

Written observations of the OHR Legal Department concerning the request of the applicant in Case No. U26-01

Comments made on behalf of the Office of the High Representative for Bosnia and Herzegovina on the Request for the assessment of constitutionality of the Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 29/2000 of 30 November 2000) and on the proposal of issue of a provisional measure rendering the said Law ineffective pending the issue of a final Decision of the Constitutional Court of Bosnia and Herzegovina on the said assessment.

1. Introduction

In a letter addressed to the High Representative of Bosnia and Herzegovina dated 3 March 2001, the President of the Constitutional Court of Bosnia and Herzegovina, Ms. Snezana Savic, invited the High Representative to submit comments and remarks on the above mentioned request and proposal which was lodged by twenty-five deputies of the National Assembly of Republika Srpska on 22 March 2001.

According to this request, the Law on the Court of Bosnia and Herzegovina is in violation of Article III of the Constitution of Bosnia and Herzegovina insofar as it concerns the competence of and relations between the Institutions of Bosnia and Herzegovina and of the Entities. In particular it is contended that since Article III: 1. of the Constitution does not provide for the "judiciary" to be within the competence of Bosnia and Herzegovina, the "judiciary" falls within the competence of the Entities. It is further contended that

Article VI of the Constitution of Bosnia and Herzegovina, which defines the scope and competence of the Constitutional Court of Bosnia and Herzegovina, deals with all issues related to the problem of competence within the “judiciary”. It is argued in consequence that no legal basis exists for the Law on the Court of Bosnia and Herzegovina because the Constitution of Bosnia and Herzegovina does not provide for any other instance except for the Constitutional Court. It is finally contended that the issue of laws required to implement the Law on the Court of Bosnia and Herzegovina such as a law on Criminal Procedure and on a Public Prosecutor would themselves, apart from financial and other complications, be in violation of the Constitution of Bosnia and Herzegovina.

The High Representative welcomes the opportunity provided to him to cause the following comments, which are made through me in my capacity as Head of the Legal Affairs Department of the Office of the High Representative and Deputy High Representative for Legal Affairs, to be supplied to the Court.

Clearly these comments are made without making any admissions express or implied as to the jurisdiction of the Court in respect of Decisions of the High Representative, and without prejudice to any issue which might hereafter in this or any other case be raised before this or any other Court with reference to the jurisdiction of this or any other Court concerning Decisions of the High Representative.

2. The origin of the draft of the Law on the Court of Bosnia and Herzegovina

It is of course correct that the only court at State level expressly referred to in the Constitution of Bosnia and Herzegovina is the Constitutional Court of Bosnia and Herzegovina, to which Article VI of the Constitution refers. It is also correct that, under Article III of the Constitution, issues not expressly assigned to the State of Bosnia and Herzegovina fall within the residual competence of

the Entities of Bosnia and Herzegovina.

In 1998 the then High Representative of Bosnia and Herzegovina asked the Venice Commission of the Council of Europe 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. In its opinion dated 3 November 1998, adopted by the Commission at its 36th plenary meeting on the basis of a paper submitted to them by the rapporteur Mr Jean-Claude Scholsem, it was concluded on the one hand that the lack of a supreme judicial institution at the level of the state of Bosnia and Herzegovina was not inconsistent with the constitutional system of Bosnia and Herzegovina having regard to the latter's particularities. It was however further concluded that under the Constitution of Bosnia and Herzegovina the State of Bosnia and Herzegovina was empowered to establish state-level courts "which should be specific, in the sense that they should have special and not general jurisdiction, and be established in response to an established constitutional need." Finally it was concluded that "as regards electoral disputes and administrative disputes, BH is empowered, and even obliged, to set up state-level courts."

A draft law on the State Court of Bosnia and Herzegovina was eventually prepared under the auspices of the Venice Commission upon the basis that a Court of the State of Bosnia and Herzegovina should be established with several chambers entrusted with criminal jurisdiction, as well as with jurisdiction in respect of judicial review of administrative acts and electoral appeals.

3. The international mandate

The members of the Peace Implementation Council met in Madrid on 15-16 December 1998 and in the Annex to the Declaration of 16 December 1998 entitled "Reinforcing peace in Bosnia and Herzegovina – the way ahead" a "Peace implementation agenda"

was set out.

Paragraph II. of that agenda concerned "Rule of law and human rights" and under subparagraph 1 it was stated:

"Without the rule of law and an independent and impartial judiciary, there can be no future for Bosnia and Herzegovina as a modern, prosperous European nation. No safeguards for the people of either Entity. No prospect of large-scale investment from outside. No chance of closer association with the European institutions."

Subparagraph 2 of the Annex concerned judicial reform and the High Representative was urged to further develop a comprehensive judicial reform strategic plan. Under subparagraph 3 such plan was to include not only strengthening the Constitutional Court of Bosnia and Herzegovina but also:

"the establishment of necessary structures at BiH State and Entity levels to fulfill the requirements of the respective Constitutions, including the creation, in accordance with the opinion of the Venice Commission, of judicial institutions at the State level, whose creation meets an established constitutional need, to deal with criminal offences perpetrated by BiH public officials in the course of their duties, and with administrative and electoral matters."

Following its meeting in Brussels on 23-24 May 2000 the Peace Implementation Council issued a Declaration in which at paragraph III it was stated:

"We call for a truly independent and impartial judiciary that will ensure the Rule of Law in all criminal, civil and commercial matters. In this context the Council considers the strengthening of the Constitutional Court and the establishment of a State Court to be major priorities."

