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D R A F T

OPINION ON THE COMPATIBILITY OF THE CONSTITUTIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA AND THE REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

approved by the working party
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and following discussions at the meeting on 27 June 1996 with representatives of the Office of the High Representative, Bosnia and Herzegovina, and the Federation of Bosnia and Herzegovina.

Introduction

The Venice Commission has been requested by the Office of the High Representative to give an opinion on the compatibility of the Constitutions of the two Entities of Bosnia and Herzegovina (hereafter referred to as B.H.), ie. the Federation of Bosnia and Herzegovina (hereafter referred to as F.B.H.) and the Republika Srpska (hereafter referred to as R.S.), with the Constitution of B.H. as established as part of the Dayton Agreements. The present text was prepared on the basis of written contributions by the rapporteurs and approved by the Working Party following discussions at a meeting in Paris on 27 June 1996 between the rapporteurs and representatives of the Office of the High Representative, of B.H., and F.B.H.

The following documents in particular have been used as a basis for the opinion:

- the Dayton Agreements, in particular Annex IV containing the Constitution of B.H.;
- the Constitution of F.B.H., being part of the Washington Agreements (Document CDL(94)28);
- the amendments to the Constitution of F.B.H. adopted on 5 June 1996 (CDL(96)50), as well as some amendments appended to document CDL(96)50 on which no agreement has yet been reached;
- the Constitution of the R.S. as amended (document CDL(96)48).

The Working Party noted that in the documents put at its disposal there was a number of discrepancies. The translation did not always seem reliable and it was not always clear which text is in fact in force. With respect to F.B.H., most of the problems could be settled at the meeting of 27 June 1996 with representatives of F.B.H and B.H But due to the regrettable non-participation of representatives of RS in this meeting, the same can not be said for the Constitution of R.S. The main comments made should however remain valid even if some adjustments in detail may be necessary.

General Comments

The Constitution of B.H. as part of the Dayton Agreements is, like the Constitution of F.B.H. as part of the Washington Agreements, in its origin more a public international law than a constitutional law text. Its character seems more contractual than normative. In order to become fully operational as the legal basis of B.H., the institutions established by the Agreements still need to acquire that degree of democratic legitimacy which can be conveyed only by free elections as foreseen in Annex 3 of the Dayton Agreements.

The Constitution of B.H., without expressly saying so, establishes a federal State. It defines two Entities, F.B.H. and R.S., as constituent parts of B.H. and divides rights and owers between the institutions of B.H. and those of the Entities. It establishes a citizenship of B.H., while recognising also the citizenship of the Entities. The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present.

B.H. however is an unusually weak federation. All governmental functions and powers not expressly assigned in the Constitutions to B.H. shall be those of the Entities (Article III.3.(a)). There is no clause conferring general implicit competence on B.H., though Article III.5.(a) may in certain respects come close to such a clause.

A decisive weakness of B.H. is that it depends for its resources on contributions from the two Entities (Article VIII.3). This dependency may well threaten the efficient functioning of B.H. There are federal systems in which the federated entities depend for their finances on the central authorities. But there seems to be no precedent for a federal State which solemnly proclaims the supremacy of its norms over the norms of the federated entities while at the same time acknowledging its financial dependency on these.

On the positive side, Article I.4 of the Constitution of B.H., which proclaims the free movement of goods, services, capital, and persons throughout B.H., seems destined to become an important factor for unifying the country.

With more specific reference to the question of compatibility, it should first be noted that Article III.3.(b) of the Constitution of B.H. provides that this Constitution supersedes inconsistent provisions of the constitutions and laws of the Entities. This implies that the Constitution of B.H. has direct abrogatory power with respect to the constitutions and other laws of the Entities, a conclusion supported by Article 2 of Annex II of the Constitution of B.H., which states "all laws, regulations, and judicial rules of procedure in effect within the territory of B.H. when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution".

