

# YOUNG LAWYERS' ASSOCIATION IN BOSNIA AND HERZEGOVINA: "NEW IDEAS, BETTER CONSTITUTION"<sup>1</sup>

## I Summary

The Working group of the Young Lawyers' Association in Bosnia and Herzegovina (hereinafter: BiH) was created with the objective of making proposals for reforms of the Constitution of BiH, led by the fact that all discussions about constitutional reforms so far have only concerned certain questions, such as the structure and methods of election and decision making in State organs and the division of jurisdiction between the State and the entities. The Working group has come to the conclusion that it is necessary to perform a complete analysis of the Constitution of BiH and has focused on analyzing the current constitutional state through pointing out the deficiencies (both functional and technical) in the Constitution of BiH by: a. describing the current state in the discussed areas and presenting the most obvious problems that occur as a consequence of the current constitutional provisions; b. proposing new solutions, i.e. describing the proposals of new solutions in the form of conclusions reached during the meetings of the Working group; and c. proposing amendments to the Constitution of BiH which are the final result of the Working group's activities and which have been reached by consensus of all members of the Working group.

The Working group has analyzed and discussed the following issues:

- Human rights and liberties;
- Local self-government in BiH;
- Displaced persons and returnees;
- Division of jurisdiction between BiH and the entities;
- Parliamentary Assembly of BiH;
- Presidency of BiH;
- Council of Ministers of BiH;
- Constitutional Court of BiH
- Judicial system of BiH
- Territorial organization of BiH.

The main results of the Working group's activities, which have been reached by consensus of all members, are: widening of the catalogue of human rights in the Constitution, replacing the term "Others" with "Nationally undeclared (undeclared in terms of nationality)

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<sup>1</sup> Final document of the Working Group of young lawyers with proposals of new constitutional solutions in BiH. These proposals were made in Sarajevo, February 2010 by the following team of authors: Muhamed Mujakić, Goran Marković, Maja Sahadžić, Damir Banović, Nedim Kulenović, Marina Mandeganja, Alma Tajić, Jelena Čehobašić, Katica Tomić and Dejan Ružić. The Project Coordinator was Zlatan Balta, Executive Secretary of the Young Lawyers' Association in BiH. The project was supported by: the Human Rights Centre of the University of Sarajevo, the Embassy of Switzerland and the Swiss Cooperation Office in BiH. This document is available on the web page [www.boljustav.ba](http://www.boljustav.ba)

and national minorities”, constitutional regulation of local self – governance, emphasizing the rights of returnees with the goal of a better implementation of Annex VII of the General Framework Agreement, determining and widening the jurisdiction of BiH in the form of exclusive and divided jurisdiction, removal of “entity voting” in the House of Representatives in the Parliamentary Assembly of BiH, changing the name “Parliamentary Assembly of BiH” to “Assembly of BiH” because of the current pleonasm, involving the nationally undeclared (undeclared in terms of nationality) and national minorities in the House of Peoples, equality of both Houses in the Assembly and decision making by a majority of votes of all members, with a qualified procedure in the case of vital interests of constitutive peoples (the current term of “vital national interest” is no longer used).

Furthermore, an indirect process of electing the President and three Vice-presidents of BiH by the Assembly of BiH is introduced, certain jurisdictions of the Presidency of BiH are transferred to the Council of Ministers of BiH (foreign policy, proposing the budget), the position of President of the Council of Ministers is introduced, the jurisdiction of the Council of Ministers is widened to governmental capacity, the Constitutional Court of BiH has ten judges, all nationals of BiH with the formula 3+3+3+1, the Supreme Court of BiH is established, already existing institutions such as the High Judicial and Prosecutorial Council of BiH, Court of BiH and the Prosecutors Office of BiH are introduced in the Constitution, the territorial organization of BiH is analyzed and a the reduction of the number of Cantons in the FBiH (hereinafter: FBiH) to five Cantons is proposed and, finally, the Working group requests the consistent application of the decision of the Constitutional Court of BiH regarding the constitutiveness of peoples in the entire territory of BiH and that all names which are not in the spirit of constitutiveness of peoples or are discriminatory are changed in the shortest time possible.

## **II Amendments to the Constitution of BiH**

### **Amendment II to the Constitution of BiH**

In the paragraph 9 of the Preamble of the BiH Constitution, words: “(community with others)” shall be replaced by “national minorities, nationally undeclared”.

