

## FEATURES OF THE CONSTITUTION AND THE CONSTITUTIONAL ORDER OF BOSNIA AND HERZEGOVINA

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**Abstract:** *The Constitution of Bosnia and Herzegovina enacted as part of the Dayton agreement confirmed the existence of the Republic of Srpska (established in 1992) and the Federation of Bosnia and Herzegovina (established in Washington, 1994.). The Constitution prescribes the organization of the state government, adding functions and relationships of the Presidency, the Council of Ministers, the Parliamentary Assembly, the Constitutional Court and other institutions. The Constitution gave to entities the state-building elements and entitled them to regulate human rights and issues of good governance using their entity constitutions. There are many ambiguities regarding this constitution, even illogical, but it is important that it was able to establish the state and its organs and brought peace, and everything else should be upgraded.*

**Keywords:** *constitution, Bosnia and Herzegovina, Dayton, Republic of Srpska, the Federation of Bosnia and Herzegovina, parliament, Council of Ministers*

### 1. INTRODUCTION

People often while talking about Bosnia and Herzegovina use “od Kulina Bana do danasnjih dana” (from the Ban Kulin’s time) neologism. Sometimes referred to as Bosnia and Herzegovina, but sometimes they are without their statehood, because it has never had its constitution until 1946, and even then as a part of the Federal Yugoslavia. When Yugoslavia broke up, Bosnia and Herzegovina also broke up to the Republic of Srpska (1992) and then the Federation of Bosnia and Herzegovina (1994). Washington Constitution from 1994 formed the Federation of Bosnia and Herzegovina, with a constitution offered with small changes that is in force even today. Republic of Srpska has its own constitution from 1993. The Dayton agreement provided Bosnia and Herzegovina with its own constitution, but with retention of the entity constitutions too.

## 2. THE CREATION AND THE NEED TO CREATE THE STATE OF BOSNIA AND HERZEGOVINA

The process of creating the constitutionality of Bosnia and Herzegovina statehood takes a very long time. The first mention of B&H was in the tenth century, and then in the twelfth century, in the time of King Tvrtko, referred to as the State but often in terms of the vassal relationship.

From the fifteenth to the nineteenth century, Bosnia and Herzegovina was under the Turkish administration and since the Congress of Berlin; B&H was under Austro-Hungarian rule. From 1918 to 1941, was one of the Croatian bans. From 1945 to 1992 was a part of Yugoslavia and it is the highest achievement of statehood. ZAVNOBiH constitutes it as a national community of Serbs, Croats and Muslims. Today's period is lasting from 1991; when after the conflict and with the help of the international community, a state of Bosnia and Herzegovina was created.

The state is the perfect tool to protect its people, but it must be democratic, generally accepted in order to fulfill the expectations of those who created it, i.e. to be the protector of the nation.

Only people that have a state or nation-building unit can have the confidence to create and preserve their identity and their individual and collective rights and freedoms.

People who have their own culture, language and traditions of the peoples of Bosnia and Herzegovina are rare in the world, which are unable to resolve their statehood status. It's hard to come up with the right solution for the B&H. Great Serbian writer and Nobel Prize winner Ivo Andrić says, "At the place where Bosnia and Herzegovina appear, the logic stops."

In the last twenty years, there have been major changes with the creation of a new order. The epicenter of events was Southeast Europe, particularly the Balkans. There was a collapse of the socialist constitution. There have been busy creating new nation-states, regardless of whether they themselves exist. Some 30 new states have been formed.

Bosnia and Herzegovina and its state-building units were created in that euphoria. During the breakup of Yugoslavia, the European Community has offered its "good services". The Badinter Arbitration Commission was formed, calling on all former federal units of Yugoslavia to apply for autonomy. In the spring of 1992, the republics of former Yugoslavia (Slovenia, Croatia, Macedonia, Serbia and Montenegro) have become recognized by the countries of the European Union. Bosnia and Herzegovina was left aside because there was no agreement between three people; a compromise of political parties and parliament was not found.<sup>1</sup>

The situation in Bosnia is different from the state in other republics, because three nations live in B&H - Serbs (35%), Croats (17%) and Muslims (42%) who are equal and constitutive. The peoples have equal rights regardless of their number. At that time - in the pre-war B&H Parliament there was a outvoting - a supremacy of the Serbian people. After these and other events, the war against all took place; even Muslims against Muslims, the war lasted for three and a half years.

