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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

O P I N I O N
ON THE DRAFT AMENDMENTS
TO THE CONSTITUTION OF
THE FEDERATION OF BOSNIA AND HERZEGOVINA

Adopted by the Venice Commission
at its 58th Plenary Session
(Venice, 12-13 March 2004)

on the basis of comments by

Mr Jean-Claude SCHOLSEM
(Member, Belgium)

1. On Friday, 20 February 2004 the Venice Commission secretariat received new proposals for amendment to the FBH Constitution (CIII to CVIII) as well as a draft law on changes and amendments to the law on the basics of local self governance (with an explanatory memorandum and an opinion by the CoE Directorate for co-operation in local and regional democracy).
2. Although the draft law is very useful in order to understand the proposed amendments to the Constitution, we will exclusively concentrate on these amendments.

The (appended) earlier opinion raised some issues on a previous version of substantially the same amendments. In general, one can state that the new drafting of the amendments is clearer and solves some of the questions previously raised.

3. One of the main points raised in our previous opinion was the kind of equilibrium the Constitution tried to reach between federal, cantonal and local (municipalities) competencies.

The new text somewhat clarifies this issue.

Amendment CIII adds to the exclusive competencies of the federation the competence of "j) determining the principles of local self-governance".

However, this is apparently the sole exclusive competence of the Federation that is worded in terms of "principles". This seems to imply that cantons keep a competence in the field of local self-governance (for what is *not* principle). Although this way of distributing competencies is far from unknown in federal states (the German concept of *Rahmengesetze*), the distinction between what is "principle" and what is not, may be difficult to draw in practice.

4. Amendment CIV defines in a new way the competencies of the cantons.

They are in particular responsible for a long list of policies or matters (items a) to l)). These competencies are in my opinion exclusive ones. Neither the Federation, nor the municipalities may interfere in them.

The end of article III-4 would read as follows "Cantons also have other responsibilities that have not been explicitly entrusted to the Federation Government or have not been entrusted by this Constitution or a Federal law to municipal or city authorities".

This wording confirms that cantons keep the residual competence (for all that is not expressly granted to either the Federation or to municipal or city authorities).

However, the text not only refers to competencies granted to the municipal or city authorities by the *Constitution*, but also by a *Federal law*. The wording is different when it defines the competencies entrusted to the Federation Government and when it refers to the competencies entrusted to the municipal and city authorities. The intervention of a Federal law is not provided for in the first case, but only in the second.

There could be some ambiguity in this difference of wording. How is the intervention of the Federal law to be understood?

This Federal law may not be contrary to the Constitution. Thus, this law may not delegate to municipalities or cities competencies that are to be found in the list of exclusive competencies of the cantons (art. III-4-a) to l)).

Could this Federal law delegate to municipalities and cities other competencies that are not in the list of exclusive competencies of cantons, thus limiting the scope of the residual competence of the cantons?

The answer is not clear. Is article III - 4 *in fine* to be interpreted as a new competence of the Federation (i.e. to delegate competencies to municipalities and cities)? Or, is the only competence of the Federation in the field of local authorities the competence stated in Article III-1-j (i.e. determining the principles of local governance, and no more)?

5. In our previous opinion, we noted that there could be some interference between the list of competencies entrusted to the municipalities and cities (by previous amendment XC) and the exclusive competencies of cantons as listed in unchanged article III-4 of the Constitution.

The new amendment CV apparently tries to clarify this issue.

It adds in chapter VI a new article 1 beginning by this sentence: "within *the framework of law*, municipalities are responsible *to regulate and perform* the public affairs of interest for the local population".

This wording seems to stress that municipalities are not at the same level as the Federation or the cantons.

They may only regulate (not pass laws) and perform certain duties in the framework of law. Moreover, the list of competencies (items 1 to 9) obviously refers to managerial or administrative responsibilities (managing, organising, establishing).

This interpretation seems to be confirmed by the last sentence of amendments CV which is of paramount importance: "The municipalities may transfer their responsibilities onto a city i.e. canton (must one not read "city *or* canton"?). The responsibilities vested upon the municipalities may not be denied nor restricted by the Federation or Cantonal authorities except in cases foreseen by law".

This drafting seems to be a real improvement, as it guarantees, in a very efficient way, the principle of local autonomy.

However, the word "law" used in the second sentence should be clarified.

