

## PROPOSED CONSTITUTION OF THE REPUBLIC OF BOSNIA-HERZEGOVINA

### Comments on Chapters I, III, IV and V

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#### Chapter I: Establishment of the Federation

Articles 1 and 2: The Federal Constitution should state the number and name of the federated units which constitute the Federation. This is a characteristic of federal States (see, for example, Article 1 of the Swiss Federal Constitution and the Preamble to the Federal Republic of Germany's Basic Law). Listing the federated States in the Federal Constitution itself makes it possible, among other things, to distinguish them from simple provinces or regions in a unitary State, whose legal basis may very well be an ordinary law. Referring to the federated States in the text of the Constitution itself should reflect their importance in the actual structure of the State.

Article 6, para. 2: The phrase "other languages" might appear too vague. In order to avoid possible abuses, would it not be better to specify which other languages are meant? In practice, they should not be so numerous as to make listing all of them impossible.

Para. 3: It would be better to stipulate that other official languages may be recognised on the basis of a revision of Article 6, para. 1, rather than through the procedure laid down by Article 6, para. 3. This procedure for revising Article 6, para. 1 would be more in accordance with the principles of parallel procedures and hierarchy of legal rules (in this case the primacy of the Constitution).

#### Chapter III: Division of Responsibilities between the Federation Government and the Cantons

Article 1, subpara (e):

- This provision is "overloaded". It would be better to subdivide it. For instance, what exactly is covered by the term "communications"? Does it refer to all forms of communication (postal, telephone, land, air, naval, rail etc)? For terrestrial communications, would it not be useful, for example, to distinguish between main roads (motorways), which are a responsibility of the Federation, and minor roads which may be the responsibility of the Cantons?
- The responsibility of the Federation for financial affairs is stated in two separate provisions (subparas (e) and (f)). Is there not duplication here?

Subpara (g): Would it not be appropriate to stipulate that the Federation, in addition to the areas explicitly mentioned here, also has general responsibility for criminal law?

#### General comment:

The following areas and subjects are not mentioned in Article 1 (responsibilities of the Federation), nor in Article 4 (responsibilities of the Cantons): civil law, labour and welfare law, weights and measures, fishing and hunting, civil defence, mines and natural resources. It could be argued that, in accordance with the first sentence of Article 4, these areas are the residual responsibility of Cantons. But is this really the case? Have some areas not been overlooked? I am thinking in particular of areas as important as civil and labour law, which should be the responsibility of the Federation.

- Equally, responsibility for raising taxes is not clearly established. It is only indirectly referred to in Article 1, subpara (j) and in Article 4, subpara (l). Should not a so important matter as tax law be regulated more specifically? It should be stated exactly which federal, cantonal or municipal authorities are responsible for levying which kind of taxes (income/ property/ direct/ indirect taxes etc).

Article 2, subpara (d): The problem of responsibility for communications also arises here. The link between this provision and Article 1, subpara (e) needs to be clarified.

Article 3, para. 1: The wording is unclear and, in my opinion, is likely to generate conflicts between the Federation and Cantons over their respective responsibilities. In order to avoid such conflict, there should at any rate be two provisions :

Firstly, it should be clearly stated that if the Federation has passed comprehensive legislation in these areas, the Cantons may not legislate in them at all.

Secondly, it should be stated that, in these same areas, the Federation may adopt framework laws, setting out the main regulatory principles, leaving responsibility for points of detail to the Cantons.

Para. 4: Do the Cantons have a general responsibility to implement and to enforce federal law, or only where federal legislation so provides?

Article 4, subpara (j): Should this not be a responsibility of the Federation? Is this not precisely the kind of area which, by its nature, requires national rather than local regulation?

#### Chapter IV: Structure of the Federation Government

##### A. The Federation Legislature

Article 3: This article does not specify whether elections based on proportional representation cover the whole territory (i.e. are wholly proportional) or whether the territory is subdivided into electoral constituencies. If the latter, are these constituencies the same as or different from the Cantons? This question can, of course, be settled by electoral law.

