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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE DRAFT FRAMEWORK LAW ON HIGHER EDUCATION
IN BOSNIA AND HERZEGOVINA

by

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I. Introduction

In September 2003 the Minister for Civil Affairs of Bosnia and Herzegovina, Professor Safet Halilovic, requested the opinion of the Venice Commission on the constitutional problems raised by the apportionment of responsibility for education, and more particularly higher education, within the Federation of Bosnia and Herzegovina.

In his letter to the Commission, Professor Halilovic explained that a major draft framework law on higher education in Bosnia and Herzegovina had been prepared at State level.

The draft, which is appended, was drawn up in conjunction with the Council of Europe, which served as a driving force.

The adoption of this draft would appear essential from an international perspective, particularly with regard to the recognition of qualifications (ratification of the Lisbon Convention). It is also important in that World Bank aid is conditional upon its adoption.

The Minister considers that, as things stand, there is a legal obstacle to the submission of the draft law to the legislative authorities of Bosnia and Herzegovina, viz. the internal apportionment of responsibility for education within the Federation of Bosnia and Herzegovina. Within the Federation, it is the cantons that are responsible, and this clearly prevents co-operation between the Entities and the State of Bosnia and Herzegovina, as envisaged in the draft law prepared by the Minister.

This is the issue that Professor Halilovic has referred to the Venice Commission. He does not mention any constitutional problem as regards respect for the respective powers of the State and the federal entities.

This opinion will first take stock of the internal problems connected with the allocation of responsibility for education in the Federation of Bosnia and Herzegovina (II). It will consider the most appropriate way of solving these problems (III). Lastly, although the question has not been raised directly, it will refer to the situation created by the draft law with regard to relations between the State and the federal entities (IV).

II. Responsibility for education within the Federation of Bosnia and Herzegovina

There is absolutely no doubt that education is the responsibility of the cantons. This is quite clear from Section III, Article 4, of the Federation's Constitution, which, in addition to stating that the cantons are responsible for all matters that do not expressly fall within the jurisdiction of the Federation, explicitly gives them responsibility for education policy, "including decisions concerning the regulation and provision of education" (Section III, Article 4(b)). No distinction is drawn according to the level of education, and higher education is therefore included.

The Venice Commission can only regret, in this connection, that the process involving the revision of the Federation's Constitution, in which the Commission was involved and which produced a number of results, did not continue (see documents CDL (2000) 52, (2000) 67 and 2000FBH-2). One of the amendments discussed at the time, but not adopted, was in fact the proposal that the Federation and the cantons be made jointly responsible for basic educational matters. The Commission, of course, remains at the disposal of the State authorities for continuing the process of reflection started in 2000.

III. Means of transferring responsibility for education from the cantons to the Federation

As Professor Halilovic himself says in his letter to the Venice Commission, two fundamentally different options may be envisaged for effecting the necessary transfer of responsibility for education from the cantons to the Federation.

It is possible to envisage a voluntary transfer on the part of the cantons on the basis of the existing Constitution. One could go further and propose a revision of the Federation's Constitution.

Under Section V, Article 2 (1), of the Federation's Constitution, each canton may confer its responsibilities either on a municipality or city or on the federal authority. The idea was therefore that the ten cantons could take concerted action and all delegate responsibility for higher education, in the same way, to the Federation.

This approach seems problematical, since it necessitates - in the short term, as the adoption of the draft is urgent - parallel and strictly identical action on the part of the ten cantons. It requires, for instance, that the ten cantons define higher education and the responsibilities they intend to transfer in this area in the same way.

In addition, the text of Section V, Article 2 (1), of the Federation's Constitution raises a number of questions. Although the text does not expressly say so, it would seem necessary for the beneficiary of the transferred responsibilities (the municipality or city, or the federal authority) to accept them. In this particular case, that does not pose a problem. But what is the nature of this "transfer"? The fact that the text of Section V, Article 2 (1), has been amended by constitutional amendment XV raises a number of questions. The original text used the phrase "delegate or confer its responsibilities". The current version states, "Each canton may confer its responsibilities". Is it the responsibility itself or merely the exercise of the responsibility that is conferred? I am inclined to opt for the latter. It seems that the constitutional system for the apportionment of responsibility cannot be permanently altered. In other words, one or more cantons would be at liberty to reclaim the exercise of the responsibility whose exercise had been transferred to the Federation. Even if this is not definite, this risk means that this legal approach is shrouded in uncertainty, particularly as the draft law prepared at State level provides for close, ongoing co-operation between the State and the federal entities. The Federation of Bosnia and Herzegovina must therefore first be fully assured of its domestic jurisdiction before a law enshrines institutional co-operation at a higher level.

