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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE IMPLEMENTATION
OF DECISION U5/98 (“CONSTITUENT PEOPLES”)
OF THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA
BY THE AMENDMENTS TO THE CONSTITUTION
OF THE REPUBLIKA SRPSKA

Adopted by the Venice Commission
at its 52nd Plenary Session
(Venice, 18-19 October 2002)

on the basis of comments by
Mr J.-C. SCHOLSEM (Member, Belgium)

I. INTRODUCTION

1. By letter dated 22 April 2002, Mr Dragan KALINIC, President of the National Assembly of the Republika Srpska (R.S.) submitted to the Venice Commission a series of amendments to the R.S. Constitution. The purpose of these amendments is to bring the constitution into conformity with the decisions of the Constitutional Court of Bosnia and Herzegovina, and more specifically with the third partial decision in case U 5/98, on the “constituent peoples” issue (Doc. CDL (2000) 81).

The amendments presented to the Venice Commission are the fruit of a general political compromise concluded on 27 March 2002, under the aegis of the High Representative, between the principal political forces of Bosnia and Herzegovina in order to implement the aforesaid decision of the Constitutional Court at the level of the two entities.

Subsequently, these amendments themselves underwent certain changes. They have now been incorporated into the text of the Constitution of the R.S., as published on the Internet site of the Office of the High Representative.

The purpose of this opinion is not to present an exhaustive, detailed picture of all these amendments. Indeed, the vast majority of them call for no particular comment and are a faithful reflection of the decisions of the Constitutional Court.

However, it may be interesting to place the amendments in their general context, bearing in mind the positions previously adopted by the Venice Commission (II), and then to highlight their salient features (III).

II. CONTEXT OF THE AMENDMENTS TO THE CONSTITUTION OF THE R.S. AND FORMER OPINIONS OF THE VENICE COMMISSION

2. In its partial decision III in the U 5/98 (“constituent peoples”) case, the Constitutional Court of Bosnia and Herzegovina declared unconstitutional paragraphs 1, 2, 3 and 5 of the preamble to the Constitution of the R.S. and the words “State of the Serb people and” in Article 1 of the same Constitution¹.

Similarly, the Court considered contrary to the Constitution of Bosnia and Herzegovina (B.H.) the words “Bosniacs and Croats as constituent peoples, along with Others” and the words “in the exercise of their sovereign rights” in Article I.1(1) of the Constitution of the Federation of Bosnia and Herzegovina (F.B.H.)².

The reasoning behind the decision of the Court on the main issue is the following. The last paragraph of the preamble of the Constitution of B.H. explicitly names the Bosniacs, the Croats and the Serbs as constituent peoples. These constituent peoples must therefore enjoy equal collective status throughout the territory of the state. It is not possible,

¹ The text of Article 1 submitted to the appreciation of the Court read: “*Republika Srpska shall be the State of the Serb people and of all its citizens*”.

² The text of Article I.1(1) submitted to the appreciation of the Court read: “*Bosniacs and Croats as constituent peoples, along with Others and Citizens of Bosnia and Herzegovina from the territories of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform their internal structure of the Federation territories, which has been defined by Annex II to the General Framework Agreement, so the Federation of Bosnia and Herzegovina is now composed of federal units with equal rights and responsibilities*”.

therefore, for two of these peoples (the Bosniacs and Croats in the Federation) or one of them (the Serbs in the R.S.) to be designated as the only constituent people(s) of the corresponding federal entity.

Preambular paragraphs 59 and 60 of the Court's decision are particularly enlightening in this respect:

“59. Even if constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats and Serbs as constituent peoples by the Constitution of B.H. can only have the meaning that none of them is constitutionally recognized as a majority, or, in other words, that they enjoy equality as groups. It must thus be concluded in the same way as the Swiss Supreme Court derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups that the recognition of constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II.3 and 4 of the Constitution of B.H., but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities.

60. In conclusion, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation.”

3. It is clear that the consequences of partial decision n° III were not limited to removing from the Constitutions of the F.B.H. and of the R.S. the terms declared unconstitutional. The very elaborate reasoning used by the Court to reach its conclusion had to lead to a much more thorough – and politically arduous – overhaul of the two Constitutions.

