

THIRD PARTIAL DECISION OF THE CONSTITUTIONAL COURT OF B&H ABOUT CONSTITUTIONALITY OF PEOPLES IN BOSNIA AND HERZEGOVINA

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ABSTRACT

Constitutionality of the peoples is one of the most frequent terms used in the post - Dayton era of B&H state functioning. The specificity of the existence of constituent binds to B&H and its complex constitutional organization, because the comparative law knows no such terminology. In the political sphere it was first mentioned in the process of dissolution of Yugoslavia, and in the constitutional order of B&H enters through the Constitution of the FB&H, and Constitution of B&H. Following the adoption of the Constitution set the important question of the importance of constituent peoples in terms of whether it is a collective right to a certain cooperation or equal to the concept of sovereignty, and that it applies only to representation in state government at the state level and throughout Bosnia and Herzegovina. This is driven by the various discussions which are usually given to political connotations. The best answer to such questions is given by the Constitutional Court through the third partial Decision on Constituent Peoples, through which prism we look the meaning of the constituent peoples in B&H.

Key words: constitution, constituent peoples, entities, segregation

INTRODUCTION TO THE TERM AND EVOLUTION OF IDEA ABOUT CONSTITUTIONALITY OF PEOPLES IN BOSNIA AND HERZEGOVINA

The word constitutive comes from the Latin term „constituo“ which „as a noun means place, order and as a verb to set, to order, to place, to found (www.rjecnik.ba). From the Latin term constituo as a term of a word is derived the English word constitution. The term constituent people could be etimologically understood as „people who make constitution“. The term constituency as an official term did not have a particular meaning in Yugoslavia, until the beginning of its dissolution. In that time it started to speak more seriously about it and the term throw the political sphere slowly enters into a sphere of constitutional

law. As for Bosnia and Herzegovina (further B&H), in fact the beginning of the content of constituency has already been determined by the decision of the First session of ZAVNOBIH (in a specific way when it said that B&H is neither Serbian, Croatian nor Muslim, but it is also Serbian, Muslim and Croatian), and AVNOJ, and subsequently by the Constitution of Yugoslavia and Socialist Republic of Bosnia and Herzegovina, firstly through the national participation in the government, even though we can not observe constituency just as a single distribution of power. However, the certain categories of constituency existed in practice for many years, this term „was not used explicitly in the constitutional documents up to the Washington Agreement and Constitution of Federation of Bosnia and Herzegovina (further FB&H) from March 1994“ (Trnka, 2000, p. 30).

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It is interesting that it has been used in all failed peace plans for BiH during 1992-1994. However, with the Dayton peace Agreement, constituency will officially get the status of constitutional category in the whole B&H.

Very important is the fact that constituency as a term enters into the domestic political – legal theory through the International community and Arbitration Committee of the Peace Conference for Yugoslavia which were answering the question „Do Serb population in Croatia and B&H, as one of the constituent peoples of Yugoslavia, the right to self-determination up to secession?“.

Arbitration Committee was giving advisory opinions based on the highest legal regulations of Yugoslavia and norms of international law. The basis for this opinion was Constitution of Yugoslavia adopted 21.02.1974. Arbitration Committee has carried out a proper conclusion, that constituent peoples are not sovereign, so they do not have the right to self-determination as a consequence of sovereignty but the right to a special collective recognition and protection. In that case the Arbitration Committee, was confronted with the multi-ethnic community such as B&H, and the issue of civil and national model, acknowledged special collective rights, in the foreground put the civil principle².

The situation changed radically with adoption of the Constitution of B&H in 1995 which put the national concept into foreground contrary to the Arbitration Committee opinion. Since the time of Yugoslavia dissolution, the question of the relationship of civil and national model sets an extraordinary border of the successful development of B&H. The worst situation for B&H is radicalization one or the other model, because the successful way to democratic development of B&H can be only through equality and protection of fundamental human rights and freedom of all the citizens and people of B&H across the entire territory.

