

# The New Constitution of Bosnia and Herzegovina

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The Constitution of Bosnia and Herzegovina (hereinafter the New Constitution)<sup>1</sup> has come into being as Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina. It has been in effect since December 14, 1995, upon the signing in Paris of the latter.<sup>2</sup> The plain language of the New Constitution states that it is a constitution “determine[d]”<sup>3</sup> by the constituent peoples--the Bosniacs, the Croats, and the Serbs--and intended to continue the existence of the Republic of Bosnia and Herzegovina<sup>4</sup> and to amend and supersede<sup>5</sup> the Constitution of the Republic of Bosnia and Herzegovina (hereinafter the Old Constitution).<sup>6</sup> Is it a legitimate amendment? Is it the result of a democratic constitution making process? The content and structure of the New Constitution indicate that it aspires to build one nation with two territorial component Entities--the Federation of Bosnia and Herzegovina and Republika Srpska--while preserving the sovereignty of the constituent peoples. What are the basic structures of this nation? Is it going to succeed?

This paper comments on these issues in an effort to provoke debate. Part I argues that questions may be raised about the legitimacy of the New Constitution as a democratic constitution and proposes that to alleviate such concerns the respective legislatures of the Entities “ratify” the New Constitution if they have not done so

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1 The Constitution of Bosnia and Herzegovina, Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter, the General Framework Agreement; together with the Annexes, the Dayton Peace Agreement], negotiated in Dayton, Ohio, November 1-21, 1995, signed in Paris on December 14, 1995. Transitional arrangements are not discussed herein.

2 The New Constitution, art. XII.

3 Ibid., preamble, last clause.

4 Ibid., art. I(1).

5 Ibid., art. XII(1).

6 This apparently refers to the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974, as amended. Although many things had taken place since the Republic declared its independence and dropped the term “socialist” from its name, it had not managed to formally overhaul its constitution until the New Constitution went into effect on 14 December 1995. This Old Constitution had over four hundred articles and many amendments, presenting a serious problem for its application. In 1993, several Bosnian scholars edited a consolidated constitution styled as the “Definitive Version” (*Prečišćeni*), which was published in the *Official Gazette of the RBiH*, 14 Mar. 1993. Citations below are to the Definitive Version (Unofficial translation of selected provisions by Vanessa Piggot).

properly. Part II briefly describes and analyses the basic structures of the governmental system set up by the New Constitution. The core values enshrined in the New Constitution and the legal system are conducive to building “one nation” and a common market. It is questionable, however, whether enough national powers have been granted by the New Constitution to make nation-building a success. Part III analyses the decision-making process of the national institutions. The institutional structures of the legislative and the executive branches trumpet the triumph of “ethnic sovereignty,” providing each ethnic group with an effective veto over all essential legislative and executive decisions, and thus will probably doom the whole enterprise of nation-building. The Central Bank and the Constitutional Court to be established will likely be free from the paralysis that may plague the legislative and executive branches and, if operating with an instrumental outlook, may provide in certain circumstances some limited remedy for the potential impasses in the political institutions.

## **I. Questions on Legitimacy**

By any standards, the process through which the New Constitution was framed and put into force can only be characterised as unusual. This unusual process gives rise to two questions: whether the amendment procedure under the Old Constitution had been complied with and whether the New Constitution is the result of a democratic constitution-making process. These questions take on particular relevance, as the New Constitution itself claims to be an amendment to the Old Constitution and to have been determined by the constituent peoples.

### **A. Possible Violation of the Amendment Procedure**

Article XII of the New Constitution states that “[t]his Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.”<sup>7</sup> This language may be read as stating that the New Constitution is “the constitutional act amending and superseding” the Old Constitution or that the General Framework Agreement is the “constitutional act amending and superseding” the Old Constitution and the signing of that agreement would bring the New Constitution into effect. The result is the same: a transformative change to the Old Constitution was being effected by the mere signing of the General Framework Agreement.

The Old Constitution apparently did not permit such an unusual amendment process. A proposal to make an amendment to the Old Constitution must comply

7 The New Constitution, art. XII.

with certain procedures. The legislation on amending the constitution must "be drafted by the Assembly at the joint session of the Assembly"<sup>8</sup> and be presented to the public for discussion,<sup>9</sup> and must finally be decided at a joint session of all chambers of the Assembly.<sup>10</sup> An amendment can only "be adopted if two-thirds of the total number of the deputies of every chamber of the Assembly vote in favour of it."<sup>11</sup> The plain terms of the New Constitution do not comply with these requirements. It requires neither presentation to the Assembly or the public for debate nor approval by a joint session of the Assembly.<sup>12</sup>

It is fair to say that the procedural formalities of amending the Old Constitution have not been followed to the letter. The New Constitution was primarily hammered out at the international level in Dayton, rather than drafted by the Assembly. However, one might argue that if the legislature of the Republic of Bosnia and Herzegovina approved the New Constitution before it went into effect, such approval, although not required under the terms of the New Constitution, would support the argument that the essential aspect of the amendment procedure was followed *de facto*, which should legitimise the amendment. The problem is that the legislature never did so *with the requisite two-thirds majority of the total number of the deputies of every chamber* (not just those present and voting).<sup>13</sup>

