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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION  
ON THE DRAFT AMENDMENTS  
TO THE CONSTITUTION OF REPUBLIKA SRPSKA**

**On the basis of comments by**

**Mr Michael Hansen JENSEN (Substitute member, Denmark)**  
**Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)**  
**Mr Chris HIMSWORTH (Expert of the Directorate  
of Democratic Institutions)**

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## I. Introduction

1. During the visit of a Council of Europe Monitoring Mission to Banja Luka on 23 April 2008 both Prime Minister Dodik and President Kuzmanovic asked for a Venice Commission assessment of the proposed Amendments to the Constitution of Republika Srpska (hereinafter RS). Mr Jensen (Denmark) and Mr Scholsem (Belgium) were appointed as reporting members, Mr Himsworth (United Kingdom) provided comments on the provisions relating to local government at the request of the Directorate of Democratic Institutions of the Directorate General of Democracy and Political Affairs. *The present Opinion was adopted by the Venice Commission at its 75<sup>th</sup> Plenary Session in Venice from 13 to 14 June 2008, on the basis of comments by Messrs Jensen, Scholsem and Himsworth (CDL(2008)059, 058 and 060).*

## II. Amendments to Chapter II of the Constitution on Human Rights and Freedoms

### ***Introductory remarks***

2. RS is an Entity of Bosnia and Herzegovina (hereinafter BiH) and the provisions on human rights in the RS Constitution therefore have to be analysed in the context of the provisions on human rights and freedoms in the State Constitution. The Constitution of BiH is particularly generous in respect to human rights and freedoms, incorporating in its text the rights and freedoms guaranteed by the European Convention of Human Rights (ECHR) and its Protocols and giving to them priority over all other law. In addition, its Article II.3 guarantees to all persons a number of enumerated rights. Moreover, Annex I grants constitutional status to a considerable number of international human rights treaties.

3. All the rights guaranteed by the BiH Constitution are fully applicable in RS prevailing over any rules of the Entity. Any human rights provisions of the RS Constitution have to be fully in line with the State Constitution. Since there were a number of discrepancies between the respective provisions of the RS Constitution and the BiH Constitution, the Venice Commission in its Opinion on the compatibility of the Entity Constitutions with the Constitution of BiH (CDL(1996)056final) suggested resolving this issue through a number of general provisions.

4. This recommendation was followed by introducing Art. 49.(3)-(5) into the RS Constitution which is worded as follows:

*“3. In the case there are differences between the provisions on rights and freedoms of the Constitution of Republika Srpska and those of the Constitution of Bosnia and Herzegovina, the provisions which are more favourable for the individual shall be applied.*

*4. The provisions of Articles 10, 21, 30, 32, 33, 34, 38 and 43 of the Constitution on rights and freedoms of citizens shall be considered the provisions on human rights and fundamental freedoms and shall apply to all, not only to citizens.*

*5. The provisions of Articles 13, 22, 23, 24, 25, 26, 28 and 30 of the Constitution on rights and freedoms shall be exercised in conformity with related provisions of Articles 8 through 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”*

5. Most of the Amendments in the area of human rights and freedoms are inspired by the wish to further harmonise some parts of the text of the RS Constitution with the ECHR. Such partial harmonisation can, as will become apparent in the following comments, lead to problems.

### ***Amendment CXXV to Art. 10***

6. This amendment adds the words “without discrimination” to Art. 10 which sets forth the constitutional principle of equality. The addition seems purely formal since its content should go without saying. While the text of the Article continues to refer to RS citizens only, Art. 49.(4)

extends its applicability to all persons, in accordance with the approach of Art. II.(4) of the BiH Constitution.

***Amendment CXXVI to Art. 11***

7. This Amendment, which harmonises the text of the RS Constitution with the prohibition of the death penalty under the BiH Constitution, is welcome.

***Amendment CXXVII to Art. 12***

8. According to this Amendment no one shall be held in slavery or servitude. It would be more appropriate to incorporate this Amendment in Art. 14, in accordance with the systematic approach used by the ECHR.

***Amendment CXXVIII to Art. 13***

9. This amendment is unacceptable. One cannot subject "human dignity, physical and spiritual integrity" to the restrictions of Art. 8.(2) ECHR. The problem in the Article is that it puts on the same level rights not subject to the restrictions of Art. 8 and rights subject to them. These different rights should be dealt with separately. As regards the rights subject to these restrictions, under the current text of the RS Constitution they already apply by virtue of Art. 49.(5). The Amendment therefore creates problems without serving any useful purpose.

