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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**Constitutional Court  
of Bosnia and Herzegovina**

**Case U 5/98  
Partial Decision III  
Issue of the “Constituent Peoples”**

**ADDENDUM I:  
Separate Opinion by Judge Hans Danelius**

### **SEPARATE OPINION BY JUDGE HANS DANELIUS**

I share the majority view that the challenged paragraphs of the Preamble of the RS Constitution as well as Article 1 of the RS Constitution and Article I.1(1) of the Federation Constitution are not in conformity with the BiH Constitution. However, my reasons for reaching this conclusion differ to some extent from those expressed in the majority opinion. My opinion is based on the following considerations:

#### **I. As regards the Preamble of the RS Constitution**

The challenged provisions of the Preamble read as follows:

**“Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;**

**Respecting the centuries-long struggle of the Serb people for freedom and State independence;**

**Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;**

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**Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people;**

**Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States;”**

I fully accept that the Preamble of the RS Constitution should be regarded as part of that Constitution. The Constitutional Court is therefore entitled to examine whether this Preamble is in conformity with the BiH Constitution.

The applicant argues that the quoted provisions of the Preamble of the RS Constitution violate the last paragraph of the Preamble of the BiH Constitution as well as Articles II.4, II.6 and III.3(b) of the BiH Constitution. He also refers to Article I.3 of the BiH Constitution and argues that it is not justified to refer to Republika Srpska as a state.

The BiH Constitution makes it clear that only Bosnia and Herzegovina is a state under international law. This appears from Article I.1 of the BiH Constitution according to which the Republic of Bosnia and Herzegovina, under the official name of Bosnia and Herzegovina, shall continue its legal existence under international law as a state with its already internationally recognised borders.

It is true that the term "state" is sometimes used not only for states which are independent subjects of international law, but also for other entities which enjoy a limited autonomy, in particular within the structure of a federal system (cf., for example, the states constituting the

United States of America). In such cases, however, the specific form of statehood of the entities is recognised by the constitutional rules of the country, and it is almost invariably the federal constitution itself which confers such statehood on the entities and defines their constitutional status.

In the present case, however, Article I.3 of the BiH Constitution provides that Bosnia and Herzegovina shall consist of two "entities", namely the BiH Federation and Republika Srpska, neither of which is called a state. The BiH Federation and Republika Srpska are also referred to as "entities" in several other articles of the BiH Constitution, and the term "state" is nowhere used in that Constitution in respect of these entities.

Moreover, in a complex state such as Bosnia and Herzegovina, which is characterised by intricate relations between state and entities, it is important that a consistent terminology be used in the various constitutions. In its first partial decision in the present case, the Constitutional Court found that the use of the term "border (granica)" in Article 2.2 of the RS Constitution to describe the boundaries between the entities was not in conformity with the BiH Constitution, since the General Framework Agreement, of which the BiH Constitution forms a part, makes a clear terminological distinction between a "border", which is a frontier between states, and a "boundary", which describes the internal geographical line separating Republika Srpska and the Federation.

For similar reasons, a consistent terminology should be used to describe the entities, and there is clearly no basis in the BiH Constitution for calling Republika Srpska a state. In so far as the term "state" is used in the preambular provisions of the RS Constitution in respect of Republika Srpska, they are therefore not in conformity with the BiH Constitution.

The challenged provisions of the Preamble of the RS Constitution also contain some other terms and expressions which cannot be considered consistent with the status of Republika Srpska as an entity within the state of Bosnia and Herzegovina. In so far as the Preamble refers to the right of the Serb people to decide independently on its political and state status, to create its democratic state and to link that state completely and tightly with other states, the provisions are not compatible with the status of Republika Srpska as an entity. Nor can the reference in the Preamble to the struggle of the Serb people for state independence be considered to be in conformity with the legal status of Republika Srpska.

In these respects too, the challenged preambular provisions must therefore be considered to violate the BiH Constitution.