It is equally clear that from the legal standpoint this revision presented itself in a fairly different light for the Federation on the one hand and the R.S. on the other.

At Federation level, a large number of provisions were based on the officially bi-ethnic structure of the State and shared posts in the Presidency, the Government and the Upper House of Parliament, for example, between Bosniacs and Croats alone.

This system was condemned by the decision of the Court affirming the principle of equality of the three constituent peoples throughout the territory of Bosnia and Herzegovina.

Concerning the R.S., on the other hand, apart from the provision of principle, declared unconstitutional, proclaiming the R.S. to be the State of the Serb people and of all its citizens, no other constitutional provision established any privilege or advantage in favour of this ethnic group. On the purely legal level, this constitution therefore seemed to present the strictest neutrality.

4. In view of this asymmetry, the practical implementation of the Court decision could take two different forms, that one might summarise as follows.

The Court's decision implies that if the entities grant special rights to the "constituent peoples", all three peoples must enjoy that status in both entities. It does not *ipso facto* oblige the federated entities to grant these special rights or mark this equality between groups. In other words, it does not appear to exclude a purely individualistic approach to rights, based on traditional citizenship criteria.

The Venice Commission studied this question in its opinion CDL-INF (2001) 6, adopted at its 46th plenary meeting on 9 and 10 March 2001.

The Commission did not wish to give an "authentic interpretation" of the Court's decision, which would clearly have been overstepping its powers. Nor did it wish to go into details of practical solutions, which are to all intents and purposes purely a matter of political preference. It should be noted here that these two provisos concerning the opinion given in 2001 also apply to the present opinion.

In its opinion CDL-INF (2001) 6 the Commission pointed out that, for the Federation, extending constituent people status to the Serbs could result in an unwieldy system with the risk of decisions being blocked and basic democratic principles being flouted.

At the same time, while drawing attention to the merits of an approach based on the individual citizen, the Commission pointed out the limits of such an approach in the present political context. At the very least this solution seemed premature and not really in tune with the real aspirations of most of the population, particularly the minority groups.

It is interesting to note that the Commission actually based itself on the example of the R.S., whose seemingly neutral and citizen-based constitution and legislation nevertheless gave rise in practice to massive, systematic discrimination against non-Serbs.

However, the Commission did not recommend extending mechanisms establishing the collective equality of the constituent peoples to the R.S. Aware of the limits of a purely formal approach to the principle of non-discrimination, especially in the context of the R.S., it proposed setting the authorities of the R.S. positive obligations in terms of equality. Mechanisms to verify the efficacy of these positive obligations were also envisaged.

5. The Venice Commission continued to contribute to thinking in this field through the Task Force set up by the High Representative. The results of the Task Force's work are reported in document CDL (2001) 23. The Task Force envisaged, amongst other options, the setting up of "Constitutional Commissions" in the two entities, to watch over the vital interests of the constituent peoples. These Commissions were effectively established by decision of the High Representative on 11 January 2001. In many respects they prefigure the solutions presented in the amendments to the Constitution of the R.S. which are now before the Venice Commission.

III. SALIENT FEATURES OF THE AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIKA SPRSKA

6. As stated in the introduction, the amendments submitted to the Venice Commission are the result of a comprehensive agreement concluded on 27 March 2002 between the different political parties of Bosnia and Herzegovina. Evidently this agreement aims to

establish as perfect as possible a parallel between the solutions adopted at the level of the entities. Only the amendments to the Constitution of the R.S. were submitted to the Commission, however.

First of all, the Venice Commission can only welcome the fact that a political agreement was actually reached on this extremely sensitive subject and that, as a result, the decisions of the Constitutional Court can at last be implemented.

Furthermore, the Commission fully understands the political reasons behind the adoption of symmetrical solutions in the two entities, even if it did not necessarily recommend this approach on a strictly legal level.

The purpose of this opinion is not to verify the conformity of the amendments made to the Constitution of the R.S. with the political agreement reached on 27 March 2002, which is a purely internal question. Nor can it conceivably present a detailed panorama of the numerous amendments made to the Constitution. It can only focus on the main aim, which is to implement the decisions of the Constitutional Court, especially by officially endorsing the principle of the collective equality of the constituent peoples in the very institutions of the R.S.

