

Written Observations made by the Legal Department of the Office of the High Representative concerning the request of the applicants in Case No. U-11/08

I. Introduction

1. On 4th June 2008 the Constitutional Court of Bosnia and Herzegovina (hereinafter: Constitutional Court) received a request from a group representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina to review of constitutionality of the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 25/04), the Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 93/05), the Law Adopting the Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 32/07) and the Law on Adoption of the Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 15/08). The application is numbered as U-11/08.

2. The applicants' request could be summarized as follows:

- First, that the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Law) only mentions in its preamble as a constitutional basis for its adoption the provision of Article IV,4,(a) of the Constitution of BiH which is a provision of general nature entitling the BiH Parliamentary Assembly to generally enact legislation (*as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under the Constitution of BiH*). The applicants point out that the preamble of the Law fails to mention the specific constitutional ground providing it with the mandate for its enactment, that is Article III,5,(a) of the BiH Constitution, "which formally makes possible that this responsibility is transferred from the entities to the Parliamentary Assembly of Bosnia and Herzegovina"[1].
- Second, that it is clear from Article III,1 of the BiH Constitution that "the justice sector" is an exclusive responsibility of the Entities as it is not mentioned explicitly in the Constitution as a responsibility of the State and furthermore that it is apparent that the constitutional grounds for enactment of the Law and subsequent amendments thereto cannot even be "derived".

3. The applicants therefore request from the Constitutional Court to "**after recognizing that there are no constitutional grounds for something like this, declare the contested laws as being in discrepancy with the constitution of BiH and therefore make them void.**"

4. On the 14th of October 2008, the Constitutional Court invited the Department for Legal Affairs of the Office of the High Representative and the European Union Special Representative for Bosnia and Herzegovina to submit its opinion in writing with regard to the allegations contained in the request.

5. The Office of the High Representative (OHR) has prepared this Amicus Curiae submission with the purpose of assisting the Constitutional Court. The applicants' allegations and specific request are addressed in turn.

II. Facts

6. The Law that is subject to the present challenge is the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The Law was adopted by the House of Representative of the Parliamentary Assembly of Bosnia and Herzegovina on 11 May 2004 and by the House of Peoples on 21 May 2004 on the basis of a positive assessment given by the Committee for Constitutional and Legal Affairs[2]. The Law repealed the Laws on High Judicial and Prosecutorial Council that existed at the level of the entities and at the level of Bosnia and Herzegovina[3]. The Law was published in the Official Gazette of Bosnia and Herzegovina[4].

7. The new Law was enacted on the basis and as a result of an "Agreement on the Transfer of Certain Entity

Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina” (hereinafter: the Transfer Agreement). Such Agreement was signed for the Government of the Federation of BiH on 11 March 2004 by the Prime Minister, Mr. Hadzipasic; for the Government of Republika Srpska on 11 March 2004 by the Prime Minister, Mr. Dragan Mikerevic. The Agreement, a copy of which is annexed to this observations, was then published in the Official Gazette of the Federation of BiH[5]. The Agreement states, inter alia, that:

“In the exercise of Article III,5,(b) of the Constitution of Bosnia and Herzegovina, the Entity of the Federation of Bosnia and Herzegovina and the Entity of the Republika Srpska hereby agree to transfer certain responsibilities for their respective judiciaries, including matters concerning the affairs and functions of judges and prosecutors, to an institution of Bosnia and Herzegovina to be known as the High Judicial and Prosecutorial Council of Bosnia and Herzegovina from the day of entering into the force of the new Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina.”

8. Following the signing of the Agreement, a draft Law was prepared and proposed to the Parliamentary Assembly by the Council of Ministers. The Proposed Law was passed by the Council of Ministers at its 44th session held on 11 March 2004. The explanation of the Proposed Law states that the constitutional basis for the adoption is contained in Article III,5 of the Constitution of Bosnia and Herzegovina. The Transfer Agreement was also appended to the Proposed Law.

III. As to the allegation that the challenged Law does not have Constitutional Grounds because it fails to mention, as a specific constitutional ground providing it with the mandate for its enactment, “Article III,5,(a) of the BiH Constitution, which formally makes possible that this responsibility is transferred from the entities to the Parliamentary Assembly of Bosnia and Herzegovina”

9. The OHR agrees with the applicants that article IV,4,(a) of the Constitution of BiH is a provision of general nature enabling the BiH Parliamentary Assembly to generally adopt and enact laws as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under the Constitution of BiH.

10. The OHR, however, contends that the applicants’ request that the law be declared null and void on the basis of an omission to quote the appropriate constitutional provision in its preamble proceeds from a misunderstanding.

11. The necessity to indicate in the preamble of laws their constitutional basis is a formal requirement provided for under the Unified Rules for Legislative Drafting in the Institutions of Bosnia and Herzegovina adopted in January 2005[6]. However, the Rules of Procedures of the Houses of the Parliamentary Assembly of BiH in force at the time of the adoption of the challenged Law did not contain such a requirement as they did not provide detailed rules related to the content of the preamble of laws enacted by the Parliamentary Assembly. The consistent practice of the Parliamentary Assembly before the adoption of the new Rules of Procedure illustrates that the Preamble of laws refers to Article IV,4,(a) of the Constitution as the constitutional basis for the Parliamentary Assembly to enact legislation rather than as a basis to exercise responsibility over a particular field of competencies.

