



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 11 February 2002

Restricted
CDL (2002) 9
Or. Engl.

N° 194 / 2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT LAW ON CIVIL SERVICE IN
GOVERNMENTAL INSTITUTIONS
OF BOSNIA AND HERZEGOVINA**

Comments by:

Mr Kaarlo TUORI
(Member, Finland)

Comments on the Draft Law on Civil Service
in Governmental Institutions of Bosnia and Herzegovina

I have been asked to comment on the Draft Law on Civil Service in Governmental Institutions of Bosnia and Herzegovina, submitted by the Council of Ministers to the Parliamentary Assembly. I have also had at my disposal the amendments included in the reports of the Constitutional and Legal Commissions of the House of Representatives and the House of Peoples. I shall mainly restrict myself to the constitutional and human rights aspects of the draft law and the proposed amendments.

1. In general, the requirements of human rights and the principles of a democratic *Rechtsstaat*, such as they have been formulated in, e.g., the recommendation R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of civil servants in Europe, have been well taken into account. The draft law can even in other respects be considered to be of high quality and to meet the objective of establishing a professional and merit-based Civil Service in Bosnia and Herzegovina in accordance with European standards.
2. Article IX of the Constitution of Bosnia and Herzegovina does include some general provisions concerning the Civil Service. In addition, the general principles of the constitution should, of course, also be respected in the Law on Civil Service.
3. According to Art. IX, par. 3, “officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina”. Depending on its application, this provision may be in tension with the principle of non-discrimination which, according to, e.g. the above-mentioned recommendation, should be respected in the recruitment of civil servants. The particular background of the BiH constitution makes understandable and – to a certain extent – even justifiable the attention paid to the ethnic composition of the constitutional organs and even of the civil service. However, the significance of such considerations should not be extended through ordinary laws beyond that explicitly presupposed by the Constitution.

It should also be noted that the principle of non-discrimination is included in the draft law itself. Thus, according to Art. 15(2) a civil servant shall be entitled to receive fair and equitable treatment in all aspects of personnel management without regard to, e.g. his ethnic origin. Art 23 provides that the Agency for Civil Service shall ensure, when organizing a public competition, that no distinction or selection shall be done on a discriminatory basis in accordance with Art. 15.2 of this Law”.

4. According to the original wording of Art. 2(2) of the draft law, the “the structure of civil servants shall generally reflect the national structure of the population of Bosnia and Herzegovina in accordance with the last census”. According to the report of the Constitutional and Legal Commission of the House of Peoples, the word “generally” should be deleted. The respective Commission of the House of Representatives has accepted an amendment according to which the provision would provide that “the structure of civil servants shall reflect the national structure of the population of Bosnia and Herzegovina according to the 1991 census, honouring the parity of the constituent peoples as regards managerial posts”. Both amendments go beyond what is required by

Art. IX(3) of the Constitution and enhance the tension with the principle of non-discrimination. The original wording is to be preferred.

5. Art. 70, par. 7, of the Draft Law is closely related to the provision in Art. 2(2). It provides that “at the initial phase of implementation of this Law, the territorial representativeness of civil servants in the Institutions shall generally be within the ratio of two thirds from the Federation of Bosnia and Herzegovina v.s. one third from the Republika Srpska”. According to the report of the Constitutional and Legal Commission of the House of Peoples, the words “in the initial phase of implementation” should be replaced with “in the course of application”. This amendment would also make the system of national representation more rigid than in the original draft and cannot be recommended.
6. Art. 6 of the Draft Law regulates the application of the Law to the civil servants of the Diplomatic and Consular Service, the Border Service and the Central Bank. Par. 1. states the main rule according to which these bodies would be subject to the application of the law. However, par. 2 provides that “ the Council of Ministers can, upon the opinion provided by the Agency of Civil Service, decide that the Institutions competent for the regulation of the above-mentioned bodies derogate to certain provisions of the law, with the exception of Articles 1, 2 and 3”. The scope of the application of the law can be considered an issue of such importance that it should be decided by the legislature and not delegated to the Council of Ministers.
7. The neutrality of officials is one of the corner-stones of civil service in a democratic *Rechtsstaat*. Therefore, provisions concerning the duty of civil servants to announce all such dependencies which may affect their neutrality are very important. It may, especially in new states only establishing their institutions, be justifiable to extend this duty even to the property and activities of close relatives, as has been proposed in the original draft law. The deletion of this extension from Art. 16(2) which has been proposed by the Constitutional and Legal Commission of the House of Peoples should therefore be reconsidered.
8. Art. IX(2) of the Constitution includes a provision on the compensations to be paid to civil servants: “Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder’s tenure.” In the Draft Law on Civil Service, provisions on “retribution and allowances” are included in Chapter 5 and on “working conditions” in Chapter 6. These chapters do not contain any explicit reference to the role of tariff agreements or trade unions in general. The rights of the civil servant, enumerated in Art. 15, however, involve the right “to form and to join, but not to be obliged to join, a Trade Union or a professional association in accordance with the law” and to “go on strike in accordance with the law” (par. 1h-i). It may be that the competence of tariff agreements and trade unions is regulated in “the laws on labour relations and other laws regulating rights and obligations deriving from employment”, which, according to Art. 45 of the Draft Law, “shall apply to a civil servant unless otherwise provided in this Law”. Even if this was the case, an explicit provision in the Law on Civil Service itself would be recommendable.
9. Art. 54 of the Draft Law regulates disciplinary responsibilities. Par. 2 seems to contain, on the one hand, quite vague and, on the other hand, redundant definitions of what can comprise a violation of official duties. A clear case of redundancy concerns especially paragraphs 2d and 2k.

10. Finally, I would like to repeat my general judgement concerning the high quality of the law-drafting.

Loppi 8.2.2002