COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 28 January 2002

Restricted
CDL (2002) 5
Eng;Only

Opinion no. 188/2001_bih

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW
ON THE AGENCY OF BOSNIA HERZEGOVINA
FOR INFORMATION AND PROTECTION

by:

Mr Georg NOLTE
(Substitute Member, Germany)

I. Introduction

This opinion relates to the Draft Law on the Agency of Bosnia and Herzegovina for Information and Protection (CDL (2001) 123 of 4 December 2001. The opinion concentrates on the constitutional issues of the draft. It does not cover other legal aspects of the law, in particular not data protection aspects.

In any country the establishment and operation of intelligence and security services poses special challenges for the rule of law, democratic accountability and human rights. This has been recognized by the Parliamentary Assembly of the Council of Europe which in April 1999 has adopted Recommendation 1402 (1999) on the „Control of internal security services in Council of Europe member states". This recommendation has been taken into account for this opinion. The basis for the constitutional assessment is the Constitution of Bosnia and Herzegovina.

II. Comments on specific articles

Article 2 (1): According to Article 2 (1) „the Service is an independent institution of Bosnia and Herzegovina with the peculiarities by nature of its organization and way of work". A similar provision was already contained in a "Draft Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service" which was subject to a previous opinion (CDL(2001)85).

The significance of the general principle that the Service is an independent institution seems to lie in the following: Although the draft provides for certain powers of the Presidency and the Council of Ministers to determine (or decisively influence) the general rules of the service and to exercise *ex post facto* control, the draft does not explicitly provide for (the possibility of) direction and control by the Presidency or the Council of Ministers of specific activities of the Service as directed by its Director and its other officials. No rules are foreseen which would give the Presidency, or the Council of Ministers, or one of its members, the power to order the director to undertake (or not to undertake) certain specific operations (Article 6 no. 5 of the law may contain certain aspects of such a power). Article V. 3. e) of the Constitution of Bosnia and Herzegovina provides that "The Presidency shall have responsibility for: ... e) Executing decisions of the Parliamentary Assembly. In addition, Article V. 4. a) of the Constitution of Bosnia and Herzegovina provides for the Council of Ministers: "The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. ... (a) Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III (1) (which contains, *inter alia*: (g) International and inter-Entity criminal law enforcement, including relations with Interpol), (4), and (5), and reporting to the Parliamentary Assembly ...". These

provisions enshrine the constitutional principle of democratic responsibility of the executive (for the Council of Ministers: of responsible government), a principle which cannot be dispensed with for the purpose of creating an independent administrative agency.

It is possible, however, that the authors of the draft intended to encapsulate the principle of democratic responsibility of the executive (or of responsible government) in the second sentence of Article 2 according to which "The Presidency of Bosnia and Herzegovina may transfer all or part of its authority to the BiH Council of Ministers to manage, on its behalf, the agency in accordance with the BiH Constitution and this Law". As already mentioned, Article V 3. (e) of the BiH Constitution lists as one of the powers of the Presidency "executing decisions of the Parliamentary Assembly". If this constitutional provision is understood to cover the execution of all laws which have been passed by the Parliamentary Assembly, and if it presupposes that the Presidency has the general power to execute all such laws, the draft law might satisfy the principle of democratic responsibility of the executive. In this case, however, the proclamation of the Agency to be an "independent institution" would not make sense anymore. It should therefore be deleted.

However, if it is the intention of the drafters to refuse the Presidency and the Council of Ministers direct day-to-day control of the Agency because they conceive it as an independent institution, such a set-up would be constitutionally problematic under a constitutional system, such as the one of Bosnia and Herzegovina. Accordingly, Guideline C. i. of Recommendation 1402 (1999) demands that „One minister should be assigned the political responsibility for controlling and supervising internal security services, and his office should have full access in order to make possible effective day-to-day control". The underlying reason for this requirement is the general principle of democratic responsibility of the executive. No. 6 of Recommendation 1402 (1999) postulates that „Effective democratic control of the internal security services, both a priori and ex post facto, by all three branches of power is especially vital in this regard".

