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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION OF THE VENICE COMMISSION

ON THE NEED FOR A JUDICIAL INSTITUTION AT THE LEVEL OF THE STATE OF BOSNIA AND HERZEGOVINA

At the 34th plenary meeting of the Venice Commission (Venice, 6 and 7 March 1998), the High Representative of the international community in Bosnia and Herzegovina, Mr Carlos Westendorp, asked the Commission to give opinions on certain questions of constitutional law, including the need to establish a judicial institution at the level of the state of Bosnia and Herzegovina (see Mr Westendorp's address to the Commission, CDL (98) 26).

The Commission appointed a number of its members as rapporteurs, to examine the issues raised by the High Representative. The rapporteurs held meetings in Venice, on the occasion of the Commission's 35th plenary meeting (12 and 13 June 1998), and in Heidelberg (7 July 1998). At these meetings, they also had an exchange of views with officials from the Office of the High Representative.

The opinion set out herein was adopted by the Commission at its 36th plenary meeting on the basis of a paper submitted by Mr Jean-Claude Scholsem, rapporteur.

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1. The Constitution's failure to provide for a supreme judicial institution at the level of the state of Bosnia and Herzegovina

The Commission has already found that the Constitution of Bosnia and Herzegovina (Annex IV to the Dayton Agreements) establishes a particularly weak federal state[1]. The Constitution defines the two entities of that state, the Federation of Bosnia and Herzegovina (hereafter the FBH) and the Republika Srpska (hereafter the RS), and allocates powers between those entities and the state of Bosnia and Herzegovina (hereafter BH). It also establishes BH citizenship. Lastly, it proclaims its own precedence over the laws and constitutions of the entities and sets up a Constitutional Court to guarantee the compatibility of those laws and Constitutions with the state Constitution. However, the state of Bosnia and Herzegovina has no own resources and is therefore dependent on contributions from the entities. From a legal standpoint, its weakness is primarily apparent from the fact that all essential functions not expressly assigned to the state come within the competence of the entities, and from the lack of any express guarantee of the state's inherent powers. Another sign of this weakness is the complete separation of the entities' legal systems, discernible, inter alia, in the lack of a supreme judicial institution at state level responsible for guaranteeing uniform application and interpretation of the law.

It follows that the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is not an "oversight" on the part of the authors of the Constitution, who seem to have been convinced that such a Supreme Court would be superfluous in a system where the main spheres of public and community affairs are governed not by laws of the state but by laws of the entities. The legal system of Bosnia and Herzegovina in fact permits the existence of two sets of rules, even in such essential fields as criminal law and civil law. On the other hand, the Constitutional Court (Article VI of the Constitution) was

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[1] *Opinion on the compatibility of the Constitutions of the entities with the Constitution of Bosnia and Herzegovina, see the Commission's annual report for 1996, pp. 60 – 73, and document CDL-INF (98) 15, pp. 54 and 55*

established in answer to a real need to ensure consistency in the application and interpretation of the Constitution of Bosnia and Herzegovina.

The Commission accordingly considers that the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is justified in view of the particularities of that state's constitutional system.

2. Does the BH Constitution allow for the creation of courts at state level?

Although the lack of a supreme judicial institution can be regarded as a particularity of BH's constitutional system, this does not mean that any state-level court is expressly banned under that system.

The state of BH is vested with own powers, in particular legislative ones, and must be capable of establishing the institutions necessary to guarantee the effectiveness of BH legislation. If the lack of a court at state level undermines that effectiveness, BH must have the authority to create one.

That authority must, however, be exercised in accordance with the Constitution, which does not make provision for any ordinary courts at BH level. To be compatible with the Constitution, the establishment of a judicial institution at state level must not be a merely useful or desirable measure but must satisfy a specific need, acknowledged in the Constitution itself or in the peace agreements.

The Commission has already held, for instance, that the state of Bosnia and Herzegovina is not empowered to establish criminal courts at state level to apply the criminal law passed by the federal state[2]. There is indeed nothing to prevent the courts of the entities from applying the laws passed by the BH legislature, a situation to be found in a number of European federal states. It is true that, given the lack of a supreme judicial institution at state level, the uniform interpretation of that legislation may not be fully guaranteed. However, as we have seen, the BH constitutional system allows for certain discrepancies. In any case, where a difference in legal interpretation by the judicial institutions of the entities poses serious problems, the view might be taken that this amounts to a breach of BH's constitutional system and could therefore be a matter for the BH Constitutional Court[3]. The same applies to offences perpetrated by BH public officials, who can therefore be tried by the entities' criminal courts according to the rules of jurisdiction laid down by BH law[4].