On the other hand, Article XII.2 of the Constitution of B.H. provides for the obligation for the Entities to amend their respective constitutions to ensure their conformity with this Constitution. Both entities have indeed proceeded to revise their constitutions to this end. It seems in fact necessary, both for political and legal reasons, not to rely simply on the abrogatory power of the Constitution of B.H., but to try to bring the constitutions of the Entities into line with the central constitution. Otherwise this task would have fallen upon the Constitutional Court of B.H. and have threatened to overburden it and to lead to a long period of legal uncertainty.

Compatibility of the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

The preamble as amended by Amendment II:

In the new wording of the preamble it is clearly stated that the Federation "is a constitutive part of the sovereign state of B.H.". Sovereignty is thereby correctly attributed to the State of B.H. and not to the Federation itself.

Article I.1 as amended by Amendment III:

The reference to Bosniacs and Croats as "constitutive peoples, together with the others" seems realistic under the present circumstances and is not inconsistent with the Dayton Agreement. It should also be seen historically in the light of the constitutions of 1974 and even of 1910. There is a clear political will to be deduced that Muslims/Bosniacs, Croats and Serbs form the constitutive peoples of B.H. Insofar as the R.S. defines itself as a national state of the Serb people, it seems to be quite "natural" that the Federation defines itself to be the component entity for Bosniacs and Croats. A closer look into the governmental structure then reveals the application of the proportionality principle as far as representation and participation in the decision-making process in the legislative, executive and judicial branches is concerned.

The new wording of paragraph (2) of Article I.1 attributes to the Federation all power, competence and responsibilities which are not, as determined by the Constitution of B.H., within "the responsibility of the B.H. institutions".[1] This correctly reflects the Dayton Agreements.

Article II.A.2:

Paragraph (2) of this article confines the enjoyment of political rights, i.e. the right to form and belong to political parties, to participate in public affairs, to have equal access to public service and to vote and stand for election, to citizens of the Federation. This is problematic and in any case does not apply to the first elections.

The first elections to the House of Representatives of the Federation have to take place in accordance with the Agreement on Elections (Annex III of the Dayton Agreements). Article II paragraph (2) of this Agreement mentions explicitly the elections to the House of Representatives of the F.B.H. Article IV.1 of the Agreement prescribes that any citizen of B.H. has, if he meets the necessary technical conditions, the right to vote. Article I.7(c) defines as citizens of B.H. all persons that were citizens of the Republic of B.H. immediately prior to the entry into force of this Constitution. And finally, in order to avoid the consequences of ethnic cleansing, Article IV.1 of the Agreement on Elections provides that the citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote in person or by absentee ballot in that municipality. Hence, the right to vote for the House of Representatives of the Federation obviously derives from citizenship of B.H. together with the place of residence and cannot be restricted to citizens of the Entity.

That this should apply not only to the first elections but also to all future elections can be concluded from the character of B.H. as a federal State. For examble, Article 43 paragraph 4 of the Swiss Constitution provides that the "established Swiss citizen" shall enjoy at his domicile all the rights of the citizens of that canton, and paragraph 5 expressly states that "in cantonal and communal matters, he shall acquire the right to vote after having settled for three months". It seems also scarcely conceivable that such a large part of the electorate should be disenfranchised between the first and second elections.

Therefore, the words "of Bosnia and Herzegovina" should be added to the text of paragraph 2 after the words "all citizens". For the right

to vote it is of course appropriate to introduce a minimum period of residence.

The Working Party noted that in the interpretation of Mr. Hasi*f*, Vice Minister of Justice of F.B.H., this provision is already applicable to all B.H. citizens. Since the usual rules of legal interpretation would however indicate that in a F.B.H text the word "citizens" without qualification refers to F.B.H citizens, it maintains its recommendation.

With respect to the right to form and belong to political parties, it should also be noted that it is often difficult to distinguish from the freedom of association also enjoyed by non-citizens.

Article II.A.5 as amended by Amendment VII:

In accordance with Article I.7(c) of the Constitution of B.H., this article rightly provides that the citizens of the Federation are citizens of B.H. However, the question how citizens of B.H. obtain citizenship of the Federation is not addressed. It is however clear that each citizen of B.H. must have the possibility to be a citizen of at least one of either of the two Entities, and that the two Entities do not have unlimited discretion in this respect.