CONSTITUTIONAL FOUNDATION OF A TERM CONSTITUENT PEOPLES

Constituency of peoples enters into the constitutional legal frameworks in B&H with the signing of the Washington Agreement respectively establishment of the FB&H and adoption of the Constitution of FB&H. As a model it is also adopted in the Constitution of B&H in a way that last decree in preamble says „Bosnians, Croats and Serbs, as constituent peoples (together with Others), and citizens of Bosnia and Herzegovina resolves that Constitution of Bosnia and Herzegovina is as follows“. We could say that the Constitution of B&H took same of the basics consociational democracy that includes functioning of the state to the full fulfilment of certain conditions³. Through entity (and cantonal organization) maximum protection of three Bosnian collectives is ensured. Then it was a good peace, and established the basic elements necessary for progress of B&H through the democratization and the access to European integration. So therefore in Article 2 Paragraph 2 of the Constitution of B&H prescribed „In B&H rights and freedoms will be directly implemented, declared in European Convention for the Protection of Human Rights and Fundamental Freedoms as well as in its Protocols. This will have priority over all other laws“. Especially important are additional agreements on Human Rights which will be applied in B&H⁴.

After adoption of the Constitution of B&H, the question was raised – what the term constituent peoples mean, is it right to a collectivity to a certain cooperation or it is equal with the concept of sovereignty, and therefore applied to representation in the state government at the state level or to the whole country etc.

²In its opinion number 4 from 11.01.1992. (conditions for recognition of B&H) Arbitration Committee declares among all that „above mentioned declarations and commitments comes from the Presidency and Government of B&H, and that Serbian members of Presidency did not join above mentioned commitments. In such circumstances Arbitration Committee considers expression of the will of citizens of B&H that SRB&H constitutes as sovereign and independent country can not be considered totally justified. That evaluation could be changed if in that case republic which formulated the request for recognition gave guarantees, eventually through the referendum of all B&H citizens would be invited without difference and under the international control“. Available on www.pescanik.net 28.08.2011.

³Arend Lijphart considered that plural or divided societies could function only if four basic conditions should be fulfilled: 1. the big coalition, 2. principle of veto, 3. proportionality, 4. high level of independency; see detail in Arend Lijphart, *Democracy in Plural Societies*, Zagreb 1992.

⁴Annex I to the Constitution of B&H consist 14 such agreements

DETERMINATION THE PEOPLES RIGHT TO CONSTITUTIONALITY WITH REGARD TO THE DECISION OF THE CONSTITUTIONAL COURT OF B&H.

The necessity of the Constitutional Court decision

The General Framework Agreement for Peace in B&H is aimed to stop the war and ensure peace and stability in B&H, which was achieved. It set an important foundations of democratic development of B&H which are secured by establishing democratic institutions of government and the obligation to respect the international standards regarding the protection of fundamental human rights and freedoms.

The international community during the peace negotiations, and also during the whole war in the some way watched „all the sides in war“. Because of this kind of approach and need to satisfy all in a certain way, it led to a numeruos compromises that paralyzed the country and obstruct, first of all, an individual abstract B&H citizens protection of its fundamental human rights and freedoms, becaues of that „Constitution of B&H is probably the only valid constitution in the world, that at the same time prohibits and presenbes (allow) discrimination (Porobić, 2005, pp. 37-39). The Constitution of B&H has set a good graund that alows democratic forces and ideas that with procedures prescribed by the Constutition, i.e agreement or consenzus change and build up the constitutional order of B&H.

„It is undersstundable that in a post - conflict situation there was (and there is) not enough trust between ethnic groups to allow that government only works on the principle of majority. In such situation the specific ways of pretection has to be found to ensure that all major groups, in BiH that are constituent peoples, can accept the constitutional rules and feel protected by them“⁵.

„Accordingly to the extend neccesity to protect specifity of one of the groups (its identity) to the extend of civil concept of the state should give in back“ (Ademović, 2006, p. 236). But now we see that the protection of collectivity is euphasized to much and thus largely threatens the rights of individuals and minority national groups, but also paralyzes functioning of the state government.

Presentation of Third Partial Decision of the Constitutional Court number U-5/98⁶

Constitution of B&H in a Article 12 Paragraph 2 prescribed „within three months from the proclamation of this Constitution, the Entities will make changes of its constitutions in order to adjust with this Constitution in accordance with Article 3(3) b“⁷. This kind of constitutional „regulation chorly shows that the constitutions of the entities, including their total legal order been accepted with the Peace Agreement only to the extend that they are consistent with the Constitution of B&H“ (Trnka, 2000, p. 78).

„Entities are only partially and after the set deadline made adjustment of certain regulation of its constitutions with the Constitution of B&H, thus leaving a large number of discrepant regulations of crucial meaning for the achievement of national equality, respecting the human rights and functioning of total law and political system, i.e. consistent implementation of the Dayton Agreement“ (Trnka, 2000, p. 78). The adequate adjustment of the entity's constitutions did not happen, then the Chairman of the Presidency of B&H Alija Izetbegović withe the request from 12.02.1998. (after 2 years from the obligation of constitution adjustment), initiated a procedure to the Constitutional Court of B&H in order to evaluate the consent of the Constitution Serbian Republic and Constitution of the Federation of B&H with the Constitution of B&H.

