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

**by
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This report on the amendments to the Constitution of the Republika Srpska (CXXII–CL) was prepared by Professor Chris Himsworth and reviewed by the DGDAP - Directorate of Democratic Institutions. It is intended as a specific contribution on local self-government issues within the overall assessment of the amendments to the Constitution by the Venice Commission.

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INTRODUCTION

1. Proposals have been made for the amendment of the Constitution of Republika Srpska and I have been asked to review and report on those which relate to local self-government. I have been supplied with the text of the current Constitution, apparently amended to 2002/2003, although the text states that amendments published in the Official Gazette 98/03 are NOT included in the version I have. I am, however, assuming that those last amendments do not affect the text in a material way.

2. The text of the proposed amendments supplied to me is organised in the order of the Chapters and Articles of the Constitution. I have, therefore, focused on Amendments CXXII–CXXVII which relate to Articles in Chapter VI of the Constitution, currently entitled “Territorial organisation” - although a passing reference is also made (in relation to Amendment CXXVI) to Amendment CXXXVI which proposes an amendment to Article 54 of the Constitution (on the ownership of property).

3. Also supplied to me is a document headed “Reasoning” which provides a summary account of the rationale underlying each of the proposed amendments. The notes relating to the amendments with which I am concerned make it clear that their general aim is to incorporate more strongly into the Constitution the principles of the European Charter of Local Self-Government (1985) which Bosnia and Herzegovina has ratified.

4. In the notes which follow, para 5 contains some general observations. The remaining paragraphs address the individual amendments.

COMMENTARY

5. Although states which have ratified the Charter of Local Self Government adopt different practices in relation to the Charter’s incorporation into domestic law (practices dependent in part upon the monist or dualist approach of each state’s legal system to the incorporation of international treaties in general), it can only be thought to be generally desirable to include the main principles of the Charter within the text of a state’s written constitution. The degree of specificity with which this is done and the style of incorporation will always be a matter of judgment for states. In the case of the Republika Srpska (“RS”) amendments proposed, it seems to me that a reasonable selection of the Charter’s principal provisions is adopted into the Constitution. There will, however, always be room for the objection that the selection of some Charter articles implies a misplaced down-grading of all others. That would be unfortunate and care has to be taken to implement remaining articles by other means. There is a case for the incorporation of the entire Charter into the constitution, if only by reference.

Amendment CXXII

6. The amendments made here to the title of Chapter VI of the Constitution and to Art 100 are a necessary, but purely formal, introduction to the substantive amendments which follow. They clarify the new focus of the Chapter by relating it directly to provision for local self-government.

Amendment CXLII

7. As the note on this proposed amendment explains, an earlier version of Art 101 of the Constitution was entirely deleted by Amendment XXXII. Now this proposed Amendment would substitute a new Art 101. It purports to create a “right to local self-government” for citizens.

8. Such a right for individuals is *not* a right which the European Charter 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. I am, however, aware of the practice in some countries of seeking to create both forms of “right” (for both institutions and individuals) to run in parallel and I believe that this is not, in itself, a disadvantage. I would, however, make two observations:

(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 provision made and that itself must be Charter-compliant.

Amendment CXLIII

9. 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. Two drafting suggestions: (1) 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. And (2), the word “other” (in para 3) - other than what? - might be deleted.

Amendment CXLIV

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

11. 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.

12. 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. However, I have again two drafting suggestions: (1) I would strongly suggest that 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 I assume that 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”.

13. The third amendment deletes paras 2 and 3 of Art 102. Those two paragraphs are not very well drafted and, subject to para 14 below, should indeed probably be discarded.

14. Since items 1-8 in the first paragraph of Art 102 do not attract any amendments, they do not call directly for comment by me. Four observations might, however, be made:

(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”. I presume that, 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, I believe, unnecessarily detailed provision for the functions to be performed. Constitutions are normally intended to make general provision for the great institutions of the country and their functions. To make constitutional provision for “handicrafts”, “catering services” and some others appears anomalous.

15. Thought must also be given to the amendment of “municipal” terminology in the text of Art 102 added by earlier Amendment LXXXV (on “constituent peoples” etc).

Amendment CXLV

16. 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.

17. Recently, the importance of this right 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 the following:

“Article 6

Local authorities' property

1. Local authorities shall be entitled to acquire and utilise property, including the right to transfer ownership or management thereof to intermunicipal co-operation structures, public services or other bodies, in the exercise of their responsibilities in the public interest and within the limits of the law.

2. So far as permitted by the law, compulsory purchase of local government assets shall be carried out solely for the benefit of the public and in exchange for fair compensation.”

18. This confirms that the new Art 102 (a) is a step in the right direction. As an aside, reference should also be made to para 2 of the substituted version of Art 54 of the Constitution inserted by Amendment CXXXVI. That rightly reaffirms the property right of “local self-government”. Two comments: (1) Should that amendment not refer to “units of local self-government” – the terminology adopted in Chapter VI? (2) Are there not *other* categories of owner of public property which go unmentioned? Other RS public bodies? Does not the State of Bosnia and Herzegovina own property within RS?

19. A more technical drafting question relates to the use, in the proposed amendment, of “bodies” of the local self-government unit. This term will not, I believe, have been defined in the Constitution. Perhaps such terminology should be introduced into the “competences” provision in Art 100? Alternatively, and probably better, could not the reference to “bodies” be deleted? Could it not be left, for the purposes of the Constitution, to the “units” themselves to manage their property?

Amendment CXVII

20. 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. In principle, this is certainly to be welcomed.

21. I have, however, a number of comments/suggestions: (1) There is the technical question of the use of “bodies” (see also para 19 above). I would prefer that the independence/autonomy were conferred on the “units” themselves. (2) I think “independent” may be a bit strong - although this is a linguistic issue in which I am reluctant to intervene. Perhaps “autonomous” would be better? (3) I would propose the deletion of the closing words “by the responsible government authorities”. Of course, the restriction of central government intrusion is the main aim. But permitted controls on grounds of “constitutionality and legality” could fall to be exercised also by agencies independent of central government and by the courts. And (4), 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 clear in the text of the amendment referring to “tasks falling under their competences”? Clarification might, however, be desirable.

Amendment CXLVII

22. 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.

23. I do, however, have a criticism of the text used for the incorporation. The text should be amended (a) to give priority (as the Charter does) to the availability of financial resources sufficient for the discharge of local authority competences; (b) to entitle 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 then (c) to secure that part at least of their total funds do indeed derive from “own income” ie. local taxes and charges whose rate they can determine.

24. I would, therefore, propose a new Art 103 as follows:

“Local self-government units shall be entitled to adequate financial resources of their own of which they may dispose freely. These resources shall be commensurate with their responsibilities/functions/competences provided for by this Constitution and the law. Part at least of the financial resources of units of local self-government shall derive from local taxes and charges of which, within the limits of the law, they have the power to determine the rate.”

25. It should also be noted that the terms of Art 9 of the Charter do extend much further than this and thought should be given to their incorporation into the Constitution. In any event, the laws of Republika Srpska must achieve their realisation. Additionally, the Draft Additional Protocol referred to in para 17 above expands greatly on the requirements of Art 9. In particular, the requirement that a “part at least” of financial resources should derive from “own” revenues, would become a requirement of a “substantial proportion”. It might be that Republika Srpska should take a lead by giving constitutional recognition to that higher standard.