### **Amendment III to the Constitution of BiH**

In the Constitution of BiH, after paragraph 3. of the Article I, a new paragraph shall be added, reading as follows: “

#### **4. Local Self – Government**

Local self – government shall be ensured in BiH on the level of the municipalities and the cities. All municipalities in BiH shall have their own statutes, equal responsibilities, equal status, and the same authorities. Cities shall have their own statutes, equal status, equal authorities and statutory defined responsibilities. Local self- government shall be more closely regulated by a Framework Law on Local Self – Government, in accordance with the European Charter on Local Self – Government. ”

The present paragraphs 4.-7. shall become paragraphs 5.-8..

### **Amendment IV to the Constitution of BiH**

Article II – paragraph 3. and 4. of the Constitution of BiH shall be amended and read as follows: “

### **3. Catalogue of Rights**

All persons within the territory of BiH shall enjoy human rights and freedoms referred to in paragraph 2) of this Article; which include:

- a. The right to life;
- b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment;
- c. The right not to be held in slavery or servitude or to perform forced or compulsory labor;
- d. The right to human dignity;
- e. The right to liberty and security of person;
- f. The right to a fair hearing in civil and criminal matters and other rights relating to criminal proceedings;
- g. The right to private and family life, home and correspondence;
- h. Freedom of thought, conscience and religion;
- i. Freedom of expression;
- j. Freedom of peaceful assembly and freedom of association with others;
- k. The right to marry and to found a family;
- l. The right to property;
- m. The right to education;
- n. The right to freedom of movement and residence;
- o. The right to work and rights in connection with work;
- p. The right to protection of the environment;
- q. d) The right to consumer's protection;
- r. s) The right to social and health care for the elderly;
- s. t) The right to effective administration for the benefit of citizens.

### **4. Non-discrimination**

The enjoyment of the rights and freedoms stipulated in this Article or in the international agreements listed in the Annex I to this Constitution shall be secured to all persons in BiH without discrimination on any ground, including, but not limited to: skin color, race, ethnicity, national or social origin, sex, sexual identity, gender, gender identity, sexual orientation, association with a national minority, political or other belief and affiliation, property status, membership in unions or other associations, education, social status, marital or family status, pregnancy, parenthood, age, health status, disability, and genetic inheritance”.

### **Amendment V to the Constitution of BiH**

In the Article II of the Constitution of BiH after the paragraph 5., a new paragraph shall be added and read as follows:”

## **6. Returnees**

BiH and its Entities shall provide the returnees their property rights and personal security, as well as equality in rights and opportunities."

Previous paragraphs 6., 7. and 8. shall become paragraphs 7., 8. and 9..

### **Amendment VI to the Constitution of BiH**

The title of the Article III of the Constitution of BiH and its paragraph 1. shall be amended and read as follows:

#### **"Article II**

##### **Responsibilities of BiH and the Entities and their relations**

###### **1. Exclusive responsibilities of BiH**

The following matters are the exclusive jurisdiction of BiH:

- a. Foreign policy;
- b. Foreign trade policy;
- c. Customs policy;
- d. Monetary policy;
- e. Financing institutions and international obligations of BiH;
- f. Housing, refugee, immigration, and asylum policy, as well as adopting regulations on these matters;
- g. Implementation of international and inter-Entity criminal law enforcement, including relations with Interpol;
- h. Establishment and operation of common and international communications facilities;
- i. Regulation of international and inter – Entity transportation;
- j. Air traffic control;
- k. Establishment and functioning of the High Judicial and Prosecutorial Council, the Court, the Prosecutor's Office and Office of Attorney General of BiH;
- l. Defense and civilian management of the armed forces;
- m. Intelligence and security affairs;
- n. Border policy, management and control of border crossings;
- o. Protection of the national monuments;
- p. Regulation of telecommunications and electronic media;
- r. Establishment and functioning of the institution of Ombudsman for Human Rights;
- s. Intellectual property, metrology and standardization;
- t. Competition policy;

- u. Consumer protection policy;
- v. Contractual relations;
- z. Public procurement”.

