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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE COMPETENCE OF BOSNIA AND HERZEGOVINA IN ELECTORAL MATTERS

prepared by
the Working Group of the Venice Commission
on the basis of comments by
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OPINION

of the Venice Commission's Working Group on the competence of Bosnia and Herzegovina in electoral matters

In a letter dated 22 May 1998, the Office of the High Representative asked the Venice Commission to give its opinion on, inter alia, the competence of Bosnia and Herzegovina in electoral matters (CDL (98) 26 Add). A Working Group, composed of Mr Helgesen, Mr Scholsem and Mr Steinberger, was set up within the Commission to study the question. The group met during the Commission's 35th Plenary Meeting (Venice, 12-13 June 1998) and again in Heidelberg on 7 July 1998. The Rapporteurs held an exchange of views with a delegation from the Office of the High Representative on the basis of preliminary reports. Following these meetings, the working group adopted the following opinion, which has been sent to the Office of the High Representative.

I

In the Dayton Agreements, electoral matters are primarily dealt with in Appendix 3.

This Appendix includes an agreement between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska to establish a Provisional Election Commission, under the auspices of the OSCE, which would be responsible for organising the first election in the country.

It also includes an agreement between the same parties to create a Permanent Election Commission responsible for future elections in Bosnia and Herzegovina ("with responsibilities to conduct future elections in Bosnia and Herzegovina").

This commitment should be interpreted broadly, as applying to all elections held in Bosnia and Herzegovina, at whatever level (state, Entity or local event). In this respect reference may usefully be made to the competence of the Provisional Election Commission, from which the Permanent Commission is clearly to take over, and which, according to Article II(2) of Appendix 3, concerns the elections for the Parliamentary Assembly and the Presidency of the Republika Srpska and also cantonal and municipal elections.

By stipulating that an institution (the Permanent Election Commission) which emerged from the Dayton Agreements and which is independent of the Entities is competent in the conduct of all elections in Bosnia and Herzegovina, Appendix 3 accepts - tacitly but unavoidably - that the legislative framework for the elections in question, including the rules on the competence and working of the Permanent Election Commission, will be determined by a legislative text, to be adopted in Bosnia and Herzegovina at state level. In fact, since the Dayton Agreements and the Constitution of Bosnia and Herzegovina do not contain explicit and uniform regulations on the

conduct of elections and on the competence and working of the Permanent Election Commission, the state legislator, namely the Parliamentary Assembly, is alone able to adopt this law.

This being so, the effect of Appendix 3, Article V, is to accord a certain competence to the state legislator in electoral matters, both for elections in the Entities and those at cantonal and municipal level. This must be understood in the special context of Bosnia and Herzegovina, where, given their crucial role in preserving the delicate balance underpinning the peace agreements, electoral matters are dealt with separately and given the same importance as the Constitution itself. In this respect, it is appropriate to recall that the Constitution of Bosnia and Herzegovina is contained in Appendix 4 of the Dayton Agreements, signed and approved by the same parties as Appendix 3 (see also Articles IV and V of the General Framework Agreement). The two annexes should be read in conjunction, and each interpreted in the light of the other.

II

The fact that the State of Bosnia and Herzegovina is competent to legislate in electoral matters does not infringe on the allocation of competence established in the Constitution of Bosnia and Herzegovina. Admittedly, Article III (3) states the principle that competence not expressly assigned to the State belongs to the Entities, and there is no general electoral competence listed among the state competence (see the list of exclusive state responsibilities in Article III (1)). However, the State of Bosnia and Herzegovina may assume responsibility for other matters on the basis of a joint agreement by the Entities (Article III (5) a), and it can reasonably be assumed that, as signatories to Appendix 3, the two Entities have tacitly but unavoidably admitted that the State has a certain competence in the matter.

III

The constitutional texts of Bosnia and Herzegovina and of the two Entities also contain rules concerning elections.

Thus, Article IV (2) of the Constitution of Bosnia and Herzegovina grants this state competence to legislate on elections to the House of Representatives.

