignity, physical and spiritual dignity” cannot be subject to restrictions under ECHR Article 8(2). This Article improperly puts rights not subject to Article 8 restrictions on the same level as rights subject to those restrictions. Article 8 addresses the right to respect for private and family life, and provides that public authorities will not interfere with this right unless interference is in accordance with law, in the interest of national security or public safety, or the economic well being of the state. |
| Amicus curiae brief for the Constitutional Court of Bosnia and Herzegovina On certain provisions of the Election Law of Bosnia and Herzegovina, of the Constitution of the | 2010 | The Venice Commission issued the opinion upon the request of the Caucus of Croat people in the House of Peoples of the Parliamentary Assembly of BiH.  
The Caucus of Croat people made three allegations regarding the procedures for the creation of the Constitutional Court of Bosnia and Herzegovina. The opinion was consistent with the Venice Commission's previous work on the subject. The Commission concluded that some of the amendments to the RS Constitution would need to be improved in order to better address human rights issues. For instance, Amendment CXXVIII to Article 13 of the RS Constitution was unacceptable because “human dignity, physical and spiritual dignity” cannot be subject to restrictions under ECHR Article 8(2). This Article improperly puts rights not subject to Article 8 restrictions on the same level as rights subject to those restrictions. Article 8 addresses the right to respect for private and family life, and provides that public authorities will not interfere with this right unless interference is in accordance with law, in the interest of national security or public safety, or the economic well being of the state. | The Venice Commission concluded that the political situation at the time of adoption should be taken into consideration when interpreting the Election Law of BiH. |

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| Federation of Bosnia and Herzegovina and of the statute of the City of Mostar | the election of persons to the City Council, the lack of a city-area electoral constituency for the Central Zone of Mostar, and the indirect election of the city Mayor. The Caucus claimed that the Election Law was discriminatory against Croats. As a result, the Croats consider Articles 19.4 and 19.6 of the Election Law of BiH to be unconstitutional. According to the Venice Commission, the principle of equal weight of votes was objective, reasonable, and in accordance with the protection of the rights of constituent peoples and others. However, the Venice Commission concluded that residents did have lesser electoral rights in the Mostar Central Zone, as they only vote for the citywide electoral constituency, and not for the city-area constituency. Because the residents of the Central Zone lack their own Committee members, they were ultimately deprived of their right to vote for the city’s Mayor. The Venice Commission argued that this unequal treatment was unjustifiable and contradictory to Protocol 12, which reaffirmed a general prohibition of discrimination by public authorities, and also possibly the principles of the European Charter on Local Self-government. Nevertheless, some provisions are discriminatory and should be revised so that all residents of the City of Mostar may exercise equal electoral rights. |
| Joint opinion on the Act on Public Assembly of the Sarajevo Canton (Bosnia and Herzegovina) | The Venice Commission issued the opinion upon the request of Željko Mijatović, Minister of Internal Affairs of Canton of Sarajevo. The Venice Commission addressed the key issues of the Act, arguing that it should include all cantons within the Federation and should respect human rights in a full sense. Furthermore, the Venice Commission suggested that more freedom should be ensured for public assembly, while the grounds for termination of an assembly should be narrowed. The Venice Commission also suggested that the Act be revised to make it more concise and direct. |
| Amicus curiae brief for the Constitutional Court of Bosnia and Herzegovina on the Law of the Republika Srpska on the status of state property located on the territory of the Republika Srpska an under the Disposal Ban | The Venice Commission issued the opinion upon the request of the Constitutional Court of BiH. According to the Venice Commission, even though there were no specified provisions regarding the division of State property, BiH distributed property among the levels of government. As a result, the Venice Commission concluded that the Law of the RS on the Status of State Property was contradictory, because the RS, as an Entity within the larger unity, was not competent to distribute State property. The Venice Commission also said that when the Law allowed the RS to make agreements with the Council of Ministers of BiH, it infringed on the sovereignty of BiH. The lack of specific provisions regarding the distribution of State property was due to these provisions’ absence in the BiH Constitution. The Venice Commission concluded that Article 68 of the RS Constitution, which provides that the RS regulates and protects all forms of property, concerns the regulation of property and not the attribution of property. Regulation under Article 68 must conform to the principles of free movement of goods, services, and people under Article I.4 of the BiH Constitution. However, the RS law did not regulate property; it transfers all State property located within RS to the government of RS. According to the Venice Commission, the RS law assumed the authority of attributing property, which is an intrinsically federal authority. |

| Opinion on the Draft Law on Internal Affairs of the Federation of Bosnia and Herzegovina and on the Draft Law on Internal Affairs of the Canton of Sarajevo | 2011 | The Venice Commission issued the opinion upon the request of the authorities of the Federation and those of Canton of Sarajevo.  

The Commission analyzed two draft laws regarding police reform: the Federation draft and the Sarajevo Canton draft. The Venice Commission emphasized the need for of institutional independence, accountability, oversight, remedies, and police training.  

The Venice Commission concluded that there were many shortcomings in the proposal, such as the issue of costs, efficiency, and the communication between the departments. The Venice Commission recommended that competent authorities at all levels needed to cooperate for the entire system to function effectively and efficiently. |
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| Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina | 2012 | The Venice Commission issued the opinion upon the request of the EC.  

The Venice Commission analyzed the judicial framework, the division of powers, the co-ordination mechanism, and their implications on legal certainty and the independence of the judiciary in BiH.  

The Venice Commission concluded that the legal and judicial systems in BiH were extremely complex. The Venice Commission noted that the Constitutional Court of BiH is the only adjudicatory body recognized under the Constitution, and the State-level courts were not entitled to apply or interpret Entity or Brcko District law.  