⁵ Opinion of the Venice Commission (European Commission for Democracy through Law) about the constitutional situation in Bosnia and Herzegovina and the jurisdictions of the High Representative –document CDL-AD (2005) 004 of 11.03.2005. taken from the veredict Sejdic and Finci vs. Bosnia and Herzegovina application number 27996/06 and 34836/06 of 22.12.2009.

⁶(Third) Partial Decision of the Constitutional Court of B&H U-5/98, OG B&H 23/00

⁷Article 12. Paragraph 2. of the Constitution of B&H

The essence of his request⁸, in the part of peoples constituency, was reflecting in the fact that the Serbian Republic (further RS) can not be determined as a national country of just one nation – the Serbian people, because the functioning of RS on the basis of exclusive power precluded the realization of the basic rights of all displaced persons to return to their home and restored the national structure of the population, which was disrupted by the war and ethnic cleansing. The Constitution of the FB&H also can not speak only in case of Bosniacs and Croats as constituent peoples. In this way the entities lead to discrimination of Croats and Bosniacs in RS, and Serbs in FB&H which is contrary to Constitution of B&H according to there are three constituent peoples Bosniacs, Croats and Serbs which together with the others nationalities and citizens achieve its sovereign rights throughout the territory of B&H, without discrimination on any grounds, like for example on ethnic background.

Arguments of the parties⁹ on any issue were apposed. „For and against“ argumentation in fact portrayed the fact that the applicant representatives defended the interests of the state B&H, and its citizens and peoples, while the representatives of the entities were against such attitude, which in their opinion is the impact on entities, their original rights, the government organization and territory, forgetting the fact that entities do not have original jurisdiction, to discriminate individuals and groups, that their territory is created on a genocide and ethnic cleansing etc. The Applicant representative pointed out that „throughout the history of B&H ethnic criteria were never applied to the organization of government structures, nor the national territories were an element of the constitutional order“¹⁰

and that „the statehood of B&H was always based on the equality of nations, religions, cultures and people who traditionally live on this territory“¹¹ and that all three peoples must be constituent throughout the whole territory of B&H because of that. Contrary to that, the expert of the House of Peoples of the Federation stated that „while writing the Washington Treaty and the Constitution of B&H there was no idea to define a third constituent people in Federation, because if someone wanted to establish the status of three constituent peoples in the entities the name Serbian Republic would not be obstacle“¹².

„A representative of the National Assembly of RS in the public hearing stated that, it does not make sense to discuss the constituent status, because it is not established anywhere in the normative part of the Constitution, as a legal principle or norm. Further, a representative of the National Assembly of RS pointed out a rework that in the last line of the Preamble of the Constitution of B&H does not literally stand that Bosniacs, Serbs and Croats are constituent throughout whole territory of B&H. Addition of the term „throughout whole territory“ significantly changes the meaning of entire sentence“¹³.

After decision that the applicant request is admissible and that the court has jurisdiction to decide about a specific question, one of the important questions arose in the process, was the question of importance of Preamble of the Constitution, and that was just because the applicant of the request believed that foundation of the right to constitutionality of Bosniacs, Serbs and Croats throughout whole territory of B&H was determined by the last paragraph of the Preamble of the Constitution of B&H.

⁸Applicant requested to reconsider the following norms of the entities constitutions from the Constitutional Court:

- a) Regarding the Constitution of RS: Preamble; Paragraph 1.; Article 2.; Paragraph 2.; Article 4.; Article 6., Paragraph 2.; Article 7.; Article 28.; Paragraph 4.; Article 44.; Paragraph 2.; Amendment LVII.; Article 58.; Paragraph 1.; Article 68 Line 6.; Article 59.; Article 60.; Article 80 changed by the Amendment XL Line 1.; Article 80 changed by Amendment XL and L Line 2.; Article 98.; Article 138 changed by Amendments LI and LXV
- b) Regarding the Constitution of FB&H: Article I.1.(1).; Article I.6 (1).; Article II.A.5.(c) changed by the Amendment VII.; Article III.1.a.; Article IV.B.7.a and Article IV.B.8

⁹On the public hearing the applicant were represented by Kasim Trnka and expert Džemil Sabrihafović; House of Representatives of Federal Parliament of B&H were represented by Mato Zovko and the expert Ivan Bender; National Assembly of RS were represented by Radomir Lukić and expert Petar Kunić

¹⁰(Third) Partial Decision, (note 5), page 36

¹¹Ibid page 36

¹²Ibid page 37

¹³According to his opinion constituent status of one or two peoples in one of the entities does not mean that they are not constituent in B&H, but on contrary: As long as one of the peoples is constituent in one of the entities, it is constituent on B&H at the same time, because the B&H territory is made of entities.

