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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA**

ON THE LAW OF THE REPUBLIKA SRPSKA

**ON THE STATUS OF STATE PROPERTY
LOCATED ON THE TERRITORY OF THE REPUBLIKA SRPSKA
AND UNDER THE DISPOSAL BAN**

On the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. The Constitutional Court of Bosnia and Herzegovina decided, at its plenary session of 15 July 2011, to ask for *amicus curiae* opinion of the Venice Commission in the case No. U 1/11 (request of the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the “Law on the status of state property located on the territory of the Republika Srpska and under the disposal ban” – hereinafter: “RS State Property Law”, CDL-REF(2011)042).
2. Such request was conveyed to the Venice Commission on 21 July 2011. A working group was set up, composed of Mr Scholsem and Mr Tuori.
3. *The present amicus curiae brief, prepared on the basis of the contributions of the working group, was examined by the Sub-Commission on Fundamental Rights on ... and subsequently adopted by the Commission at the Plenary Session of*

II. Background information

4. The Constitution of Bosnia and Herzegovina does not contain any explicit provisions on the division of state property between levels of government. The State and the two Entities have disagreed as to their respective rights to use, manage and dispose of state assets.
5. In December 2004, the Council of Ministers of Bosnia and Herzegovina established the “Commission for State Property”,¹ composed of representatives of the State, of the Entities and of the Brčko District of BH. The Commission’s mandate included the development of criteria for identifying which property is owned by Bosnia and Herzegovina, the Entities and Brčko District and the preparation of legislation on the rights of ownership and management of state property necessary for the implementation of the above criteria. State Property, in terms of the Commission’s mandate, encompasses property that belongs to the State of Bosnia and Herzegovina pursuant to the international Agreement on Succession Issues, property over which the Socialist Republic of Bosnia and Herzegovina (hereinafter: SRBH) and any of its bodies held the right of disposal or management before 31 December 1991, and property deemed subject to apportionment between the State and other levels of authority in Bosnia and Herzegovina based on an analysis of land registries and cadastres.
6. In March 2005, the High Representative enacted three Laws on the Temporary Prohibition of the Disposal of State Property at the levels of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska (hereinafter, collectively: the Disposal Ban).² The Commission on State Property having failed to reach an agreement, the Disposal Ban, originally introduced for a period of one year, was subsequently extended for several periods of time, until 2008 when it was further extended until either the entry into force of the aforesaid State Property Legislation or until an “acceptable and sustainable” apportionment of State Property is endorsed by the Steering Board of the Peace Implementation Council, or until the High Representative decides otherwise.

¹ Decision of the BH Council of Ministers on “Establishment of the Commission for State Property, for the Identification and Distribution of State Property, the Specification of Rights and Obligations of Bosnia and Herzegovina, the Entities and the Brčko District of Bosnia-Herzegovina in the Management of State Property,” Official Gazette of Bosnia and Herzegovina, no. 10/05, 18/05, 69/05 (Corrigenda) and 70/05.

² High Representative Decisions Nos. 342/05, 343/05, and 344/05 of 18 March 2005, respectively enacting Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska, (“Official Gazette of Republika Srpska” no. 32/06, 100/06, 44/07, 86/07, 113/07, and 64/08); the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, (“Official Gazette of Bosnia and Herzegovina” no. 29/06, 85/06, 41/07, 74/07, and 58/08), and the Law on the Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina, (“Official Gazette of the Federation of Bosnia and Herzegovina” no. 20/05, 17/06, 40/07, 94/07 and 41/08).

7. On 14 September 2010, the National Assembly of the Republika Srpska adopted the RS State Property Law. This Law was published in the Official Gazette of the Republika Srpska on 29 December 2010.

8. The RS State Property law transfers the ownership of state property (immovable property which passed to BH pursuant to the international Agreement on the Succession Issues and considered to be either owned or possessed by any level of governmental body or public organization in the RS and immovable property for which the right of disposal and management belonged to the former Socialist Republic of BH before 31 December 1991, which is considered to be either owned or possessed by any level of governmental body, public organization or any other body in the RS) to the Republika Srpska. Management and disposal of state property belong to the government of RS, which may conclude with the Council of Ministers of BH an agreement «on transfer of usage of the part of property required by the institutions of BH for conduct of affairs within their competences» (Articles 4 and 5).

9. On 6 January 2011, Mr Sulejman Tihic, Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, filed with the Constitutional Court of Bosnia and Herzegovina, a request to institute proceedings for review of constitutionality of the RS State Property Law.

10. The High Representative issued an Order Suspending the Application of the Law until a final decision of the BH Constitutional Court on the said Law enters into force, during which any change of ownership rights over state property in the territory of Republika Srpska is prohibited.

11. On 14 February 2011, the National Assembly of Republika Srpska submitted to the Constitutional Court of BH a response to the request for review of constitutionality.

