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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

O p i n i o n
on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the "Constituent Peoples"

adopted by the Commission
at its 46th Plenary Session
(Venice, 9-10 March 2001)

I. Introduction

1. By a letter dated 21 December 2000 the Chairman of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly asked the Venice Commission to give an opinion on the partial decision of the Constitutional Court of Bosnia and Herzegovina on the issue of the constituent peoples. By letter dated 27 December 2000, the Minister for Foreign Affairs of Bosnia and Herzegovina, Mr Prlić, expressed full support for the initiative that the Venice Commission should provide its expertise on the implementation of the decision. The Venice Commission sees as its task in this respect not to give an abstract interpretation of the decision, which in any case could not be authentic, or to review the decision from a legal point of view, but to provide the political bodies having requested the opinion with indications on its possible implementation, with a view to ensuring the functioning of the institutions of Bosnia and Herzegovina at all levels in a manner consistent with the Constitution. The Commission understands that the implementation of the decision will constitute an important step towards accession of Bosnia and Herzegovina to the Council of Europe.

2. In addition to the requests from the Parliamentary Assembly and the Ministry of Foreign Affairs, the High Representative, Mr Petritsch, set up a Task Force consisting of representatives of OHR, OSCE and the Venice Commission to prepare concrete proposals for the constitutional amendments required to implement the decision. The Task Force met on 19 and 20 January 2001 in Brussels with the participation on behalf of the Venice Commission of Mr Scholsem (Belgium) and Mr Markert from the Secretariat. The Task Force prepared the text of constitutional and legislative amendments to implement the decision, providing in some cases different options. Its proposals appear in document CDL (2001) 23. The Commission therefore refrains from making concrete text proposals but limits its opinion to general considerations.

II. The decision

The decision goes back to a request of the former President of Bosnia and Herzegovina, Mr Izetbegović, to declare a large number of articles of the Constitutions of both Entities unconstitutional. The Court has rendered four partial decisions on his request and in Partial Decision III it declares in particular as unconstitutional

- In Art. 1 of the Constitution of Republika Srpska the description of the Republic as "the State of the Serb people and all its citizens";
- In Art. 1 of the Federation Constitution the wording that "Bosniacs and Croats as constituent peoples, along with Others" have transformed the internal structure of the Federation territories.

The Court decided that in accordance with the Preamble of the Constitution of Bosnia and Herzegovina all three constituent peoples of Bosnia and Herzegovina, Bosniacs, Serbs and Croats, are constituent and equal throughout the country and that it is not possible to divide the country in one Entity in which two of these peoples are constituent and another Entity in which the third people is constituent.

2. Some paragraphs of the reasoning of the Court seem of particular interest not only for the understanding of the decision but also as statement on the possible functioning of any democracy in a multi-national context:

> "55. … Moreover, it is a generally recognized principle to be derived from the list of international instruments in Annex I to the Constitution of BiH that a government must

represent the whole people belonging to the territory without distinction of any kind thereby prohibiting - in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of BiH through Annex I - a more or less complete blockage of its effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-national state, democratic decision-making would be transformed into ethnic domination of one ore even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them thereby enabling a numerical minority represented in governmental institutions to enforce its will on the majority forever.

56. In conclusion, it follows from established constitutional doctrine of democratic states that democratic government requires - beside effective participation without any form of discrimination - compromise. It must be concluded thus under the circumstances of a multi-national state, that representation and participation in governmental structures - not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights - does not violate the underlying assumptions of a democratic state.

57. Moreover, it must be concluded from the texts and underlying spirit of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities that not only in national states, but also in the context of a multi-national state such as BiH the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, not a legitimate aim in a democratic society. It is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as determined by Article I.2 of the Constitution of BiH in conjunction with paragraph three of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but - quite contrary - must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.

58. (…)

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 BiH 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 BiH, 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."

The full text of the decision appears in document CDL (2000) 81.

3. These paragraphs show that the decision establishes wide-ranging principles for the institutions of both Entities and that, as assumed in the requests addressed to the Venice Commission, it has consequences going far beyond the deletion of some words in the first Article of the Constitutions of both Entities.

III. The implications of the decision

a) At the level of the State of Bosnia and Herzegovina

4. To dispel any misunderstanding it should first of all be underlined that the decision of the Court applies to the Constitutions of both Entities and not to the Constitution of the State of Bosnia and Herzegovina. The decision does not, and could not, provide a legal basis for amendments to the Constitution of the State agreed at Dayton.

b) At the level of Republika Srpska

5. The constitutional structure of the two Entities is very different and the implications for both Entities therefore have to be examined separately, not only as regards the drafting of any required constitutional amendments but also with respect to the general concepts.