12. The Laws adopted pursuant to III,5,(a) or III,5,(b) of the Constitution originating from transfer agreements concluded by the entities are another case in point. Both preambles of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina[7] and of the Law on Indirect Taxation System in Bosnia and Herzegovina[8] contain references to Article IV,4,(a) while no reference to Article III,5,(b) and III,5,(a) respectively were included. In its Decision on the constitutionality of the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina[9], the Constitutional Court recognised that Article III,5,(b) of the Constitution constitutes the constitutional basis for the adoption of the Law and recognised that:

“it is indisputable that the provision of Article III(5)(b) of the Constitution of Bosnia and Herzegovina was respected when the relevant Law was adopted, considering the fact that the relevant law was adopted on the basis of the Agreement signed on 2 June 2003 by Prime Ministers from both Entities”.

13. By doing so, the Court considered the actual constitutional basis for Bosnia and Herzegovina to regulate this field and did not only consider the fact that the Parliamentary Assembly, within the Preamble of said Law, only listed Article IV,4,(a) of the Constitution as a basis to enact legislation.

IV. As to the applicants’ submission that “there are no constitutional grounds” for adopting the law and their request to “declare the contested laws as being in discrepancy with the constitution of BiH

and therefore make them void”

14. We contend that the applicants’ conclusion that the law is in conflict with the Constitution because “there are no constitutional grounds for adopting the law” and their final request to nullify the law are both unsubstantiated. It is worth noting that, contrary to their conclusion, the applicants point at article III,5,(a) of the Constitution as a valid constitutional ground for enacting the law.

- It is indisputable that the challenged law was adopted pursuant to Article III,(5),(b) of the Constitution as originating from a transfer agreement. In this regard it is reminded that: The explanation attached to the Proposed Law forwarded by the Council of Ministers to the Parliamentary Assembly, expressly states that the constitutional basis for the adoption of the law is contained in Article III,5 of the Constitution of Bosnia and Herzegovina.

- In addition, evidence that the challenged Law was adopted under such transfer can be found in its articles 92 and 93. Article 92 explicitly states:

“The Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, as amended, the Law on High Judicial and Prosecutorial Council of Republika Srpska, as amended, and the Law on High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina, as amended, *shall* be repealed as of the entry into force of this Law.”

15. This seems to indicate that intention of the proponent was to ensure that Bosnia and Herzegovina could assume full responsibility over a field that was included in its responsibilities by the entities.

V. Concerning the assertion of the applicants that judicial and prosecutorial matters constitute the exclusive competency of the entities.

16. With respect to the applicants’ claims that *Article III of the Constitution of BiH does not leave any doubt that the justice sector is an exclusive responsibility of the entities, and that there is no mention of the High Judicial and Prosecutorial Council anywhere in the Constitution of Bosnia and Herzegovina and it is completely clear that the relevant area is left over to the entities to be regulated, implemented, and amended by them where necessary, as provided by law*, we would like to provide the Court with the following observations:

- In a prior Decision^[10] in a case concerning the Law on Court of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina declared said Law to be in conformity with the Constitution of Bosnia and Herzegovina. The fact that there is a role for Bosnia and Herzegovina in judicial and prosecutorial matters notwithstanding any transfer was further reflected in the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina enacted on 23 May 2002.

- It is precisely because certain matters covered by the challenged Law were falling within the responsibilities of the entities that a Transfer Agreement was concluded. It is clear that the effect of such agreement was to transfer to the institutions of Bosnia and Herzegovina matters concerning the “affairs and functions of judges and prosecutors” that were still falling within the responsibility of the entities.

VI. Conclusion

17. For the reasons spelled out, we believe that the request of the applicant relies on the wrong assumptions that:

(1) the obligation to indicate the constitutional basis of the law in the Preamble relates to the constitutional basis for the institutions Bosnia and Herzegovina to exercise responsibility over a certain matter rather than to the constitutional basis for the Parliamentary Assembly to enact legislation and,

(2) that a violation of such obligation renders the law null and void.

18. We further believe that the constitutional basis for the adoption of the challenged Law exists and was made clear by the proponent of the Law and that such constitutional basis was accepted by the Parliamentary Assembly of Bosnia and Herzegovina.

Notes:

[1] "Request for Initiation of a Constitutional Law Dispute" page 3, eleventh paragraph.

[2] S. minutes of the 36 Session of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina held on 11 May 2004, item 5.

[3] High Representative Decision 167/02 of 23 May 2002, "Official Gazette of Bosnia and Herzegovina", No. 15/02 of 2 July 2002 and 39/03 of 19 December 2003; High Representative Decision 168/02 of 23 May 2002, "Official Gazette of Republika Srpska", No. 31/02 of 10 June 2002; High Representative Decision 169/02 of 23 May 2002, "Official Gazette of the Federation of Bosnia and Herzegovina", No. 22/02 of 5 June 2002.

[4] "Official Gazette of Bosnia and Herzegovina", No. 25/04 of 1 June 2004.

[5] "Official Gazette of the Federation of Bosnia and Herzegovina", No. 16/04 of 27 March 2004.

[6] "Official Gazette of Bosnia and Herzegovina", No. 11/05.

[7] "Official Gazette of Bosnia and Herzegovina", No. 35/04.

[8] "Official Gazette of Bosnia and Herzegovina", Nos. 44/03, 52/04, 34/07 and 4/08.

[9] No. U-17/05 of 26 May 2006.

[10] Case U-26/01, "Official Gazette of Bosnia and Herzegovina", No. 4/02.