

OPINION ON LEGISLATIVE POWERS IN BOSNIA AND HERZEGOVINA IN THE PERIOD BETWEEN THE ENTRY INTO FORCE OF THE CONSTITUTION SET OUT IN ANNEX IV TO THE DAYTON AGREEMENT (14 DECEMBER 1995) AND THE ELECTIONS OF 14 SEPTEMBER 1996

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I. Introduction

1. By letter dated 18 November 1996 the Office of the High Representative asked the European Commission for Democracy through Law to give an opinion on the validity of the legislative acts adopted by the Constituent Assembly of the Federation of Bosnia and Herzegovina and by the Assembly of the Republic of Bosnia and Herzegovina in the period between the date of the entry into force of the Constitution of Bosnia and Herzegovina set out in Appendix IV to the Dayton Agreement (14 December 1995) and the elections of 14 September 1996.

2. This opinion has been drafted on behalf of the Commission by Professor Jean-Claude Scholsem, Belgium, Professor Sergio Bartole, Italy, and Professor Giorgio Malinverni, Switzerland.

II. The Legal Background

3. An answer to the question put to the Commission can only be given by first looking at the situation existing in Bosnia and Herzegovina before the entry into force of the Dayton Peace Agreement. During this period legislative competences were legally exercised by the Constituent Assembly of the Federation of Bosnia and Herzegovina on the basis of the Constitution of the Federation of Bosnia and Herzegovina as contained in the Washington Agreements. Article IX.3 of this Constitution provides that "until the House of Representatives is first convened, its functions under this constitution shall be carried out by the Constituent Assembly referred to in Article (IX)1.1". According to Article IX.1.1, the Constituent Assembly comprises "those representatives elected at the 1990 elections to the Assembly of the Republic of Bosnia and Herzegovina whose mandate is still valid".

4. The Constitution contained in the Washington Agreements was legally implemented at the level of the Republic of Bosnia and Herzegovina by the Constitutional Law on the Amendment of the Constitution of the Republic of Bosnia and Herzegovina adopted by the Assembly of the Republic of Bosnia and Herzegovina on 30 June 1994. This same constitutional law provides in its Article 4: "the Assembly of the Republic of Bosnia and Herzegovina, elected in 1990, will continue its work based on the authority and powers vested into it by the Constitution of Bosnia and Herzegovina for as long as it takes to reach and implement a peace agreement for Bosnia and Herzegovina".

5. From these provisions it results that two parliamentary bodies were in legal existence which had the same composition.

6. The Constitution set out in Appendix IV to the Dayton Agreement, according to its Article XII.1, enters into force as follows: "this Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". As from the date of signature, both parliamentary bodies therefore had to exercise their competences while respecting the provisions of this Constitution.

III. The Legislative Powers of the Constituent Assembly of the Federation

7. The new Constitution of Bosnia and Herzegovina is based on the existence of two Entities, among them the Federation of Bosnia and Herzegovina, and contains no obstacle to the continued existence of parliamentary bodies of the Federation.

8. However, Article III of the Constitution contains a distribution of responsibilities between Bosnia and Herzegovina and the Entities. According to the above-mentioned Article XII.1 of the Constitution, this new distribution of responsibilities entered into force upon signature. If Article XII.2 requires from the Entities to amend their constitutions within three months to bring them into conformity with this text, this is a requirement in the interest of legal certainty and it in no way puts into question the immediate entry into force of the new provisions and the immediate abrogation of contrary provisions in the Constitutions of both Entities. This is confirmed by section 2 of the Transitional Arrangements (Annex II of the Constitution): "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina."

9. It therefore results:

B that the Constituent Assembly could continue to exercise legislative activities until its replacement by the House of Representatives and the House of Peoples foreseen in the Constitution of the Federation of Bosnia and Herzegovina;

B that, in exercising this legislative activity, the Constituent Assembly had to respect the new distribution of responsibilities between Bosnia and Herzegovina and the Entities and that any legislative act falling within the area of responsibility of the central institutions of Bosnia and Herzegovina would be *ultra vires* and void.

IV. The Legislative Powers of the Assembly of the Republic of Bosnia and Herzegovina

10. Article IV of the new Constitution of Bosnia and Herzegovina contains provisions on a Parliamentary Assembly. This Parliamentary Assembly is different from the Assembly of the Republic of Bosnia and Herzegovina existing under the previous Constitution.

11. Following the rule on immediate entry into force of the new Constitution, contained in its Article XII.1, at first sight the Assembly of the Republic would lose its legal basis upon signature of the Dayton Agreement and therefore cease to be able to validly enact legislation or other decisions. A different conclusion may however result in particular from the Transitional Arrangements contained in Annex 2 to the Constitution.

12. Section 2 of the Transitional Arrangements on the continuation of laws is worded as follows: "all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina".

This provision does not cover legislation adopted after the entry into force of the new Constitution, but only previously enacted legislation. The very

absence of a provision on legislation adopted during the transitional period might however be regarded as an indication that such legislation was not envisaged.

13. On the other hand, section 4 of the Transitional Arrangements provides under the heading "offices" as follows: "until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law".

Within the terminology of the Dayton Constitution, a parliamentary body may be covered by the expression "governmental offices, institutions, and other bodies". This results from Article III.1 where the word institution is applied to all State organs, including the Parliamentary Assembly. Moreover, section 2 of Annex 2 cited above calls "governmental" the competent body which determines the continued validity of previous legislation.

By contrast, the application of the words "until superseded by applicable agreement or law" to a parliamentary body seems problematic since parliament has its main legal basis in the Constitution and the new Constitution has already superseded the previous Constitution.

14. The wording of the Transitional Arrangements therefore seems ambiguous and an answer has to be found by applying general principles to the interpretation of the Constitution contained in the Dayton Peace Agreement.

15. According to Article I.1 of the Constitution, Bosnia and Herzegovina is not a new State but it continues its legal existence under international law as a State. This also results clearly from Article XII.1 according to which the new Constitution enters into force "amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". It is therefore clear that the State of Bosnia and Herzegovina continued to exist throughout the whole period. As a State it had to exercise the attributes of State power proper to any State under international law. The organs of the State therefore had to be able to effectively exercise their powers. Since the new parliamentary organs did not come into existence before the elections on 14 September 1996, a denial of the continued existence of the Assembly of the Republic of Bosnia and Herzegovina would mean that for a period of 10 months no parliamentary or legislative body would have existed at the level of the State of Bosnia and Herzegovina. This is difficult to conceive, and in the absence of any clear provision in the text itself, the principle of continuity requires the continued existence of a parliamentary organ of the State of Bosnia and Herzegovina.

16. However, this continued existence would seem to be very limited.

17. First of all, it is obvious that the Assembly of the Republic, acting as an organ of Bosnia and Herzegovina, could only act within the sphere of responsibilities given to the parliamentary organs of Bosnia and Herzegovina (as distinct from the Entities) by the new Constitution.

18. In addition, the powers of the Assembly were only justified on the basis of the principle of necessity. The Assembly was not a competent organ by virtue of the new Constitution, with the full powers given by the new Constitution to the new institutions. It only continued to exist to avoid the absence of the existence of any competent body and its actions were only justified to the extent that such a lack of a competent body had to be avoided. The Assembly of the Republic could therefore only deal with current matters and not take any measures going beyond what is necessary to ensure the continuity of the State. This limitation may be difficult to determine, as is for example the case for the current matters a government still can expedite during a governmental crisis. The limits can however be, if necessary, assessed by the Constitutional Court and, provisionally, by the High Representative under the conditions of Article 2.1.d of Annex 10 to the Dayton Agreement.