## **II. As regards Article 1 of the RS Constitution**

Article 1 of the RS Constitution provides:

**"Republika Srpska shall be the State of the Serb people and of all its citizens."**

There are two aspects of this Article which raise questions as to its conformity with the BiH Constitution, namely, on the one hand, the fact that Republika Srpska is referred to as a "state" and, on the other hand, the fact that the Serb people – unlike the Bosniac and Croat peoples – is expressly mentioned as a people of Republika Srpska.

a) As regards the first aspect, I have already explained, when commenting on the Preamble (see above under I), why I consider it not to be justified in the RS Constitution to refer to Republika Srpska as a state. The same reasoning applies, *mutatis mutandis*, to Article 1 of the RS

Constitution, and on this point Article 1 of the RS Constitution is therefore not in conformity with the BiH Constitution.

b) As regards the second aspect, the applicant first claims that there is an inconsistency with the last paragraph of the Preamble of the BiH Constitution. That paragraph is an introduction to the actual text of the Constitution and reads:

**"Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:"**

The Preamble of the BiH Constitution must in itself be regarded as part of that Constitution. Accordingly, the Constitutional Court is in principle competent to examine whether the constitutions of the entities are in conformity with that Preamble. However, a precondition for finding a lack of conformity with the Preamble of the BiH Constitution must be that the relevant provision of the Preamble is of a normative character and sets limits or imposes obligations which are binding on the entities.

The question is now whether Article 1 of the RS Constitution, in so far as it refers to the Serb people but not to the Bosniac and Croat peoples, is in conformity with the above-mentioned provision of the Preamble of the BiH Constitution. In this regard, I find it appropriate to take into account the contents and special character of that provision of the Preamble. As appears from its wording, the provision does not contain any legal norm from which specific rights or obligations can be derived. The provision is no more than an introductory paragraph which identifies those who adopted and enacted the BiH Constitution. It is in this context that Bosniacs, Croats and Serbs are referred to as constituent peoples together with others and as having, jointly with citizens of Bosnia and Herzegovina, determined the contents of the Constitution.

Thus, in so far as the said provision of the Preamble refers to the three peoples as constituent peoples, it does so in the context of the adoption and enactment of the BiH Constitution only, and this provision cannot be considered to lay down any rule of a normative character or to create any concrete constitutional obligations.

It follows that there is no sufficient basis for finding Article 1 of the RS Constitution to violate the last paragraph of the Preamble of the BiH Constitution.

However, the applicant has also referred to Article II.4 and Article II.6 of the BiH Constitution and alleged that Article 1 of the RS Constitution is in conflict with those provisions.

Article II.4 and Article II.6 of the BiH Constitution read as follows:

**"4. Non-Discrimination**

**The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to the Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."**

**"6. Implementation**

**Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.”**

The question is therefore whether the reference to the Serb people in Article 1 of the RS Constitution and the fact that the Bosniac and Croat peoples are not mentioned jointly with the Serb people constitute discrimination contrary to the prohibition against discrimination in the BiH Constitution.

A key element in the BiH Constitution is the protection of human rights, and in this connection the prohibition against discrimination is given particular weight. According to Article II.2 of the Constitution, the European Convention on Human Rights, which in its Article 14 prohibits discrimination in respect of the rights protected in the Convention, shall apply directly in Bosnia and Herzegovina and have priority over all other law. Moreover, Article II.4 of the Constitution contains a specific prohibition against discrimination in the enjoyment of the rights provided for in Article II or in the international instruments which are protected under the Constitution.

In view of the circumstances in which the BiH Constitution was adopted, it is easy to understand why particular attention was given to the discrimination issue. Discrimination and intolerance were causes of tragic events which had occurred in the years before the Constitution was adopted. Moreover, there can be no doubt that discrimination remained a serious problem in both entities of Bosnia and Herzegovina even after the Constitution had entered into force. Against this background it must be justified to interpret the said provisions of the Constitution in a strict manner. Consequently, special attention must be given to any constitutional or other legal provisions which could reasonably be understood as encouragement or approval of discriminatory practices or attitudes.

In connection with the war in Bosnia and Herzegovina, large numbers of people were forced to leave their homes and had to live elsewhere as refugees or displaced persons. The whole population structure in Bosnia and Herzegovina was dramatically changed. An important aim of the Dayton Peace Agreement and of subsequent efforts to secure lasting peace and stability is the return of these refugees and displaced persons to their homes. This aim is clearly reflected in Article II.5 of the BiH Constitution. Any discrimination on ethnic grounds could make it more difficult to achieve this aim.

