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**COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT**

**COMMENTS RELATING TO THE PROPOSED CONSTITUTION OF  
THE FEDERATION OF BOSNIA AND HERZEGOVINA**

**Comments on Chapters II and VII**

by

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**COMMENTS RELATING TO THE PROPOSED CONSTITUTION OF  
THE FEDERATION OF BOSNIA AND HERZEGOVINA  
(CHAPTERS II AND VII.)**

(Preliminary version.)

**CHAPTER II. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.**

Firstly, it must be stated that the inclusion of the protection of human rights and fundamental freedoms into the Constitution, is to be welcomed and to be interpreted as an important step towards a full-fledged democracy and the rule of law.

According to the Draft, human rights is protected, at the national level, both according to international as well as to national standards. This "dual" approach is reflected both in Chapter II (including the ANNEX) and in Chapter VII.

Chapter II is divided into two main parts: "A. General." and "B. Initial Appointment and Functions of the Ombudsmen."

**A. General**

**Art. 1.**

The text contained in Art. 1 may probably be edited slightly differently, seen from a technical point of view.

The opening phrase refers to the "principles set out below", while the international human rights standards are referred to as "rights and freedoms". This distinction, between "principles" and "rights", might be said to reduce the importance of the national standards. On the other hand, the wording chosen may be defended by the fact that Art. 2, which contains a "human rights catalogue", does operate at a rather general level; the term "principle" may consequently be more appropriate than "right".

I am inclined to believe, however, that the distinction mentioned above, is not established by intention. The latter part of Art. 1 uses the concept "following provisions", obviously referring to both "provisions" and "rights".

## Art. 2.

Art. 2 declares that the Federation shall ensure "the application of the highest level" of the international human rights standards. Thereby, the opening phrase of the article incorporates the international protection into domestic law (see also Chapter VII).

Linked to this general statement by the words "In particular", one finds two sub-groups of rights and freedoms which are explicitly spelled out. The first group of rights applies to "all persons within the territory", while the second applies to "citizens" only. This distinction is acceptable, taking into consideration the different rights grouped into the two categories. The exercise of political rights are reserved to citizens, which in itself is acceptable. It should be added, however, that the differentiation between an association (which may be formed by anyone, Art. 2 (1)) and a political party (which may be formed by citizens only, Art. 2 (2)) is not uncontroversial in all respects. As a long time perspective, one should also encourage a situation where the right to participate in local elections, is extended also to permanent residents, irrespective of their citizenship.

As for subcategory (1), the usual remarks applicable to any catalogue would be valid here as well: one might discuss whether the enumeration of rights is the appropriate one. Since the list of rights is not exhaustive, one should probably have a rather relaxed attitude towards this dilemma. I notice the fact that the catalogue includes both civil and political rights, as well as social, economic and cultural rights. I add, however, that litra (1) is somewhat confusing, when the rights spelled out here is described as "fundamental freedoms". This concept ("fundamental") would, according to most experts, be applicable also to other rights mentioned in Art. 2 (1).

(There is a small editorial problem in subcategory (2) (b); the sentence reads: "All citizens shall enjoy the rights ..... to political rights".)

## Art. 3.

The right of refugees to freely return to their homes of origin, is - generally - an important provision. In the particular circumstances of Bosnia and Herzegovina, the effective implementation of such a right would represent an effort to repair - to the degree possible - at least some of the implications of the policy of ethnic cleansing.

Arts. 4 and 5.

The same comments (Art. 3) would apply. I shall add that the system of double citizenship, which is permitted according to Art. 5 (b), is generally not recommendable. Under the special circumstances, however, it may be a wise solution.

Art. 6.

It is preferable to state clearly in the Constitution that all state bodies shall implement the human rights protection. This is covered in the first part of Art. 6.

I find it somewhat confusing, when Art. 6 refers to the international standards only, bearing in mind the fact that Art. 2 refers both to international and to national human rights standards.

The reference in Art. 6 to the Court of Human Rights is incorrect, it should have been IV. C. Art. 18.

Art. 7.

This provision is conducive to the effective implementation of human rights.

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I shall, at least in this preliminary version, not present detailed comments upon the provisions relating to the system of Ombudsmen. I shall have to restrict myself to express a favourable position on the inclusion of such a remedy into the Constitution.

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## CHAPTER VII. INTERNATIONAL RELATIONS.

### Arts. 1 and 2.

No comments.

### Art. 3.

This article has a double function. Firstly, the body of international law (not only the international human rights law) is integrated into domestic law. Secondly, the status of international law is that of *lex superior vis a vis* domestic legislation at the statutory level and below (but not *vis a vis* the Constitution)

This system reflects the international character of the Constitution and the legal system based thereupon. It shall be added that this provision, like so many other Constitutions, refers to a rather unprecise concept: "the general rules of international law". One also notes that when it comes to giving priority to international law *vis a vis* domestic law, this applies to treaty law only. Such a restricted solution is, however, to be found in a number of European constitutions.

### Art. 4.

Para. (1) leaves it to the legislator to decide on their own competence to consent to the signing and ratification by the President of international treaties. One might have expected that the Constitution itself spelled out at least certain basic criteria for when such a consent is necessary. This reflection is, however, not a substantial one. The Constitution declares, from the outset, that the legislator has the right to consent, and leaves it to him to restrict his own competence.

As often is the case, the Constitutional provision declares that treaties shall not enter into force until approved by the legislator. Such a statement avoids the problem of possible disharmony between the regulation of this problem according to international law (the Vienna Convention on the Law of Treaties) and domestic law (The Constitution).

Para. (2) gives the President the competence to denounce international treaties, on the "advice" of the Prime Minister. One observes that this right shall have to be carried out (also) under instructions ("directed") by the legislative body. While the right to enter into treaties is established as a prerogative for the President, the right to denounce treaties is somewhat more restricted. (Compare also to IV. A.

Art. 20 (g), where the legislative body is given a "guiding" role only vis a vis the Prime Minister in foreign affairs.)