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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

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1. Introduction

This opinion concerns the Draft Law on the Agency of Bosnia and Herzegovina for Information and Protection (Doc. CDL (2001) 123 restricted).

The Office of the High Representative has requested the Council of Europes opinion on this text, on the understanding that the Venice Commission must analyse in particular the constitutional aspects of the matter.

So this opinion on the draft law will confine itself to the constitutional dimension. More specifically still, we shall only analyse those parts of the text that are liable to raise problems vis-à-vis the distribution of competences between Bosnia-Herzegovina (BH hereafter) and its two constituent Entities, the Federation of Bosnia-Herzegovina (FBH hereafter) and the Republika Srpska (RS hereafter).

2. Under the terms of the draft law, the Agency for Information and Protection comprises three separate departments.

The first is the Criminal Information (or investigation) Department, which is responsible for collecting and analysing data relevant to the implementation of international and BH criminal laws. The text comprises a non-exhaustive list of the offences covered (including acts of terrorism, trafficking in narcotics, nuclear substances and chemical or biological weapons, war crimes and crimes against humanity). The text further stipulates that the Department is responsible for any offence comprising an international element or an international obligation incumbent on BH (Art. 11 para. 2).

The second department is the VIP Protection Department, which provides protection for any persons exercising important official duties for the BH institutions, as listed in Article 12. Foreign dignitaries visiting BH and other persons designated by the Presidency are treated as equivalent categories and are also protected as such.

The role of the third department is fairly similar to that of the VIP Protection Department. It is responsible for protecting diplomatic and consular missions and the BH institutions premises and facilities[1].

3. This brief overview of the tasks assigned to the Agency for Protection and Information and its three component departments highlights the problems which the draft is liable to raise in terms of the distribution of competences between BH and its two constituent Entities.

According to Article 2 paragraph 2 of the draft, the Agency is responsible for implementing the provisions set out in Article III-1-g of the Constitution, which assigns BH specific competences vis-à-vis international and inter-Entity criminal law enforcement, including relations with Interpol.

The drafters have thus rightly endeavoured to base the legislators competence explicitly on a provision of the BH Constitution.

The Venice Commission has already had occasion to analyse the scope of Article III-1-g of the BH Constitution, notably in its opinion in the FBHs competences in criminal law matters[2], and in its opinion on inter-Entity judicial co-operation in BH[3].

The information set out in these opinions would appear to suggest that Article III-1-g of the BH Constitution provides an appropriate legal basis for the tasks assigned to the Criminal Information (Investigation) Department under Article 11 of the draft, and the cases listed do indeed have an international or inter-Entity dimension.

The text also, and quite rightly, applies to the offences covered by BH criminal laws. Although the Constitution of BH does not explicitly assign the State any criminal-law competences, it must be acknowledged that BH does have some competences in this area, where recourse must be had to criminal-law machinery in order to implement the other competences explicitly allocated to the State. This conception is directly in line with the analysis developed previously by the Venice Commission in the two aforementioned opinions.

4. Where the tasks assigned to the VIP Protection Department are concerned, it should be noted that the department is mainly responsible for protecting persons holding official posts in the BH institutions, plus visiting foreign dignitaries and other individuals designated by the Presidency.

Such assignment of responsibilities also falls within the jurisdiction of BH. Although the theoretically exhaustive list of the competences of BH set out in Article III-1 of the Constitution does not seem to include this particular responsibility, the provision should be taken in conjunction with Article III 5 a, which confers on BH additional competences necessary for preserving its sovereignty, territorial integrity, political independence and international personality. In more specific connection with foreign dignitaries visiting BH, reference might be made to the competence conferred on BH under Article III-1-a of the Constitution on foreign policy. If it is to implement this competence BH must be in a position to take all necessary measures to protect political figures travelling within its territory.

So this would seem to establish the competences of BH. However, these competences are established on the basis not of Article III-1-g but of Article III 5 a) of the Constitution. The wording of Article 2 paragraph 2 should therefore be amended accordingly.

If we accept that BH is responsible, on the basis of Article III 5 a, for State protection of its own institutions and individuals holding official posts therein, this opinion is in line with the Venice Commissions established interpretation. The Commission has held that even though the Constitution of BH does not assign any criminal-law competences to the State, offences may be established at this level where this is necessary for implementation of responsibilities peculiar to the State or to preserve the legal system of BH as a state system[4].