***Amendment CCIX to Art. 15***

10. This addition, if it is considered necessary and useful, does not fit very well into Art. 15 dealing with arrest and detention in the context of criminal proceedings.

***Amendment CXXX to Art. 20***

11. This text, which follows more closely the wording of the ECHR, does not seem to aim at any change in practice. The previous wording with its reference to a final decision by a court seems clearer and preferable.

***Amendment CXXXI to Art. 21***

12. The aim of this Amendment is to integrate the provisions of Art. 3 of the Fourth Protocol to the ECHR into the RS Constitution. Since the ECHR Article only concerns expulsions at the international level, it seems questionable whether such a text should be included in an Entity Constitution.

13. Moreover, according to its wording, this Amendment is limited to RS citizens. By virtue of Art. 49.(4) of the RS Constitution, which provides that the rights granted by Article 21 to citizens are applicable to every individual, one arrives nevertheless at the absurd result that nobody may be expelled from the RS territory or be denied entry. It does not seem possible to interpret Art. 49.(4) as applicable only to those parts of Art. 21 which existed when the provision was introduced. Restricting these rights to RS citizens would also contradict the BiH Constitution, in particular its Art. I.(4) (movement of goods, services, capital and persons) and II.(5) (refugees and displaced persons). In any case III.(1).(f) of the BiH Constitution gives to the State level the responsibility for "immigration, refugee and asylum policy and regulation".

14. This Amendment therefore has to be withdrawn

***Amendment CXXXII to Article 25***

15. This Amendment adds to the current text a more detailed text inspired by Art. 10 ECHR. In this respect it meets with no objection. However, the sentence "This article shall not prevent the public authorities from requiring the licensing of broadcasting, television or cinema enterprises" should be deleted since by virtue of Art. III.(1).(h) of the BiH Constitution such licensing is within the responsibility of the State institutions.

16. Moreover, by incorporating the provisions of Art. 10.(2) ECHR into the text, the Amendment duplicates Art. 49.(5). This is bound to lead to confusion.

**Amendment CXXXIII to Article 31**

17. This Amendment replaces the current second paragraph of Art. 31 by a text inspired by Art. 11 ECHR. From the point of view of legal drafting, the Amendment meets with numerous objections:

- The Article would start with the specific freedom to set up political parties and organisations before moving to the more general idea of freedom of assembly and association;
- Freedom of assembly is already guaranteed by Article 30, but with different restrictions;
- The freedom to establish trade unions is already covered by Article 41 but without restrictions;
- The restriction for members of the armed forces should be deleted since the Entity does not dispose of its own armed forces.

An easier and more elegant way of solving the issue of permissible restrictions would be to include Art. 31 in the list of Articles in Art. 49.(5).

**Amendment CXXXIV to Art. 36**

18. This Amendment introduces a text inspired by the Convention on the Rights of the Child. This Convention is already applicable by virtue of Annex I, item 12 of the Constitution of BiH.

**Amendment CXXXVI to Art. 54**

19. This revised Article on property and natural resources goes into some detail and the Commission does not have enough information about the background of this provision to assess it fully.

20. In general, it does seem questionable whether it makes sense to provide for a constitutional protection of public property. This amounts to a protection of state property against state intervention. The principle of equal protection of private and public property could also have a negative impact on the legal position of private owners.

**Amendment CXXXVII to Art. 56**

21. The idea behind this Amendment clearly is to formulate a general provision on protection of property that reflects the model in Article 1 of the First Protocol to the ECHR. According to the current text of Article 56 the right to ownership may be restricted or taken away by law "against fair indemnity". However, the amendment does not contain a requirement for compensation in the case of expropriation and may therefore be regarded as a step back. It is recommended that article 56 guarantees compensation in case of expropriation. It must be remembered that traditionally a central idea behind constitutional protection of property is to ensure that an individual who owns property which must be surrendered for the public good should not thereby suffer a financial burden. The financial burden should be borne by society at large, in whose interest the intervention is made.

**III. Amendments of institutional character****Amendment CXXII to Article 3**

22. According to this Amendment "The transfer of powers from the Republika Srpska to the institutions of Bosnia and Herzegovina shall be carried out under the procedure and method prescribed for the amending the Constitution of the Republika Srpska". Constitutional amendments are regulated by Chapter XI of the Constitution (Articles 132-137). This procedure is quite heavy, involving first an amendment proposal (art. 132), then its approval by the majority of members of the National Assembly (art. 133), thereafter a public debate (art. 134) and finally adoption by a two-thirds majority of the National Assembly and a majority of the members of the Council of Peoples from each constituent people and the Others.