In addition, Article IV (A) 1-3 of the Constitution of the Federation also contains certain fundamental provisions concerning elections to the House of Representatives of the Federation: the Constitution of the Federation already establishes the principle of election by direct, universal, secret and equal ballot, in a single constituency based on proportional representation with a threshold of 5% of votes cast. Likewise, Article 71 of the Constitution of the Republika Srpska states that the electoral system for national Assembly- elections must be established by the parliament of the Entity.

Rightly, Articles IV (A) 1-3 of the Constitution of the Federation and Article 71 of the Constitution of Republika Srpska have not been viewed as encroachments on the competence of

the State (see the Opinion of the Venice Commission on the compatibility between the Constitutions of the two Entities and the Constitution of Bosnia and Herzegovina, Annual Report on Activities for 1996)[1]. In fact, it seems natural that the entities in a federal state should be competent to administer their electoral system, especially when the state in question is highly decentralised, as is the case of Bosnia and Herzegovina. However, it is clear that the Entities' competence in this area is not unlimited. The electoral system of the federal entities must respect the fundamental regulations of the Federal State. This is especially so with regard to human rights regulations including non-discrimination, the principles of a democratic state (universal, secret and equal suffrage ensuring freedom of expression for the population) and those which guarantee the balance underpinning both the State itself and the peace.

IV

It is clear from the preceding remarks that competence in electoral matters is in fact divided between the Entities and the State of Bosnia and Herzegovina.

It is also clear that the State will have to adopt the electoral law on elections to State institutions. In this matter, the competence of Bosnia and Herzegovina is absolute.

It is also the State's duty to establish the principles of the country's electoral law, in legislation that will define the fundamental parameters applicable in all elections. As noted above, these refer on the one hand to human rights and democratic principles, and, at the same time, they guarantee the balance underpinning the State of Bosnia end Herzegovina.

Thus, in addition to the principle of universal, secret and equal suffrage, it is possible and highly desirable - if not essential - that certain aspects of the right to elect and be elected are regulated in a uniform manner for all elections. This is particularly relevant for issues such as the right of displaced persons and refugees to vote, the grounds for ineligibility; the choice of the electoral system (proportional representation); electoral lists and the procedure for establishing them; political parties and their registration, and registration of individual candidates and coalition parties; access to the media for candidates during electoral periods; funding of electoral campaigns; the voting procedure; complaints and the associated procedure; and publication of the results. Equally, the law must establish the membership, competence and working on the Permanent Election Commission and may delegate powers to it to enact the necessary regulations for the conduct of elections.

On the other hand, regulation of other questions, for example the creation of electoral constituencies, can be left to the competence of the Entities, or even to the cantons, as long as

[1] *The constitutionality of other relevant provisions of the constitutions of the Entities is worth being examined with respect to further issues such as respect for the principle of non-discrimination. The Commission will turn its attention to these issues at a later stage.*

the principles established in the State law are respected. In addition, any special provisions regarding implementation of the parameters of State legislation can be adopted only at Entity - and possibly cantonal - level.

V

The question of which courts will have competence in the area of electoral disputes has also been raised.

There is no doubt that the courts of the Entities have jurisdiction with regard to elections at Entity level.

With regard to elections to the State institutions, this competence must be assigned to a court. The choice of court is left to the state legislator, who may decide to set up a new electoral chamber or to assign these disputes of a specialised division of the Constitutional Court. The practical details for the second option require careful consideration. Furthermore, if, as the High Representative's question suggests, an administrative jurisdiction had to be set up at state level in Bosnia and Herzegovina, competence in electoral matters could be assigned to it. However, it is worth noting that, due to the specific nature of the issues involved and the urgency of most of the decisions, separate courts, distinct from the ordinary courts of law, are frequently established to deal with electoral matters.

Appeals to the State electoral authority against decisions by courts in the Entities are also necessary: these would have the advantage of ensuring the development of case law and of standard approaches to interpreting the electoral law. However, for the reasons indicated above, time limits for appeals and for the proceedings must be very short.