III. Questions

12. The request pending in the Constitutional Court raises in the first place the lack of constitutional basis for the National Assembly of the Republika Srpska to enact the law (issue of competence). Further, it raises the incompatibility of the law with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina as well as Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (issue of substance).

IV. Analysis

A. The issue of competence: the alleged lack of constitutional basis for the RS to legislate on state property distribution

a) The parties' arguments

13. In support for the claim of a lack of legislative competence, the request refers to Article I(1) of the Constitution of BH which provides for the legal continuity of the state of Bosnia and Herzegovina, the Agreement on the Succession Issues concluded between the BH, the Republic of Croatia, "the former Yugoslav Republic of Macedonia", the Republic of Slovenia and the Federal Republic of Yugoslavia (Succession Agreement), as well as the principle of *pacta sunt servanda* as one of the general principles of international law which, according to Article III(3b) "shall be an integral part of the law of Bosnia and Herzegovina and the Entities".

14. As a conclusion, the request states that “It follows from the above stated that the state of Bosnia and Herzegovina, i.e. the Parliamentary Assembly of Bosnia and Herzegovina, pursuant to Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, is competent to resolve the issues of state property and that Amendment XXXII which amended Article 68 of the Constitution of the Republika Srpska in its paragraph 1 item 6³ lacks the constitutional basis which may entitle the Republika Srpska, as one of the Entities constituting the state of Bosnia and Herzegovina, to unilaterally decide upon the status of state property located on the territory of the Republika Srpska and under disposal ban.”

15. In its response, the National Assembly of Republika Srpska states that the Constitutional Court in its decision U 5/98 of 18 and 19 February 2000 has already confirmed the compatibility of Article 68, as modified by Amendment XXXII, item 6, of the Constitution of Republika Srpska with the Constitution of BH. The National Assembly also states that it “adopted that law in accordance with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina, i.e. the case relates to a matter which does not fall within the scope of the responsibilities of the institutions of Bosnia and Herzegovina unless the Entities entered into an agreement on it in accordance with Article III(5)(a) of the Constitution” and that “there is no such agreement, i.e. as Republika Srpska did not transfer this responsibility to the institutions of Bosnia and Herzegovina”.

16. As to the argument concerning the legal continuity of BH, the RS National Assembly argues that the provision of Article I(1) of the Constitution of BH must be interpreted in connection with Article I(3), which lays down that Bosnia and Herzegovina shall consist of the two Entities Federation of Bosnia and Herzegovina and Republika Srpska, as well as with Article III(1) and III(3a) regulating the distribution responsibilities between the Entities and institutions of BH. According to the response, “Bosnia and Herzegovina does not exist without or beyond Entities, it is composed of the Entities”. Thus, “the solutions defined in the Law in question are based on the original principles of the Dayton Peace Agreement, since the Inter-Entity Boundary Line clearly regulates the boundary line between the Entities, i.e. the territory where Republika Srpska exercises in full capacity its legislative, executive and judicial powers in accordance with the distribution of responsibilities between Bosnia and Herzegovina and Entities”.

b) Analysis

i. Principles of distribution of powers in a Federal State

17. In federal states, a constitutional division of power is established between the federal state, which exercises authority over the whole national territory, and federated entities which exercise independent authority over their territory. The distribution of powers is done in the constitution of the federal state. There are different means of distributing powers (exclusive, concurrent, residual powers), combining different criteria (direct attribution or delegation of powers etc.). Historical factors may also be taken into account. The federal constitution distributes in the first place the *primary* powers of each component of the federal state.

18. *Instrumental or incidental* powers, that is those powers which are necessary to carry out the primary powers, follow the latter: this rule ensures the necessary reciprocal autonomy of all the components of the federal state. Incidental powers are normally, at least in part, distributed in the federal constitution. To the extent that this is not done explicitly, incidental powers may be *implied and distributed - at the federal level - on the basis of the distribution of primary powers*

³ Amendment XXXII § 1.6 to Article 68 of the Constitution of the Republika Srpska reads: “The Republic shall regulate and ensure property and obligation relations and protection of all forms of property, legal status of enterprises and other organizations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, market and planning”.

in the federal constitution. This means in particular that the federal parliament may legislate in any area when the effective exercise of its primary powers so requires.

19. In Federal States, the distribution of state property between the central state and the federated entities is usually regulated by an explicit constitutional provision. When this is not done, the issue of state property may be regulated on the basis of the rule on incidental powers. Indeed, public authorities, unlike private individuals, in principle only own those assets which are necessary to provide public services or possibly to earn revenues; state property may thus be seen as an issue of incidental powers.

ii. Distribution of powers in Bosnia and Herzegovina

20. According to Article VI(3a) of the Constitution of BH, "*the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to: ... (w)hether any provision of an Entity's constitution or law is consistent with this Constitution*". Thus, the normative yardsticks to be applied to the case at hand are provided by the Constitution of BH. Article VI(3a) of the Constitution of BH clearly indicates that the legislature of the entities must exercise its legislative competence in a way which is consistent with the Constitution of BH.