(Third) Partial decision (note 5) page 15.

In contrary to that „the representatives of the RS National Assembly pointed out that this example is the only exception to the general rule that the preamble is not part of the constitution, because the French Constitution contains no regulations on human rights and freedoms in the normative part of the Constitution and its preamble, referring to the French Declaration of the Rights of Human and Citizens, incorporates this regulations into the Constitution. Preamble of the Constitution of B&H therefore neither in form or content would not fulfill the requirement of legal norms, so therefore could never be used as constitutional basis for reviewing the entity's constitution“¹⁵. Because of that the Preamble of the Constitution of RS is not an operative part of the constitution and has no normative character. The same applies for the Preamble of the Constitution.

The Constitutional Court decided that the Preamble of the Constitution of B&H must be considered as an integral part of the Constitution for the following reasons. Unlike the constitution of many other countries, the Constitution of B&H in Annex IV of the Dayton Agreement is an integral part of an international agreement. Therefore Article 31 of the Vienna Convention on the treaty law, which establishes a general principle of international law, and those principles are according to Article III/3 (b) of the Constitution of B&H „is an integral part of legal order of B&H and the entities and must be applied in the interpretation of all its regulations including the Constitution of B&H“¹⁶. According to the formulation taken from the Article 31 paragraph 2 of the Vienna Convention the text that is being interpreted includes preamble and annexes. The same is implied for the Preamble of the Constitution of RS, but for another reason: the text of the Preamble of the Constitution of RS is modified by Amendments XXVI and LIV („The Official Gazette of RS“ no 28/94 and 21/96) in which *expressis verbis*

states that „these amendments are an integral part of the Constitution of RS...“¹⁷

The Constitutional Court referred to the decision of the Supreme Court of Canada¹⁸, which found that „these constitutional principles support and sustain the constitutional text: they are the vital unstated assumptions upon the text is based on. Even though these fundamental principles are not explicitly included into the Constitution by any written regulation, except in some aspects of the indirect reference in the preamble to the Constitution Act, it would be impossible to imagine our constitutional structure without them. The principles dictate main elements of the architecture of the Constitution itself, and as much as his Life Blood. The principles help in the interpretation of the text and description of spheres jurisdiction, the reach of rights and obligations and role of our political institutions“. Thus „the principles are not purely descriptive, but also contain a powerful normative force, and are obligatory both courts and governments“¹⁹. „Since any regulation of an entity's constitution must be consistent with the Constitution of B&H including the Preamble of this constitution, the regulations of the Preamble provide the legal basis for reviewing all normative acts of a lower status respectively to the Constitution of B&H as long as the mentioned preamble contains constitutional principles which according to the Canadian Supreme Court, describe obligations, or the role of political institutions“²⁰. The Court evaluates that the regulations of the preamble represent a proper standard for judicial control of the Constitutional Court regarding that they are not just declarative, but they were given a „powerful normative force“²¹.

Deciding upon the request of the applicant which considers that the RS can not be denated just as a country of Serbian people, nor that just Bosniacs and Croats in the Federation should be constitutive.

¹⁵Ibid page 15.

¹⁶Article 31. General Rule of Interpretation

1. The contract must be interpreted in good will according to the general sense which must be given in the terms of contract and their context on the basis of its case and its goal
2. In the case of contract interpretation, context considers, beside the text introduction and included additions:
 - a) each agreement connected with the contract which exist between the members during the contract signing;
 - b) each instruments which is made of one or more members during the contract signing which is accepted by other members regarding to the contract instruments.

¹⁷(Third) Partial Decision (note 5) page 20.

¹⁸Case „Reference re Secession of Quebec“ (1998) 2 S.C.R. paragraphs 49-54

¹⁹(Third) Partial Decision (note 5) page 23.

²⁰Ibid page 26.

²¹Ibid page 26.