23. The Amendment has to be understood in the context of Art III.(5).(a) of the BiH Constitution which stipulates that “Bosnia and Herzegovina shall assume responsibilities for such other matters as are agreed by the Entities”. This provision is of major importance in order to alleviate the lack of adequate responsibilities of the State level and to provide it with additional powers by a voluntary agreement of both Entities. In its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (CDL-AD(2005)004) the Commission noted that the responsibilities of the State of Bosnia and Herzegovina cannot be compared with the powers enjoyed by European federal states such as Switzerland, Belgium, Austria, Germany or Russia. It expressed concern that, with such a weak State, Bosnia and Herzegovina will not be able to make much progress on the way towards European integration. This concern is strengthened by the fact that the envisaged constitutional reform, which would have explicitly transferred additional powers to the State level, failed in 2006. It appears therefore not desirable to make transfers of powers from the Entities to the State more difficult by introducing heavy and cumbersome procedural requirements. The Amendment should therefore be abandoned.

***Amendment CXXIII to Article 4***

24. This amendment takes into account the new situation following the disappearance of the Federal Republic of Yugoslavia. The alternative wording reflecting the text of the BiH Constitution seems preferable.

***Amendment CXL to Article 87***

25. This Amendment *inter alia* introduces disability or death as additional reasons for the early termination of the mandate of the President. Since “disability” is a subjective term open to differing interpretations, some guarantees should be introduced. Is it permanent or temporary disability? Who establishes it? Which are the remedies?

***Amendment CL to Art. 119***

26. This Amendment provides that the decisions of the RS Constitutional Court are not only binding and enforceable but also final. The sentence would read: “The decisions of the Constitutional Court are final, universally binding and enforceable in the territory of the Republic.” The last words were added by a previous Amendment since it is indeed possible that a State level Court may arrive at another decision. The decisions of the RS Constitutional Court are therefore not final (i.e. not subject to any further appeal) but only final within the internal legal order of the Entity.

**IV. Amendments in the area of local government**

***Amendment CXLI to the title of Chapter VI***

27. The amendment to the title of the Chapter adding “and local self-government” seems indeed desirable.

***Amendment CXLII to Art. 101***

28. As the note on this proposed amendment explains, an earlier version of Art 101 of the Constitution was entirely deleted by Amendment XXXII. Now the proposed Amendment would substitute a new Art 101. It purports to create a “right to local self-government” for citizens. Such a right for individuals is *not* a right which the European Charter of Local Self-Government seeks to guarantee although there is a reference to citizen participation in the Charter’s preamble and Art 3 acknowledges the possibility of such “direct citizen participation”. The focus of the Charter is instead on the autonomy of organs of local self-government. There is, however, a practice in some countries of seeking to create both forms of “right” (for both institutions and individuals) to run in parallel and this is not, in itself, a disadvantage. Two observations should be made: (1) Although the “citizen” terminology may suit present purposes, it may soon turn out to be too narrow. Rules of the European Union require voting rights at local level to extend beyond citizens of the member state to citizens of other EU countries. (2) It is

important that any right to local self-government for individuals should never be capable of being construed as undermining the autonomy of local authorities guaranteed by the Charter. The right exercisable “directly” must not displace the right exercisable through the elected authorities. All will depend, in practice, on the more detailed legal provisions made and these must be Charter-compliant.

***Amendment CXLIII inserting a new Article 101(a)***

29. This proposed amendment, by inserting a new Art. 101(a), expands on the concept of “units of local self-government” introduced in the new Art. 101 by defining those units as municipalities and cities. There are no Charter concerns or other major points of principle raised by the amendment. A drafting suggestion: It might be appropriate to remove from the second clause “and their statuses shall be regulated by law” and instead insert at the end of the first clause “which shall be regulated by law”. It seems desirable to make regulation by law a requirement for both municipalities and cities.

***Amendment CXLIV to Art. 102***

30. The first amendment to Art 102 (i.e. replacing “municipality” with “unit of local self-government”) is technical and consequential.

