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Strengthening of democratic institutions in Bosnia and Herzegovina

Report
Political Affairs Committee
Rapporteur: Mr Evgeni Kirilov, Bulgaria, Socialist Group

Summary

The report welcomes the progress in building democratic institutions in Bosnia and Herzegovina but observes that this process is still very slow and meets with difficulties.

The Rapporteur considers that one of the causes of these difficulties is the institutional system which is based on the Dayton Agreements and that a constitutional reform is necessary, whilst underlining that it remains the remit of the Bosnians to establish the timetable and parameters of such a constitutional reform.

He remains nevertheless convinced that the current Constitution is not an insurmountable obstacle to implementing reforms, on condition that the political forces of the country undertake them. The draft resolution calls on them to demonstrate their political maturity and to concentrate on the country's real problems.

The draft resolution also calls on the international community to envisage a more coherent and specific strategy for transferring responsibilities to the Bosnians and a gradual withdrawal and asks the Venice Commission to examine the conformity of certain elements of the institutional system of the country with the basic principles of the Council of Europe.

I Draft resolution

1. The Parliamentary Assembly welcomes the undeniable progress in building democratic institutions which has been achieved in Bosnia and Herzegovina since the Dayton Agreements were signed in 1995 and especially since its accession to the Council of Europe in April 2002. A stable, democratic Bosnia and Herzegovina is an important factor of stability for South-East Europe as a whole.

2. However, in its Opinion No. 234 (2002) on Bosnia and Herzegovina's application for membership of the Council of Europe, the Assembly stressed that "the state institutions should be strengthened at the expense of the institutions at Entity level, if need be by a revision of the constitution". In that respect, it observes that the said strengthening is coming about very slowly indeed and essentially under pressure from the international community, in particular through the action of the Office of High Representative (OHR).

3. The constitutional order prescribed by the Dayton Agreements, on which the State institutions are founded, is extremely complicated and contradictory. As the outcome of a political compromise reached in order to end the war, it cannot secure the effective functioning of the State in the long term and should be reformed once national reconciliation has been irreversibly achieved and confidence fully restored.

4. The Assembly is aware that the change in the constitutional framework established by the Dayton Agreements can only take place by consensus among the principal political forces of Bosnia and Herzegovina, both at State and at Entity level.

5. It considers that a constitutional reform must be the subject of a dispassionate political debate and welcomes that this is already beginning within the civil society of Bosnia and Herzegovina.

6. It remains the remit of the Bosnians to establish the timetable, terms and parameters of a constitutional reform. The Assembly is at their disposal to assist in this but wishes to point out that, as a Council of Europe member state, Bosnia and Herzegovina is bound to comply with the Council's fundamental principles.

7. At the same time, the Assembly is convinced that the present Constitution allows progress to be made towards reforms designed to strengthen the institutions. This is appropriately illustrated by the recent creation, at central level, of a Defence Ministry, a move necessitated by the shared aspiration of the political forces for Bosnia and Herzegovina to be integrated into the Partnership for Peace. In this context, the Assembly welcomes the agreement concluded between the political parties in Parliament to carry out the reforms needed to open negotiations aimed at coming to an agreement on stabilisation and associate status with the European Union.

8. At the same time, major political forces, while proclaiming their commitment to European integration, remain hesitant in striving for a stronger, united Bosnia and Herzegovina and still see the assurance of their future in maintenance of the present State structure. The Assembly reiterates that the right path to Europe is by way of unity in diversity, not division and excessive nationalism.

9. The Assembly deplores the fact that several institutions put in place at central level are struggling to become fully operational because of a shortfall in human and financial resources made available to them, detracting from their effectiveness and credibility. It considers that the political decision-makers at Entity level who command the funding of the State institutions should have more say in structuring the policies at central level.

10. The implementation of the reforms is also hampered by the lengthy procedures for the appointment to positions of responsibility, bearing in mind the need to ensure proper regard for balance between the representatives of the three constituent peoples. The Assembly fully appreciates the sensitivity of the issues relating to ethnic balance within the institutions but stresses that it cannot constitute the prime – or indeed the single – component of the political process. The common interest of the people of Bosnia and Herzegovina must come before any factional or community concerns.