Is law synonymous with Federal law? This would mean that only the Federation could curtail the municipal autonomy. In this case, the cantons would lose this kind of control on the municipalities and cities and the word "Federal law" should be used.

Or is law only used to indicate that the municipal regulations are inferior and subordinate to legislation, be it Federal or cantonal, depending on the competencies of the Federation or of the cantons? In this case, it would be clearer to write: "except in the cases foreseen by Federal or cantonal legislation".

6. In the former opinion, we noted that draft amendments XC introducing in article VI-1 a new item e) relating to the taxing powers of the municipalities raised some difficult issues.

This matter is now treated in amendments CVI (new article VI -2 - c).

The new text reads as follows: "When performing their responsibilities, the municipalities, ... c) Have the right to sources of financing that will be adequate to their responsibilities, providing that one part of those funds will come from the local taxes and fees the rates of which the municipalities have the right to determine".

This new text is, in some ways, less precise than previous amendments XC. It is in the first place a provision stating principles: the principle of an "adequate" funding and the principle of a necessary "autonomy" of the municipalities. There is, in my view, nothing wrong with this kind of text. But they must be taken for what there are. If the principles of adequate funding and fiscal autonomy are written down in the Constitution, why not mention the principle of equalisation between rich and poor municipalities? Moreover, one may wonder whether this kind of provision could be or should be subject to judicial review. Could, for example, the Constitutional Court strike down a statute, because the funding (by whom, exactly?) of the municipalities is not sufficient or because the proposition of autonomous local taxes is not high enough? It seems that the legal meaning of this provision would deserve to be defined.

Is it a binding provision or only a programmatic one? In any case, there should be an additional provision stating that the law determines the financing system of the municipalities and that the law may restrict or regulate their taxing powers. This would lead us back to the questions raised in our previous opinion (and also raised in other parts of the present opinion). Would this "law" be only Federal law or Federal and/or cantonal law? This financial issue seems to be of crucial importance for the equilibrium of the whole federal system of the Federation of Bosnia-Herzegovina.

APPENDIX

COMMENTS ON THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA CONCERNING LOCAL AUTHORITIES

(Version prepared by the Constitutional Committee
of the House of Representatives at its sessions
on 12 December 2003 and 22 January 2004)

by

Mr J.-C. Scholsem (member, Belgium)

I. 1. – In a letter dated 28 January 2004, the Chair of the Constitutional Committee of the House of Representatives of the Federation of Bosnia and Herzegovina sought the opinion of the relevant Council of Europe bodies, in particular the Venice Commission, on a number of amendments to the Constitution of the Federation concerning local authorities.

These amendments are effectively based on those submitted in summer 2000 (CDL (2000) 67 - for a consolidated version incorporating the various amendments proposed at that time, see CDL (2000) FBH-2).

On the basis of discussions held at the meeting of the Venice Commission on 11 and 12 October 2000, the ADACS ("Activities for the development and consolidation of democratic stability") submitted an opinion on the relevant amendments. The opinion, which was drafted by Mr Nicolas Levrat, noted that the basic features of the proposed amendments were in keeping with the text and the general spirit of the European Charter of Local Self-Government. Nevertheless, the opinion identified a number of points in the wording of the amendments which were likely to cause difficulties.

2. – The present very urgently requested opinion will therefore simply take a look at a number of legal drafting problems raised by the new wording of the amendments. The following comments therefore in no way challenge the validity of either the principle of these amendments or the basic political choices they reflect.

II. -1. Taken together, amendments LXXXVIII and LXXXIX reveal a major change to the division of responsibilities among the Federation, the cantons and the municipalities (or cities).

The responsibilities of the Federation have now been extended to include the determination of the "foundations of local governance and self-governance" (new Art. III-1-j).

At the same time, the responsibilities of the cantons have been reduced. Article III-4 has been reworded in such a way that, while the cantons continue to have responsibilities in other areas, these responsibilities expressly exclude both those entrusted to the Federation (which was, of course, also previously the case) and – and this is new – responsibilities explicitly assigned to the municipalities and cities by the Constitution or by federal legislation.

The first amendment does not cause any real problems. It appears to be a good idea for the federal Constitution to grant the Federation power to determine the “foundations”, in other words the general principles governing local authorities. The difficulty will be to distinguish between these “foundations” and other more detailed measures, which will continue to be the responsibility of the cantons.

