

COMMENTS ON THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

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My comments on the Constitution of Bosnia and Herzegovina are as follows.

I. Chapter II on human rights calls for several remarks.

A. Article 1 provides that all the principles and rights embodied in various international legal instruments listed in an Annex are to be applied throughout the territory of the Federation, which shall observe the highest standards in securing the recognition and exercise of these rights.

However, Article 2 simply lists a whole series of specific rights without precise definitions (right to life, to privacy, to property, to education).

Does this mean that the authors of the Constitution wished particular significance (but which?) to attach to the specific rights singled out among all those listed in the international instruments appended to the Constitution?

And if the international instruments explicitly referred to in the text thereby acquire constitutional force, is it really necessary to list certain rights in the text of the Constitution itself?

What would happen if there were differences in definition between the rights listed in the Constitution and the much more numerous rights set out in the various international conventions appended to it?

B. Article 6 provides that the courts and organs of the Federation shall apply the rights and freedoms provided for in the international instruments listed in the Annex and that a Court of Human Rights shall be established for the purpose.

Does this mean that the Court of Human Rights could be required to rule on any breach of those rights committed by an organ or a court? But does this not imply that the Court of Human Rights will have to rule on the decisions given by other courts when they are alleged to have committed such breaches? Will the three highest courts (Supreme Court, Constitutional Court, Court of Human Rights) therefore be on a graduated scale, with the Court of Human Rights alone being empowered to rule on the decisions of the two other courts in human rights matters?

C. The Constitution provides for three Ombudsmen, one Bosnian, one Croat and the third belonging to another community.

Why three? Most modern states which have established Ombudsmen have provided for one only. The idea underlying this triple appointment is admittedly understandable (ensuring that no community feels left out). But what will the three Ombudsmen's respective powers be? Each community will probably have its own Ombudsman; but will this institutionalisation of the Federation's two major components not deepen the split in the country?

The text specifies that each Ombudsman is empowered to intervene in proceedings pending before the courts, including those before the Court of Human Rights.

In my view that is a breach of the principle of separation of powers. Is it advisable for an administrative or political authority such as the Ombudsman to interfere in judicial proceedings? Surely the Ombudsman's duty is, on the contrary, to intervene before contentious proceedings are initiated and avoid a court case?

Provision is also made for each Ombudsman to present an annual report to some of the highest state authorities. That is standard procedure. But why is the report to be submitted to the CSCE? Why that international organisation rather than another? Unless I am mistaken, it is not usual for national ombudsmen's annual reports to be transmitted to international institutions.

II. As regards **the judiciary (Chapter IV. C.)**, the Constitution provides for the establishment of three courts in the Federation, comprising an equal number of Bosnian and Croat judges, with the other communities appropriately represented in each court. This composition is the same for all courts. The intention is to ensure fully equal and balanced representation of the national communities in each court.

All judges - in all courts - are required to be distinguished jurists of the highest moral standing. The Constitution has thus opted for "professionalising" judges. Does not this requirement mean depriving the courts of the invaluable experience of other persons who may also contribute their skills - in other areas? My own experience as a constitutional judge has taught me how very fruitful it is to confront differing opinions backed by differences in education and training. The settlement of disputes, which vary widely, demands a broad range of skills. None of these are irrelevant. The judges of all courts are to be appointed by the President and their appointment is to be approved by a majority of the House of Peoples. Is not this rather a cumbersome procedure for all a country's courts? While it is conceivable that the judges of a supreme court - irrespective of its jurisdiction - should be appointed under a complex procedure which is not affected by the small number of its members, it would seem more questionable to have the appointment of all judges ratified by a majority of one of the houses of parliament.

Is it absolutely necessary to provide for a special judicial police force, reflecting the composition of the population, to keep order and maintain security in each court? What is required of a security force: to be efficient - or to be representative of the entire population?

- More specifically, the Constitutional Court is composed of nine judges and required, among numerous other responsibilities, to determine whether laws adopted by both houses of parliament or either House are constitutional. The Constitution does not specify the nature of this review. Does it take place before or after the law is adopted? Who can bring the matter before the Court? Within what time-limit? Does the Court have a time-limit for giving its judgment?

Admittedly, it may be supposed that all these questions will receive appropriate answers in the subsequent institutional acts. But the Constitution should - at least - lay down the basic principles and arrangements for review of the constitutionality of legislation.

