



Strasbourg, 21 July 2000

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**CDL (2000) 57**  
English only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**Revision of the Constitution  
of the Federation of Bosnia and Herzegovina**

**PRELIMINARY OPINION  
ON THE ISSUE  
OF SHARED COMPETENCES**

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**Preliminary advisory opinion  
on proposal No. 2 (CDL(2000)52, 20.6.2000)  
to amend the Constitution  
of the Federation of Bosnia and Herzegovina**

There is a proposal to include certain subject matters in the list of Article III.2 of the Constitution of the Federation of Bosnia and Herzegovina. Article III.2 provides for shared competences between the Federation and the Cantons.

**Exclusive and shared competences in federal states**

The question of shared competences is well-known in other European federal systems. Federal constitutions usually provide for certain exclusive competences of the Federation (e.g. foreign affairs and the common currency) and for some exclusive competences of the component parts (e.g. education). Sometimes the competences of the component parts are laid down in a general clause which declares that all powers which are not attributed to the federal level belong to its component parts (e.g. Article 70 German Const., Article 73 Russian Const., Article 3 Swiss Const.). In addition to exclusive competences for either level, most European federal systems also know some form of shared competences (Austria, Germany, Russia, Spain, Switzerland).

**The form of sharing of competences in the Federation of Bosnia and Herzegovina**

One possible form of sharing competences between a Federation and its component parts is to create a list of subject matters with respect to which the component parts may specifically delegate the power to legislate to the Federation. So far, such a system exists in the Constitution of the Federation of Bosnia and Herzegovina (Art. III.2). Other major European federal systems do not know such a form of sharing competences which seems to require a specific delegation from the lower to the higher level<sup>1</sup>. Article 72 of the Russian Constitution contains a list of “shared competences”, but it does not require the agreement of the component parts for federal legislation in these areas (see Article 76 (2) Russian Const.). The reason why no other major European federal system provides for a form of sharing competences like Article III.2 is that it is impractical for many topics. Social security legislation, for example, needs frequent amendments. If each amendment of the social security laws would depend on the agreement of every component part of the Federation, such an arrangement would probably lead to endless negotiations and, perhaps, to a political impasse. The state and the population, however, cannot afford endless negotiations on social security legislation. On the other hand there are subject matters for which the requirement of the component states' unanimous agreement makes good sense. It appears that education is such a field.

**The forms of competence sharing in other European federal systems**

The experience of other European federal systems shows that there are also other ways of sharing competences.

1. The most decentralized form of shared competences is the **conclusion of agreements** between the component parts of a federal state on the exercise of their respective exclusive competences without any involvement from the Federal level (e.g. Article 48 Swiss Const.). In Germany, for example, the *Länder* have concluded agreements among themselves on the

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<sup>1</sup> Art. 150 of the Spanish Constitution knows a delegation of competences from the federal level to the component parts – the exact opposite of the solution of the Federation of Bosnia and Herzegovina.

programming rules for radio and television stations, and on the access of students to their universities. Such agreements were concluded without federal involvement. Such agreements between component parts typically exist in areas of cultural importance.

2. A more centralized form of shared competences are the so-called **framework competences** (e.g. Article 75 German Const.; Article 150 (3) Spanish Const.; Article 76 (2) Swiss Const). When a federal constitution provides for a framework competence, the federal legislative body may legislate on the subject matter, but only to a limited degree. This means that federal legislation may establish general principles in certain areas, but it must leave room for the legislative body of the component parts to formulate exact rules. This form of shared competences is not used, however, for legislation which requires a high degree of precision and uniformity, such as, for instance, social security legislation (see Articles 111-117 Swiss Const.). Rather, it is used for such cultural matters in the wider sense which require a higher degree of uniformity and flexibility than what could be achieved by agreements between the component states acting independent of the federal level. Thus, in Germany, framework competences exist in the field of press regulation and the general principles of university administration.
3. The most important form of shared competences, however, are the so-called **concurrent competences** (Article 11 (2, 4-6) Austrian Const.; Article 74 German Const.; Articles 72 and 76 (2) Russian Const.). Concurrent competence means that both the Federation and the component parts may legislate, but that the Federal level may act only if certain conditions are fulfilled. When these conditions are fulfilled, however, the federal law takes precedence over the law of the component part. In Germany, for example, the federal legislator may only legislate in an area of concurrent competence „if this is necessary for the creation of equal living conditions within the territory of the Federation or to ensure legal or economic uniformity in the interest of the whole state“. Concurrent competences require that an institution determines when their exercise on the federal level is “necessary”. In Germany, the Federal Constitutional Court must make such a determination (see Articles 72 and 93 (1) (2a) German Const.).

Taking into account the experience of other federal states, it is clear that they all provide for some non-exclusive federal competences to legislate without the agreement of all the component states. Such competences typically concern the economy in the wider sense, Federation-wide problems or the organization of Federation-wide structures. On the other hand, in fields which primarily concern cultural aspects, the active agreement of all the component parts is usually required. When drawing the line between fields which require independent federal legislative competence and those which do not, the most important points to consider are: the need to ensure a uniform application of the rules in question and the future need for the rule’s amendment, which may face opposition in the form of a veto from one or more component parts for unrelated reasons.

### **Sharing competences differently according to different subject matters**

Concerning the specific proposal to amend Article III.2 of the Federation of Bosnia and Herzegovina it appears that the suggestions on the table concern two different kinds of subject-matters:

1. The subject matters “educational system elements” and “local self-government” concern issues which are usually within the competence of the component parts of a federal system. When the desire to achieve some form of harmonisation arises in such areas in other

European federal systems, it is usually achieved either by agreements among the component parts themselves or by federal framework legislation which allows the component parts room to legislate according to their specific needs. It appears just as well, however, to use the form of shared competences which is provided for by Article III.2 of the Constitution of FBH. These areas are typically very important for the component parts and the dangers connected with possible political blockades do not appear to be very grave.

2. The subject matters of “criminal law”, “civil law”, “criminal and civil procedure”, “social protection” and “protection of the environment”, on the other hand, concern issues which in other European federal systems are usually either an exclusive competence of the federal level or at least concurrent in the sense that the federal level can legislate if a need for harmonisation can be demonstrated. These fields concern issues which require precise rules and which cannot be easily divided between general federal framework rules and the component part’s specific implementing legislation. In addition, experience shows that the regularity with which such legislation is amended necessitates a less complicated procedure.

### **Conclusion and Recommendation**

The aim of the proposal to amend Article III.2 of the Constitution of FBH to provide for more uniform legislation in certain areas is reasonable. The proposal should therefore be supported. However, it appears highly advisable to distinguish between two groups of subject matters. The subject matters of “educational system elements” and “local self-government” fit well into the existing system of sharing competences between the Federation and the Cantons (Article III.2 of the Constitution of the Federation of Bosnia and Herzegovina). The subject matters of “criminal law”, “civil law”, “criminal and civil procedure”, “social protection”, and “protection of the environment”, on the other hand, should be shared in a different way. In other European federal systems, these competences are exercised (at least) concurrently, which means that the federal legislature may act only if a need for harmonisation on the federal level can be demonstrated. The Constitutional Court should be given adjudicative responsibility, should a dispute over this requirement arise.

It is therefore suggested that a provision which provides for concurrent competences be inserted between Article III.1 and Article III.2 of the Constitution of FBH. This provision should include the subject matters of “criminal law”, “civil law”, “criminal and civil procedure”, “social protection” and “protection of the environment” and possibly other subject matters.