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<sup>1</sup> Kuzmanović, Rajko, *Ustavno pravo*, Fakultet poslovne ekonomije, Banja Luka, 2006, p. 295

### 3. THE INTERNATIONAL COMMUNITY IN THE SEARCH FOR PEACE AND CONSTITUTION MAKING

The international community (European countries) led by the United States, knew that the recognition of B&H is the political act. No nation would accept such B&H or countries in the region. Talks have been ongoing, and pointed to serious negotiations and plans: Cutilheiro's plan, London Conference, Vance - Owen plan, Owen - Stoltenberg plan, the Washington Agreement, the Contact Group plan, and others.

Sometimes the desire and sometimes the intention of the international community to create and preserve Bosnia and Herzegovina were transformed into ideas and plans of peace conferences.

In all negotiations, still one of the warring parties refused to accept some of the peace talks.

There are many similarities in all peace negotiations, and this one is the most common - a single B&H, government organizations, maps, percentages of territorial division, form of government, etc.

All plans and negotiations, despite the desire for a unified and indivisible B&H by the warring parties sought termination of the war, which was very difficult because of the fact that since there is B&H, it is a multinational, multiconfessional, and multicultural community.<sup>2</sup> The big problem for the restoration of peace in B&H, gave the West because the legitimacy of the rump presidency of Bosnia and Herzegovina was admitted, rump Assembly, and it was necessary to respect the consensus of all three constituent nations.<sup>3</sup>

The final solution was reached in the fall of 1995 with the adoption of the Dayton peace agreement in the U.S. state of Ohio (Wright Patterson air force base). States participating in the negotiations are the U.S., UK, Germany, France, and now the Russian Federation with representatives of the United Nations and the European Union, as well as witnesses - guarantors - Serbia, Croatia and Montenegro, as well as the parties to the conflict - the delegation of Serbs, Croats and Bosniaks. About a thousand delegates and observers attended the gathering.

If not for the strong U.S. pressure, this agreement would not have been passed, just as previous plans. Agreement for Peace in Bosnia and Herzegovina has eleven annexes and was signed in Paris on 14 December 1995. Finally, with the Annex IV of this Agreement, Bosnia and Herzegovina received the Constitution and after 500 years, the full capacity of the state as a complex of two units of state-building was constituted.

### 4. BOSNIA AND HERZEGOVINA AND ITS DAYTON CONSTITUTION

The Constitution of B&H, Article I states that the new state of Bosnia and Herzegovina has been created, the instead of earlier Republic of B&H, now with three equal and constituent groups. As undue unitary - a unique country was dismissed, which was the problem of negotiating groups. The new state must be ethnic - civil and apply ethical and civic movements, it has to protect the collective rights of each nation and every citizen's personal rights. It turns out that it can only exist as a complex state with a mechanism of protection

<sup>2</sup> Carević, Mićo, *Uzroci i posledice raspada Jugoslavije*, Pravni fakultet, Banja Luka, 2003, p. 428

<sup>3</sup> Avramov, Smilja, *Postherojski rat zapada protiv Jugoslavije*, Idi, Veternik, 1997, p. 149

entities and the people at the polls. In this country, no one got everything they wanted, or had lost the elements of independence; further compromise is necessary, consensus, and equality of all three constituent nations. According to the Dayton constitution, it continues to exist within its internationally recognized borders.

It was necessary to determine the free movement of goods, services, capital, people, and the existence of entity citizenship and citizenship of Bosnia and Herzegovina with the Constitution. The Constitution established human rights in thirteen points, but the European Convention on Human Rights was fully accepted.

The Constitution established the authorities of B&H as a state and the entities. Bosnia and Herzegovina is primarily responsible for the positive system of enumeration, exhaustive enumeration, and the entities are primarily responsible for the authorities according to the system of the general clause, i.e. they have all powers not given to governmental institutions.<sup>4</sup> Constitution of Bosnia and Herzegovina is *lex superior* and regulates all the essential elements, while its principles are:

- The principle of a democratic state, everyone is equal and there is no discrimination,
- The principle of legal actions,
- The principle of citizen sovereignty,
- The principle of universality of rights and freedoms,
- The principle of equality as an entity of the federal units

In addition to the principle of state organization, the Constitution regulated state organizing with the entities and the B&H institutions - Parliament, the Presidency, the Council of Ministers, the Constitutional Court, the Central Bank and others.