31. The other amendments, as explained in the “Reasoning”, adjust the competences of the units of local self-government. One specific competence is added and two general provisions are deleted. The added competence is intended to enable (*not* require) the establishment of forms of local government for settlements within municipalities and cities. There can be nothing objectionable in principle to the promotion of such structures, although there is no Charter requirement for the establishment of communities within units of local self government. Two drafting suggestions: (1) The terminology “forms of local self-government” should be replaced by, for instance, “forms of community self-government” to avoid confusion with the units of local self-government properly so called. It is important to know to which organisations the Charter requirements apply and presumably they would not be intended to apply at the “lower” level (2) In the English language version at least, there is a problem about starting item 7(a) “May establish . . .” because the whole paragraph is structured with separate items after “shall”. To correct this, it may be necessary to establish two lists of items - one (a list of mandatory functions) following “shall” and the other (perhaps a list of only one permissive function) starting with “may”.

32. The third amendment deletes paras 2 and 3 of Art 102. Those two paragraphs are not very well drafted and should indeed probably be discarded. Four observations on the resulting list: (1) The remaining references to “municipality” presumably need to be removed and replaced by references to “unit of local self-government”. (2) The Charter (Art 3) requirement is that local authorities do “regulate and manage a substantial share of public affairs under their responsibility”. Presumably, subject to the further sectoral and other legal regulation made, this list does include such a substantial share of public affairs. (3) Is it, however, really anticipated that the smallest municipality and the largest city should be required to discharge the *same* list (subject to item 8) of functions? Do *all* municipalities provide *all* these services at present? (4) Furthermore, the Constitution does make very detailed provision for the functions to be performed. Constitutions are normally intended to make general provision for the great institutions of the country or in this case Entity and their functions. To make constitutional provision for “handicrafts”, “catering services” and some others appears anomalous.

***Amendment CXLV inserting a new Article 102(a)***

33. The European Charter of Local Self-Government currently makes no specific provision for a “right to property” of local authorities. However, the absence in the domestic order of such a right undermines the “ability” of local authorities to “manage” local affairs “under their own responsibility” and is difficult to reconcile with the subsidiarity principle itself. Therefore, the introduction of the new Art 102.(a) is to be welcomed. Recently, the importance of municipalities’ right to property has been given formal recognition by the Congress of Local and

Regional Authorities of the Council of Europe by the inclusion in its Draft Additional Protocol to the Charter of November 2007 of an article on property of local authorities.

***Amendment CXLVI inserting a new Article 102(b)***

34. This proposed amendment would introduce a new Art 102.b designed to give units of local self-government the protection of Art 8 of the Charter. This is to be welcomed. It should, however, be born in mind that full Charter protection extends only to the so called “own functions” of local authorities and not to functions additionally delegated to them by central government. Perhaps this is implied in the text of the Amendment referring to “tasks falling under their competences”. Clarification might, however, be desirable.

***Amendment CXLVII to Art. 103***

35. This amendment is designed to capture the essence of Art 9 of the Charter. It greatly expands on the existing Art 103 of the Constitution and is, therefore, greatly to be welcomed. The text could, however, be further improved by (1) giving priority (as the Charter does) to the availability of financial resources sufficient for the discharge of local authority competences; (2) entitling units of local self-government freely to dispose of *all* those resources - not just those deriving from their “own incomes” as in the present text of the Amendment; and (3) securing that part at least of their total funds do indeed derive from “own income” i.e. local taxes and charges whose rate they can determine.

**V. Conclusions**

36. The proposed Amendments to a large extent clearly are not ripe for adoption. This concerns in particular the Amendments to the Chapter on Human Rights and Freedoms which create more problems than they resolve. The Amendment rendering a further transfer of powers to the State level more difficult also seems undesirable in the present situation in BiH. By contrast, the Amendments in the area of local self-government are in general positive and reflect important principles of the European Charter of Local Self-Government. Nevertheless the drafting of some Amendments could be further improved.

37. With respect to the Amendments in the area of human rights, it seems questionable whether the approach chosen of partly harmonising the text with the ECHR is pertinent. As set forth above, there is a wealth of human rights rules at the State level and these rules are fully applicable in RS. Each RS judge first has to apply these rules and in practice there seems little room left for specific Entity rules. Instead of trying to harmonise the text of the Entity Constitution with the ECHR without succeeding to achieve this aim, a far more elegant but also far easier approach would be to simply delete the human rights provisions in the RS Constitution and replace them with a reference to the applicability of the human rights rules of the BiH Constitution. Only those (few) rules of the RS Constitution, which really add to the protection provided by the State Constitution, should be kept. This would in no way diminish human rights protection in practice but avoid numerous technical problems and problems of interpretation and make the life of legal practitioners in the Entity a lot easier.