- In addition, the Constitution provides that in all cases referred to the Constitutional Court (disputes between cantons or with the Federation, review of the constitutionality of legislation, referral of preliminary points of law), the parties in the dispute or those requesting the Court's intervention are entitled to be represented, including representatives of the House that adopted the law.

However, it does not specify the arrangements for their representation. What does the Constitution intend - the appearance in court of the parties

themselves, representation by a lawyer, oral proceedings in the presence of both parties, a political hearing?

Does the Constitution endorse the requirement - embodied in the European conventions and the case-law of the European Court of Human Rights - of a fair hearing within a reasonable time?

III. Chapter VIII concerning amendments to the Constitution

These may be proposed only by the President, the government, a majority of the House of Representatives or a majority of the Bosnian and the Croat delegates in the House of Peoples.

The majorities required for the adoption of constitutional amendments seem difficult to attain: a majority of the House of Peoples, which must include a majority of the Bosnian and the Croat delegates, and a 2/3 majority of the regional House.

Above all, it will be noted that there is no provision for approval by referendum. The people are excluded from the revision process, as they are indeed excluded from the process of ratification of the Constitution itself.

At a time when the referendum is gaining ground, and when people in more and more countries are required to approve the proposed Constitution by a vote, it is regrettable that the Constitution of the Republic of Bosnia and Herzegovina should not have taken steps towards direct-vote democracy. No doubt present circumstances were not conducive to it. But it is to be hoped that in the future the new republic will move beyond the stage of purely representative democracy.

In addition, it is stated that no amendment may eliminate or diminish the rights and freedoms provided for. Does this mean that an amendment could affect the separation of powers, the republican system of government, the bicameral system or the balance established between the institutions?

IV. Under "**Transitional arrangements**" (**Chapter IX**) the Constitution provides that the Constitution of the Federation shall be approved and promulgated by a Constituent Assembly comprising those representatives elected in 1990 to the Assembly of the Republic of Bosnia and Herzegovina whose mandates are still valid.

It thus opts for the method of convening a Constituent Assembly to approve the new Constitution. But this will not be an assembly specially elected for the purpose. The new Constituent Assembly will be the former legislative assembly. And it is this Assembly, which already exists and is simply assigned the status of Constituent Assembly, that will be required to approve the new text by a 2/3 majority of its members, including a consensus between the delegation of the Croat people, comprising all representatives of Croat nationality, and the delegation of the Bosnian people, comprising all representatives of Bosnian nationality.

It is this Assembly that will appoint the interim bodies responsible for running the country's affairs, pending the entry into force of the Constitution and the setting up of the institutions it provides for.

This means that the people of the Federation will be completely excluded from both the drafting and the approval of the new Constitution.

They are to be consulted neither on the election of the Constituent Assembly (which will simply be a continuation of the Assembly whose mandate is currently running) nor on the ratification of the final text.

V. I shall conclude with **two general remarks**.

A. The Constitution does not give sufficiently precise information on the legal nature of the political system it proposes to introduce in the Republic of Bosnia and Herzegovina.

Of course it appears to be a system similar to the conventional parliamentary system, but little explicit information is provided on the techniques for bringing ministerial responsibility into play.

The text admittedly specifies the sectors for which the main leaders are responsible, but does not say to which institution each one is answerable.

Article 16 of Chapter IV provides that the President may dissolve either or both of the houses when he decides that Parliament is unable to enact necessary legislation. But is the President's power to dissolve confined in political terms to this instance alone?

Is not the right to dissolve among the President's discretionary powers?

It would have been helpful if more details had been given on this point.

B. Lastly, since the matter in hand is the possibility of a confederation between the Republic of Bosnia and Herzegovina and the Republic of Croatia, it will be noted that the two issues which may prove problematic when the federation is established are, firstly, the powers to be conferred on the Confederation and the member states respectively and, secondly, the legal conditions governing the withdrawal of one of the members from the Confederation.

a. As far as the distribution of powers is concerned, the preliminary agreement sets out an "immediate" list which includes neither defence nor foreign affairs. Yet the criterion for a Confederation is precisely the sharing of these two vital areas of state activity.

Admittedly, Article 5 provides for the Confederation to deal with defence matters, since the Federation of Bosnia and Herzegovina and Croatia intend to agree on defence arrangements, but there are no express provisions on diplomacy.

b. Agreement will definitely have to be reached on the procedures for the withdrawal of one of the members from the future Confederation.

There are only two possible solutions to choose from

- either unilateral withdrawal by the state wishing to leave the Confederation,
- or withdrawal by agreement between all the member states.

The two systems are incompatible.