Deficiencies of unusual Constitution are:

- The fact it is a part of the Dayton Agreement, no such examples in the world. It is the act of the international law, made by the Anglo-Saxon law (and B&H is in Europe), it was written in the form of the essay, not by members. It is very short and has twelve articles, therefore it is the shortest constitution in the world (the U.S. Constitution has twenty-seven articles and amendments).
- There are many gaps, ambiguities, incompleteness, and others.
- The Constitution did not establish a form of government, has not said whether it is federation or confederation, and did not set a form of government.

## 5. INSTITUTIONS OF BOSNIA AND HERZEGOVINA

a) The highest representative body in Bosnia and Herzegovina is the Parliamentary Assembly of the bicameral system, made up of the House of Peoples and the House of Representatives. Such a structure corresponds to this type of state boards.

- The House of Peoples is specific because it is home to three ethnic groups. For the Republic of Srpska, the entity coincides with the people, but the Federation is comprised of two people, which means that the House of People expresses the equality of peoples. The House is composed of five Croats, five Serbs, and five Bosniaks.

<sup>4</sup> Gligorić, Tihomir, *Zajedničke institucije Bosne i Hercegovine*, Narodna biblioteka, Doboj, 2002, p. 32-33

Two-thirds (ten) from the Federation elects the House of Peoples of the Federation, where Bosniaks delegates elect Bosniaks, and Croatian delegates elect Croatians. The National Assembly of the Republic of Srpska elects five Serbian delegates.

- The House of Representatives consists of 42 representatives, of that two-thirds (28) elected representatives is from the Federation and one-third (14) is from the Republic of Srpska. Representatives of the House of Representatives elect people directly in their entity. Quorum in this House makes a majority of two-thirds of the elected delegates (28).

Jurisdiction of the Parliamentary Assembly is:

- Passing laws,
- Deciding upon the sources and amounts of income for the functioning of the institutions of Bosnia and Herzegovina and its international obligations,
- Budget approval,
- Deciding on agreement ratification,
- Other issues

The Parliament accepted the principle that the majority (more than half) contains at least one third of the votes of the delegates – i.e. the representatives from the territory of each entity. If the majority does not contain one third of the votes of the delegates - representatives from each entity, then it will meet the President and the Vice President in the Commission who will try to secure approval within three days of voting.<sup>5</sup> If they fail to provide one-third of the delegates from each entity, the decision of the majority of members present and voting shall be accepted, providing that the dissenting votes do not include two-thirds or more than two-thirds of the delegates - representatives elected in a single entity. In parliamentary assembly is allowed in certain cases, to highlight the protection of vital interests. If a majority of delegates - delegates from one of the three constituent nations declares that a decision of parliament is destructive to their vital interests, then the decision will be re-examined and it will be re-voted. For decision to be re-enacted in the voting, it is necessary that majority of the votes in the House is by Bosniaks, Croatian and Serbian delegates present and voting. If there is no majority, the Chairman of the House will assemble a committee to address the issue, and if it does not resolve the issue, it shall be submitted to the Constitutional Court to check the validity of procedural issues.

b) The Presidency of Bosnia and Herzegovina

The Presidency is the collective head of state; it was the only possible solution in a divided B&H. The Presidency is composed of three members (representatives of the three constituent nations) elected directly by citizens (one of two from the RS and two from the Federation). The members of the Presidency are elected for a term of four years, and they rotate every eight months.

The functions of the presidency:

- Conducting the foreign policy
- Appointing ambassadors and other international representatives of Bosnia and Herzegovina (evenly across the constituent nations)
- Presentation of B&H in international and European organizations and institutions,
- Negotiation of international agreements, cancellation and ratifying of such contracts with the consent of the Parliamentary Assembly,
- Executing the decisions of the Parliamentary Assembly,

<sup>5</sup> Golijan, Dragan, *Zakonodavna vlast Bosne i Hercegovine*, NUBL, Banja Luka, 2011, p. 80

