

Strasbourg, 16 April 1998
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CDL (98) 37
Or.Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**OPINION
ON THE NUMBER OF
MUNICIPAL COURTS
TO BE ESTABLISHED IN MOSTAR**

by
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I. INTRODUCTION

1. By letter dated 26 February 1998 the Office of the High Representative asked the Venice Commission to provide an opinion on the question of whether, within the City of Mostar, a separate court has to be established for each municipality unless the municipalities concerned agree to establish a common court. The City of Mostar is composed of six municipalities and one central zone.

2. Under the Constitution of Bosnia and Herzegovina, the two Entities are competent for the establishment of courts. The City of Mostar is within the territory of the Federation of Bosnia and Herzegovina (Herzegova_ko Neretvanska Canton). The question is therefore to be decided on the basis of the Constitution of the Federation.

II. THE APPLICABLE CONSTITUTIONAL PROVISIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

3. Article VI.7 of the Constitution of the Federation of Bosnia and Herzegovina is worded as follows:

"(1) Each municipality shall have courts, which may be established in co-operation with other Municipalities, and which shall have original jurisdiction over all civil and criminal matters, except to the extent original jurisdiction is assigned to another court by this or the Cantonal Constitution or by any law of the Federation or the Canton.

(2) Municipal courts shall be established and funded by the Cantonal government.

(3) Judges of the cantonal courts shall be appointed by the President of the highest Cantonal Court after consultation with the Municipal Executive."

...

4. The first and the second sections of art. 7 might seem contradictory at first sight. Section 2 attributes the power to establish a court to the cantonal government, section 1 gives the impression that the municipalities are competent to establish courts. Both sections may however be reconciled by distinguishing between the power to decide on whether to establish a municipal court, which belongs to the municipality, and the establishment itself. Under section 1 a court common to several municipalities may be established only "in co-operation with other Municipalities". Co-operation is a voluntary process and the establishment of a court common to several municipalities therefore requires their consent. The importance of the role of the municipalities is confirmed by the fact that the municipal courts appear in the chapter of the Constitution on municipality governments.

5. One may wonder whether it is wise to give such an important role to the municipalities if the financial consequences are then borne by the cantons. But this corresponds obviously to the will of the constituent.

6. It may also seem surprising to foresee such a large number of courts. The provision that each municipality shall, in principle, have its own court is understandable only if one knows that municipalities in Bosnia and Herzegovina are fairly large. Nevertheless, it seems questionable whether this rule facilitates the establishment of an efficient court system. At least if, in accordance with certain intentions, a municipal reform is carried out in the Federation which would substantially increase the number of municipalities, this constitutional provision will have to be reviewed. These considerations however do not justify a departure from the clear wording of the existing Constitution.

III. PROVISIONS SPECIFIC TO THE CANTON AND TO THE CITY OF MOSTAR

7. With respect to the establishment of courts, the Constitution of the Herzegovina_ko Neretvanska Canton is less specific than the Constitution of the Federation.

"Article 79

The municipal courts are established by the Law of the Canton.

The municipal courts are financed by the cantonal budget.

Article 80

The municipal court is established for the territory of the municipality. One municipal court can be established for two or more municipalities."

8. The second sentence of art. 80 does not explicitly provide that the establishment of a municipal court competent for more than one municipality requires the consent of the municipalities concerned. This article has however to be interpreted in accordance with the Constitution of the Federation (see art. V.4 of the Constitution of the Federation) and the consent requirement therefore also applies within this canton.

9. It remains to be considered whether the above-mentioned principle is also applicable within cities. It should be noted that initially the Constitution of the Federation did not provide for cities and that city authorities were created only by Amendment XVI to the Constitution. Amendment XVI does however not mention judicial matters among the powers of cities. The establishment of a city instead of a municipal court could therefore only be based on the provision that cities are responsible for "other competence the city is being entrusted with by the canton or municipalities". The canton may not entrust the city with a power not belonging to it, therefore only the municipalities concerned could jointly decide the establishment of a city court.

10. As regards the central zone of the City of Mostar, it does not have the status of a municipality. Article VI.7 is therefore not applicable and there is no obligation to establish a municipal court in this zone. The cantonal legislature is free to adopt a solution compatible with the general court structure of the Federation. If the central zone seems too small to justify a specific court, other solutions may be found. Possibilities include dividing the territory between neighbouring courts, detaching one judge from each of the other municipal courts of the City of

Mostar on a part time basis (eg for one day a week) with a rotating chair or a rotating competence of the neighbouring courts for the central zone. Attributing competence directly to the cantonal court would seem less appropriate since parties would lose one instance.

IV. CONCLUSION

11. In conclusion, the text of the Constitution of the Federation clearly requires the consent of the municipalities concerned for the establishment of a court competent for the territory of more than one municipality. The municipalities concerned would certainly be well advised to give this consent: otherwise Mostar may well be the only town of this size in Europe, if not the world, to have six courts of general jurisdiction.