In all likelihood the New Constitution is not a legitimate amendment to the Old Constitution. The implication of this possible violation of the amendment procedure under the Old Constitution is unclear. Such a violation is probably innocuous and definitely not fatal, if the New Constitution is otherwise legitimate. However, this violation may invalidate part of the language in Article XII regarding its status as an

8 The Old Constitution (Definitive Version), art. 268 (2).

9 Ibid.

10 Ibid., art. 268(3) & (4).

11 Ibid.; art. 268(3). A change to the Old Constitution may be made by a constitutional law or an amendment, Ibid., art. 268(5). It is not clear whether the voting requirement for a constitutional law is different from that for an amendment. If substantive changes to the Old Constitution may be made by both constitutional laws and amendments, the voting requirement should be the same. If not, the more stringent requirement for amendments will be circumvented.

12 One may argue that the Old Constitution may permit other means of amending it such as by the Presidency through the emergency powers. See The Old Constitution (Definitive Version), art. 222. But the tenor of the language of this article shows that it is limited to defence and other war-time matters during the state of war or emergency and should not be interpreted to permit a transformative change in the Old Constitution.

13 The Assembly elected in 1990 had the mandate to continue its functions until the peace agreement on Bosnia and Herzegovina was reached and implemented, see Constitutional Law of 30 March 1994, art. 4, *Official Gazette of RBiH*, 6 Apr. 1994, at 127. That Assembly consisted of two chambers, one with 130 members and the other 110, see *Official Gazette of SRBiH*, 19 Dec. 1990, at 1263 (table of election results). After the Serb members abandoned the Assembly, 161 members remained. The Assembly at a joint session approved the Dayton Peace Agreement on November 30, 1995, with 85 members present and voting in favour. On December 12, 1995, the Assembly at a joint session passed a Constitutional Law on Amendments and Additions to the Constitution, *Official Gazette of RBiH*, 20 Dec. 1995, at 540, with 92 members voting in favour. [Voting information was provided by the Embassy of Bosnia and Herzegovina in Brussels in a letter dated 31 January 1996, on file with the author.] Accordingly, less than a two-thirds majority of the remaining members voted in favour at either session. If the total members of the 1990 Assembly were counted, no simple majority existed at these sessions.

amendment. This means that the New Constitution is not an amendment to the old, but a completely new one. The Old Constitution has simply been jettisoned. A new regime is being established.

Such an abandonment of an Old Constitution probably has no effect on the new constitutional order to be instituted under the New Constitution. All the old institutions both political and legal are gone and all the new institutions both political and legal will operate under the authority of the New Constitution. When a dispute relating to rights and duties exist, the New Constitution and laws made under its authority will provide rules of decision for the courts.<sup>14</sup> Nor does this abandonment in itself affect the continuation of the legal existence of Bosnia and Herzegovina under international law as a state. Normally changes in its constitution or government will not affect the personality of a country under international law, unless such changes are substantively incompatible with such personality, which is not the case with the New Constitution.

The abandonment of an old constitution in favour of a new one may be justified, on theories of necessity, in times of great distress or revolution. In times of crisis, the niceties of normal procedure may need to be sacrificed. Under revolutionary theories, the people can always change their government in order to meet the needs of the nation. Both grounds militate in favour of the New Constitution of Bosnia and Herzegovina, and each in itself is sufficient to legitimise it. An obvious analogy is the relationship between the United States Constitution and its predecessor--the Articles of Confederation. The Constitution provided that it would go into effect when the ratification conventions of nine states ratified it,<sup>15</sup> while the Articles required any amendment to be first "agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."<sup>16</sup> The United States Constitution's break from the ratification procedure under the Articles was thus twofold: both with respect to *who* had the power to ratify and *what* the voting requirements were. In defence of the Constitution, some alluded to both theories of necessity and revolution,<sup>17</sup> while others stressed grounds of revolution.<sup>18</sup> Respectable scholars have argued that the founding of the United States was unconventional and the departure from the amendment procedure under the Articles is best characterised as

14 When there is a conflict between the laws of a new regime and those of the old, courts established by the new regime normally apply the rules of decision provided by the new regime. This may cause injustice but courts may not be the proper organs to deal with this. Cf. *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."). The legislature is better positioned to resolve such a problem.

15 US Constitution, art. VII.

16 US Articles of Confederation, art. XIII, reprinted in Henry Cabot Lodge (ed.), *The Federalist* (1888) 560.

17 James Madison appeared to embrace both necessity and revolution theories. On necessity, see *The Federalist*, No. XLIII (Madison), in Lodge, *The Federalist* 267, 275-76. On revolution, see *The Federalist*, No. XL (Madison), in Lodge, *Ibid.*, 239, 246.

18 See Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), quoted in Ackerman & Katyal, *Our Unconventional Founding*, 62 *U. Chi. L. Rev.* (1995) 475, 487-88.