21. The Constitution of B.H., without expressly saying so, establishes a Federal State. It defines two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, as constituent parts of B.H. and divides rights and powers between the institutions of B.H. and those of the Entities. It establishes a citizenship of B.H., while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present.

22. According to Articles I.1 and I.3 of the Constitution of B.H., both the R.S. and the F.B.H. are Entities of B.H. which "shall continue its legal existence under international law as a State, with its internal structure modified as provided herein...". Thus, the Entities are part of the internal structure of B.H. and cannot be sovereign States in their own right (Venice Commission, Opinion on the compatibility of the constitutions of Bosnia and Herzegovina and the Republika Srpska with the constitution of Bosnia and Herzegovina CDL(1996)056rev2).

23. The division of powers (responsibilities) between the institutions of BH and the Entities is regulated in the first place by Article III of the Constitution, whose paragraph 1 enumerates the exclusive responsibilities of the institutions of BH and para. 2 those of the Entities. Para. 3 accords residual competence to the Entities: "*All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.*" In addition, para. 5 provides for other competencies of the State of BH, notably for the possibility of transferring responsibilities from Entities to BH through agreement: "*Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities.*"

24. In its decision U 25/00 of 23 March 2001, the Constitutional Court stated that "*the issues not explicitly listed in Article III. 1 of the Constitution of BH, referring to the competencies of the institutions of BH, do not necessarily fall within the exclusive competence of the Entities*" and that "*under the Constitution, the Parliamentary Assembly of BH is competent to decide on the sources and amounts of the funds necessary for the operation of the institutions of BH.*" Here, the Constitutional Court made reference to Article VIII(3) of the Constitution, which implies that the Parliamentary Assembly is competent to regulate on revenues which complement the revenue contributions of the Entities.

25. The Constitutional Court has therefore clarified that the list of powers (responsibilities) of the institutions of Bosnia and Herzegovina contained in Article III of the Constitution is not exhaustive; the powers of the State of BH and of its entities stem from the division of powers established in the constitution also outside that provision. The state constitution sets up certain institutions at the state level and confers certain powers on them which may be found in several provisions of the constitution (for example, in Article IV.4 for the Parliamentary Assembly and in Article V.3 for the Presidency). However, these powers are not necessarily enumerated, i.e. reiterated in Article III.1 of the State constitution (Steiner and Ademovic, Constitution of Bosnia and Herzegovina, Commentary, Konrad Adenauer Stiftung, Sarajevo, 2010, p. 575 and ff.).

26. Incidental powers are therefore not necessarily “residual powers” within the meaning of Article III.3 (a) and belong to the state component which has the pertinent primary powers

27. As already explained (supra, para. 1), the Constitution of Bosnia and Herzegovina does not contain any explicit provision on state property. By virtue of Article 1 of Annex A of the Succession Agreement, *“the movable and immovable State property of the Federation constituted as the SFRY (“State property”) shall pass to the successor States in accordance with the provisions of the following Articles of this Annex”*. Article 2 of Annex A, in turn, provides that *“immovable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated”*.

28. Under the Succession Agreement, ownership over state property in the territory of BH has been passed to the state of BH. Two opposite claims have been made in this respect. According to the RS, Bosnia and Herzegovina does not exist without or beyond Entities; all State Property in existence at the moment of entry into force of Annex 4 to the GFAP is owned by the Entity where situated⁴ and the joint institutions of Bosnia and Herzegovina may use property needed for the exercise of its constitutional and legal responsibilities, insofar as the Entities may authorize by law. In contrast with this view, according to the application of Mr Tihic, Bosnia and Herzegovina, as the legal successor of the Republic of Bosnia and Herzegovina, is the titleholder to all State Property but the Entities and other levels of government may use or own those assets necessary for the exercise of their respective competences insofar as may be authorized by legislation adopted by the Parliamentary Assembly of Bosnia and Herzegovina.

29. In the view of the Venice Commission, neither claim is well-founded. It is obvious that, in order to carry out its primary functions, the State of Bosnia and Herzegovina must own and dispose of (some) state property. And so do the entities. As concerns the first claim, the Constitution of BH clearly indicates the distinct legal existence of the state of Bosnia and Herzegovina under both international law and domestic legal order, i.e., an existence which is not reducible to that of the Entities. The Constitutional Court of Bosnia and Herzegovina has clearly rejected such a reading of Article I(1), Article I(3), Article III(1) and Article III(3)(a) of the Constitution in its Third Partial Decision no. 5/98 (Third Partial Decision in Case no. U-5/98 of 1 July 2000, paragraphs 29-30).