11. The future of Bosnia and Herzegovina belongs to its people who, via its elected representatives, must at last shoulder responsibility for its destiny.

12. The Assembly calls on

- i. the political forces of Bosnia and Herzegovina to:
 - a. increase their efforts to achieve a broad political consensus in favour of establishing, reinforcing and ensuring the efficient functioning of the State institutions;
 - b. demonstrate their political maturity and concentrate on the country's real problems, while avoiding any potential obstacles to the political process provided by the current institutional system;
 - c. become fully and constructively involved in the debate on the need for constitutional reform and its timing and parameters;
 - d. pay special attention to the need to ensure that any future Constitution brings the concept of "constituent peoples" and their specific rights into line with the principle of the primacy of individual rights;
- ii. the international community to:
 - a. place greater trust in the political leaders of Bosnia and Herzegovina, while continuing to support the reforms, and restrict any direct intervention to cases of strict necessity;
 - b. envisage a more coherent and specific strategy for transferring responsibilities and gradually withdrawing the OHR.

13. The scope of the OHR is such that, to all intents and purposes, it constitutes the supreme institution vested with power in Bosnia and Herzegovina. In this connection, the Assembly considers it irreconcilable with democratic principles that the OHR should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal remedy. The Assembly asks the Venice Commission to determine how far these practices comply with Council of Europe basic principles, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Explanatory memorandum

Introduction

1. The motion for an order tabled in March 2003 by Mr Jakic, Chairman of the Political Affairs Committee, and others asked that the competent Assembly committee submit a report on the difficulties encountered in establishing democratic institutions in Bosnia and Herzegovina. The preparation of this report was entrusted to the Political Affairs Committee.

2. In May 2003 that committee, in co-operation with Bosnia and Herzegovina's delegation to the Parliamentary Assembly, held a colloquy in Sarajevo entitled "Bosnia and Herzegovina on the road to European integration". That colloquy, which marked the first anniversary of the country's accession to the Council of Europe, provided an excellent opportunity for frank, open discussion of the problems arising in the democratisation process. This report is based on the proceedings of the colloquy.¹

3. To update his preliminary conclusions, the rapporteur made a study visit to Bosnia and Herzegovina in March 2004. He wishes to thank the country's authorities, in particular the delegation to the Assembly and its outgoing Chairman, Mr Muratovic, and Ms Sonja Moser-Starrach, Special Representative of the Secretary General of the Council of Europe, for organising this visit.

4. The rapporteur wishes to point out that the Assembly is monitoring the situation in Bosnia and Herzegovina as part of the procedure to verify that the country is honouring its commitments, some of which are relevant to the proper functioning of state institutions. The Monitoring Committee's first report should be submitted to the Assembly at the same time as this report, with a view to holding a joint debate on both reports.

5. In their report the Monitoring Committee's rapporteurs, Ms Shakhtakhtinskaya and Mr Surjan, who was moreover the author of the Political Affairs Committee's report on Bosnia and Herzegovina's accession to the Council of Europe, paint a sufficiently detailed picture of the country's current circumstances, highlighting its particularities - and hence those of the monitoring procedure concerning it - compared with other Council of Europe member states. To avoid unnecessary repetitions, your Rapporteur has chosen to focus on analysing the difficulties facing the country's institutions.

6. Those difficulties can be summarised as follows:

a. the Constitution and allocation of responsibilities between the state and the entities prevent the effective functioning of the state institutions;

b. even where the Constitution poses no obstacle to reform, the reform process is hindered by a lack of political will and by "ethnocratic" considerations;

c. the international community, especially the Office of the High Representative (OHR), too frequently acts in place of the country's political institutions, which discourages political initiative and endeavour.

Bosnia and Herzegovina, a country subject to numerous transitions

7. Bosnia and Herzegovina's accession in April 2002 was undoubtedly one of the greatest challenges ever faced by the Council of Europe. It was the country most scarred, divided and devastated by the war which followed the break-up of former Yugoslavia, and it was put together again thanks to the international community's efforts. On its journey from the past to the future, the country has undergone a number of transitions - from totalitarianism to democracy, from a planned economy - moreover one destroyed by war - to a free-market economy, from inter-ethnic hatred to reconciliation. The Council of Europe was duty-bound to assist Bosnia and Herzegovina with these many transition processes.