Article 1 of the RS Constitution is drafted in an unusual manner in so far as it places side by side the Serb people, on the one hand, and all citizens of Republika Srpska, on the other. In fact, these two groups of people overlap, since most Serbs in Republika Srpska are at the same time citizens of Republika Srpska. It is true that the reference to all citizens includes those Bosniacs and Croats who are citizens of Republika Srpska. However, unlike the Serbs, the Bosniacs and Croats are not referred to as peoples but as citizens, which means that from a constitutional point of view they are not placed on an equal level with the Serbs.

It could be argued that the fact that, since the Serbs are at present the majority population in the territory of Republika Srpska and that they also were the majority - although a much smaller majority - before the war in Bosnia and Herzegovina broke out, it should be permissible to mention them as a special category in Article 1 of the RS Constitution. However, in the prevailing circumstances a central provision in the RS Constitution which makes Republika Srpska appear primarily as an entity of the Serb people is likely to be interpreted by those Bosniacs and Croats who live in Republika Srpska or who wish to return there as an indication

that they are not accepted as being equal to the Serbs but are seen to a certain degree as second-class citizens.

Consequently, there is in this respect in Article 1 of the RS Constitution a discriminatory element which cannot be disregarded. The Article may also contribute to dissuading refugees and displaced persons from returning and is therefore inconsistent with an important objective of the BiH Constitution.

For these reasons I conclude that Article 1 of the RS Constitution is not consistent with the prohibition against discrimination in the BiH Constitution.

### **III. As regards Article I of the Federation Constitution**

Article I.1(1) of the Federation Constitution provides:

*"Bosniacs and Croats as constituent peoples together with others, and the citizens from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina, defined by Annex II of the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities."*

The applicant considers that this provision is not in conformity with the last paragraph of the Preamble of the BiH Constitution or with Article II.4 and Article II.6 of that Constitution in so far as it refers only to Bosniacs and Croats as constituent peoples.

For the same reasons as indicated in regard to Article 1 of the RS Constitution (see under II above), I consider that the last paragraph of the Preamble of the BiH Constitution does not contain a normative rule which could lead to a finding that Article I.1(1) of the Federation Constitution is not in conformity with that paragraph.

It remains to be examined whether Article I.1(1) of the Federation Constitution is discriminatory and therefore violates Article II of the BiH Constitution.

I note that there are certain differences between Article I.1(1) of the Federation Constitution and Article 1 of the RS Constitution.

First, according to its wording, Article I.1(1) of the Federation Constitution was meant to describe a constitutional change which was taking place in territory which constituted the Federation ("Bosniacs and Croats ... together with others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina ... transform the internal structure of the territory ..."). The Article does not state that the Federation is and should remain an entity of Bosniacs and Croats but only that it was the Bosniacs and Croats who, together with others, transformed the structure of the territory of the Federation.

It is true that the Federation consists of territories with a majority of Bosniac and Croat population. However, for the same reasons as in regard to the RS Constitution (see under II above), I do not consider this to be a sufficient justification for the reference in the Constitution to only Bosniacs and Croats.

Secondly, unlike Article 1 of the RS Constitution, Article I.1(1) of the Federation Constitution uses the term "constituent peoples", which also appears in the Preamble of the BiH Constitution. This is a term which, in the minds of many people, has a symbolic significance and is

emotionally coloured, but which can hardly be said to have a clear and precise meaning. In the Federation Constitution, the naming of Bosniacs and Croats as constituent peoples presumably means that they were the peoples who played a special role in creating and developing the Federation, but it could also convey the idea that the Federation is primarily a territory of Bosniacs and Croats.

It is true that the Federation Constitution specifically provides that all refugees and displaced persons have the right to freely return to their homes of origin (Article II.A.3) and that all persons have the right to have property restored to them (Article II.A.4). Nevertheless, if a central provision in the Federation Constitution could reasonably make the Federation appear primarily as a territory of Bosniacs and Croats, this may well have a dissuasive effect on others, particularly on Serb refugees and displaced persons wishing to return to the Federation, and the emphasis placed on Bosniacs and Croats thereby contributes to preventing the realisation of an important objective of the BiH Constitution.

For these reasons, I conclude that Article I.1(1) of the Federation Constitution is also not consistent with the prohibition against discrimination in the BiH Constitution.