

## Opinion on the Constitutional Aspects of Recommendation 1238 (1994) of the Parliamentary Assembly on the situation in Bosnia - Herzegovina

At the 513th meeting of the Ministers' Deputies held in Strasbourg from 24 to 26 May 1994, the Committee of Ministers decided to consult the European Commission for Democracy through Law on the constitutional aspects of Recommendation 1238 (1994) of the Parliamentary Assembly on the situation in Bosnia-Herzegovina. That recommendation concerned, *inter alia*, the creation of a federation between Bosnia's Croats and Muslims as well as the Agreement on a confederation between the proposed federation of Bosnia-Herzegovina and Croatia (Washington Agreements of 18 March 1994).

Moreover, the Commission had been requested at its 19th plenary meeting in Venice (13 -14 May 1994) by the Government of the Republic of Croatia to give an opinion on the possible amendments of the Croatian Constitution with a view to the Washington Agreements.

The Commission examined these two questions jointly.

The present opinion addressed to the Committee of Ministers is based on the comments of MM Bartole, Berchtold, Economides, Helgesen, Maas Gesteranus, Malinverni, Nick, Triantafyllides et Robert, which were presented and discussed at the Commission's 20th Plenary meeting in Venice (9 -10 September 1994), and on the discussions between the Commission Rapporteurs and a delegation from the constituent assembly of Bosnia-Herzegovina (composed of Mr Ljubic, President of the Constitutional Assembly, and Mr Campara, Secretary General of the Parliament of the Republic) which took place at Santorin (Greece) on 22-25 September during the UniDem seminar on "The modern concept of confederation", a part of which was devoted to the Washington Agreements.

This opinion deals with

- the Constitution of the Federation of Bosnia and Herzegovina adopted on 30 March 1994, as appended to the Washington Agreements of 18 March 1994,

and with

- the compatibility of the Washington Agreements of 18 March 1994 with the Constitution of the Republic of Croatia of 22 December 1990.

Having regard to the events which preceded the adoption of the principal documents examined by it, the Commission presents the following observations and conclusions subject to the approval of the texts in question by the majority of the peoples concerned, through the application of democratic principles.

### A. The Constitution of the Federation of Bosnia and Herzegovina

The text of the Constitution of the Federation of Bosnia and Herzegovina contains, in general, the principal elements of a federal Constitution based on the principles of democracy and the rule of law. It includes instrumental provisions which define the various authorities and their powers, as well as their relations *inter se*. The Constitution does not confine itself to dealing with federal authorities, but also contains chapters on cantonal and municipal authorities. The Constitution then sets out provisions on the division of competences between the Federation and the cantons, identifying those areas in respect of which the Federation has responsibility.

The Constitution also contains a chapter devoted to human rights. Two particularly positive features should be highlighted in this connection: the reference to rights and freedoms guaranteed by international instruments and the provisions concerning the Ombudsman.

The Commission nonetheless considers it necessary to offer a few observations on certain aspects of the Constitution.

1. The number and names of federate entities composing the Federation should appear in the Constitution. This is one of the characteristics of federal states (see e.g. the Swiss Federal Constitution, the Preamble to the Basic Law of the Federal Republic of Germany).

Mention of the federate states in the actual text of the Constitution distinguishes them from mere provinces or regions of a unitary state and reflects their importance in the state structure.

2. The implementation of international **human rights** norms (as provided for in Article II.A.1) is without doubt a particularly felicitous provision, which demonstrates Bosnia-Herzegovina's commitment to effective protection of human rights. However, it could give rise to difficulties of a technical kind in practice.

Such problems could arise in cases where there are discrepancies between the texts of international instruments safeguarding human rights and the catalogue of rights guaranteed by the Constitution. One solution to this problem might be to state the principle whereby the provision most favourable to the rights of the individual would be applicable in the event of conflict. Failing the inclusion of such a provision in the Constitution, it will probably fall to the Constitutional Court or the Court of Human Rights to establish this principle through its case law.

The list of rights appearing in Article II.2 may also raise some problems. Although it is a non-exhaustive list of rights guaranteed (as indicated by the words "in particular"), this list might nevertheless give the impression that the drafters of the constitution wanted to accord the rights expressly mentioned there a higher value than the rights guaranteed by international instruments. It will be for the supreme courts of the Federation to clarify this point.