¹ Cf. the summary of the proceedings, document AS/POL/SAR (2003) 03.

8. Bosnia and Herzegovina holds a key position in the Balkans. The country's stability and democratisation are of prime importance not only to its own people, but also to neighbouring states and the entire region of South-East Europe beyond its borders.

The Constitution - a source of institutional contradictions

9. Bosnia and Herzegovina, as it stands at present, is the outcome of the Dayton peace agreements, the result of a political compromise negotiated between the former belligerents so as to end the war. The state's structure, which was designed with a view to enabling former enemies to live side by side, reflects the balance of strengths in the conflict and the realities of the war.

10. The Constitution, which is part of the Dayton Agreements (forming Appendix 4 thereto), accordingly contains many contradictions and impediments to the country's transformation into a "normal" state.

11. It in fact combines features typical of a federation with some more characteristic of a confederation. Among the "federation style" elements mention can be made of the continuity of Bosnia and Herzegovina's legal existence under international law within its recognised borders, its membership of the United Nations and other international organisations, the supremacy of the Constitution over all other laws and the existence of the Constitutional Court as the institution responsible for guaranteeing that supremacy.

12. At the same time, the elements of a "confederative" nature, in particular the legal existence of the entities (the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS)), the fact that they are partly treated as subjects of international law (e.g. their capacity to conclude international agreements), dual citizenship of the state and an entity and the provision whereby all powers not expressly assigned to Bosnia and Herzegovina belong to the entities, have the effect of weakening the state in relation to the entities. Moreover, the entities have constitutional weapons that enable them to block the decision-making process in the common institutions, which are moreover fully dependent on the entities for their revenue.

13. The second contradiction inherent in the Constitution is the antithesis between democracy and what some experts term "ethnocracy". Although individual freedoms and equality between citizens are guaranteed, some institutional mechanisms are based on separate representation of ethnic groups. The fundamental principle legitimating state authority is protection of the interests of the "constituent peoples" (the Bosnians, the Serbs and the Croats), rather than of common interests. This contradiction is the main reason for political obstruction and, consequently, for the common institutions' ineffectiveness.

14. As rapporteur, I moreover wonder to what extent the principle that the rights of the "constituent peoples" take precedence over those of "others", such as members of minority ethnic groups or people who merely do not wish to be categorised in one of the three constituent groups, is compatible with fundamental democratic standards.

15. Mention should also be made of the essential contradiction between the state's sovereignty and the authority exercised by the international community. Under the terms of the Dayton Agreements, which were further reinforced in 1997 ("the Bonn powers"), the international community, through the Office of the High Representative (OHR), exercises legislative, executive and even judicial powers, interfering in the functioning of institutions at both state and entity level, and even supplanting those institutions. This situation, which is unique among Council of Europe member states, gives some people a reason to describe Bosnia and Herzegovina as a "semi-protectorate".

16. The weakness of the central state and its institutions is accordingly a direct, unavoidable consequence of the constitutional and political system established by the Dayton Agreements, which in fact endorse the ethnic and political division ensuing from the war.

The need for constitutional reform

17. Far-reaching constitutional reform is accordingly necessary to guarantee that Bosnia and Herzegovina will evolve into a fully sovereign state, governed by the rule of law and respect for human rights and endowed with effective institutions at all levels.

18. Nonetheless, the present constitution forms the basis for the country's very existence and has so far enabled the restoration of peace, reconciliation and renewed trust between the ethnic groups. A hasty substantive reform of the basic Dayton principles, in particular the rights of the "constituent peoples", would risk jeopardising the balance of power and the country's newly regained stability, which is still fragile.

19. Any constitutional reform should accordingly be approached with the greatest caution and necessitates the broadest possible consensus among the country's political forces.

20. In this connection, it is to be mentioned that the idea of constitutional reform and, in general, institutional reorganisation at both state and entity level is increasingly a subject of debate in various circles within Bosnia and Herzegovina, particularly within the academic and expert communities. However, most of the political representatives whom your Rapporteur has met seem to prefer to remain silent on the subject and consider that the time is not yet ripe to discuss it.