Article III.1 as amended by Amendment VIII:

Article III.1 contains the competences of the Federation Government, and Amendment VIII is of particular importance for bringing the Constitution of the Federation into line with the Constitution of B.H.

As required by the Dayton Agreements, the amendment deletes the former competence of the Federation Government to conduct foreign affairs.

A new paragraph (a) on defence provides *inter alia* for co-operation with the standing committee on military matters established by Article V.5(b) of the Constitution of B.H. No details are given on this co-operation, but the word "co-operate" could lead to the assumption of an equal relation between the Federation bodies and the standing committee. Article V.5(b) however entrusts the standing committee with the function of co-ordinating the activities of the armed forces in B.H., which could imply a dependence of the Federation bodies upon the authorities of the Republic. It would seem advisable to include provisions on a necessary decision-making process in this area in the Constitution of the Federation, not least because the provisions of Article V.5 of the Constitution of B.H. are fairly ambiguous.

The various competences in the economic field, in particular concerning economic policy (c), finance (e) and energy policy (h), have to be interpreted in accordance with the overriding principle of the Constitution of B.H. that there shall be free movement of goods, services, capital and persons throughout B.H. (Article I.4). These competences may therefore not be exercised in a manner such as to impede the free circulation of persons, goods, services and capital. For example, the fiscal system of the Entities may not constitute an impediment to free circulation. Similarly, the scope of financial competence under (e) has to be interpreted in the light of these provisions of the Constitution of B.H. which reserve monetary policy and the statute of the central bank to the institutions of B.H. (Articles III.1(d) and VII). The Entities' regulations may not encroach upon the exercise by the institutions of B.H. of competences necessary to maintain the monetary unity of the country.

It is welcome that in (g), it is expressly recalled that the allocation of frequencies has to be done in accordance with the Constitution of B.H.

With respect to (d), no agreement has yet been reached and there are still two proposals. Insofar as one of them does include a competence of the Federation in the matter of customs within the Federation, this proposal should not be retained. By restricting this competence to customs within the Federation, it avoids violating the exclusive competence of B.H. for customs policy under Article III.1(c). However, it is still in contradiction with the principle of the free circulation of goods contained in Article I.4 of the Constitution. This makes it not only illegal to introduce customs duties between the Entities, but, as the wording "throughout B.H." shows, it rules out the introduction of customs duties within one Entity, for example between the cantons.

At the meeting on 27 June 1996, it has been explained that the proposal does not purport to legitimise customs within the Federation, but only to give the Federation bodies the task of implementing the customs policy adopted at B.H. level. The justification for this proposal is that Art.III.1.(c) speaks only of "customs policy" and not of customs as such.

The Working Party was reticent to accept this distinction between customs policy and implementation. At B.H. level it may of course be decided in the future to entrust implementation of the customs policy to the Entities. In the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. It is essential that customs rules are uniformly applied throughout B.H. since merchandise can then freely circulate within B.H. The lack of other resources of B.H. (see above) is also an argument in favour of B.H. collecting the customs duties on its own behalf.

In Article III.1(f) (fight against crime) it is necessary to avoid any interference with the functions entrusted to B.H. under Article III.1 (g) of the Constitution of B.H. It would be advisable to provide for mixed bodies entrusted with ensuring co-operation between B.H. and the Federation in the field of international and inter-Entity criminal law enforcement.

The provision on energy policy as adopted in (h) no longer contains a reference to the public corporations foreseen by Annex IX of the Dayton Agreements. It seems advisable to explicitly provide in the Constitution for the implementation of Annex IX in the fields of communication and transportation.

Article III.2:

The wording of sub-paragraphs (f) and (g) following the adoption of Amendment IX seems somewhat unclear. The new sub-paragraph (g) seems partly to cover the same ground as sub-paragraph (f), and the provision on "foreigners staying and movement" seems to be inconsistent with the responsibility of the B.H. government for foreign policy (Article III.1 (d) and immigration refugees and asylum policy (Article III.1 (f)).