The Court stated that „in the Constitution of B&H there are no definition of a term a constituent people and that the last line of the Preamble does not include the phrase *expressis verbis* „through the whole territory“²² but despite the fact that the language of the Preamble of the Constitution of B&H is undefined because of this lack of definition of the status of Bosniacs, Croats and Serbs as constituent peoples it clearly marks them all as constituent peoples i.e. as nations“²³.

Attitudes that lead to segregation predict that peoples are constituent, but Serbs in the RS, and the Bosniacs and Croats in the FB&H. Parity participation in the institutions of B&H satisfies the principle of equality of nations because peoples can be equal only at the state level, but never on the entity level because „the Dayton Agreement itself accepted the territorial separation“²⁴.

The Constitutional Court took a different attitude on this issue. Specifically, in the case of multinational state the representation and participation in government structures – not only as the right of individuals who belong to certain groups but also ethnic groups as such in case of collective rights – do not violate the fundamental assumptions of a democratic state, with the exception that in case like this it requires a special form of decision - making a compromise. It is necessary to emphasize that „the protection of cultures and ethnic groups prohibits their assimilation and therefore for their segregation“²⁵ „Therefore, there is no question that ethnic separation with territorial demarcation does not satisfy standards of a democratic state and a pluralist society based on Article I/2 of the Constitution of B&H in connection with third paragraph of the Preamble. Territorial arrangement therefore must not serve as an instrument of ethnic segregation but quite the contrary must please the ethnic groups with preserving linguistic pluralism and peace, in order to contribute to the integration of state and society as such“²⁶.

„In conclusion, the constitutional principle of the collective equality of the constituent peoples which arises from marking of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privileges for one or two of these peoples, any kind of domination in government structures and any ethnic homogenization through the segregation based on territorial

segregation“²⁷ „From all this comes that the Court accepted the starting point that regulations that discriminate certain constituent peoples on the entity level do not only mean a violation of the guaranteed collective national rights, but also produce discrimination regarding the realization of fundamental human rights“ (Trnka, 2000, p. 100), which is in contradiction with the Article 2 Paragraph 4 of the Constitution of B&H as the fundamental and the highest general legal act in B&H.

The Constitutional Court has declared that it is indisputable that the FB&H and RS in the Article I/3 of the Constitution of B&H recognized as a constituent elements of B&H. However „this recognition does not give them any kind of *carte blanche*. So despite the territorial arrangement can not serve as a homogenization or the right to manipulation the effects of ethnic cleansing“²⁸.

Based on this kind of argumentation, the Constitutional Court adopted a partial decision which:

A) Regarding the Constitution of RS:

Constitutional Court declares the following regulations, or parts of regulations unconstitutional:

- a) paragraphs 1,2,3 and 5 of the Preamble, complemented by Amendments XXVI and LIV,
- b) a word state of the Serbian people and Article 1 complemented by Amendment XLIV

B) Regarding to the Constitution of FB&H

The Constitutional Court declares unconstitutional the regulations of the following sections:

- a) the words Bosniacs and Croats as constituent peoples along with the others, as well as complementation of their sovereign rights of Section I/1 (1) replaced by Amendment III“²⁹.

CONCLUSION

Constitutionally guaranteed protection of national collectivity is not opposite to the democratic principles and is known in comparative law. It is achieved through the presentation and consideration of the special national – collective interests. However, the specificity of collective protection in BiH is that, the constitutional regulations of entities about constituency generated the discrimination pretending to the ethnic definition and understanding of the entity.

²²Ibid page 50.

²³Ibid page 52.

²⁴Ibid page 13.

²⁵Ibid page 57.

²⁶Ibid page 57.

²⁷Ibid page 60.

²⁸Ibid page 61.

²⁹ Ibid, decision dispositive

If this principle would be consistently carried, it would mean that on matters of vital national interest and entity's level of government must be decided by the consensus of all three constituent peoples. The process of determining the vital national interests should be effective and identical in both entities. If those two principles are completely fulfilled the members of constituent people would feel the same security throughout the whole country of BiH and it would not be important in which entity a member of the constituent peoples lives. That kind of promotion of democracy returns the faith in the concept of a multi - ethnic community because the Constitutional Court says that the internal organization of B&H "should not serve as an instrument of ethnic segregation, but on the contrary must satisfy ethnic groups by the preserving the linguistic pluralism and peace in order to contribute to the integration of state and society as such"³⁰. The aim of this short review is to point out the importance and meaning of the Constitutional Court of B&H decision once again and direction which B&H should follow, which is the opposite to the way of the High Representative intervention, this decision is "institutionalized" through the entities constitutions.

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³⁰Ibid, page 57.