“revolutionary reform.”<sup>19</sup> Compared to the United States at the end of the 1780’s, the dire situation in Bosnia and Herzegovina provided a stronger case for relying on either necessity or revolutionary theories.

## B. The Undemocratic Origin

In addition to claiming to be an amendment to the Old Constitution, the New Constitution also asserts that “Bosniacs, Croats, and Serbs, as constituent peoples (along with others), and citizens of Bosnia and Herzegovina ... determine[d]”<sup>20</sup> the Constitution. This obviously is an allusion to the famous phrase “We the People” that appears in the United States Constitution.<sup>21</sup> This catch phrase stands for popular sovereignty, which no doubt is the most legitimate source of authority.<sup>22</sup> If the document is not the work of the people, however, the presence of that famous phrase does not transform it into one of democratic origin.

Does the New Constitution live up to its claim to being a constitution of democratic origin? Theoretically, the people may participate in the drafting and the ratification of a constitution. The people may participate directly through a referendum or plebiscite or indirectly through their representatives. The terms of the New Constitution require neither form of democracy to bring it to life. No ratification by referendum is required for its entry into force. Neither was ratification by the legislature of the Republic of Bosnia and Herzegovina, or by the legislature of the Federation of Bosnia and Herzegovina or that of Republika Srpska. Instead, the New Constitution went into effect “upon signature of the General Framework Agreement” by the Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic of Yugoslavia.<sup>23</sup> This is an undemocratic birth.<sup>24</sup>

Although not necessary to bring the New Constitution into life under its own terms, the “gratuitous” approval of the New Constitution by the legislatures of the Federation of Bosnia and Herzegovina and Republika Srpska may be considered as *de facto* blessing of the people and would probably sanitise it. This would support the argument that the New Constitution has been “ratified” by the people through

19 See Ackerman & Katyal, *Ibid.* at 478.

20 The New Constitution, preamble.

21 US Constitution, preamble.

22 See Univ. Declaration of Human Rights, UNGA Res. 217(A) (1948), art. 21 (“The will of the people shall be the basis of the authority of government”); Int’l Covenant on Civil & Political Rights, 999 UNTS 171, art. 25. See also Crawford, ‘Democracy and International Law’, 64 *BYIL* (1993) 113.

23 The New Constitution, art. XII.

24 Although each of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska attached to the New Constitution a declaration stating that it approved the New Constitution, see The New Constitution, Annexes, these declarations were not a condition to its entry into force. More importantly, these declarations were decisions of the various governments, and not necessarily those of the people.

their representatives.<sup>25</sup> It is not clear whether such approval has been properly given. It was reported that the legislature of the Federation of Bosnia and Herzegovina supported the Dayton Peace Agreement and therefore presumably the New Constitution, and approved its signing.<sup>26</sup> However, the Bosnian Serb assembly was alternatively reported on 17 December 1995 to have ratified the Dayton Peace Agreement only “conditionally”<sup>27</sup> or decided that it “would not endorse the Bosnian peace accord for the time being.”<sup>28</sup> Conditional ratification, if it indeed existed, after the agreement went into effect is troubling and its implication is not clear. It is submitted that the respective legislatures of the Entities should study the situation and act to “ratify” the New Constitution wholeheartedly and unconditionally if such ratification has not in fact been carried out. This proposed ratification should be accomplished as soon as practicable and before any institutions are established so that their existence may not be questioned.

## II. Nation-building Aspirations

If the origin of the New Constitution causes one some unease, the nation-building framework set up by it is also troubling. The New Constitution aspires to preserve and continue Bosnia and Herzegovina as *one* nation under international law,<sup>29</sup> while recognising the essential consequences of the infamous war. To that end, the New Constitution defines citizenship, guarantees human rights, promotes democracy and a market economy, sets up national institutions and grants them certain powers, and establishes a legal system. However, it is questionable whether it has given these institutions the necessary muscle required for the task of building one nation.

### A. The Federal Structure

The structure of the nation that the New Constitution attempts to build upon the remains of the protracted war may be best characterised as federal. This is evident in its internal composition and the allocation of power between the national institutions and the component Entities.

25 Such ratification solely by the legislature of the Republic of Bosnia and Herzegovina constituted under the Old Constitution would be problematic. It did not represent all the constituent peoples which representation would be necessary as the New Constitution claims to be “determined” by *all* peoples. It is arguable that it no longer had power after the New Constitution went into effect on 14 December 1995. Nor can it be carried out by the new Parliamentary Assembly to be constituted under the New Constitution because the legitimacy of the new Parliamentary Assembly depends upon that of the New Constitution.

26 See Report of Croatian TV, 13 Dec. 1995, as summarised by BBC Summary of World Broadcasts, 14 Dec. 1995, available in NEXIS, CURNWS file.

27 See Bryan Brumley, *Slow Day Plus Four for Fog-bound GIs in Bosnia*, AP International News, 17 Dec. 1995, available in NEXIS, CURNWS file.