Theoretically, there exist two possible justifications for conceiving the Agency as an independent institution. The first is the American model of independent agencies, the second is functional necessity:

In the United States, the Supreme Court has recognized that the Parliament (Congress) can create certain agencies which are not subject to executive appointment and/or direction and control. Without going into the details of American constitutional law (see L. Tribe, American Constitutional Law, vol. 1, 3rd. ed. 2000, § 4-9 at pp. 703-717) it is clear that the justification for the possibility of setting up such agencies rests in the specific nature of the American Presidential system which is established by the US Constitution.

Another possible justification for making an exception from the general rule of direction and control of the executive by the government is functional necessity. There exist certain independent executive institutions even in states with a parliamentary system which have been ac-

cepted. One example are Central Banks which are independent in order to prevent self-serving policies by the government of the day at the expense of general financial stability. Examples for such institutions, however, are rare and they are often legitimated by the constitution itself. They must be convincingly justified. It is not entirely excluded that there exist certain reasons in Bosnia and Herzegovina which make it imperative to insulate the Agency from direct governmental direction. Such reasons are, however, hardly conceivable. The specific „concordant" constitutional system of Bosnia and Herzegovina (which requires different organs and groups to cooperate in order to achieve a valid decision) seems to ensure that it is virtually impossible for one (ethnic or other) group to govern alone and to abuse the possibilities of the Security Service. In addition, Recommendation 1402 (1999) states that „the risk of abuse of powers by internal security services, and thus the risk of serious human rights violations, rises when internal security services are organized in a specific fashion", thereby indicating that they should be subject at least to the usual forms of governmental direction and control .

Article 2 (2): provides that the Agency is responsible for implementing the provisions of the BiH Constitution as defined in Article III (1) (g) "International and inter-entity criminal law enforcement, including relations with Interpol". While it seems clear that the institutions of Bosnia and Herzegovina have the power to establish an agency which has the task to implement this competence, it should not be forgotten that Article III 2. (c) of the BiH Constitution also provides: that "The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate". It is recommended that the law further specify the relations between the Agency and the Entity Ministries of the Interior and other BiH law enforcement agencies. Thus the draft could specify, in addition to establishing a general obligation of cooperation and coordination, a clause according to which the entity organs may act as long as the Agency has not taken up a specific matter, and to lay down a duty of the entity agencies to inform the Agency of developments which are within the bounds of its competence under Article III (1) (g) of the BiH Constitution.

Article 14: This article appears to be placed under the wrong heading. It it obviously not intended to apply merely to the acts of the Department for the Protection of Diplomatic-Consular Missions and the B&H Institutions. It is suggested that the article finds its appropriate place together with or following Article 2 (3) of the Draft.

Article 15: This article on the police powers of the Agency raises concerns about its specificity. The simple reference to "police powers which cannot be delayed" does not satisfy the usual standards with respect to the specificity of an enabling law. Would the Agency officers have the power to arrest persons, or the power to use weapons, or the power to identify individuals? Such powers seem to be called for for the VIP Protection Department and the Diplomatic-Consular Misions and the B&H Institutions Facilities Protection Department.

Such powers do not seem to be necessary, on the other hand, for the Criminal Information Department whose responsibility is limited to "the collection and analysis of data which are important for the implementation of (certain) international and the BiH criminal laws". Should the authors, however, have envisaged the possibility that the Agency would also "collect" the pertinent data by way of an exercise of its police powers, this possibility would also have to be circumscribed more specifically. Otherwise the principle of legal certainty which is an essential element of the principle of the rule of law would be violated.

Article 16: It would be desirable if the provision would also include an obligation of the Agency to inform the Parliamentary Assembly of its work (in appropriate form, such as confidential reports to a small select committee). Otherwise the Assembly would not be able to meaningfully perform its task to oversee the lawfulness of the work of the Agency.

Articles 19 and 20: Although these provisions concern data protection (an area with which the present opinion does not deal with in detail) it should be noted that it is problematic if the data protection matters should be regulated merely by way of executive order. Data protection is a human rights issue and its rules should be "prescribed by law", its basic rules preferably by parliamentary legislation.