In the Annex to the Brussels Declaration it was stated under the heading "Institutions" that "The following legislation

must be adopted by the BiH Parliamentary Assembly: ... Law on the State Court .. “

4. The Law on the Court of Bosnia and Herzegovina – jurisdictional provisions compliant with the Constitution of Bosnia and Herzegovina

The Law on the Court of Bosnia and Herzegovina is based on the Venice Commission draft referred to above. During the course of working group meetings with representatives of the Ministry of Civil Affairs and Communications and of the Entities various changes were made to comply with particular representations made, but always so as to ensure that the respective fields of responsibility of the Entities were not trespassed upon. In the outcome the Law as imposed by the High Representative is fully in accordance with the international mandate above referred to and with the Constitution of Bosnia and Herzegovina.

A summary of its main jurisdictional provisions follows.

a) Criminal Jurisdiction

Under Article 13 paragraph 1 of the Law, the jurisdiction of the Court in criminal matters is limited to “crimes defined in the Laws of the State of Bosnia and Herzegovina, when provision is made in the said Laws that the Court has such jurisdiction.”

The jurisdiction under Article 13 paragraph 2. a) of the Law is equally limited to taking “a final and legally binding position on the implementation of State Laws and international treaties on request by any court of the Entities or any court of the Brcko district entrusted to implement State Law”.

Article 13 paragraphs 2. b) and c) of the Law should be read within the context of Article III.1 (g) of the Constitution of Bosnia and Herzegovina. The matters set out clearly come within the competence of the Institutions of the State of

Bosnia and Herzegovina.

Finally Article 13 paragraph 2 d) relates exclusively to crimes defined at State level.

b) Administrative jurisdiction

Under Article 14 paragraph 1 of the Law, the administrative jurisdiction of the Court is limited very narrowly to “actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina and its bodies, Public Agencies, Public Corporations, institutions of the Brcko District and any other organisation as provided by State Law, acting in the exercise of a public function.”

Article 14 paragraph 2 proceeds to set out that the Court shall have jurisdiction in particular over the matters set out in sub-paragraphs a)-d) of this paragraph. Accordingly Article 14 paragraph 2. a) specifically gives the Court jurisdiction over “The assessment of the legality of individual and general enforceable administrative acts adopted under State law, performed in the exercise of public functions by the authorities listed in paragraph 1 of this Article, for which judicial review is not otherwise provided by law”.

In turn Article 14 paragraph 2. b) gives the Court jurisdiction over “Property disputes between the State and the Entities, between the State and the Brcko district, between the Entities, between the Entities and the Brcko district and between the institutions of Bosnia and Herzegovina, which are interrelated with the exercise of public functions.”

Article 14 paragraph 2. c) gives the Court jurisdiction over “Conflict of jurisdiction between the courts from the Federation of Bosnia and Herzegovina and Republika Srpska, and between the courts of the Entities and the courts of the Brcko district.”

The above summary of the provisions relating to jurisdiction over administrative matters should be read in the light of the opinion of the Venice Commission of 3 November 1998 in which it was stated:

“There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution ... 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).

c) Appellate and electoral jurisdiction

The appellate jurisdiction provided for under Article 15 paragraph 1, subparagraphs a), b) and c) of the Law enables appeals to be entertained against decisions of the Criminal and Civil Divisions of the Court of Bosnia and Herzegovina itself, as well as against judgements of the courts of last resort in the District of Brcko.

Article 15 paragraph 1.d) requires the Court to decide in

respect of extraordinary legal remedies against final judgements reached by divisions of the Court itself and by the courts of last resort in the District of Brcko.

The jurisdiction provided for under Article 15 paragraph 2. a) is defined in very concrete terms as being in respect of “complaints concerning violations of the electoral code and the additional regulations and directives issued by the Permanent Election Commission.”

Under Article 15 paragraph 2. b) it is provided that the Court shall have jurisdiction over “any other case for which competence is provided by the laws of Bosnia and Herzegovina”. It is clear that this provision refers to State laws only.

5. Request to issue a provisional measure

The issue of a provisional measure to render a law ineffective initially interferes with the legislative competence of the body which enacts it. In the instant case the law was, as already noted, imposed by a Decision of the High Representative. The issue of a provisional measure is a remedy which should be employed by a court against a provision of law only in the most exceptional circumstances. Not only should extreme care be taken over using it but a narrow interpretation should be placed upon such use. Only where the damage which would follow from allowing the challenged law to take effect was so destructive to constitutional rights as to cause an irreparable justice, should provisional measures be concerned. That situation does not arise in relation to the steps for the establishment of the Court of BiH.

In the request forwarded by the deputies of the RSNA no proper argument is put forward as to why such provisional measure should be issued. No exceptional circumstances are demonstrated which might be said to require the issue of a provisional measure nor is an explanation given as to what the “damaging consequences” referred to are said to be.

6. Conclusion

The Law on the Court of Bosnia and Herzegovina corresponds not only to a constitutional obligation identified by the Venice Commission to establish a Court on the level of the State of Bosnia and Herzegovina, but is also required to be set up by the Peace Implementation Council. Since the Law on the Court of Bosnia and Herzegovina is itself clearly constitutional, it follows that laws such as those relating to criminal procedure and to the position of public prosecutor which will be required to implement this Law must themselves be in principle constitutional.

Furthermore the issue of a provisional measure to render ineffective the Law on the Court of Bosnia and Herzegovina would not only run counter to the international mandate and requirement referred to above, but would be harmful to the prospects of Bosnia and Herzegovina becoming a modern and prosperous European nation and would further be detrimental to the establishment of the rule of law in Bosnia and Herzegovina and to compliance with the European Convention on Human Rights.