After the paragraph 1., a new paragraph 2. shall be added and read as follows:”

## **2. Divided responsibilities between BiH and the Entities**

Divided responsibilities between BiH and its Entities are:

- a. Judiciary;
- b. Citizenship;
- c. Local self-government and administration;
- d. Tax policy;
- e. Electoral process;
- f. Security and internal affairs;
- g. Control and transportation of arms;
- h. Education and sports;
- i. Labor and social policy;
- j. Health care policy, security and control of medicines;
- k. Postal and traffic circulation;
- l. Energy policy;
- m. Concessions;
- n. Food security;
- o. Demining policy;
- p. Protection and health of the plant;
- r. Protection of animals;
- s. Environmental protection, cultural and natural heritage;
- t. Protection of human rights;
- u. Gender equality;
- v. Civilian protection;
- z. Agriculture and rural development.

Responsibilities will be divided in a way that either BiH adopts framework laws in these areas, containing general principles for the Entities to elaborate with their laws, or that BiH and the Entities each regulate particular segments of these fields for themselves.

Paragraph 4. shall be deleted and the present paragraphs 2. and 3. shall become paragraphs 3. and 4..

Paragraph 5. shall be amended and read as follows:”

## **5. Further responsibilities and the transfer of jurisdiction**

a. BiH shall assume responsibility for such other matters agreed by the Entities; matters provided for in Annexes 5- 8 of the General Framework Agreement; or matters necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of BiH, in accordance with the division of responsibilities between the institutions of BiH. Additional institutions may be established as necessary to carry out such responsibilities

b. The responsibilities transferred to BiH may be returned to the Entities with unanimous consent of BiH and the Entities.”

### **Amendment VII to the Constitution of BiH**

The Article IV of the Constitution of BiH shall be amended and read as follows:

#### **"Article III Assembly of BiH**

Assembly of BiH shall have two Chambers: the House of Representatives and the House of Peoples.

##### **1. The House of Representatives**

The House of Representatives shall be a representation of BiH citizens. The House of Representatives shall compose 42 members, two- thirds elected from the territory of the FBiH, and one – third from the Republika Srpska (hereinafter: RS). Members of the House of Representatives shall be elected directly, by a secret ballot, on the basis of universal and equal suffrage. Majority of all members elected to the House of Representatives shall comprise a quorum.

##### **2. The House of Peoples**

The House of Peoples shall be a representation of the Constituent peoples, national minorities, nationally undeclared and the Entities. The House of Peoples shall comprise of 23 delegates, out of which 13 shall be from the FBiH (including five Bosniaks, five Croats, two Serbs and one representative of the national minorities and nationally undeclared), and 10 from the RS (including five Serbs, two Bosniaks, two Croats and a representative of national minorities and nationally undeclared).

Delegates from the FBiH shall be elected by the House of Peoples of the FBiH, and delegates from the RS shall be elected by the Council of Peoples of the RS, in a manner that the Delegate Clubs from each of the Constituent peoples, national minorities and nationally undeclared elect delegates to the respective Clubs in the House Peoples of BiH Assembly. Thirteen members of the House of Peoples shall comprise a quorum, provided presence at least four Bosniaks, Croats, four Serbs and one Delegate from the Others.

##### **3. Mandate**

a. The term of the Assembly of BiH shall be four years.

b. In case of a Chamber’s dissolution, the mandate of the new House congregation shall last until the expiry of the Chamber’s congregation.

##### **4. Procedure**

a. Each Chamber shall have its own Rules of Procedure and shall elect a Chairman and two Deputy- Chairmen among its members.

b. Chambers shall be equal in the decision making-process. All decisions of the BiH Assembly must be adopted in both of the Chambers. Decisions of the Assembly shall not take effect before they are published in the “Official Gazette of Bosnia and Herzegovina”.

c. All decisions in the House of Representatives shall be by majority vote of all members. All decisions in the House of Peoples shall be by majority vote of all members, if a procedure of the vital interest protection has not been initiated.

d. The proposed decision of the BiH Assembly may be declared to be destructive of a vital interest of the Bosniak, Croat or Serb people by a majority of Bosniak, Croat, or Serb Delegates. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniak, of the Croat, and of the Serb Delegates present and voting.