7. To achieve this the whole organisation of the Constitution of the R.S. has undergone a complete overhaul. On certain points the amendments adopted go even further than was strictly necessary to implement the decision of the Constitutional Court on the “constituent peoples” issue.

In addition to the preamble, which has been completely rewritten, Article 2 of the Constitution lays down two essential principles. On the one hand it explicitly recognises that the R.S. is one of the two equal entities of Bosnia and Herzegovina, something the Venice Commission has long wished for. And on the other, it specifies that the Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens shall share in the exercise of power equally and without discrimination.

This principle has numerous implications, only the most important of which are referred to here.

Article 5 of the Constitution describing the basic principles of the political system has acquired a new provision concerning the protection of the vital interests of the constituent peoples.

The delicate question of official languages is dealt with by the new Article 7. The official languages of the R.S. are the language of the Serb people, the language of the Bosniac people and the language of the Croat people. This roundabout wording is designed to avoid any unnecessary disputes over the exact names of the languages. It is also specified that both the Cyrillic and Latin alphabets are officially accepted.

Paragraph 4 of Article 28 establishing special financial links and co-operation between the State and the Orthodox Church was deleted following the Constitutional Court decision. The maintenance of paragraph 3 of the same article, stating that the Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion, is also open to debate, as it may raise problems in respect of religious freedom. It was not submitted to the Constitutional Court, however.

Similarly, paragraph 16 of Article 68, empowering the R.S. to regulate co-operation with Serb people living outside the Republic, has been deleted.

Together these changes clearly reflect a new attitude to the very foundations of the State, and its multi-ethnic outlook.

8. Changes at the institutional level are equally numerous and far-reaching.

For example, the last paragraph of Article 69 lists six important posts (Prime Minister, President of the National Assembly, President of the Council of the Peoples, President of the Supreme Court, President of the Constitutional Court, Principal State Prosecutor) no more than two of which may be filled by representatives of any one of the constituent peoples or of the "Others". This provision seems to go beyond the mere application of the Constitutional Court decision.

Similar provisions based on equal representation of the groups are found in several places.

For example, two Vice-Presidents assist the President of the Republic in the fulfilment of his functions (Art. 80).

The Prime Minister and Deputy Prime Minister may not come from the same constituent people (Art. 92).

The ethnic composition of the government is established by the Constitution itself, with a distinction between a transitional phase and a final phase (following full implementation of Annex VII of the Dayton agreement) (Art. 92).

Article 97 generally establishes the principle that the constituent peoples and members of the group of "Others" will be proportionally represented in public institutions of the R.S. (based, until Annex 7 is fully implemented, on the 1991 population census figures). The same principle applies *mutatis mutandi* at municipal level, based on the latest census and the composition of the municipal assembly (Art. 102), as well as to judges in district courts and courts of first instance (Art. 127).

Finally, the Constitutional Court panel responsible for protecting vital interests must comprise seven members, two from each constituent people and one from the group of "Others" (Art. 116).

This selection from the most important provisions shows the essential place left by the constitutional amendments for mechanisms to protect and enhance equality between the groups, especially between the constituent peoples.

9. The most important provision of all, however, concerns the assemblies.

Until now the R.S. has been governed by a single chamber, the Senate playing a merely consultative role.

The reform introduces a second chamber, the House of Peoples. Organically the House of Peoples derives from the National Assembly, itself elected by direct universal suffrage³. The members of the House of Peoples are elected by the different “caucuses” in the National Assembly. Each “caucus” nominates eight members in respect of the constituent peoples and four in respect of the “Others”. The Constitution even stipulates that if the number of members of a “caucus” in the House of Peoples exceeds the corresponding “caucus” in the National Assembly, the latter must be enlarged to the municipal councillors for the purposes of these elections (Art. 71).

In other words, in the House of Peoples the principle of equality of the peoples prevails, the minorities (“Others”) having the right to half the number of seats allocated to each constituent people.

