

COMPATIBILITY OF THE CONSTITUTION OF THE REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA FOLLOWING THE ADOPTION OF AMENDMENTS LIV – LXV BY THE NATIONAL ASSEMBLY OF REPUBLIKA SRPSKA

Secretariat Memorandum on the basis of the Commission's opinion appearing in document CDL(96)56 final

Introduction

At its 28th meeting in Venice on 13 and 14 September 1996 the Venice Commission adopted an opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS) with the Constitution of Bosnia and Herzegovina (BH). The text of this opinion appears in Document CDL(96)56 final. Appendix 2 to the opinion contains a number of concrete proposals for amendments to the Constitution of RS.

On 13 September 1996, the National Assembly of RS adopted amendments LIV to LXV to the Constitution of RS. These amendments were adopted following discussions between the working group of the Commission and experts from RS on 28 August 1996. To a considerable extent, these amendments take up recommendations made by the Venice Commission.

The Preamble

The opinion of the Commission recommends to replace the previous text of the Preamble by a new text. Amendment LIV only replaces the third and fourth paragraphs which were in clear contradiction with the Constitution of Bosnia and Herzegovina (establishment of a sovereign and democratic state, decision to reunite with other Serb countries). The new text of the Preamble is still problematic. Can one state that the Serb people independently decides on its political and national status when the Entity is part of BH, and can one speak of the decisiveness of the Serbian people of the RS to connect their state closely and in all aspects with other states of the Serbian people, when all such relations have to be consistent with the sovereignty and territorial integrity of BH? It is also problematic to call the RS a state, though there are precedents for this in other federal states (United States, Free States of Bavaria and Saxony in Germany). On the whole the Preamble still gives the impression of being a Preamble for an independent state. Although the Preamble has no direct operational consequences but is a text mainly serving to interpret the Constitution, it should reflect the character of the RS as an Entity of BH and therefore a further revision seems necessary. The Constitutional Court of BH might be called upon to decide on this matter.

Chapter I - Basic Provisions

The previous inconsistencies with the text of the Constitution of BH have been removed, as recommended in the Commission's opinion. This concerns in particular Articles 2 and 3. The Commission's proposal to state explicitly that RS is a constitutive part of BH has not been taken up. This can however not be regarded as directly required by the text of the Dayton Constitution and it may be argued that the new Article 3, as well as other Articles, implicitly acknowledge that RS is a part of BH.

Chapter II - Human Rights and Freedoms

With respect to this Chapter, the recommendations of the Commission have been implemented. In particular, the rights previously reserved to RS citizens have now been granted to everyone and the clauses on the restriction of rights which were formulated in a completely unacceptable way have been deleted.

The problem that the international legal instruments being part of the Constitution of BH may in several respects be more favourable to citizens than the Human Rights catalogue contained in the Constitution of RS has been solved, as proposed by the Commission, by introducing a provision that, in case of any discrepancy, the provision more favourable to the individual will be applied. It is therefore not essential that the wording of every single article is fully in line with the most recent interpretation of the legal international instruments.

Chapter III - Economic and Social Order

No amendments were requested by the Commission to bring this Chapter in conformity with the Constitution of BH.

Chapter IV - The Rights and Duties of the Republic

The Commission recommendations to amend Article 68 have mostly been followed, in particular:

- B in No. 1 the words "sovereignty" and "independence" were deleted and replaced by "integrity" and "constitutional order";
- B in No. 6 the words "economic relations with foreign countries" were not deleted but qualified "which have not been transferred to the institutions of BH"; direct incompatibility is thus avoided;
- B in No. 7 the words "monetary", "foreign exchange" and "customs" were deleted;
- B in No. 15 international co-operation is qualified now by "except one which has been transferred to the institution of BH";
- B the unfortunately worded second paragraph introduced by amendment XLIX is deleted.

The proposal to introduce into Nos. 2 and 3 a reference to the civilian command authority of the members of the Presidency of BH and to the coordinating function of the Standing Committee on Military Matters was not followed. It should however be noted that this reference is also missing in the Constitution of the Federation.

Chapter V - Organisation of the Republic

The catalogue of competences of the National Assembly in Article 70 has been amended, as requested by the Commission, by deleting the reference to the uniting with other countries and introducing the reference to the BH competences concerning international agreements.

The provision on the declaration of war was reworded but not deleted. This provision raises very delicate and difficult issues. Can an Entity declare war and to what extent do Entities have under international law the right to self defence? This problem will have to be settled by the Constitutional Court of BH.

With respect to the competences of the President enumerated in Article 80, first of all the proposed reference to the BH Constitution in No. 8 concerning tasks related to defence was not introduced. This would have been advisable but can not be regarded here as a direct inconsistency and is also missing in the Constitution of the Federation. In Article 80, No. 9, an inconsistency remains insofar as the word ambassador may also refer to the RS representative (while the Amendment to Article 90 makes it clear that there is no more a possibility for diplomatic offices of the RS). This inconsistency seems not very important.

In Article 90, the possibility of the establishment of diplomatic and consular offices by RS was deleted as recommended.

Chapter VI - Territorial Organisation

Article 101 was already deleted by Amendment XXXII.

Chapter VII - Defence

In Article 104 the words sovereignty and independence were deleted as recommended.

However, Article 106 still gives command authority over the army of RS to the President of RS. According to the Constitution of BH, it rests with the members of the BH Presidency. This provision is the most direct remaining contradiction with the Constitution of BH. Its practical importance is somewhat lessened by the fact that according to the spirit, if not the letter, of the Dayton Constitution it may be assumed that command authority should rest with the Serb member of the BH Presidency.

Chapter VIII - Constitutionality and Legality

The Commission made no proposals for amendments.

Chapter XI - The Constitutional Court

The proposal for an amendment to Article 119 was based on a translation error.

Chapter X - Courts of Law and Public Prosecutors Office

The Commission made no proposals for amendments.

Chapter XI - Amending the Constitution

The Commission made no proposal for amendments.

Chapter XII - Concluding Provisions

The Venice Commission requested the deletion of Article 138 since this Article gave the authorities of RS the possibility to take unilateral measures when they believe that their rights are violated by acts of BH or FBH. This Article has not been deleted but it has been very much qualified. Such measures are now possible only "temporarily until the decision of the Constitutional Court of BH in cases when ineliminable detrimental consequences may occur". This is still not acceptable under the Constitution of BH but the practical importance of this provision seems very much reduced.

Conclusions

In conclusion it may be stated that the amendments adopted by the National Assembly of RS take to a very large extent account of the recommendations of the Venice Commission and that nearly all direct incompatibilities have been removed, the most obvious exception being the command authority of the President over the military forces. The RS has not followed the recommendations to introduce positive references clearly stating that it is a constitutive part of BH, but these recommendations could not be regarded as directly required by the Constitution of BH.

Since the Constitution of BH foresees that its provisions supersede any incompatible provisions of the legal order of the Entities and gives to the Constitutional Court the power to decide in the case of conflict, it would seem that the Constitutional Court of BH should be able to deal with the remaining problems of incompatibility. The area of defence certainly merits the further attention of the international community with respect to both Entities. On the whole, however, it has to be acknowledged that the RS, like before the Federation, has taken a major step to fulfil its commitments under the Dayton Peace Agreement.