e. When a majority of the Bosniak, Croat and Serb Delegates object to the invocation of vital interest, in terms of paragraph (d), Chairman of the House of Peoples shall immediately convene a Joint Committee, composing three Delegates, each from one of the Constituent peoples, in order to resolve this issue. If the Committee fails to resolve the given matter within five days, the case is referred to the Constitutional Court of BiH, which will reexamine through an urgent procedure whether the contested decision is destructive of a vital interest of the Constituent peoples. The decision will not be considered destructive of a vital interest of one of the Constituent peoples if that is the view of majority Constitutional Court’s judges, including at least votes of two judges from amongst the Constituent peoples, whose delegates have initiated the procedure for the protection of vital interests in the House of Peoples.

f. The House of Peoples may be dissolved by the President and Vice-President or the Chamber itself, provided that the decision to dissolve is approved by a majority that includes the majority of Delegates from at least two Constituent peoples – Bosniak, Croat or Serb.

g. Both Chambers shall publish a complete record of their deliberations, and their sessions shall be, except in exceptional circumstances in accordance with the Rules of Procedure, made public.

h. Members of the Assembly of BiH shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Assembly of BiH.

## **5. Powers**

The Assembly of BiH shall:

- a. Adopt amendments to the Constitution of BiH;
- b. Adopt laws, regulations and general acts;
- c. Adopt the budget of the BiH institutions and international obligations of BiH;
- d. Decide whether to consent to the ratification of international contracts/ treaties/ conventions;
- e. Confirm the appointment of the President of the Council of Ministers and its Ministers;
- f. Supervise the work of the Council of Ministers;

- g. Appoint the judges of the Constitutional Court of BiH;
- h. Perform other duties in accordance with the Constitution and laws.

### **Amendment VIII to the Constitution of BiH**

The Article V of the Constitution of BiH shall be amended and read as follows:

#### **"Article V President and Vice- Presidents of BiH**

The function of the head of state in BiH shall be exercised by the BiH President. In exercising his functions he shall be assisted and, if necessary, replaced by Vice-Presidents of BiH. President and Vice- Presidents of BiH shall be from different Constituent peoples and national minorities, or nationally undeclared.

#### **1. Election and Term of Office**

a. The President and Vice-Presidents of BiH shall be elected by the Assembly of BiH. Each Delegates Club in the House of Peoples of the BiH Assembly shall propose one candidate for the common list of four candidates. The formed list shall be addressed to the House of Representatives of the BiH Assembly upon confirmation. If the President and Vice-Presidents are not elected within 90 days of the BiH Assembly constitution, a Chamber which did not confirm the proposed list of candidates shall be dissolved.

b. Each of the elected candidates shall perform the function of President for twelve months, and the order of exercising its function shall be determined by the BiH Assembly.

c. The term of the President and Vice-Presidents shall be four years. Same person may perform the function of the President no more than twice.

#### **2. Powers of the President**

President of BiH shall:

- a. Represent BiH;
- b. Declare with the decree laws passed in the BiH Assembly;
- c. Sign and ratify international agreements;
- d. Appoint diplomatic representatives of BiH on the proposal of the Council of Ministers;
- e. Receive and issue letters of recall to the foreign diplomatic representatives;
- f. Propose candidate for the President of the BiH Council of Ministers;
- g. Award medals and other avowals in accordance with laws;
- h. Give pardons.

#### **3. Powers of the President and Vice – Presidents**

President and Vice-President together and based on consensus, shall:

- a. Exercise civilian command over the armed forces of BiH;
- b. Appoint members of the Governing Board of the BiH Central Bank;



- c. Dissolve the House of Peoples of the BiH Assembly.

### **Amendment IX to the Constitution of BiH**

After Article V of the Constitution of BiH, a new Article V/ (a) shall be added, reading:

#### **"Article V/ (a)**

The BiH Council of Ministers shall be an institution of the BiH executive power, performing its functions as governmental functions. The Council of Ministers shall be responsible for carrying out policies and decisions of the BiH institutions and reporting to the BiH Assembly.

#### **1. Composition, election and responsibility**

a. The Council of Ministers shall compose of the President and the Ministers. The BiH President shall appoint President of the Council of Ministers, who shall take office upon the appointment confirmation from the BiH Assembly. The President of the Council of Ministers, as a trustee for the composition of the Council of Ministers, shall determine the list of Ministers and their Deputies, taking into account the parity representation of Constituent peoples and adequate representation of ethnic minorities and nationally undeclared, and submit the list to the BiH Assembly for confirmation. At most two-thirds of Ministers may be appointed from the territory of the FBiH.

b. The composition, method of decision-making and other issues closely regulating the work of the BiH Council of Ministers and the responsibilities of the Ministries, shall be regulated by relevant laws. The Council of Ministers shall adopt its own Rules of Procedure.

c. The Council of Ministers shall be responsible to the BiH Assembly, and shall resign if at any time there is a vote of no-confidence by the BiH Assembly. Ministers and Deputy Ministers may be removed by the BiH Assembly, on its own initiative or on the proposal of the Council of Ministers' President.