This very clear source of over-representation of certain population groups can lead to the use of techniques which are questionable in democratic terms. This is the case, as mentioned earlier, when simple municipal councillors are called upon to take part in the election of representatives to the House of Peoples.

10. The House of Peoples does not have a say in all legislative matters, but only when the vital interests of the constituent peoples are at stake (Art. 69, para. 2).

The vital interests of the constituent peoples are defined in the last paragraph of Article 70 of the Constitution. The definition is very broad. It comprises, for example, the right of the constituent peoples to be adequately represented in the legislative, executive and judicial bodies, the identity of the constituent peoples, education, religion, language, promotion of culture, tradition and cultural heritage. To this already long and broad list, the terms of which will no doubt give rise to problems of interpretation, the new Article 70 of the Constitution adds any other question considered as raising a problem of vital interest by one of the “caucuses” of the constituent peoples in the House of Peoples.

This last, wide open possibility seems excessive and could give rise to numerous blockages in the political decision-making process. It would appear wiser to settle for a list of points, themselves described in terms sufficiently broad to guarantee the protection of the vital interests of the various peoples. It should also be noted that if the vital interests included in the list can concern the minorities (the “Others”), the political process of determining additional vital interests benefits only the constituent peoples and not the “Others”.

11. The procedure applicable when the vital interest clause is brought into play is too complex and unwieldy to summarise here. Essentially, however, the House of Peoples must decide by a majority of the members of the different “caucuses” of the constituent peoples.

This “over-qualified” majority will inevitably cause problems. The least numerous constituent peoples are already over-represented in the House of Peoples, so requiring a majority in each of the groups or “caucuses” representing the constituent peoples is difficult to justify. In any event, as far as efficiency is concerned, this need for a majority in each group almost certainly portends frequent blockages in the decision-making process.

³ However, Article 71, paras. 1 and 2 guarantee at least 4 representatives to each constituent people out of a total of 83 members.

The desire to protect the constituent peoples seems to lead to a system of reciprocal paralysis the long-term effects of which may be destructive.

A second criticism of this system is that in the event of divergence between the two assemblies over whether a draft law falls within the scope of vital interests or effectively violates vital interests, recourse may be had to a special panel of the Constitutional Court composed of seven members, as described at the end of section 8 above.

This panel reaches its decisions by a qualified majority (which may be two thirds or three quarters, depending on the circumstances). While there is nothing unusual about asking a Constitutional Court to decide whether a proposed legislative measure falls within the scope of a constitutional provision like the vital interest clause, asking it, or rather the panel, to decide whether these same vital interests – of which there is no definition – have been violated seems much more questionable. This role so resembles a judgment of political expediency that the Court's credibility could easily be undermined. The fact that the Constitutional Court panel reaches its decisions by a variable qualified majority only compounds the danger.

IV. CONCLUSIONS

12. Rather than constitutional amendments, what we have here is a veritable overhaul of the Constitution of the R.S.

The Venice Commission is extremely pleased that a political agreement was concluded concerning the implementation of a decision of the Constitutional Court which itself profoundly affected state structures in the two entities of Bosnia and Herzegovina.

In one way or another the Commission has followed the whole process that is culminating today. It has done so in its traditional capacity as an independent legal expert.

It is in that same capacity that it has drawn up the present opinion.

On several occasions it has stressed the very positive aspects of the constitutional amendments, which reflect a real determination to implement the decision of the Constitutional Court as well as great openness of mind.

There is no denying, however, that the practical application of the principles underlying the decision of the Constitutional Court was no easy matter and that several courses were open, each with its advantages and its disadvantages.

The political agreement of 27 March 2002 was based on solutions that were as symmetrical as possible in the two entities and geared to a philosophy of equality between the groups.

This course is not without its pitfalls, some of which are highlighted in this opinion: effective decision making is one, then there is the danger, in trying to protect the vital interests of the constituent peoples, of endorsing a sort of mutually paralysing hegemony of these different groups.

This course does seem to be defensible, however, in the present context in Bosnia and Herzegovina, especially if it is part of a dynamic effort to pacify and reconcile the various populations, which the international community sincerely hopes it is.