28 Agence France Press, International News, 17 Dec. 1995, available in NEXIS, CURNWS file.

29 The New Constitution, art. I(1).

The New Constitution recognises or legitimises the existing consequences of the war<sup>30</sup> by establishing two militarily independent territorial components within Bosnia and Herzegovina, although it does not itself demarcate the boundaries of these two Entities, which was done by other parts of the Dayton Peace Agreement. Article I(3) states that “Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.” Another provision mandates that “under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina.”<sup>31</sup> As a result, the military conquests by the Bosnia Serbs are solidified, and the military independence of each Entity assured.

In addition to the military independence of the component Entities, each also enjoys almost complete autonomy in its own internal governance. Each Entity regulates its own citizenship.<sup>32</sup> The New Constitution grants only limited powers<sup>33</sup> to the national institutions and beyond these explicit grants of power, the New Constitution decrees that “[a]ll governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”<sup>34</sup>

Furthermore, each Entity also has certain foreign relations power which a constituent component in a federal nation normally does not have. First, the “Entities shall have the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.”<sup>35</sup> Secondly, “[e]ach Entity may also enter into agreements with states and international organisations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.”<sup>36</sup> It is not clear whether “special parallel relationships with neighbouring states” require approval of the Parliamentary Assembly. On the one hand, because one provision explicitly states that approval of the Parliamentary Assembly is required while another is silent on this point, one may argue that when the provision is silent no approval is required. On the other hand, one may also contend that the provision requiring approval is a general provision and the other provisions are to be interpreted in light of the general provision, and thus *all* agreements with another State, in whatever form, must be approved by the Parliamentary Assembly. Nor is it clear what constitutes “special parallel relationships with neighbouring states

30 To this extent, it may be considered a constitution “out of the barrel of a gun”. Cornford, *On Writing Constitution*, 44 *Parliamentary Affairs* (1991) 558 (paraphrasing Mao Tse Tung).

31 The New Constitution, art. V(5)(a). The phrase “any armed forces” might be considered to include armed police forces.

32 *Ibid.*, art. I(7).

33 See Part II.C below.

34 The New Constitution, art. III(3)(a).

35 *Ibid.*, art. III(2)(a).

36 *Ibid.*, art. III(2)(d).

consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina,” which may have to be ultimately decided by the Constitutional Court.

## **B. Core Values of the New Nation**

On the foundations of the federal structure, the New Constitution attempts to build a new nation with several core values. It defines Bosnia and Herzegovina citizenship.<sup>37</sup> It enshrines democracy, although its origin is not a model of democracy. Article I(2) states that “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.” It puts human rights on a pedestal.<sup>38</sup> Article II(1) states that “Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms.” The New Constitution provides that certain rights and fundamental freedoms “shall have priority over all other law,”<sup>39</sup> and that an amendment may not affect these rights adversely.<sup>40</sup>

Freedom of movement will be guaranteed. Article I(4) states, “There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.”

## **C. National Powers and Institutions v. Entities’ Powers and Institutions**

The New Constitution establishes a national government with limited and enumerated powers. These powers relate to (a) foreign relations, i.e., foreign policy, foreign trade policy, customs policy, immigration, refugee, asylum policy and regulation, international criminal law enforcement, international communication facilities and air traffic control; (b) inter-Entity relations, i.e., inter-Entity criminal law enforcement, common communications facilities, inter-Entity transportation, and finances of the national institutions; and (c) national economy, i.e., currency issuing authority and monetary policy.<sup>41</sup> All other powers belong to the Entities, although the Presidency may decide to facilitate inter-Entity co-operation unless an Entity objects.<sup>42</sup> This no doubt will serve as a principle of interpretation mandating that the national powers be interpreted strictly.

Another important national feature is the pre-emptive power of national law. The New Constitution places the New Constitution and decisions of the national institu-

37 Ibid., art. I(7).

38 See elsewhere in this issue James Sloan, *The Dayton Peace Agreement: Human Rights Guarantees and Their Implementation*, for a full analysis of this issue.

39 The New Constitution, art. II(2).

40 Ibid., art. X.

41 Ibid., arts. III(1), VII.

42 Ibid., art. III(3), (4).



tions on the top of the hierarchy of law and provides that contrary laws and decisions of the Entities be pre-empted.<sup>43</sup> National law and decisions of the national institutions of course must yield to the New Constitution.<sup>44</sup> The New Constitution also mandates that “[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.”<sup>45</sup> The effect of this mandate is not clear because it does not specify the position of these principles of international law in the legal hierarchy. Different theories to be applied by the courts may result in different outcomes.<sup>46</sup> The New Constitution does not directly address the hierarchical status of treaties except that it provides for the direct application in Bosnia and Herzegovina of the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and for the supremacy of these rights and freedoms over all other law<sup>47</sup> and, as such, apparently over even other provisions of the New Constitution. As decisions of the national institutions, treaties should pre-empt laws of the Entities.