It was explained at the meeting on 27 June 1996 that these provisions have a partly transitory character and are necessary due to the present lack of adequate structures at B.H. level.

Chapter III in general:

The Constitution as amended contains no provision for the implementation of Article III.4 (co-ordination) and III.5 (additional responsibilities) of the Constitution of B.H. or Annex 7 (Agreement on refugees and displaced persons) and Annex 8 (Agreement on commission to preserve national monuments) of the Dayton Agreements.

It is suggested to introduce into the Constitution a clause like "F.B.H. shall co-operate with bodies that may be established by the competent authorities of B.H. to implement the responsibilities of B.H. under the Constitution and other Annexes to the Dayton Agreements."

Article IV.B.7 as amended by Amendment XIII:

With respect to Article IV.B.7(a) (i) and (ii), the text of the amendments to be adopted has not yet been agreed. The various versions agree however on deleting the competence of the President of the Federation to appoint heads of diplomatic missions and to serve as Commander in Chief of the military of the Federation.

Article IV.B.7 III (a) (vii) still says that the President of the Federation shall be responsible for receiving and accrediting Ambassadors. The Working Party was however informed at the meeting on 27 June 1996 that there is consensus not to apply this provision.

Article IV.B.8 in conjunction with the proposed amendment XIV:

Article IV.B.8 in its present form is incompatible with the Constitution of B.H. because, according to Article V.3.B. of this Constitution, the Presidency of B.H. appoints Ambassadors. The appointment of Ambassadors by the President of the Federation therefore cannot be admitted. There are now proposals that the President of F.B.H. "initiates" or "proposes" nominations of Ambassadors from the territory of F.B.H. It is up to B.H. legislation to decide on whether to involve the Entities in the nomination procedure. There is no basis in the B.H. Constitution for requiring a consensus between Entity and B.H. on the nomination. The President of F.B.H. can therefore be at most one of the authorities making proposals.

Articles IV.C.12, 16 and 20:

According to these articles the judgments of the Constitutional Court and of the Supreme Court of the Federation and of the Human Rights Court shall be final. Article VI.3 of the Constitution of B.H., says that the Constitutional Court of B.H. shall have appellate jurisdiction over issues arising under the B.H. Constitution out of the judgment of any other Court in B.H. The Human Rights Commission established by Annex 6 to the Dayton Agreements may also deal with cases already decided by the highest courts of F.B.H.

The Working Party noted that the word "final" is understood as "final at the level of F.B.H." It nevertheless suggested to qualify this word, eg "final for matters not within the jurisdiction of the B.H. courts".

Article VII.4 as amended by Amendment XX:

According to the new wording of this Article, agreements between the Federation and States or international organisations enter into force following approval by the Parliamentary Assembly of B.H. unless the Parliamentary Assembly has provided by law that such types of agreement do not require its consent. This corresponds to the requirement of approval by the Parliamentary Assembly of B.H. as provided for in Article III.2.(d) of the Constitution of B.H.

The Working Party was informed that this approval is in fact required before signature and/or ratification, and not, as the wording leads to assume, before entry into force.

Compatibility of the Constitution of Republika Srpska with the Constitution of Bosnia and Herzegovina

Both the Working Party and the representatives of B.H. and F.B.H. regretted that there was no opportunity to discuss this question with a representative of R.S. since, despite repeated invitations, no R.S. representative participated in the meeting.

Preamble:

The new consolidated text of the Constitution of R.S. made available to the Commission and appearing in document CDL(96)48 no

longer contains the preamble. It seems to have been omitted by error because, according to previous information, the Parliament of R.S. passed on 11 November 1994 Amendment XXVI containing a new preamble for the Constitution and this amendment was not replaced, repealed or amended by the later amendments adopted on 2 April 1996.

According to Articles I.1 and I.3 of the Constitution of B.H., both the R.S. and the F.B.H. are Entities of B.H. which "shall continue its legal existence under international law as a State, with its internal structure modified as provided herein...". Thus, the Entities are part of the internal structure of B.H. and cannot be sovereign States in their own right. It is recalled in this connection that all references to sovereignty and independence have been deleted from the Constitution of the Federation; this should also be the case for the R.S.