This an instance of reasoning by analogy. It should also be stressed that BH has exclusive competences in these areas since it would appear obvious that only the State can take measures to ensure the protection of persons who hold official posts in its various bodies.

5. The problems raised by the BH Diplomatic and Consular Mission and State Facilities Protection Department are very similar to those we have just mentioned.

Here again we find manifest links with both BHs competences in matters of foreign policy (Article III-1-a) and the protection of the State institutions themselves (Article III-5-a). In fact these two departments seem to have very similar tasks, apart from the fact that one deals more with individuals while the other is more concerned with premises and property.

6. BHs competence would therefore seem to have been firmly established on all these points. It would no doubt be desirable to broaden the constitutional basis mentioned in Article 2, paragraph 2 of the draft to include also Article III-1-a and Article III-5-a of the Constitution.

Furthermore, co-ordination with parallel policies conducted by the Federate Entities is also liable to cause problems.

For instance, the RS has a Law on the Investigations (Intelligence) and Security Service of the Republika Srpska (Official Gazette of RS 21/98). The FBH apparently has no such law, but a highly detailed bill is currently being drafted (the latest version was drafted in May 2001).

Although we shall not be going into detail on these two texts since that would be irrelevant to the subject of this opinion, we should perhaps make a number of comments on them.

First of all, these texts are much more elaborate (the RS Law comprises 46 articles, while the FBH draft has 78) than the BH draft (26 articles). We can only guess at the reasons for this imbalance.

In principle, the subject of the texts, viz information and protection services, is quite suited to parallel exercise of competences. For example, it is only natural for the RS to act to protect its own constitutional order (Article 1 of the RS Law), its own institutions and the persons holding official posts therein (Article 4 of the RS Law). There is no need to labour the point that the Federate Entities have residual competence in BH (Article III-3-a), and that they also have special responsibilities in connection with the safety of persons present on their respective territories, which requires the authorities to maintain the appropriate institutes and services (civilian law enforcement agencies) (Article III-2-c).

A co-operation-oriented federal framework is required if such parallel exercise of competences is to be effective. In fact, this co-operation is the subject of Article 2, paragraph 2 of the BH draft law (which could be made more explicit in this respect with a specific mention of co-ordinating similar departments already existing at Entity level).

However, the RS Law would appear to have effected some abusive attributions of competence. This applies, for instance, to some of the items in the list set out in Article 4 of this Law on international and humanitarian offences, international organised crime, inter-State offences and threats to BHs constitutional order. These subjects do not fall within the RSs jurisdiction, and the Law should be amended on these points at he latest when the BH law comes into force.

7. The FBH draft Law on the Intelligence and Security Service of the Federation of Bosnia-Herzegovina manages to avoid most of these encroachments on parallel competences. For example, it only covers protecting Federation (not BH) institutions and bodies. However, Article 3 c) assigns it jurisdiction over acts punishable under international and humanitarian law and co-operation with the International Criminal Tribunal for former Yugoslavia.

This latter competence is a matter not for the Federation but for BH, under Article III-1-g of the Constitution.

Nevertheless, the Federations draft law should be seen in a completely different light from the RS Law. The draft is presented as a transitional solution pending the establishment of an Intelligence and Security Service at State level (Article 1 para. 2 of the FBH draft law).

It would therefore appear that there are two competing drafts, one at the FBH level and one at the level of BH itself, whereby it is acknowledged that the former must be withdrawn as soon as the latter comes into force.

8. At first sight, from the legal angle, this approach may appear excessive since Federation has specific competences in the criminal-law field. For instance, it is up to the FBH to protect its own installations and buildings and the security of its bodies.

However, the BH Constitution does potentially offer an appropriate legal framework for what looks like a transfer of exercise of certain competences by a Federate Entity to BH. This transfer is apparently not confined to the mere co-ordination provided for in Article III-4, which may be decided by the Presidency, barring objections from one of the Federate Entities. New competences could be attributed to BH under Article III-5-a (responsibility for such other matters as are agreed by the Entities).

Apparently, this refers to situations where either Entity assigned certain competences to BH. On this assumption, the solution which the Federation seems to be envisaging should be accompanied by parallel moves from the RS. This would centralise all the Intelligence and Security Services, regardless of their individual specialisations.

