



Rodna jednakost/ravnopravnost i ustavne promjene

Bergin Kulenović

Gender Equality/Equity and Constitutional Changes

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UVOD

Ustavna reforma, kao jedna od glavnih problematika današnjice u Bosni i Hercegovini, konkretno utiče na budućnost demokratskog razvoja ovog kompleksnog društva. Jedno od pitanja koje se nikad dosada nije direktno postavljalo jeste: "Da li je rodna jednakost pitanje procesa ustavnih reformi?". Ovaj tekst je, prvenstveno, dio projekta čiji je cilj u konačnici pokušati odgovoriti na ovo pitanje. Tekst sadrži komparativne analize (entitetskih ustava i Ustava BiH) i daje konkretne preporuke. Konkretni prijedlozi navedeni su tako da se tekst može koristiti kao priručnik za aktiviste/ice iz nevladinog, vladinog i akademskog sektora, koji/e žele da se bave ovom problematikom.

1. PREGLED POLITIČKOG OKRUŽENJA U BOSNI I HERCEGOVINI

Kompleksnost političkog sistema

Iako Bosna i Hercegovina pokušava slijediti smjernice za pristupanje Evropskoj uniji, taj proces neće biti lak, jer je proces reforme trenutno zaustavljen zbog "vitalnih nacionalnih interesa". Da bismo shvatili šta ovaj termin znači, moramo razmotriti kako je sistem kreiran i zašto učešće javnosti nije prioritet reforme, što vodi ka pristupu ustavnoj reformi koji ne uzima u obzir ravnopravnost rodova.¹

Današnja Bosna i Hercegovina je kreacija međunarodne zajednice. Među "lokalnim potpisnicima" Mirovnog sporazuma nema nijedne žene. Rezultat ovog sporazuma je Dejtonski mirovni sporazum. Dejtonski sporazum, tj. Opći okvirni sporazum za mir u Bosni i Hercegovini,² označio je kraj vojnog sukoba u Bosni i Hercegovini i stvorio novu multietničku državu. Ovaj sporazum sastoji se od Općeg okvirnog sporazuma za mir sa aneksima koji obrađuju sljedeće teme: Vojni aspekti mirovnog rješenja (1A), Regionalna stabilizacija (1B), Linija

¹ Kao dva osnovna pojma spol/pol i rod se razlikuju. Spol/pol se odnosi na biološke razlike između žena i muškaraca. Rod se odnosi društvene razlike između žena i muškaraca ili, drugim riječima, različite odgovornosti koje imaju žene i muškarci u datom društvu, vremenu i lokaciji. Ove uloge se uče i mijenjaju tokom vremena.

² Usvojen u Parizu 14.12.1995.

razgraničenja između entiteta i pitanja vezana za to (2), Izbori (3), **Ustav (4)**, Arbitraža (5), Ljudska prava (6), Izbjeglice i raseljena lica (7), Komisija za očuvanje nacionalnih spomenika (8), Uspostavljanje javnih preduzeća Bosne i Hercegovine (9), Civilna implementacija mirovnog rješenja (10) i Međunarodne policijske snage (11).

Dejtonski mirovni sporazum postavio je temelje novom Ustavu Bosne i Hercegovine, izbornom zakonu i pravnom sistemu, s posebnim ciljem rješavanja **međuetničkih problema putem izjednačavanja vlasti između tri glavna etnička bloka (Hrvata, Bošnjaka i Srba)**. Tako postavljeni temelji nisu direktno obuhvatili mnoga druga suštinska pitanja za funkcioniranje demokratske, pluralističke države bazirane na principima Povelje Ujedinjenih nacija. Država je podijeljena na dva entiteta (Federacija i Republika Srpska) i jedan distrikt (Brčko).

Osnovni princip u BiH jeste da se izbalansira nacionalno predstavljanje. U nekoliko slučajeva to je zvanično pravilo, ali u većini slučajeva to je nezvanično usaglašeni princip koji se uvijek mora pažljivo uzimati u obzir za vrijeme pregovora. Naprimjer, ako je ministar/ica iz jednog od konstitutivnih naroda, njegov/njen zamjenik/ca će biti iz drugog, ili će ekvivalentni položaj biti dodijeljen trećem. Održavanje izbalansiranog kalupa naroda još uvijek je najvažnije pitanje.

Postojanje institucionalnih mehanizama za promociju rodne jednakosti u Bosni i Hercegovini

U bosanskohercegovačkom sistemu za rodnu jednakost potrebni su dodatni mehanizmi koji bi osigurali da ovaj suštinski aspekt ne bude zanemaren. Trenutno, postoje određeni mehanizmi na svim nivoima zakonodavnih i izvršnih vlasti. Na izvršnom nivou osnovane su komisije za jednakost/ravnopravnost spolova.³

U okviru izvršne vlasti, u nadležnosti Ministarstva za ljudska prava i izbjeglice Bosne i Hercegovine, postoji Agencija za jednakost spolova Bosne i Hercegovine; na entitetskom nivou postoje, ranije formiran, Gender centar Federacije Bosne i Hercegovine i Gender centar Republike Srpske; na kantonalnom nivou u Federaciji Bosne i Hercegovine formirana su kantonalna vijeća koja se sastoje od imenovanih osoba za pitanja spolova iz različitih ministarstava. U okviru ureda načelnika općine, također, su formirane komisije za jednakost/ravnopravnost spolova. Svi institucionalni mehanizmi su precizno definirali mandate. Njihovi, jasno definirani mandati, pokazuju barem teoretsku obavezu vlade prema pitanjima ravnopravnosti rodova.