In addition, while Article III.2.(a) of the Constitution of B.H. allows the entities to establish special parallel relationships with neighbouring States, these relationships have to be "consistent with the sovereignty and territorial integrity of B.H.". This does not allow one of the Entities to unite with a foreign State. The phrase concerning the decision to unite with other Serb countries would therefore have to be deleted.

Article 3:

It has already been recommended that the word "sovereign" be deleted throughout the whole Constitution. The words "in the joint interest" are also inappropriate because the competences of B.H. result from the Constitution of B.H. and it is not up to the R.S. to unilaterally decide on whether there is a joint interest justifying the competences of B.H.

The reference in paragraph 2 of this Article whereby "the Republic can establish special parallel relations with the Federal Republic of Yugoslavia and its constitutional units" is partly a quotation from Article III.2 (a) of the Constitution of B.H., whereby "the entities shall have the right to establish special parallel relationships with neighbouring States consistent with the sovereignty and territorial integrity of B.H.". The important qualification "consistent with ..." is however missing and should be introduced.

Article 4:

The possibility for the R.S. to unite with other countries on the basis of confederation or on a similar basis is again not consistent with the sovereignty and territorial integrity of B.H. and it even contradicts Art. 3 of the R.S. Constitution as amended. It should therefore be deleted unless it is already considered abrogated following the introduction of the new version of Art. 3.

Article 5:

The first dash refers to the guarantee and protection of human freedoms in accordance with international standards. While it does not contain as many specific details as the provisions on the implementation of international human rights agreements in Article II of the Constitution of B.H., this cannot be considered as an inconsistency. It would however be advantageous if such provisions were explicitly included in the text.

Article 6:

While the main inconsistencies with the Constitution of B.H. have been removed, an explicit reference to the citizenship provisions of the Constitution of B.H. is still missing. The above remarks on Article II.5 of the Constitution of F.B.H. apply *mutatis mutandis* to this Article.

Chapter II - Human Rights and Freedoms:

a) The Constitution contains an extensive Chapter on Human Rights and Freedoms (Articles 10-49). At the same time, the Constitution of B.H. provides for the application of a great number of international legal instruments in this field, with a particularly prominent place being reserved to the European Convention of Human Rights in Article II.2. The rights and freedoms set forth in the Convention are applied directly in B.H. and have priority over all other law. There is obviously a big risk that a detailed catalogue of human rights and freedoms as set out in the Constitution of R.S. may not always be fully in line with the relevant international instruments and the latest interpretation given to them by the competent bodies like the European Court of Human Rights. It is impossible in the present opinion to analyse the text of the Constitution article by article and to assess for each article whether some formulation might be incompatible with one or the other international legal instrument. Only some particularly important questions will be addressed.

As a general solution to this problem, it is suggested that the Constitution should expressly state that, in the event of any discrepancy between the rights set out in the Constitution of the R.S. and the rights applicable by virtue of the Constitution of B.H., the provision most favourable to the rights of the individual will be applicable.

b) A striking feature of this chapter is that a large number of rights are guaranteed only to citizens of the Republic, in particular:

- Article 5: non-discrimination;

- Article 21: freedom of movement and residence;

- Article 29: the right to vote;

- Article 30: the right to peaceful assembly;

- Article 32: the right to petition;

- Article 33: the right to participation in public affairs;

- Article 34: freedom to express national affiliation;

- Article 38: the right to establish private places of instruction;

- Article 43: the right to job training for partially disabled.

With respect to the right to vote (Article 29), the comments on Article II.A.2 of the Constitution of F.B.H. apply *mutatis mutandis* to the Constitution of the R.S.

The restriction of the principle of non-discrimination, of freedom of movement and of the right to peaceful assembly to citizens of the R.S. clearly contradicts Article II.2, II.3 and II.4 of the Constitution of B.H., which provide that the rights guaranteed in these Articles apply "to all persons in B.H.". The restriction of the freedom of movement to citizens in Article 21 is also in direct contradiction with Article I.4 of the Constitution of B.H.