To carry out these national powers, the New Constitution establishes the following national institutions: the Parliamentary Assembly, the Presidency, the Constitutional Court, and the Central Bank. These institutions and their powers will be described briefly here and their decision-making process will be analysed in Part III.

The Parliamentary Assembly consists of the House of Peoples and the House of Representatives. The House of Peoples will have five Delegates from each of the ethnic groups, to be elected by their legislatures at the Entity level. Election of the forty-two members of the House of Representatives will be pursuant to an election law to be passed by the Parliamentary Assembly except that the first election will take place in accordance with Annex 3 to the General Framework Agreement. The Parliamentary Assembly has the power to enact legislation, decide upon the sources and amounts of revenues, approve budgets to be proposed by the Presidency for the operation of the national institutions, and ratify treaties.<sup>48</sup>

The Presidency consists of one Bosniac, one Croat, and one Serb, whose election will be pursuant to an election law to be passed by the Parliamentary Assembly except that the first election will take place in accordance with Annex 3 to the General Framework Agreement. The Presidency has the power to nominate the Chair of the Council of Ministers which will carry out the policies and decisions of Bosnia and Herzegovina. Although not crystal clear, this Council appears to be a “ministerial” organ and has no policy-making power. The Presidency has the power to conduct foreign policy, appoint ambassadors and envoys, represent Bosnia and Herzegovina internationally, negotiate and denounce, and, with consent of the Parliamentary Assembly, ratify treaties, and execute decisions of the Parliamentary As-

43 Ibid., art. III(3)(b).

44 Ibid.

45 Ibid.

46 See Cassese, *Modern Constitutions and International Law*, 192(III) *Recueil des Cours* (1985) 335.

47 The New Constitution, art. II(2).

48 Ibid., art. IV(1)-(4).

sembly, among others.<sup>49</sup> Apparently, the Presidency alone may denounce treaties. Finally, “[e]ach member of the Presidency shall, by virtue of the office, have civilian command over armed forces.”<sup>50</sup> This language, together with the command that no armed forces of either Entity may enter into the other Entity without consent of the latter and the Presidency,<sup>51</sup> implies that each member of the Presidency should be the commander-in-chief of the armed forces of his or her ethnic group only. Members of the Presidency shall select a Standing Committee on Military Matters to “coordinate military activities in Bosnia and Herzegovina” and be members of this Committee.<sup>52</sup> The power of this Committee is not specified but the term “coordinate” obviously does not imply “command.” Any decision will depend upon the good faith of the members of the Presidency.

The Constitutional Court will have nine members.<sup>53</sup> It will have original and exclusive jurisdiction over disputes arising under the New Constitution between the Entities, between one Entity and Bosnia and Herzegovina, or between the national institutions. It will also have appellate jurisdiction over a judgement of any other court and referral jurisdiction over any question referred by any other court, if the issue relates to the New Constitution.<sup>54</sup>

The Central Bank will be “the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.”<sup>55</sup> This apparently forbids the Entities from issuing their own currency and prevents them from having their own monetary policy. The detailed responsibilities will be determined by the Parliamentary Assembly.<sup>56</sup>

#### D. General Comments

The core values and the legal system are conducive to nation-building and promoting a common market within Bosnia and Herzegovina. Democracy and the protection of human rights will help heal the wounds of the people. The guarantee of freedom of movement of persons, goods and capital, although having a human rights connotation, is no doubt geared towards building a common market.<sup>57</sup> This guarantee is strong and is capable of being strengthened through judicial interpretation, as the experience of its counterpart in the European Union shows,<sup>58</sup> and will probably

49 Ibid., art. V(1)-(4).

50 Ibid., art. V(5)(a).

51 Ibid.

52 Ibid., art. V(5)(b).

53 See Part III.D on the composition of the Court.

54 Ibid., art. VI.

55 Ibid., art. VIII. See Part III.C on the composition of the Bank.

56 Ibid.

57 The preamble of the New Constitution states that the peoples desired “to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy.”

58 See George A. Bermann, et al., *Cases and Materials on European Community Law* (1993) 315 (“the most powerful force for the achievement of the four freedoms was the Court of Justice,

succeed in promoting a lively market. To this guarantee, the New Constitution adds the sole authority to issue currency and to make monetary policy throughout Bosnia and Herzegovina. All these if effectively enforced may help build a strong economy, particularly with foreign assistance and investments.

Other than the core values, the national powers are weak and it is questionable whether they can fulfil the aspirations of nation-building. The federal structure will continue to divide the allegiance of the citizens who are both citizens of Bosnia and Herzegovina and the Entities. No doubt many will feel more attached to their Entity than to Bosnia and Herzegovina. When dual citizenship becomes available pursuant to an agreement to be approved by the Parliamentary Assembly,<sup>59</sup> the division of allegiance will be exacerbated. For this reason, it may be advisable not to approve any such agreement. The potential "special parallel relationships" with neighbouring States may cause strife. Moreover, the absence of an explicit national defence power and a unified command structure may leave the nation vulnerable to attacks by foreign forces or forces from the Entities. Although the Presidency together with the Standing Committee on Military Matters may decide to co-ordinate military affairs in order to thwart invasions from outside, it may have trouble dealing with ambitions from within Bosnia and Herzegovina. This is extraordinary in light of the fact that national defence is one of the essential attributes of sovereignty.