3. The **protection of minorities** receives only a simple mention: having regard to the particularly delicate character of this question in Bosnia and Herzegovina, an economy of detailed provisions on this matter is unwarranted.
4. The Commission welcomes the existence of precise rules governing the **Ombudsman**, but express provision in the Constitution to enable the Ombudsman to make recommendations to the administration would have been desirable. The present text allows for a wide range of different practices by both the ombudsman and the administrative authorities. Furthermore, intervention by the ombudsman in the course of a trial should be exceptional, or at least subject to extreme caution. His role should in fact be to intervene before the institution of judicial proceedings. Intervention during a trial should have no other purpose than to bring about a friendly settlement. Any other kind of intervention would be contrary to the principle of the separation of powers, the independence of the judiciary and equality of arms.
5. The Commission welcomes articles 3, 4 and 5. It considers in particular that the constitutional guarantee of the right of refugees to return to their homes is of paramount importance in the present political context in Bosnia-Herzegovina.

6. The matter of the **division of competences between the Federation and the cantons** also gives rise to certain questions. Residual competence is vested in the cantons (Article III.4), which means (cf. Article III.1-3 *a contrario*) that the Federation has no competence in the field of criminal law, and that it cannot legislate for example in respect of such matters as private law, labour law and social security or environmental law. It may be questioned whether such a situation is satisfactory.

It would have been wise to include a provision whereby, in the areas in which both the Federation and the cantons have competence, the cantons may not exercise their legislative powers if the Federation has enacted comprehensive legislation; it would also have been useful to make express provision for the Federation to adopt outline legislation, leaving it to the cantons to regulate matters of detail.

In addition, the division of competences in fiscal matters should be specified.

In addition, the possibility for cantons to delegate certain competences to the Federation (Article V.2, para.1) could give rise to problems. It would have been preferable to limit this possibility, in order to prevent the cantons being completely stripped of their powers.

7. As regards the various **organs of central government** and their respective powers, the points open to discussion include the following:
- the Constitution leaves open the question of whether the legislature will be elected by proportional representation for the whole country or whether the country will be divided into electoral constituencies and, if so, whether the constituencies will correspond to the cantons; these questions can of course be dealt with later by electoral legislation.
  - the absence of a clear choice between perfect and imperfect bicameralism which could lead to a certain incoherence;
  - there is no express provision for a Parliamentary control over the administration, nor for the executive's right to initiate legislation;
  - Article IV.B.16 which enable the President to dissolve both chambers of the legislature if he determines that they are unable to enact necessary legislation gives rise to some misgivings; rash application of this provision could easily result in abuse and seriously infringe the principle of separation of powers.
  - the powers of the Constitutional Court to intervene to put an end to political disagreements between the two Chambers or to decide as to the vital interests of one of the peoples of the Federation (Articles IV.A.18 and IV.B.6) are questionable. The Constitutional Court should as far as possible remain aloof from political disputes. Its involvement could discredit it and substantially impair its effectiveness as guarantor of the Constitution and the rule of law.
  - The Commission considers that some of the conditions laid down for the appointment of military and diplomatic staff and all judges (appointments subject to approval by both Chambers) are often difficult to meet and hence the cause of malfunctions; another rule difficult to apply in all cases is the one requiring an equal number of Bosniac and Croat judges in every court (see eg the Constitutional Court, which is made up of 9 judges).
8. The Commission finds it important that Cantons can create **cantonal councils** to coordinate their activities. In the Commission's opinion, such bodies will allow for the consideration of questions of more than a mere cantonal interest without requiring action by the Federation. It is on the other hand to be regretted that such cantonal councils cannot meet together with cantons having ethnically different majorities (Article V.3).
9. In addition, regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the **independence of the judiciary**.
- Finally, the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges (Articles V.11, para.3 and VI.7, para.4).
10. Lastly, the Commission notes that the new Constitution has not been adopted by a specially elected constituent assembly, but by a legislative assembly composed of Deputies whose mandate was still valid. It further observes that the referendum process has not been followed, either for the approval of the new constitution, or for the amendments to be made to it. However, this may be explained by the extreme political conditions prevailing in Bosnia-Herzegovina.