The freedom to express one's national affiliation (Article 34) is guaranteed by the Framework Convention on National Minorities (Annex I to the Constitution of B.H.). One could also argue that freedom of expression, in conjunction with the non-discrimination principle, implies the freedom to express one's national affiliation. Hence this particular right at least must be granted to all citizens of B.H., but should better be understood as a fundamental human right.

Article 22:

The reference to the security of Yugoslavia at the end of this Article should be deleted.

Article 34:

The last paragraph of Article 34 that citizens of the Republic may also declare that they are Yugoslavs is a remainder of a previous Yougoslav practice. The freedom to express one's national affiliation is already guaranteed by the first paragraph, and the paragraph therefore seems superfluous. In no case it may be understood as referring to Yougoslav citizenship.

Articles 47 and 48:

These Articles should be thoroughly reviewed and are in their present form clearly incompatible with the European Convention on Human Rights. Part of the language of Article 47 is not only incomprehensible but also a clear contradiction of Article 48. Why should human rights and freedoms be restricted "by the need to protect universal human values and democratic accomplishments". Article 48 paragraph 2, which states that "abuse of freedoms and rights is unconstitutional and punishable", is by far too imprecise. Clear criteria would have to be included on what constitutes such abuse.

Article 57:

The provision in paragraph 2 that property and other rights of a foreign investor acquired on the basis of capital invested cannot be restricted even by a law goes too far (cf. the first additional protocol to the European Convention on Human Rights).

Article 68:

Amendment XLIX has introduced a new paragraph into Article 68, stating that the "functions of the Republika Srpska ... are carried out in accordance with its Constitution, and within the framework and to the extent they have been determined as being the competence of the institutions of Bosnia and Herzegovina as well, shall also be carried out in accordance with the Constitution of B.H." There is a serious problem of language (or perhaps of translation) here, but the Amendment, if it means anything, seems to have recognised the supremacy of the Constitution of B.H., in which case all competences attributed to the R.S. by Article 68 as amended by Amendment XXXII should be read within the limits posed by the Constitution of B.H. Nevertheless, Amendment XLIX requires clarification. It should clearly state the supremacy of the Constitution of B.H., as well as stating that the S.R. is competent in all matters which are not within the competence of B.H. by virtue of its Constitution.

The provision also does not justify leaving in the catalogue of competences matters which are within the exclusive jurisdiction of B.H. since this would threaten to completely overburden the Constitutional Court of B.H. and be incompatible with legal certainty.

As regards the various provisions in the catalogue, the following comments have to be made:

No. 1:

It has already been stated above that the word "sovereignty" cannot be used for the R.S. This equally applies to the word "independence", which is in contradiction with Article I.3 of the Constitution of B.H.

Nos. 2 and 3:

As is the case of the Federation of B.H., it would be desirable to introduce a provision on co-operation with the Standing Committee on military matters set up by Article V.5 of the Constitution of B.H.

No. 6:

According to Article III.1 of the Constitution of B.H., economic relations with foreign countries are the responsibility of the institutions of B.H. These words should therefore be deleted in No. 6.

No. 7:

According to Articles III.1 (d) and VII of the Constitution of B.H., the Central Bank of B.H. shall be the sole authority for issuing currency and for directing monetary policy. The references to the monetary and foreign exchange systems in No. 7 therefore have to be deleted.

As explained with respect to Article III.1 of the Constitution of the F.B.H., the word "customs" must also be deleted.

In particular for the remaining competences under Nos. 6 and 7, and also for others, the overriding principle of the freedom of movement of goods, services, capital and persons throughout B.H. will have to be respected.

No. 15:

The R.S. has only a very limited capacity to enter into agreements with States and international organisations under Article III.2.(d) of the Constitution of B.H. The wording of No. 15, which indicates a general competence in the field of international co-operation, therefore has to be amended.

Article 70:

In No. 12 the references to confederation or similar forms of uniting with other countries have to be deleted (cf. the remarks on Article 4).

No. 13 has to be brought into line with the limited foreign policy competence of R.S. (see above, Article 68 No. 15).