The lack of an explicit national taxing power may bankrupt the national institutions, although the Entities are to bear the financial burdens.<sup>60</sup> It is possible that an implied taxing power be inferred from the power of the Parliamentary Assembly to decide "the sources and amounts of revenues".<sup>61</sup> Deciding the sources of revenues is a flexible phrase that may be reasonably interpreted by a court to include taxing power. Lending support to this interpretation is the exception to the financial responsibilities of the Entities carved out in Article VIII(3). That provision states that each Entity shall provide a certain proportion of the revenues required by the budget, "except insofar as revenues are raised as specified by the Parliamentary Assembly."<sup>62</sup> This language evinces the drafters' intent that the Parliamentary Assembly should have the power to raise revenue. It is reasonable to consider taxing power part of this power.

Finally, there is no national law enforcement mechanism. Although the New Constitution grants the national institutions the power to decide on the inter-Entity co-operation in criminal law enforcement, it creates no mechanism for uniform national law enforcement and thus leaves it to the Parliamentary Assembly and the Presidency to decide. As discussed in Part III below, these national institutions may be paralysed. While the New Constitution requires the Entities to maintain civilian

whose constantly expanding case law widened the field of Community rights and struck down many barriers to trade").

59 The New Constitution, art. I(7)(d).

60 *Ibid.*, art. VIII(3).

61 *Ibid.*, art. IV(4)(b).

62 *Ibid.*, art. VIII(3).

law enforcement agencies,<sup>63</sup> leaving law enforcement to them may prove hazardous. Open defiance or sly arguments may hinder the operation of the rule of law. The recent dispute on the kidnapping of Bosnian civilians is a prime example.<sup>64</sup> It appears that international pressure is necessary for the purposes of law enforcement, a precarious state of affairs, to say the least. The presence of the International Police Task Force<sup>65</sup> may alleviate the situation somewhat, but its mandate is limited and its presence will be short-lived. In light of the importance of the matter, it is hoped that the authorities will bury their differences and establish a national law enforcement mechanism.

### **III. Ethnic Sovereignty and Potential Breakdowns in Decision-making**

The weak national powers granted by the New Constitution to the national institutions may be further weakened if not completely debilitated by the potential breakdowns in the decision-making process of these institutions. The potential problem comes from the phenomenon I have referred to as “ethnic sovereignty” in the composition and decision-making process of the national institutions. In each of the national institutions, each of the constituent peoples, the Bosniacs, the Croats and the Serbs, as opposed to simply the territorial components in other federal nations, is represented essentially equally, and, other than in the Central Bank and the Constitutional Court, each group has essentially a veto power over all essential decision-making therein. This structure presumably was intended to ensure equality of the ethnic groups, but wittingly or unwittingly it gives each ethnic group the ultimate decision-making power in any matters it considers important to it. In this sense, each group enjoys sovereignty. This ethnic sovereignty if fully utilised will ultimately paralyse the national institutions.

#### **A. The Parliamentary Assembly**

Ethnic sovereignty prevails in the Parliamentary Assembly. The Assembly consists of the House of Peoples and the House of Representatives.<sup>66</sup> All legislation will require the approval of both chambers<sup>67</sup> and accordingly each chamber may prevent any decision from being made.

The House of Representatives is designed to represent the population at large and conducts its business with a quorum consisting of a majority of all mem-

63 Ibid., art. III(2)(c).

64 See, e.g., John Pomfret, *Serbs Release 16 Civilians Held for 10 Days*, *The Washington Post*, 5 Jan. 1996, p. A24.

65 See Annex 11 to the General Framework Agreement.

66 Ibid., art. IV.

67 Ibid., art. IV(3)(c).

bers.<sup>68</sup> Decisions in this House will normally be taken by majority of those present and voting, but a two-thirds majority of the Members from the territory of either Entity (rather than ethnic group) may block a measure.<sup>69</sup> This means that either the Bosniacs or the Croats separately as a group may not have enough votes to veto a decision in this House, unless either group elects two-thirds of all members from the Federation of Bosnia and Herzegovina. Together these two groups (including where both agree on the matter under consideration, or where they disagree but one group wins enough members from the other to constitute a two-thirds majority) have a veto. The Serbs from Republika Srpska as a group, however, will have a veto.

However, the House of Peoples is designed to represent the ethnic groups as groups rather than the population at large and it is there where ethnic sovereignty is most likely to rear its ugly head. Each of the ethnic groups will have equal representation in the House of Peoples. The House of Peoples will have fifteen Delegates, five Croats and five Bosniacs to be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation of Bosnia and Herzegovina, and five Serbs by the National Assembly of the Republika Srpska.<sup>70</sup> This equal representation does not provide any group with a veto power but the quorum requirement does. The New Constitution provides that a quorum must include at least three Bosniac, three Croat and three Serb Delegates.<sup>71</sup> Should any group intend to block any proposed legislation, its Delegates need only absent themselves. Such a mechanism is easy to take advantage of and must be tempting to those who are inclined to abuse it. This assures each ethnic group the ultimate decision-making power in the Parliamentary Assembly.