Because there are four separate legal systems (the State, two Entities, and the Brcko District), each judicial system had interpreted similar or identical laws differently, which led to inconsistencies and discrepancies among the legal systems. The Venice Commission noted that it has repeatedly commented on the lack of cooperation between the various judicial bodies. The Venice Commission also noted that  

The Venice Commission suggested that the only solution was constitutional reform, particularly the unification of the judiciary; the creation of a Supreme Court, a common or joint body, and a separate Court of Appeals; the harmonization of legislation, judicial, and prosecutorial systems; and the implementation of “model laws.” The Venice Commission also recommended centralizing the budget, as well as addressing the backlog of cases in accordance with the High Commission and Prosecutorial Council of BiH. |
| Amicus curiae brief on the compatibility with human rights standards of certain articles of the Law on Primary Education of the Sarajevo Canton of the Federation of Bosnia and Herzegovina | 2012 | The Venice Commission issued the opinion upon the request of the President of the Constitutional Court of the Federation of the BiH.  

The opinion analyzed Article 8 of the Law on Primary Education of the Sarajevo Canton of the Federation of Bosnia and Herzegovina to be applied to primary schools. |
The Venice Commission’s Opinions on Bosnia and Herzegovina, November 2013

| Opinion on the practice of blanket resignation of Ministers in the Federation of Bosnia and Herzegovina | 2012 | The Venice Commission issued the opinion upon the request of the Minister of Justice of the Federation of Bosnia and Herzegovina, Mr. Zoran Mikulić. The opinion addressed the issue of blanket resignations through the case of the Minister of Spatial Planning’s blanket resignation. The Venice Commission concluded that blanket resignations were a manipulation tool that political parties used at will. The Venice Commission noted that such practices were dishonest and non-transparent, and should be discontinued. A blanket resignation is a signed contract between the holders of a political office and their political party. A potential candidate for office signs the contract before being appointed to the political position. If an office holder does not follow party directives while in office, then the political party can trigger the blanket resignation at any time. Once the blanket resignation is triggered, it serves as a pre-signed letter of resignation and the official is removed from office. This practice is used to strengthen party discipline and control by reducing the chance that party members will act based on their individual conscience. The Venice Commission said that practices that bypass the law are contrary to the main principles of democracy and inconsistent with the rule of law should be avoided in European democracies. |
| Opinion on the Draft Law on the Courts of Bosnia and Herzegovina | 2013 | The Venice Commission issued the opinion upon the request of the Ministry of Justice of BiH. The main purpose of the Draft Law on the Courts of Bosnia and Herzegovina was the establishment of the High Court (a new court of appeal), as well as to clarify particular provisions within the 2000 Law and amendments. The Venice Commission analyzed the Draft Law’s main provisions and concluded that there was potential for overlap between the Draft Law and the Law on the High Judicial and Prosecutorial Council (HJPC). The Venice Commission recommended that the Draft Law be harmonized with the Law on the HJPC and that the judicial officials not be elected on the basis of their ethnicity, but according to their skills and competences. In a previous opinion, the Venice Commission had recommended the establishment of a State-level High Court that would serve as a court of second instance. The Venice Commission welcomed this court’s establishment, but noted a number of outstanding issues for BiH to address. For instance, BiH should ensure that the criminal jurisdiction referenced in Article 15(2) of the law should not be ambiguous and ensure that there is no overlap between this law and the Law on the HJPC. |
| High Judicial and Prosecutorial Office | 2013 | Document(s) currently unavailable. |
| Amicus Curiae on the compatibility with the non-discrimination Principle of the section of the Republic Day of Republika Srpska | 2013 | The Venice Commission issued the opinion upon the request of the BiH Constitutional Court. |

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The opinion analyzed the constitutionality of Articles 2(b) and 3(b) of the Law on Holidays of the RS, and addressed whether a day to observe January 9 as the Day of the Republic was discriminatory against Bosniaks, Croats, and Others who lived in the RS.

The Venice Commission noted that the RS had not specified why it had selected this particular date for the holiday. The Venice Commission observed that the date could be associated with two events in RS. First, the holiday could honor St. Stephen, the patron saint of Serbia and the RS. Second, the holiday could recognize the day that the Assembly of the Serb People in BiH adopted the Declaration to Proclaim the Republic of the Serb People of BiH.

The Venice Commission noted that the adoption of the Declaration to Proclaim the Republic of the Serb People of BiH was a unilateral act that was not supported by all constituent peoples in the RS. It also noted that a civil war with large-scale ethnic cleansing followed shortly after the adoption of the Declaration. Therefore, using this date would not strengthen a shared identity, and would instead provide a yearly reminder of past tragedies that could increase tensions between the constituent peoples.

The Venice Commission recognized that states have selected holidays based on a predominant ethnicity or identity. However, it suggested that these types of holidays were particularly sensitive for the three constituent peoples and the Others. The Venice Commission emphasized that in this situation, it was important to encourage equality and non-discrimination.

The Venice Commission explained that the date selected was primarily associated with one constituent people, the Serbs, and was imposed on all constituent peoples and the Others in the RS. Therefore, the Venice Commission concluded that the selection of January 9th as Republic Day would give rise to discrimination under the ECHR and the Constitution of BiH.

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Conclusion

The Venice Commission has published a significant number of documents regarding BiH. The opinions primarily focus on issues of human rights or on the competencies of the State, Entities, and cantons. The Venice Commission has also issued numerous opinions regarding BiH legislation and has critically assessed BiH’s constitutional structure. Despite the Venice Commission’s recommendations, however, many of these issues are still unresolved as the constitutional reform process turns stagnant and human rights protection mechanisms remain weak. Nevertheless, the Venice Commission will continue to assist BiH’s EU accession process and to establish a constitutional structure that will enable the State to function more efficiently and effectively.