B. Compatibility of the Washington Agreements of 18 March 1994 with the Constitution of the Republic of Croatia of 22 December 1990

The "Preliminary Agreement Concerning the Establishment of a Confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia" (hereinafter "Agreement") was signed on 18 March 1994 by the President of the Republic of Croatia, Mr Franjo Tudjman, and the President of the Republic of Bosnia and Herzegovina, Mr. Alija Izetbegovic. It establishes a confederation for cooperation in economic and defence matters between the Republic of Croatia and the Federation of Bosnia and Herzegovina. Attached to the Agreement are two further agreements granting the Federation unrestricted access to the Adriatic and granting Croatia unrestricted transit through the municipality of Neum.

The Commission is of the opinion that the creation of the confederation is in principle compatible with the Constitution of Croatia.

The Croatian Constitution expressly provides for the association of the Republic of Croatia in alliances with other States (cf. Articles 2 and 132 et seq. of the Constitution). The term "alliance", used in a broad sense, may cover also the envisaged Confederation with the Federation of Bosnia and Herzegovina. This Confederation is not given the power to enact regulations with direct effect in the internal legal order of the Parties. Internal regulations which the progressive establishment of a common market and a monetary union might entail (cf. Article 4 of the Agreement) will be adopted by each of the participating States separately. In its present form, the incipient Confederation has therefore not been granted "powers derived from the Constitution" in the sense of Article 133, paragraph 2, of the Constitution.

The envisaged cooperation and common policies in economic, cultural, migration and legal matters do not entail any transfer of sovereignty which would be contrary to Article 2, paragraph 1, of the Constitution. The limitation on the exercise of constitutional powers inherent in the establishment of the Confederation is not unusual in the present practice of international cooperation, and the provisions contained in Articles 132 et seq. of the Constitution are a sufficient basis for the envisaged cooperation, including the conclusion of such defence arrangements as are provided for in Article 5 of the Agreement.

Since the international identity and legal personality of each of the Parties will remain unaffected by the establishment of the Confederation (Article 2 of the Agreement), the unitary structure of the Croatian State (cf. Article 1, paragraph 1, of the Constitution) is not put into question.

It should be noted, however, that the Confederation Agreement provides for the establishment of joint decision-making machinery in certain areas of activity, intended to operate on a permanent basis. The Parties to the Agreement undertake to give this decision-making process a certain priority in relation not only to their other international undertakings with third states, but also in relation to each Party's internal decision-making process. The effect of this is indirectly by certainly to limit the powers of each Party, even though there is no direct transfer of powers to the Confederation. Such a limitation arising from the special relationship between the two Parties ought normally to be provided with justification and a legal basis in the Constitutions of both states.

From a more technical point of view, the only constitutional provision which might be in contradiction with the Washington Agreements is Article 2, paragraph 5, according to which the "Republic of Croatia may conclude alliances with other States, retaining ... the right freely to withdraw from them". According to Article 7 of the Agreement, it shall "remain in force until otherwise agreed by the Parties". The attached agreements on access to the Adriatic and transit through Neum "shall remain in force for a period of 99 years, except as otherwise agreed by the Parties" (Article 7 and 5 respectively). These provisions exclude the right of Croatia to withdraw at will unilaterally from the agreements. In the view of the Commission, Article 2, paragraph 5, of the Constitution should accordingly be amended in order to allow the Republic of Croatia to conclude alliances which may not be denounced unilaterally.

The Commission further considers it advisable to insert an additional provision into the Constitution which explicitly mentions the Confederation with the Federation of Bosnia and Herzegovina.

## **CONCLUSIONS**

The Commission finds that the Constitution of the Federation of Bosnia and Herzegovina contains the essential norms of a federal constitution. Particular prudence will nevertheless be necessary in the practice of the federal and cantonal authorities in order for it to be implemented without difficulty.

The Commission further finds that with the exception of Article 2 para. 5 of the Constitution of Croatia, no provision of this Constitution is incompatible with the Washington Agreements.

Finally, the Commission considers it advisable that an explicit constitutional basis be given to the planned Confederation. With the establishment of a Confederation, the two States concerned are entering on a permanent basis into a special, privileged relationship which should find some expression in each of their Constitutions.