21. The political forces' reluctance to engage a public debate on constitutional reform is understandable. In a country where the scars of war are not yet fully healed and which remains in a fragile balance, any proposal regarded as too radical can backfire on its author, costing him or her the support of his or her electorate, in other words his or her "constituent people". At the same time, there is no way that an agreement on amending fundamental constitutional principles can be reached without the support of the three "constituent peoples".

22. Nonetheless, by not taking part in a political debate on problems of key importance to the country's future, the political forces run the risk of surrendering their leadership and being sidelined.

Progressing within the current constitutional framework

23. There is apparently a wide-ranging consensus among all the political forces in Bosnia and Herzegovina that the country's future lies in membership of the Euro-Atlantic organisations. This consensus should be transformed into active backing for the reforms needed to prepare the country for the different stages of the integration process.

24. In this connection, I can but welcome two positive developments, the creation of a Ministry of Defence at state level and the signature of an agreement between the political parties in favour of supporting the reforms necessary for opening negotiations on a stabilisation and association agreement with the EU.

25. The establishment of a defence ministry, a state institution not provided for in the Dayton Agreements, is a good example of the progress that can be made with reforms even within the existing constitutional framework. However, such progress requires the genuine joint will of all the main political players, and hence convergence of their interests. In practice, most of the country's political forces prioritise the perceived interests of the ethnic group they represent over the general interests of the state and the people of Bosnia and Herzegovina.

26. It must also be said that an official decision to create a new institution at state level does not necessarily mean that that institution will be effective. In actual fact, the success of the state institutions depends on the real backing they receive from decision-makers at entity level and on the material and human resources allocated to them.

27. The need to strike a balance among representatives of the three "constituent peoples" when making appointments to positions of responsibility within the common institutions renders the appointments process extremely complex, sensitive and slow, and deadlocks are often the result. Since all appointments involve political bargaining, it is no surprise to hear people say that the entire political process in Bosnia and Herzegovina comes down to haggling over distribution of posts.

28. Although your Rapporteur is aware that the issue of ethnic balance is of major importance in a country very recently prey to an inter-ethnic conflict, he nonetheless believes that too much attention is paid to this matter, particularly in view of the challenges the country must take up. Furthermore, this principle merely sustains and deepens the country's division along ethnic lines.

29. It is clear that nationalism is still a strong political tactic that can easily be played and that wins votes, above all in the context of Bosnia and Herzegovina.

30. However, as long as each political group's prime objective is to safeguard the interests of the ethnic community it represents, the central state will bear the consequences and its institutions will remain ineffective.

The role of the international community

31. Since the signature of the Dayton Agreements the international community has played a crucial role in building the new Bosnia and Herzegovina. The progress that has been made is largely due to the efforts of the various international organisations operating within the country, first and foremost the Office of the High Representative (OHR), which is responsible for enforcing the Dayton Agreements and enjoys very wide-ranging powers, both "positive" (law-making) and "negative" (suspension and even dismissal of officials at various levels).

32. Given the institutions' weakness and local politicians' insufficient commitment, the OHR has often been obliged to impose decisions with binding force on both the state and the entities.

33. Most politicians in Bosnia and Herzegovina acknowledge that the energetic, often interventionist, action taken by the OHR was essential to the reform process, especially initially. It has played a vital role in establishing the institutional system provided for in the Dayton Agreements. However, criticism of its role and powers is growing, since, by imposing decisions, it takes the place of the country's own institutions.

34. There was every justification for the extraordinary powers vested in the OHR when the country was emerging from a state of war. The extent, and above all the exceptional nature, of those powers are becoming far less justifiable and more open to challenge as time goes by and the country's situation is no longer so out-of-the-ordinary.

35. The imposition of legislative decisions, which the parliaments at state and entity level are required to make into laws without being able to amend them, causes demotivation and takes responsibility away from the country's politicians and political institutions. It is particularly frustrating for those holding political office to see the results of their work rejected by a foreign institution, and it is very harmful for an elected assembly to be confined to the role of a machine for passing legislation not of its own making. What is more, these powers give the country's political forces an excellent excuse for doing nothing.

36. It should be noted that those in charge of the OHR, beginning with the High Representative himself, appear to be fully aware of the need to hand over full powers to the national authorities as soon as the country's institutions are capable of taking charge and of making rapid advances on the reforms front.