Articles 6, et seq: Good legislative practice would require, in my view, that Article 9 should come immediately after Article 6. This section would then be easier to read.

Article 9: This provision does not make it clear whether the Delegates to the "House of Peoples" are to be elected from among members of the Cantonal legislatures by their peers. Alternatively, could they be elected by the people again from among the members of the cantonal legislatures? The drafting of this article should be improved in order to eliminate this ambiguity.

Articles 15 and 17: Again, good legislative practice would require that Article 17 precede Article 15. The statement that both Houses of the Legislature

shall have the same responsibilities and the same powers and that laws must be adopted in identical terms by both Houses (a perfect bicameral system should come first). Article 15 is simply a consequence of this principle.

Article 16: Does this provision not vest excessive authority in the President? Is this not contrary to the principle of the sovereignty of the Legislature to enact legislation, and consequently, to the principle of the separation of powers?

Article 20, subpara (c): Should it not be stated that, in addition to approving the Cabinet, the Legislature also has the power to censure it, i.e. to bring a vote of no confidence?

Subpara (g): Why is responsibility for guiding the Prime Minister only provided for in the conduct of foreign affairs and not also in domestic affairs? Moreover, in foreign affairs, what ought to happen is the opposite of this provision: the impetus and initiatives ought to come from the Prime Minister, with the Legislature's role restricted to supervision and monitoring.

### **B. The Federation Executive**

Article 2: This article does not specify which of the two persons elected on the joint ticket is to serve as president first.

Article 5: Para. 1 states that the Cabinet must be approved only by the House of Representatives, whereas para. 2 states that the vote of no confidence must be passed in both Houses. Why are these procedures not parallel?

Article 7, subpara (c)(i): Would it not be appropriate to stipulate that the Prime Minister is responsible not only for enforcing and implementing, but also, and perhaps primarily, for proposing laws, giving impetus and taking initiatives in legislative matters?

Article 8: It seems excessive to require parliamentary approval for the nomination of heads of diplomatic missions and officers of the armed forces. Is this not more appropriately a responsibility of the Executive?

Article 9: Should provision not be made here for the responsibility of the Executive to adopt not only the decrees already included (i.e. urgent decrees) but also ordinary implementing regulations for laws voted by the Legislature? In this connection, see Article 15 of Section C, which refers to "Laws and regulations". Does the term "regulations" not refer precisely to enforcement and implementing regulations?

### **C. The Judiciary**

Article 1: Perhaps the functions devolved to the Constitutional Court and those assigned to the Human Rights Court could be exercised by a single court, as is the case in most countries?

Article 9: How can the uneven number of judges (9) be reconciled with the requirement in Article 6, subpara (a) for an equal number of Bosnian and Croat judges?

Article 12, subpara (b): Cf. Article 10, para. 2. These two provisions do not make it clear whether the Constitutional Court's supervisory powers cover legal bills, laws already adopted by the Legislature or possibly both at once.

### **Chapter V: The Cantonal Governments**

Article 2, para. 1: Delegating responsibility upwards (from the Cantons to the Federation) could pose problems, since the Federation might need to set up administrative structures to carry out the tasks conferred to it by the Cantons, even if only one Canton or a small number of Cantons had relinquished their responsibilities to the Federation. This might place disproportionate costs on the Federation.

Article 3: Inter-cantonal agreements, as envisaged in this article must be possible not only between Cantons belonging to the same ethnic group, but also more generally between all Cantons, whether belonging to the same or different ethnic groups, and not only in matters of common interest to one particular ethnic community. It must be possible for such agreements to be concluded between Cantons of different ethnic groups, in areas such as the law governing the rights and duties of adjacent owners, transport, communication etc.

Article 8: In Cantons with a minority ethnic group, would it not be appropriate to provide also for a Vice-President from this ethnic group?

Article 9, subpara (a): Cantonal Governments must be given the right to propose as well as to execute laws.

Subpara (d): Is this task genuinely a governmental responsibility? Rather, is it not a task more appropriately assigned to the judiciary and, in particular to the State Prosecution Service?