#### **2. Powers of the Council of Ministers:**

a. Ensuring sovereignty and territorial integrity, political independence and international subjectivity, as well as internal and external security of BiH in accordance with the Constitution and laws;

b. Conducting foreign policy and proposing diplomatic representatives of BiH;

c. Implementing policies and enforcing regulations and decisions of the BiH Assembly;

d. Proposing laws and other acts to the BiH Assembly;

e. Proposing budget to the BiH Assembly;

f. Issuing decrees and other bylaws necessary for the implementation of laws;

g. Directing the work of administrative bodies and organizations of BiH;

h. Ensuring the efficient functioning of the state in accordance with the Constitution and law;

- i. Ensuring the execution of BiH obligations in accordance with the Constitution and laws;
- j. Performing other duties entrusted by the Constitution and laws."

### **Amendment X to the Constitution of BiH**

In the Article VI of the Constitution of BiH, the title of the Article and paragraphs 1., 2. and 3. shall be amended to read:

#### **"Article VI**

#### **The Constitutional Court of BiH**

##### **1. Composition**

The Constitutional Court of BiH shall compose ten judges.

- a. The judges of the Constitutional Court shall be elected by the BiH Assembly, on the proposal of the High Judicial and Prosecutorial Council of BiH.
- b. From the ten judges, three members shall be per each of the Constituent peoples and one member shall be from the nationally undeclared and from the national minorities.
- c. Judges of the Constitutional Court shall be citizens of BiH, who are distinguished jurists of high moral standing. Judges of the Constitutional Court can not be persons who held any type of office in political parties at least ten years prior to the election.
- d. The term of office of the Constitutional Court's judges shall be until the age of 70, unless they resign or be removed for cause by consensus of the other judges.

##### **2. Procedures**

- a. A majority of all its judges shall constitute a quorum of the Constitutional Court.
- b. The Constitutional Court may decide, in a three-member Council or plenary.
- c. The Constitutional Court shall adopt its Rules of Procedure, by majority of all members. The Constitutional Court shall hold public debates, and its decisions shall be publicly explained and published.

##### **3. Jurisdiction of the Constitutional Court**

The Constitutional Court shall uphold the protection of this Constitution.

The Constitutional Court shall:

- a. Decide on any dispute that arises under this Constitution between two Entities or between BiH and one or both Entities, as well as between the institutions of BiH, including but not limited to:
  - Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of BiH.

– Whether any provision of the Constitution, laws or other general legal acts of an Entity is consistent with this Constitution.

b. Has appellate jurisdiction over the matters under this Constitution, Constitution arising out of a judgment of any other court in BiH.

c. Upon request referred by any court in BiH, concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of BiH; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

d. Decide on the consistency of laws, other regulations and general acts of BiH with this Constitution.

e. Decide on the consistency of regulations and general acts with the laws of BiH.

f. Decide on the threat to vital interests of Constituent peoples, as stipulated by the Article IV/3. (e) of this Constitution.

Disputes before the Constitutional Court referred to in paragraphs a), d) and e) may be initiated by the President or one of the Vice – Presidents of BiH, President of the Council of Ministers, Chairman or Deputy Chair of either Chamber of the BiH Assembly, one- fourth of the members/Delegates of either Chamber of the BiH Assembly, one- fourth of the members of either Chamber of legislative organs of one Entity or by majority members of the representative bodies of local self-government units on issues of protection of the rights to local self-government.”

### **Amendment XI to the Constitution of BiH**

After the Article VI of the Constitution of BiH, a new Article VI/(a) shall be added, reading as follows:

#### **"Article VI/(a)**

#### **The Supreme Court of BiH**

a) BiH shall have the Supreme Court.

b) The Supreme Court of BiH shall be the highest court, with second instance and third instance authorities upon decisions of the BiH Court. In accordance with the law, the Supreme Court shall be responsible for unifying the case-law regarding the application of laws and other legal acts of BiH.“