It therefore seems that, although it would be a cumbersome process, revision of the Federation's Constitution is to be recommended in order to establish the Federation's responsibility for higher education clearly, unambiguously and irreversibly. This might also provide an opportunity to rethink the issue of the apportionment of responsibility for education generally between the cantons and the Federation. The initiatives in 2000 were a step in this direction, the idea being that certain basic educational matters, at least, should be considered to be the joint responsibility of the Federation and the cantons.

IV. Apportionment of responsibility for education between the State and the federal entities

The draft law forwarded to the Venice Commission takes the form of a framework law. It sets out the general principles that need to be established in order to honour the international obligations of Bosnia and Herzegovina, particularly in Articles 1 and 2.

Clearly, implementation of the law requires very close co-operation between the State institutions and those of the federal entities. For example, Articles 32 and 33 of the draft assign responsibilities to the State authorities and the authorities of the federal entities, respectively. The system for the apportionment of responsibility is a complex one, in which the State has broad responsibility, but, as we have seen, the system can work harmoniously only if there is close co-operation between the entities. The system can no doubt be compared with the German higher education model (German Constitution, Article 75, paragraph 1a, Article 91a, paragraph 1.1, and Article 91b).

According to the Constitution of Bosnia and Herzegovina, the State has no responsibility for education. Professor Halilovic does not, however, raise the issue of constitutionality in this connection.

The draft law is based on Section IV, Article 4 (a), and Section II, Article 3 (1) of the Constitution of Bosnia and Herzegovina. The reference to Section IV, Article 4 (a), does not seem relevant, since this provision is concerned solely with the powers of Parliament. I do not consider that anything can be inferred from this article as regards the responsibility of the State of Bosnia and Herzegovina itself. As for the reference to Section II, Article 3 (1), it does not seem to be directly relevant. This provision is found under Section II (Human rights and fundamental freedoms), and it entrenches the right to education. This provision does not normally interfere with the apportionment of responsibility as it stands under Section III. It distributes duties to various public authorities, on the basis of their respective responsibilities. It would perhaps be possible to have a more supple reading and a more dynamic vision of the Constitution. In this way, it could also be argued that if the literal rules of the apportionment of responsibility conflict with the implementation of a fundamental right (here: the right to education), those rules must be interpreted so that the responsibility is to be exercised at the level where the effectiveness of the right is guaranteed. This thesis merits discussion at a deeper level. As that question was not directly put to me, I shall only raise the problem here.

Consequently, I consider that, in the present state of analysis, the responsibility of Bosnia and Herzegovina can be principally based only on Section III, Article 5 (a), which states that "Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities". If necessary, this provision may be combined with Section III, Article 2 (b), under which the Entities must provide the State with all the assistance needed to enable it to honour its international obligations. One might even go so far as to say that Section III, Article 2 (b) is likely to reinforce Section III, Article 5 (a) in the sense that the duties imposed on some entities by the former provision can, in some cases, such as the one covered here, be fully executed only by an agreement concerning the transfer of responsibilities of the entities to the State.

Accordingly, it is mainly on a contractual basis (recourse to Section III, Article 5 (a)) that the responsibility of Bosnia and Herzegovina could be established. The agreement of the two entities should therefore be placed on a formal footing for the sake of legal certainty.

The "additional responsibilities" technique has the same shortcomings, in certain respects, as those referred to above in connection with the possibility of transferring responsibility from the cantons to the Federation.

Here again, a formal revision of the Constitution would appear to be an approach guarding against uncertainty. The problem seems, however, to take on a different complexion in practice when it comes to relations between the State and the two federal entities. Firstly, the number of partners is very restricted. Secondly, each partner no doubt has every interest in the success of the arrangement, particularly as there is very great international pressure for it to succeed. Lastly, because of the complexity of the framework legislation and co-operation machinery introduced by the draft law, it would probably be technically very difficult to revise the Constitution in such a way as to reflect sharing of responsibility of this kind.