6. The Constitution of Republika Srpska, following the decisions of the Court, no longer contains any provisions giving special privileges to any of the constituent peoples or discriminating against any group of citizens. All government institutions are composed without any reference to ethnic origin and Article 10 of the Constitution proclaims the equality of all citizens before the law. While the decision of the Court does not generally exclude any provision based on the participation of ethnic groups in governmental structures (cf. in particular para. 56 of the decision), it certainly does not require a generalised system of allocating posts to groups such as the constituent peoples of Bosnia and Herzegovina (cf. below at 15). On the face of it, everything would therefore seem to be in order.

7. Unfortunately, the decision of the Court shows that this is not the case and that there exists a pattern of discrimination against non-Serbs in the Republic. According to the figures quoted in the decision of the Court the percentage of Serbs within the population living on the territory of Republika Srpska has increased from 1991 to 1997 from 54.30% to 96.79% and, while about 25% of the members of the National Assembly are non-Serbs, the government is composed of Serbs only[1] and all judges and prosecutors outside the Brčko district which is under a special regime are Serbs. The Court concludes:

> "95. In conclusion the Court finds that, after the Dayton-Agreement came into force, there was and is systematic, long-lasting, purposeful discriminatory practice of the public authorities of RS in order to prevent so-called >minority< returns either through direct

[1] In this respect the situation has slightly changed following the decision of the Court. In the new RS government there is one Bosniac minister.

> participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation or violent attacks solely on the ground of ethnic origin, let alone the failure "to create the necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration" which follows from the right of all refugees and displaced persons freely to return to their homes of origin according to Article II.5 of the Constitution of BiH. …"

8. An approach purely based on the text of the Constitution seems therefore clearly insufficient, especially in the light of the Court's comments in para. 81:

> "81. In the final analysis, all public authorities in BiH have not only to refrain from any act of discrimination in the enjoyment of the individual rights and freedoms referred to, in particular on the ground of national origin, but also a positive obligation to protect against discriminatory acts of private individuals and, with regard to refugees and displaced persons, to create the necessary political, social and economic conditions for their harmonious reintegration."

The authorities of Republika Srpska will have to take clear and firm action to end this pattern of discriminatory behaviour and create the necessary conditions for the reintegration of the refugees and the High Representative will have to take the necessary steps if they fail to do so. It will not be sufficient to abrogate discriminatory and obviously unconstitutional legislation such as the article of the Law on the Senate of Republika Srpska providing that only ethnic Serbs may be appointed to the Senate.

11. Much more important will be practical steps to ensure that throughout the Republic people receive equal treatment regardless of ethnic origin. Having regard to the present situation of generalised discriminatory behaviour as noted by the Court, in addition a provision should be inserted into the Constitution imposing on the authorities a positive obligation to stop such treatment. A possible wording of such a provision is the proposed Article 5 section 2 in the report of the Task Force.

12. It is not up to the Venice Commission to provide more details on the further steps to be taken to remedy the present situation. A possible measure would be the setting-up of a Constitutional Commission as suggested by the Task Force following an innovative decision of the High Representative.

c) At the level of the Federation

13. For the Federation the implications of the decision for the text of the Constitution are far more important. According to the Constitution, the posts in the Presidency, the government and the upper house of parliament as well as partly in the cantons are to be divided between Bosniacs and Croats with some places for the Others. This system may not be maintained since according to the decision of the Court the three constituent peoples must first of all enjoy equal rights throughout Bosnia and Herzegovina.

14. One possible way to implement the decision would therefore seem to make the Serbs the third constituent people of the Federation and to extend the privileges hitherto enjoyed by Bosniacs and Croats to the Serbs. This approach seems to be favoured by some politicians in the Federation.

15. For a number of reasons the Commission considers that this is not an appropriate way of implementing the decision:

a) Dividing the positions of responsibility between the representatives of the three constituent peoples entails a serious risk of discriminating against Others by excluding them from such posts. The decision of the Court strongly emphasises the need to avoid any discrimination. While it does not object to a preferential treatment of minorities or weaker groups, it takes a clear position against rules favouring the groups which are already dominant (see in particular para. 112[2]).

b) If one tried to avoid this obstacle by granting positions also to the Others, this would increase the conflicts with the democratic principle. In a democracy parliament should reflect the population and government be based on the will of the people expressed in elections. To allocate the seats between various ethnic groups risks setting up institutions which are not based on the will of the people. While some preferential treatment of minorities is unobjectionable, rules providing for example that a group constituting the absolute majority of the population may have only one fourth of the posts appear undemocratic.

c) The system of allocating posts between people coming from the various ethnic groups used both at the level of the State and the Federation has hitherto not produced good results. The institutions work so badly that this has become a major obstacle to be surmounted on the way towards Council of Europe accession and the system seems to have cemented the antagonism between the various groups instead of inducing them to co-operate.

d) An important part of the present system are veto rights of the two constituent peoples. Extending these veto rights to more groups would risk further blocking the decision-making process. It would also go against the decision of the Court which in its para. 55 warns against the undemocratic character of such vetoes and underlines the need for all groups to accept compromise.

e) The decision of the Court, in particular in its para. 68, treats the institutional arrangements at the level of Bosnia and Herzegovina with their allocation of seats between the three constituent peoples as an exceptional case only justifiable to the extent it has a clear basis in the Constitution of Bosnia and Herzegovina. To fully extend this system to the Federation clearly does not correspond to the intent of the Court.