- Proposing the annual budget to the Parliamentary Assembly with the recommendation of the Council of Ministers,
- Reporting to the Parliamentary Assembly on expenditures by the Presidency,
- If necessary, coordination with international and non-governmental organizations,
- Performing other responsibilities as assigned by the Parliamentary Assembly

c) The Council of Ministers

The executive authority next to Presidency makes the Council of Ministers. Presidency appoints the chairman, and he appointed ministers and deputy ministers. The ministers and their deputies shall take its positions after the approval of the House of Representatives, and the current Council of Ministers has nine ministers and chairman. The relationship of the ministerial positions is as in other organs (one third of the Republic of Srpska and two-thirds of the Federation). This body is responsible for implementing the policy of Bosnia and Herzegovina.

d) The Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina was established as authoritative institutions in order to implement and evaluate the constitutionality and legality of regulations and other laws, and in particular to protect the Constitution. The court has nine judges, of whom two members elect the National Assembly of the Republic of Srpska, four by the House of Representatives of the Federation, and the other three members appoints the President of the European Court.

The Constitutional Court decides on disputes:

- Between the two entities,
- Between Bosnia and Herzegovina and an entity or both,
- Among the institutions of Bosnia and Herzegovina

The Constitution regulates from whom the requirements to file a case before the Constitutional Court can be made:

- Member of the Presidency,
- Chairman of the Council of Ministers,
- Chairman or his replacement of one of the Houses of the Parliamentary Assembly,
- By one quarter of one of the houses of the Parliamentary Assembly,
- By one quarter of one of the houses of the legislature of an entity

## 6. HIGH REPRESENTATIVE FOR BOSNIA AND HERZEGOVINA

Annex 10 of Dayton agreement that regulates the implementation of civil affairs establishes the institution of the High Representative. According to Annex 10 and by the way some performers of the institution of the High Representative behaved, it looks it has the power of the protector. It can be said that the Bosnia and Herzegovina is a complex state that is under the protectorate of the specific nation and which encompass (entities) that have more autonomy than in the famous complex states<sup>6</sup>. The High Representative is not an institution but a body of an international character. The establishment of the High Representative to facilitate the parties' efforts to maintain peace and co-ordinate activities is listed in the Annex.

<sup>6</sup> Fira, Aleksandar, *Enciklopedija Ustavnog prava*, tom 4, Ustavno pravo BiH, Novi Sad, 2002, p. 68

The Parties have agreed and predicted that the High Representative will:

- Monitor the implementation of the peace settlement,
- Coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina
- Maintain close contacts with political parties,
- Facilitate overcoming of all difficulties,
- Participate in meetings of donors
- Periodically report to the United Nations and the European Union

Based on these tasks, there is no possibility that the High Representative comes into the position of any authority, and makes any decisions instead of them. The Peace Implementation Council and its Steering Committee were established after the Dayton Agreement<sup>7</sup>. At the Steering Committee meeting in Bonn held on 10 December 1997, to Carlos Westendorp (representative at that time) has been given authority to pass laws and take appropriate actions, which he did. The activities of the High Representative could be grouped into three groups:

- Passing legislation of constitutional and legal character,
- Passing legislation regarding outlawing,
- Adoption of acts of personal and organizational character

The High Representative is the usurper of democracy and human rights, but somewhat lenient.

## 7. RESUME

The Constitution of Bosnia and Herzegovina is an act of international law, not the law of democracy of Bosnia and Herzegovina. The Constitution was adopted in a foreign country without a democratic procedure. True, it was passed to establish a situation in a state that just came out of war in order to bring peace. Bosnia and Herzegovina is not a state of continuity; it is a different in form, government and the state organization and of everything, only territory with previous boundaries left.

Moreover, after almost twenty years of the existence of the institution of the High Representative, institutions hardly functioning, the election results are difficult to implement, the parliamentary majority change, ministers do not take responsibility, and the government of entities are falling. All this shows us that the Constitution is not adapted to the needs of the people, and that Bosnia and Herzegovina is not a state of continuity. The problem that should be solved if the B&H is to be a "normal" country lies in the attitudes of individuals inside the country, unsettled relations among politicians, but the personal interests of individuals and still-present hatred between the constituent peoples in B&H.<sup>8</sup>

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<sup>7</sup> Golijan, Dragan, *Politička predstavništva balkanskih zemalja*, Alegraf, Han Pijesak, 2004, p. 101

<sup>8</sup> Golijan Dragan, Soja Tijana: Bosnia and Herzegovina, foreign policy and foreign investments. *International Journal of Economics and Law*, Vol.1, No. 3, Novi Sad, December 2011, p. 52.