37. In this connection, it is to be welcomed that the trend in relations between the OHR and the institutions at state and entity level is now towards cooperation within joint committees. This enables involvement of elected representatives in the drafting of legislation and thus prepares them to take over responsibility for the country's future.

38. Mention must also be made of the High Representative's authority to dismiss public officials, whether elected or appointed, at all levels and in all branches of power if he considers that their activities are in breach of the Dayton Agreements. Dismissal goes hand in hand with a ban on holding another public office and with freezing of the assets of the person concerned. The High Representative is not obliged to show that the decision is founded, not does any appeal lie against it, since the Constitutional Court has held that it has no jurisdiction in such matters.

39. Your Rapporteur believes that such powers run counter to the basic principles of democracy and are reminiscent of a totalitarian regime. Their use, no matter how seemingly justifiable on public interest grounds, has an extremely harmful effect on the democratisation process in Bosnia and Herzegovina, since it causes feelings of injustice and undermines the credibility of democratic institutions and mechanisms.

40. In this respect, it should be recalled that the rights of the people of Bosnia and Herzegovina are protected by the European Convention on Human Rights. The OHR, which is in point of fact the supreme power within the country, must abide by the convention. Those removed from office in such a manner should have a right of appeal on both the merits and the procedure. Moreover, it would be advisable to request an opinion from the Venice Commission as to whether these powers enjoyed by the High Representative are consistent with the principles of the ECHR.

Conclusions

41. All political forces in Bosnia and Herzegovina and the country's civil society share the same vision of its future as a member of the Euro-Atlantic organisations, above all the European Union and NATO.

42. However, this consensus has yet to be translated into country-wide practical efforts to establish fully operational, effective, unified institutions. The logic of division on an ethnic basis must be overcome.

43. The Dayton Agreements were intended to bring peace and to lay the foundations of a new Bosnia and Herzegovina. Certain aspects of those agreements hamper the development of the country's institutions and should be reviewed.

44. However, political reform can be speeded up even within the current institutional framework, provided that a strong political will exists.

45. The international community must continue to support the institution-building process, but the country's political leaders must assume their responsibility for the future of Bosnia and Herzegovina.

Reporting Committee: Political Affairs Committee.

Reference to Committee: Doc. 9739, Reference 2822 of 31.03.03

Draft Resolution unanimously adopted by the Committee on 25 May 2004

Members of the Committee: Jakic (Chairman), Margelov (Vice-Chairman), Spindelegger (Vice-Chairman), Ates (Vice-Chairman), Aguiar, Akhvlediani, de Aristegui, Arzilli, Atkinson, Azzolini, Banáš, Berceanu, Bianco, Blankenborg, van den Brande, Cekuolis, Davern, Dreyfus-Schmidt, Druvieta, Duivesteijn, Durrieu, Elo, Glesener, Goulet, Gross, Hedrich, Henry, Hörster, Iwinski, Jahic, Jovašević, Judd, Kalezic, Karpov, Klich, Koçi, Kosachev (*alternate: Kolesnikov*), Kostenko, Lindblad, van der Linden, Lloyd, Loutfi (*alternate: Kirilov*), Magnusson, Martinez-Casan, Marty, Matušic (*alternate: Jurica*), Medeiros Ferreira, Meimarakis, Mercan, Mignon, Mihkelson (*alternate: Herkel*), Narochnitskaya (*alternate: Umakhanov*), Nemcova, Nemeth, Oliynyk, Ouzky, Pangalos, Petrova-Mitevská, Petursdottir, Pintat Rossell, Pourgourides, Prentice, Prijmireanu, Prisacaru, de Puig, Pullicino Orlando, Ranieri, Roth, Severin, Severinsen, Seyidov, Slutsky, Tabajdi, Tekelioglu, Torosyan, Toshev, Tritz, Vakilov, Wielowieyski, Wohlwend, Wurm, Zacchera.

Ex-officio: Davis, Eörsi, Einarsson, Russell-Johnston

N.B. : The names of the members who took part in the meeting are printed in italics

Head of the Secretariat : Mr Perin

Secretaries to the Committee: Mrs Ruotanen, Mr Chevtchenko, Mr Dossow