16. The obvious alternative to the extension of special rights to the Serbs and perhaps the Others would be to completely abolish such special group rights altogether and to give equal rights to all citizens. This would correspond to the practice in many European countries and avoid the problems set out above.

17. For a number of reasons the Commission nevertheless doubts whether such a pure citizens approach is adequate under present conditions in Bosnia and Herzegovina:

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[2] "The provisions of the Federation Constitution providing for minimum or proportional representation and veto powers for certain groups do certainly constitute a 'preference' in the sense of Article 5 of the Race Discrimination Convention. However, insofar as they create preferential treatment in particular for members of the two constituent peoples, they cannot be legitimised under Article 1 paragraph 4 since these 'special measures' are certainly not 'taken for the sole purpose of securing adequate advancement of Bosniacs or Croats 'requiring such protection' in order to ensure the equal enjoyment of rights."

a) In a multi-ethnic country such an approach risks being prejudicial to the interests of minorities who may simply be outvoted. If politics is based largely on ethnicity, the minority groups risk being completely excluded from power.
b) This risk is far from theoretical in Bosnia and Herzegovina where the various groups have not yet learnt to work together constructively and where there is a mentality of "them" against "us". The situation in Republika Srpska described above, where there is a Constitution based on an ethnically neutral approach and at the same time generalised discrimination, shows the inadequacy of such a model in Bosnia and Herzegovina.
c) Bosnia and Herzegovina, according to its Constitution, has three constituent peoples but only two Entities. The Croats as the smaller of the present two constituent people in the Federation would risk losing any influence within the Federation. The possible consequence would be a withdrawal of the Croats into the Croat-majority Cantons- in other words, increased division along ethnic lines- and a weakening of the Federation.
d) The Court in its decision, specifically in para. 56, acknowledges the need to take into account the multi-ethnic reality in Bosnia and Herzegovina including by the granting of group rights.
e) For the moment such a complete switch of the constitutional approach seems not to reflect the wish of the population, especially not of the non-majority groups.

18. It therefore seems necessary to adopt a balanced and pragmatic approach, taking into account on the one hand the multi-ethnic reality of Bosnia and the persistent lack of trust between the various parts of the population while on the other hand avoiding discrimination against any group, in particular the weakest ones, the blocking of decision-making and the setting up of institutions on the basis of artificial ethnic quotas instead of the democratic will.

19. Such a solution could contain the following elements:

a) The present provisions distributing posts between Bosniacs and Croats could be replaced by provisions avoiding the monopolisation of positions by the dominant group such as "if the President comes from one group, the Vice-President has to come from another" or "not more than half of the members of government may come from one group".
b) The House of Peoples is already now elected on the basis of representation in the cantons but with special privileges for Bosniacs and Croats. If the members of this House continue to be elected on a cantonal basis without specific ethnic reference, this should be sufficient to mirror the diversity of the population of the Federation.
c) The Articles in the Constitution requiring consent by a majority of the Bosniac and of the Croat delegates could be replaced by a special majority such as two-thirds.
d) It should not create great difficulties to abandon the vital interest veto at the governmental level. For the veto within the House of Peoples, a different solution should be found. Either there could be a veto right of a number of cantonal delegations or the initiative of the High Representative to set up constitutional commissions with this task could be taken up.

V. Conclusions

20. The Commission considers that the decision of the Constitutional Court provides an opportunity to ensure the full protection of the rights of all citizens of Bosnia and Herzegovina throughout both Entities and for the full participation of citizens of any ethnic origin in the political life of both Entities. In Republika Srpska the implementation will have to focus on

legislative and practical measures to advance the rights and interests of the non-Serb population. In the Federation, where the Constitution contains a significant number of provisions drafted in ethnic terms, the Constitution will have to be redrafted and the privileges of the two constituent peoples will have to be replaced by more neutral formulations.

21. As regards the details of implementation, the Commission refers to the report of the Task Force (CDL (2001) 23). The Commission was associated with its preparation and its conclusions reflect the point of view taken by the institutions of the international community involved in this issue.