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[2] *Opinion on the competence of the FBH in criminal law matters, adopted at the Commission's 34th meeting, 6 and 7 March 1998, CDL-INF (98) 5 and CDL-INF (98) 15, pp. 85 ff., paragraph 17*

[3] *See Article VI, paragraph 3(b) of the Constitution of Bosnia and Herzegovina establishing the appellate jurisdiction of the Constitutional Court.*

[4] *This naturally does not concern offences committed by persons appointed to high government or political office (members of the presidency, ministers, members of the Constitutional Court, etc.). As in many other European states, special rules of procedure must be issued concerning such offences.*

It follows from the above that BH is empowered to establish courts at state level provided that:

- the courts in question are specific, in that they have special rather than general jurisdiction; allowing the establishment of courts with general jurisdiction would lead to the creation of a system of ordinary courts at BH level, which is clearly not what is intended by the BH Constitution; and

- they are established in response to a constitutional need, or a need acknowledged in the peace agreements, in the sense that the constitutional system is weakened until such courts come into existence.

3. Areas where there is a need to establish a judicial institution at BH level

The Commission has identified a number of fields where the above conditions are met.

3.1 Electoral disputes

Elections are one such area.

In its opinion on the competence of BH in electoral matters (adopted on *), the Commission held that, with regard to disputes concerning elections to BH institutions, it was necessary to assign appellate jurisdiction to a court at state level. Indeed, the democratic nature of BH (which is enshrined in the preamble to its Constitution) and, above all, the requirement that BH (and the entities) organise "free and fair elections" (Article I, paragraph 1 of Annex 3 to the Dayton Agreements) make it mandatory that any electoral dispute be dealt with by an independent judicial institution. BH is therefore bound both by the peace agreements and by its own Constitution to refer such disputes to a judicial institution. The choice of institution is left to the state legislature, which might envisage giving jurisdiction in such matters to a special division of the Constitutional Court or might establish a separate court (ibid.). Whatever solution is adopted by the legislature, it will necessarily entail an addendum to the BH Constitution, which makes no provision either for the constitutional court to have jurisdiction in electoral matters or for the establishment of a separate court. This does not mean that the Constitution will not be observed, since, as we have seen, the existence of such an institution is a requirement of the Constitution itself.

3.2 Administrative disputes

Another field where the establishment of a judicial institution at BH level must be envisaged is that of disputes over administrative decisions.

The general principle that administrative authorities must abide by the law as well as the principle of the Rule of law, on which the BH Constitution is founded (Article I, paragraph 2), require that administrative decisions be subject to judicial review.

This general requirement takes an even more definite form in cases where administrative decisions affect individual rights. In such cases the requirement that administrative decisions be subject to judicial review comes within the ambit of respect for fundamental rights.

Article II of the BH Constitution provides that "the highest level of internationally recognised human rights and fundamental freedoms" shall be ensured in BH and that a Human Rights Commission shall be set up to that end, in accordance with Annex 6 to the peace agreements. The first article of Annex 6 itself makes reference to the European Convention on Human Rights (hereafter the ECHR), Article 6, paragraph 1 of which provides, inter alia, "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". (Also see Article II, paragraph 3 (e) of the BH Constitution.)

According to the established case-law of the European Court and the European Commission of Human Rights, the notions of "civil rights and obligations" and "criminal charges" are autonomous ones, specific to the ECHR, which are not to be interpreted by reference to the domestic law of the states bound by this convention. The European Court of Human Rights has consistently held that it is sufficient that the outcome of a dispute should be decisive for civil rights, that is to say that the rights in issue should be personal and economic rights of one of the parties to the proceedings. Disputes in fields traditionally governed by administrative law of member states have thus been regarded, in the context of the convention, as disputes over civil rights. Examples are disputes over the refusal of certain tax advantages (Editions Périscope v. France judgment of 26 March 1992, Series A No. 234-B); over entitlement to social security benefits (Deumeland v. Federal Republic of Germany judgement of 29 May 1986, Series A No. 100); over entitlement to a civil service pension (Lombardo v. Italy judgements of 26 November 1992, Series A Nos. 249-B and 249-C); and over the right to compensation for unlawful administrative acts (Tomasi v. France judgement of 27 August 1992, Series A No. 241-A). Similarly, certain administrative proceedings have been considered to involve a "criminal charge". Examples are cases concerning penalties imposed in economic matters (Deweer v. Belgium judgement of 27 February 1980, Series A No. 35); in tax matters (Commission report in the Sydow v. Sweden case); and for road traffic offences (Özturk v. Federal Republic of Germany judgement of 21 February 1984).

There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.

The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act).

4. Conclusions

The Commission finds that:

- the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina is justified in view of the particularities of that state's constitutional system;

- BH is empowered to establish state-level courts, which should be specific, in the sense that they should have special and not general jurisdiction, and be created in response to a constitutional need or a need recognised in the peace agreements;

- as regards electoral disputes and administrative disputes, BH is empowered, and even obliged, to set up state-level courts.