The second amendment raises more questions. The cantons admittedly have the residual responsibility. However, the scope of the responsibility should be considered not only in relation to the list of responsibilities that are the sole preserve of the Federation (Art. III -1) and those jointly exercised by the Federation and the cantons (Art. III -2) *but also* in relation to those assigned to the municipalities and cities either by the Constitution or simply by a federal law.

Amendment XC (inserting a sub-paragraph c) to Article VI -1) explicitly entrusts the municipalities with the affairs that most directly concern citizens and gives a large number of examples such as town planning and urban development, sport, tourism and primary education. This list could be added to by federal legislation.

The aim here is obviously to incorporate the subsidiarity principle into the Constitution. However, many points on this new list of the responsibilities of municipalities and cities appear to be very similar, if not identical, to those which, according to Article III-4, are the specific responsibility of the cantons, for example education, housing policy and tourism.

It is essential that the body drafting the Constitution clarify how these two lists of responsibilities relate to each other. Does it intend to give municipalities and cities exclusive powers in these fields, and that any action they take in these fields should be limited only by federal legislation? This would be a radical interpretation, which might deprive the cantons of a large number of their responsibilities.

Or does it, on the contrary, intend to give the municipalities and cities responsibility only for the local aspects of the affairs listed in the new Article VI-1-c? According to this interpretation, the municipalities and cities could have a role to play in these fields, but only subject to federal legislation and the legislation of the cantons and no doubt under the supervision of the Federation and the cantons.

We consider the second interpretation, *a priori*, more appropriate as it would avoid conflicts of powers between the different authorities and encourage harmonious co-operation. Whichever interpretation is correct, the scope of this provision needs to be clarified.

2.- Amendment XC adds to Article VI-1 a sub-paragraph on municipalities' financial resources. Under this provision, the municipalities are entitled to have their own sources of income, which are listed in the text, provided these are compatible with national tax policy. They also have the right to a share in the distribution of other financial resources (sales tax, corporation tax, etc.), in accordance with federal legislation.

The financial autonomy of local authorities is a major aspect of the European Charter of Local Self-Government.

Nevertheless, the proposed provision raises the question of the respective tax and financial powers of the Federation, the cantons and the municipalities and cities.

The Constitution is very vague with regard to both the Federation and the cantons and grants each of them the authority to finance their activities by levying taxes, borrowing or other means (Art. III -1- h and Art. III -4- 1).

The proposed text is much more specific with regard to the municipalities and appears to state that they should have their own sources of income (e.g. taxes on the sale of property, land tax, etc.).

The text explicitly stipulates that the authority to levy such taxes must be exercised in accordance with the country's tax policy. Does this refer to the policy of the Federation or can the cantons also pursue their own tax policy? There is also another question: are the taxation powers granted by the draft text exclusive powers or is it conceivable that the municipalities and the cantons might levy concurrent or parallel taxes on a particular tax base (for example on real estate)? The text needs to be clarified in this respect.

3.- Amendment XCIV extends the jurisdiction of the Constitutional Court. The first version of this article proposed gives the Court specific responsibility for protecting the right to local self-government.

The right to bring proceedings is extended to municipal or city councils and to the Association of the Municipalities and Cities of the Federation of Bosnia and Herzegovina, the establishment of which is provided for by amendment XC (new Article VI -1 - d). This provision appears to be based on the special complaints procedure which the German Constitution (Article 93, para. 1) 4b) makes available to municipalities. Under German law this is a special complaints procedure available only to municipalities or groups of municipalities and in respect of the breach of only one provision of the Constitution (Article 28, guaranteeing the right to local self-government).

Moreover, such appeals may only be made on condition that no other appeal with the same subject matter is lodged with the constitutional court of the Land in question.

In Germany, such appeals are exceptional: appeals are seldom lodged and those that are are rarely successful. This lack of success is no doubt due to the difficulty of defining the exact scope of the right to municipal self-government. It is quite likely that the same problem will arise in the case of the Federation of Bosnia and Herzegovina.

It is therefore possible that the second version may be the better of the two. It merely extends the list of authorities which may lodge complaints with the Constitutional Court to include municipal or city councils and their executive bodies. As in the case of all the other applicants provided for in the existing text, complaints may concern alleged violations of the Constitutions by any measure taken or proposed by a body of the Federation or the cantons. As the Constitution recognises the principle of local self-government (Art. VI-2-1) but contains many other provisions that may affect the municipalities' exercise of their powers and responsibilities, this second version is perhaps simpler and more effective.