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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE TRANSFER OF RESPONSIBILITY
IN THE FIELD OF HIGHER EDUCATION
WITHIN THE FEDERATION OF BOSNIA AND HERZEGOVINA**

**Adopted by the Venice Commission
at its 56th Plenary Session
(Venice, 17-18 October 2003)**

on the basis of comments by

Mr Jean-Claude SCHOLSEM (Member, Belgium)

I. Introduction

1. In September 2003, the Minister for Civil Affairs of Bosnia and Herzegovina (BiH), Professor Safet Halilović, 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 (F BiH).

2. Mr J-C Scholsem was appointed Rapporteur and presented his comments on this matter. The present opinion, which was prepared on the basis of these comments, was adopted by the Commission at its 56th Plenary Session on 17-18 October 2003.

II. Introductory remarks

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

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

5. 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.

6. 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.

7. This is only the issue that Minister S. Halilović 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. The latter point will therefore not be addressed in the present opinion, notwithstanding that it appears to raise certain issues which would deserve themselves a careful examination.

8. 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 (III). It will then consider the most appropriate way of solving these problems (IV).

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

9. 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.

10. 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) 66 and (2000) 67). 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 Federation authorities for continuing the process of reflection started in 2000.

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

11. As Minister S. Halilović 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.

12. 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 Constitution¹.

13. 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.

14. 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.

15. 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.

16. 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? The Commission is 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

¹ The idea of a constitutional law has also been raised. The adoption of this "law" would be subject to the same conditions of voting as a revision of the Constitution (a two-thirds majority of the House of Representatives, a simple majority of the House of Peoples, including a majority of the Bosniac and Croat delegates). Consequently, it may be asked what the real difference is between the two formulas.

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.

17. 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 in a more global manner 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.

18. Whatever the method chosen (preferably, that of Constitutional revision), very special attention must be paid to the financial aspects of the transfer made of responsibilities. In all developed countries, education is a very large item of the budget. To resolve the issue of responsibilities in this field (or, in a part of this field, such as higher education) without at the same time resolving the financial aspects would risk leading to a chaotic situation.