Article 80:

According to No. 8, the President of the R.S. should perform, in accordance with the Constitution and the law, tasks related to the defence, security and the Republic's relations with other countries and international organisations. These tasks are not defined and, since the competences of the R.S. are limited by the respective provisions of the Constitution of B.H., a specific reference to the Constitution of B.H. should be introduced into this provision.

As set out above with respect to the Constitution of the F.B.H., Article V.3.(b) of the Constitution of B.H. vests the power to appoint ambassadors in the Presidency of B.H. There is no room for the President of the R.S. to nominate ambassadors of B.H.; at the most he may make non-binding proposals. As regards the nomination of ambassadors of the R.S., the word ambassador implies a sovereign State and can therefore not be used. The existence of representation offices abroad and of other international representatives may comply with the Constitution of B.H. provided that these offices and representatives do not function as regular embassies or consular offices.

Article 90:

With respect to No. 10 the remarks on Article 80, No. 9 apply. No diplomatic or consular offices of the R.S. may be established.

Article 106:

The Articles on defence, in particular Article 106, do not take into account the fact that under Article V.5 of the Constitution of B.H. the members of the Presidency of B.H. have command authority over the armed forces, and that there is a Standing Committee on military matters to co-ordinate activities of armed forces in B.H.

Article 119:

As set out above for the F.B.H., the decisions of the Constitutional Court are final only at the level at the Entity ad the wording should therefore be qualified.

Article 138:

According to the wording of Article 138 as it appears in document (96)48, the Constitution of the R.S. shall be amended to conform to the constitutive act on the order of relations in B.H. This would be welcome. This provision, seems however to have been prior to

Amendment LI.

Adopted on 1 and 2 April 1996 by the National Assembly of the R.S., Amendment LI to the Constitution provides for a new text of Article 138, including a sort of ius nullificandi for the R.S. with respect to acts of B.H. considered as violating the rights and legal interests of the R.S. This provision is in clear contradiction with the Constitution of B.H., which requires such conflicts to be settled by the Constitutional Court and which provides for many procedural guarantees for the Entities and for the national groups to protect their interests. This Amendment is completely unacceptable and has to be deleted.

Conclusions

The Commission acknowledges with satisfaction that both the F.B.H. and the R.S. have made a serious effort to bring their Constitutions into line with the Dayton Agreements. As the above detailed analysis of their provisions has shown, however, such compatibility has not as yet been achieved.

With respect to the F.B.H., the task is obviously complicated by the fact that the federated Entity is itself a federation and that competences have to be distributed between multiple levels, making the whole legal system extraordinarily complicated. However, the obvious discrepancies with the Constitution of B.H. have been eliminated or, at least, their elimination is under discussion. In particular it has to be acknowledged that Article 1 of the Constitution of the Federation as amended explicitly provides for the integration of the Federation into B.H.

With respect to the R.S., an effort has also been made to remove incompatible provisions from the Constitution of R.S. There remain problems in particular with respect to the concept of the sovereignty of the R.S., which is maintained in a form that is inherently incompatible with its status as an entity of a Federal State, and concerning the rights of non-citizens of the R.S. within the R.S. In addition, Article 68 paragraph 2, which acknowledges the competences of B.H., is worded in a somewhat unfortunate way.

Therefore, work remains to be done for both Entities. It should however be stressed that this work cannot be seen to consist simply in removing inconsistencies from the Constitutions of the Entities. B.H. will have to become a viable State. In order for this to come about, the difficulties of the implementation of the Constitution of B.H. as agreed at Dayton will have to be overcome. At present the Federation has a dual character with certain competences lying with B.H. and others with the Entities. But co-operative mechanisms, which will be indispensable in many sectors to ensure the effective functioning of the institutions both of B.H. and of the Entities, are lacking. Article III.4 and III.5 of the Constitution of B.H. may provide a starting point for the development of such mechanisms. Both Entities however will have to reflect on how to integrate such co-operative mechanisms into their constitutional structure.

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[1] *In document CDL(96)50 the wording "exclusive competence" is used. This seems to be an erroneous translation.*