Once the Delegates are present, decisions will normally be taken by majority of those present and voting. It will take two-thirds or more of the Delegates from either Entity (rather than ethnic group) to block a decision.<sup>72</sup> In addition, a majority of the Delegates from each group may declare a legislative measure destructive of a vital interest of its ethnic group, but that declaration does not in itself defeat the measure; it will merely initiate a procedure for negotiation and compromises. If that procedure fails, the matter will be sent to the Constitutional Court for review which is limited to procedural regularity.<sup>73</sup> This limitation on the Court's jurisdiction obviously is designed to protect the supremacy of the substantive decisions of the legislature but is bound to be controversial. To the extent that this limitation adversely affects human rights and fundamental freedoms, it probably is invalid.<sup>74</sup>

68 Ibid., art. IV(2).

69 Ibid., art. IV(3)(d).

70 Ibid., art. IV(1).

71 Ibid.

72 Ibid., art. IV(3)(d).

73 Ibid., art. IV(3)(e), (f).

74 See *supra* note 47 and the accompanying text.

## B. The Presidency

The Presidency will consist of two members elected directly from the Federation of Bosnia and Herzegovina—one Bosniac and one Croat—and one Serb from Republika Srpska.<sup>75</sup> Decisions will be made by consensus and failing that by majority vote.<sup>76</sup> Article V(2)(d) provides that “[a] dissenting member may declare a decision to be destructive of vital interest of the Entity from the territory from which he was elected.”<sup>77</sup> Once such a declaration has been made, the decision will be referred to “the National Assembly of the Republika Srpska, if the declaration was made by the Member from that Territory; to the Bosniac Delegates of the House of the Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member.”<sup>78</sup> If the declaration is confirmed by a two-thirds vote of the respective persons within ten days of the referral, the challenged decision will have no effect.<sup>79</sup> The language “vital interest of the *Entity*” is in effect the “vital interest of the *ethnic group*” because a Bosniac declaration will be voted upon only by the Bosniac Delegates in the Federation and a Croat declaration, by the Croat Delegates only.

This power to declare a decision destructive to the interest of an ethnic group is apparently designed to enable each ethnic group’s representative in the Presidency to protect the vital interest of that group. The confirmation process ensures that such a declaration truly represent the position of the ethnic group. Together, they ensure that each group have a veto and thus a final say in the Presidency.

## C. The Central Bank

The Central Bank will have for six years a first Governing Board consisting of one outside Governor to be appointed by the International Monetary Fund, who may not be a citizen of Bosnia and Herzegovina or any neighbouring State, and three members appointed by the Presidency, two from the Federation of Bosnia and Herzegovina (one Bosniac and one Croat) sharing one vote, and one from Republika Srpska.<sup>80</sup> The Governor may cast a tie-breaking vote.<sup>81</sup> After the first six years, the Governing Board will consist of five members to be appointed by the Presidency.<sup>82</sup> The New Constitution does not specify any eligibility or quorum requirements, which thus need to be determined in the future.

It is thus clear that none of the ethnic groups will have a veto power in the decision-making process of the Central Bank and in the first six years it will be immune

75 Ibid., art. V.

76 Ibid., art. V(2)(c).

77 Ibid., art. V(2)(d).

78 Ibid.

79 Ibid.

80 Ibid., art. VII(2).

81 Ibid.

82 Ibid., art. VII(3).

from impasses. However, ethnic sovereignty will still prevail here. The responsibilities of the Bank will be determined by the Parliamentary Assembly.<sup>83</sup> The appointment of the members after six years will be completely controlled by the Presidency. Both the Parliamentary Assembly and the Presidency will have to combat the veto power of each group.

#### D. The Constitutional Court

The composition and decision-making process of the Constitutional Court do not strictly follow the pattern of the other institutions, although ethnicity figures prominently even in this judicial organ. Out of the nine members of the Court, six will be internal judges who must be eligible voters and thus must be citizens and residents of Bosnia and Herzegovina.<sup>84</sup> Four of the internal judges will be selected by the House of Representatives of the Federation of Bosnia and Herzegovina, two by the Assembly of Republika Srpska.<sup>85</sup> The remaining three will be outside judges, who may not be citizens of Bosnia and Herzegovina or any neighbouring State, to be appointed by the President of the European Court of Human Rights after consultation with the Presidency.<sup>86</sup> In the future the Parliamentary Assembly may provide another method of selecting the three outside judges.<sup>87</sup> Strictly speaking, the four judges to be selected by the Federation of Bosnia and Herzegovina need not be divided equally between the Bosniacs and the Croats and thus the three ethnic groups may not be represented equally on the Court.