30. The second interpretation cannot be followed either. As an international treaty, the Succession Agreement has passed over the property of the Federation constituted as SFRY to the State in its entirety (Gesamtstaat in the meaning of Kelsen) and not the Federal State (Oberstaat). An international agreement cannot directly resolve the constitutional issue of the division of ownership within BH. Such division can only be done by the Constitution. Indeed,

⁴ There seems to be confusion between the territory and the immovable property. The territory is the area under the jurisdiction of a state or another public body: it is a public law concept. Ownership is the right to enjoy the use and dispose of assets. It is primarily a private-law concept, although it may apply to public law bodies. It is therefore incorrect to claim that « what is on the territory of the RS is the ownership of the RS », particularly in an economy based on private property and market economy (Preamble, 6 paragraph).

Article I.1 of the Constitution provides precisely: “The Republic of BH, the official name of which shall henceforth be “Bosnia-Herzegovina”, shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders.” The principle of legal continuation (in international law) needs to be combined with the rules of distribution of powers set out in the federal constitution.

31. The division of state property is substantively a constitutional issue. As such, in principle it should have been regulated in the constitution of the State of BH, but due to historical reasons this was not done, so that there exists a lack in explicit constitutional law. The issue of ownership and concomitant legislative competence must be resolved on the basis of the constitution, in a way which is in harmony with the distribution of constitutional powers.

32. In the opinion of the Venice Commission, this essentially constitutional issue is necessarily to be decided at the federal level, by the State of BH. The basic principle on which such allocation needs to be based is that property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property.

33. After the distribution of property has been settled at the level of the state of BH, legislative competence will follow ownership: to the extent that state property belongs to the State of BH, so does legislative competence over such portion of state property, and, correspondingly, to the extent that state property belongs to the Entities, the latter must also possess legislative competence over it (with due respect for the constitutional principles and the framework state legislation).

34. Pending the decision by the State of BH on the distribution of state property, entities may not exercise any legislative competence in relation to the state property which they assume to be in their ownership. A contrary interpretation would mean that the solution to the formal issue of legislative competence would prejudice the solution to the controversial substantive issue of the principles to be followed in the division of state property.

35. In this respect it should be underlined that item 2 of amendment XL to the RS Constitution (article 68) providing that “The Republic shall regulate and ensure property and obligation relations and protection of all forms of property...” and found by the Constitutional Court to be compatible with the Constitution of Bosnia and Herzegovina (U-5/98 (Partial decision II) of 18 et 19 February 2000 (§§ 26-29)) concerns the regulation of property and not the attribution of property. In addition, the Constitutional Court had indicated that the regulation of property had to be done in conformity with the framework legislation of BH protecting the free movement of goods, services, capital and persons (article I. 4 of the Constitution). The RS Law on state property does not regulate property, it transfers all state property situated on the territory of the Republika Srpska in the hands of the latter’s government.

36. The State of Bosnia and Herzegovina has the power to distribute the state property. It has indeed already exercised this power: it was the State which established in 2004 the Commission for State Property, considering that it fell within its competence, and which adopted in 2002 the Law on the Purpose and Use of the Property that BH received under the Succession Agreement, whereby certain receipts of the Succession Agreement were distributed between the State, the two Entities and the Brcko district.

37. In conclusion, it is up to the State of Bosnia and Herzegovina to decide on the distribution of state property. The basic principle on which such allocation needs to be based is that property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property. In this respect, the importance of the role of the Commission on State Property should be underlined.

B. The issue of substance: the alleged incompatibility of the RS Law on State Property with the Constitution and with Protocol 1 to the ECHR

38. In the light of its conclusions above, the Venice Commission does not deem it necessary to address in a separate manner the substantial issues raised before the Constitutional Court in the case under consideration.

V. Conclusions

39. In the opinion of the Venice Commission, the law of the Republika Srpska “On the Status of State Property located on the Territory of the RS and under Disposal Ban” violates the fundamental principle that, in federal states, issues of distribution of powers (state property may be seen as an issue of incidental powers) between the central state and the federated entities must be settled at the federal level, either in the federal constitution or through federal legislation taken pursuant to such constitution. The basic principle on which such distribution needs to be based is that property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property.

40. The RS law on state property therefore arrogates powers which may not belong to a federated entity because they deal with distribution of powers and are thus intrinsically federal.

41. It also violates the functional principle of distribution of property and encroaches on the autonomy of Bosnia and Herzegovina by providing that the Republika Srpska may enter into an agreement with the Council of Ministers of BH “on transfer of usage of the part of property required by the institutions of BH for conduct of affairs within their competence”. The usage of such property belongs *ipso iure* to the State and cannot depend on a possible agreement by the Republika Srpska.