However, we cannot completely exclude the possibility of a very flexible interpretation of Article III-5-a, which could well lead to a lopsided type of federalism. Under such a reading the text would permit either or both of the Entities to assign specific missions to BH. The plural used in the text would no longer be decisive. If such an interpretation were adopted, there would be nothing to prevent the Federation from entrusting the exercise of its competences in the intelligence and security field to BH, while the RS would continue to exercise the corresponding competences separately (though obviously within the limits of its constitutional powers). This solution would necessitate a new financial equalisation system because one of the two Entities would continue to exercise competences which the other had assigned to the central level.

9. During the drafting of this opinion a new text dated December 2001 was sent in. This latter draft replaces the previous one, dated May 2001, on the FBH Intelligence and Security Service.

Article 1 of this new draft has been radically changed: the second paragraph stipulating that the FBH service would only exist until an intelligence and security service was set up at BH level has been deleted.

However, Article 68, which has been added to the transitional and final provisions, incorporates a similar kind of stipulation. In fact, it might be argued that it is more appropriate to include this stipulation among the transitional provisions than among the general provisions of the Law.

Nevertheless, Article 1, paragraph 2 of the May 2001 draft and Article 68 of the December 2001 draft are worded differently.

The former text simply states that the FBH service will cease to exist as soon as an intelligence and information service has been set up at BH level (and must immediately transfer all its assets, documents and information to this new service).

The December 2001 text specifies that the service set up at FBH level will cease operations as soon as a relevant intelligence and information service has been set up in BH[5].

The drafters should explain whether this difference in wording is purely fortuitous or intentional. If it is intentional, what is the exact purpose of the difference? In one sense the service set up at BH level will never be relevant because it would have to be responsible for information and security activities in fields falling within the jurisdiction of the FBH (eg protecting FBH staff and buildings [Art. 3 e, December 2001 text]). The BH service would only be relevant if both Entities (or even only one of them) transferred the exercise of this competence to BH by virtue of Article III-5-a) of the BH Constitution (see section 8 above).

There is another possible interpretation. It is conceivable that an intelligence and security service set up at BH level might not be deemed relevant because its competences *ratione materiae*, that is to say its duties and assignments, are narrower than those exercised by the equivalent service set up at FBH level.

In this case, would part of the service operating at the FBH level survive, the other part being absorbed by the service set up at BH level? The text apparently precludes this possibility. That would mean that both services would coexist for as long as the service set up at BH level was not considered relevant. However, who is to decide on such relevance, and how?

It therefore seems necessary to clarify the scope of the new Article 68 in terms of the possible coexistence of similar services at the FBH and BH levels.

Moreover, we feel that the new draft (December 2001) on the FBH service still comprises a number of unjustified competences, particularly in

Article 3 a) (international crime) and 3 c) (international law and humanitarian law crimes and co-operation with the ICTY).

10. Conclusions

a) The Draft Law on the Agency for Information and Protection is in line with BHs constitutional competences.

b) Its legal basis can be deduced not only from Article III-1-g but also from Article III-1-a and Article III-5-a of the Constitution.

c) The subject dealt with lends itself to parallel exercise of competences. Indeed, such parallel exercise is necessary if the respective competences of the BH and its constituent Entities are to be honoured.

d) The RS Law on the Intelligence and Security Service of the Republika Srpska seems to comprise a number of encroachments on BHs competences.

e) The FBH draft law envisages absorption of the service to be set up at Federation level by that to be set up at BH State level. This is constitutionally possible if both Federate Entities so decide (Article III-5-a). The question remains whether one Entity can act in this way unilaterally.

f) The latest version of the FBH draft law contains a transitional provision (Art. 68) which may be different in scope from the similar provision in the previous text (Article 1, paragraph 2) and which should in any case be elucidated.

24 January 2002

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[1] *Even though such a proposal lies outside the scope of the present opinion, we might consider whether it would not be useful to merge the last two departments, given that they have similar roles which contrast starkly with that of the Criminal Information Department.*

[2] *Adopted by the Commission at its 34th plenary meeting (6 and 7 March 1998); see Opinion on the Constitutional system of Bosnia-Herzegovina, September 1994 - June 1998, CDL-INF (98) 15, p. 88.*

[3] *Adopted by the Commission at its 35th plenary meeting (12 and 13 June 1998); see CDL-INF (98) 15, p. 123.*

[4] *See in particular the Opinion on the Competence of the Federation of BH in Criminal Law Matters.*

[5] *Furthermore, unlike Article 1, second paragraph (May 2001 text), Article 68 (December 2001 text) does not provide for compensation for the assets thus transferred from one service to the other. This would appear to be an unintentional omission.*