One can only speculate as to why even the composition of this judicial organ is still so ethnically oriented, except for the three outside judges. The ideal of justice should be that ethnicity plays no part in judicial decision-making, whatever one may say about legislative and executive decision-making, and that judges act only in their individual capacity to hand out justice impartially and conscientiously. The New Constitution does not so provide expressly, but one may infer this from the requirement that judges be jurists of high moral standing.<sup>88</sup> Even if the New Constitution is silent on this point, one must not forget that this ideal is inherent in any exercise of judicial power.

Finally, the composition of the Court and the quorum requirement are such that no one ethnic group will have a veto power at the Court. The New Constitution provides that a majority of all judges constitute a quorum and thus two internal judges together with the three outside judges will be able to conduct business.<sup>89</sup> As the New Constitution does not specify the voting requirement for decision-mak-

83 Ibid., art. VII(1).

84 Ibid., arts. VI(1)(a), (b), I(7)(d).

85 Ibid., art. VI(1)(a).

86 Ibid.

87 Ibid.

88 Ibid.

89 Ibid., art. VI(2).

ing, presumably decisions will be made by majority of those voting.<sup>90</sup> Theoretically the three outside judges voting as a block against the other two in a possible quorum of five may decide the outcome of certain cases.<sup>91</sup> Consequently, the impasses that may plague the legislature and executive branches will not visit upon the Court.

### E. General Comments

The ethnic sovereignty prevailing in the legislative and executive branches of the government is likely to paralyse the government and ultimately the nation. The leitmotif underlying ultimate decision-making in both of these branches is not democracy but ethnicity. To this extent, it conflicts with the democratic principles enshrined in Article I(2), although the election of members to these bodies may to some extent be based on democracy. Although it has the seductive appeal of ensuring equality of the ethnic groups, it is ultimately a mild form of racism. As such, ethnic sovereignty does not help foster *one* people for *one* nation but will keep three peoples separate and divide their allegiance. It affords each group the chance to bring down the whole nation, and if history is any guide, it is possible that one of them will. One need only look at the dissolution of the former Czechoslovakia,<sup>92</sup> if the fate of the former Yugoslavia is not sufficient proof.<sup>93</sup>

Free from the potential impasses that may haunt the legislative and the executive branches, the Constitutional Court and the Central Bank, if taking an activist and instrumental view, may provide in certain circumstances some remedy for the potential ills in the governmental structure. However, this is not cause for optimism. The Central Bank's responsibilities are to be assigned by the Parliamentary Assembly which may be paralysed. The Court has its inherent limitations and cannot take over the competencies of other branches. It also will be handicapped by the lack of a national law enforcement mechanism. Its orders may risk defiance. More important, a

90 The New Constitution does not provide a voting requirement in deciding cases, but it should be presumed that it is by majority. The Court may provide for this in its rules to be made under Article VI(2).

91 The presence of the outside judges alone, not to mention their theoretical power to decide the outcome of cases, is rather extraordinary and no doubt will be considered foreign assistance by some and foreign intervention by others. It may not please the people to have foreigners sitting on their highest court, but it may be necessary evil at present. It is hoped that the outside judges will not only be "jurists of high moral standing," the New Constitution, art. VI(1)(b), but also will have an intimate knowledge of the situation in Bosnia and Herzegovina so that they will not wander too far from the pains and aspirations of the citizens, or worse, impose their "foreign views" on the local population.

92 See Mathernova, 'Czecho?Slovakia: Constitutional Disappointments', in A.E. Dick Howard, (ed.), *Constitution Making in Eastern Europe* (1993) 57.

93 In 1988 a constitutional law scholar in the United States questioned "whether a constitutional arrangement can exist where it is impossible to have one people", and stated categorically that he found "a constitutional arrangement based upon race inconceivable." Remarks of William T. Coleman, in Robert A. Goldwin & Art Kaufman (eds.), *Constitution Makers on Constitution Making* (1988) 456. At that time, the turmoil had yet to arrive in the former Yugoslavia and Mr. Coleman singled it out as an aberration from his theory.



government of juristocracy has its drawbacks and will defeat the democratic principles that the New Constitution champions because the judges are not democratically elected.

#### IV. Conclusion

Constitutions can never be perfect. This unfortunate fact has been pointed out by prominent scholars<sup>94</sup> and has perhaps found proof in the New Constitution. Some of the imperfections may be remedied. Some others, such as the structural problems in the decision-making process, may not, and these remain a potential eruption which may paralyse the government.

Making predictions about a future life at the time of its birth has its perils, particularly in the case of a constitution. The words of a New Constitution, we must keep in mind, "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."<sup>95</sup> Its interpretation by judicial bodies may result in improvement. Potential problems may be prevented by public-spiritedness or comprises made under international pressure. The classic ideal of a government, especially the legislative branch, is that it consists of reasonable persons pursuing reasonable purposes reasonably. We can only hope that the constitutional players will act in the best interests of all concerned.

94 E.g., Monaghan, 'Our Perfect Constitution', 56 *N.Y.U. L. Rev.* (1981) 353.

95 *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J., for the Court).