Međunarodni pravni okvir u Bosni i Hercegovini

Bosna i Hercegovina je potpisnica 16 međunarodnih konvencija. Sve ove konvencije su navedene u Ustavu BiH. Među svim ovim međunarodnim dokumentima poseban položaj dat je Konvenciji o uklanjanju svih oblika diskriminacije žena (CEDAW), Pekinškoj deklaraciji i Planu akcije. CEDAW je usvojena rezolucijom Generalne skupštine Ujedinjenih nacija broj 34/180 u decembru 1979. godine, a stupila je na snagu 03.09.1981. godine. Ovaj dokument

³ U sklopu Parlamentarne skupštine Bosne i Hercegovine na državnom nivou; u sklopu Doma naroda Parlamenta Federacije Bosne i Hercegovine i Narodne skupštine Republike Srpske na nivou entiteta; u kantonalnim skupštinama, općinskim vijećima i općinskim skupštinama na lokalnom nivou.

Bosna i Hercegovina je ratificirala 1993. godine i naknadno ugradila u državni Ustav, dok je Pekinšku deklaraciju potpisala, zajedno sa 179 drugih vlada, u septembru 1995. godine.

Međunarodni okvir je stalna referentna tačka, posebno u pogledu rodne jednakosti. Sve javne institucije se često pozivaju na razne međunarodne konvencije koje garantiraju mnoga prava, ali to je stvorilo državu u kojoj građani/ke, uglavnom, vjeruju u snagu međunarodnog nad državnim. Ovo uključuje i ženski pokret u Bosni i Hercegovini.

Domaći zakonski okvir (Zakon o jednakosti spolova)

Korak naprijed u pravcu postizanja stvarne ravnopravnosti spolova bio je usvajanje Zakona o jednakosti/ravnopravnosti polova/spolova, 2003. godine. Nakon što su ustavne odredbe o nediskriminaciji i međunarodni instrumenti za zaštitu ljudskih prava ugrađeni u Ustav Bosne i Hercegovine, ovaj državni instrument bio je korak na pravom putu. Po prvi put je usvojen zakon koji naglašava da su i muškarci i žene *individue* u jednom društvu i da bi trebalo da imaju ista prava i obaveze, a ne samo da su članovi određene *grupe* konstitutivnog naroda. Cilj ovog zakona jeste uspostava pune ravnopravnosti muškaraca i žena u svim aspektima života, posebno u područjima u kojima su žene tradicionalno zapostavljene u odnosu na muškarce. Ova područja uključuju obrazovanje, privredu, rad i zapošljavanje, socijalno i zdravstveno osiguranje, sport, kulturu, javni život i medije.

2. USTAVNI PROCESI

Zanimljivo je da i Ustav Federacije BiH i Ustav Republike Srpske prethode Ustavu BiH. Ustav Federacije BiH usvojen je u junu 1994. godine,⁴ dok je Ustav Republike Srpske usvojen 1992. godine.⁵

Ustav Bosne i Hercegovine u stvari je Aneks 4 Dejtonskog mirovnog sporazuma. Da bismo ga promijenili, oba entiteta i njihovi izabrani predstavnici/e moraju se složiti s promjenom.⁶ Otuda dolazi zastoj koji trenutno vlada. Ranije je bilo pokušaja od strane raznih političkih stranaka da krenu naprijed s promjenom, međutim bez šireg konsenzusa.

Tokom prošle decenije, Ured visokog predstavnika (OHR) prezentirao je različite alternative kako bi se popravila situacija po ovom pitanju. Dvije alternative su posebno vrijedne spomena: prva je bila bazirana na restriktivnoj, a druga na opsežnoj interpretaciji Dejtonskog mirovnog sporazuma. Rezultat ovog djelovanja bile su promjene koje su se odrazile na jačanje državnog nivoa, bez stvarnog prepravljavanja Ustava.

Vremenom je sam Dejtonski sporazum postao glavna prepreka reforme. Međunarodna zajednica je smatrala da će njegovo mijenjanje voditi prema obnovljenom sukobu, kao i prema aktivnostima izgradnje države. Godine 2000., međunarodna zajednica je počela

⁴ "Službeni list Federacije BiH", broj 1/94, 30.03.1994.

⁵ Ustav Republike Srpske, "Službeni list Republike Srpske", broj 3/92, 6/92, 8/92, 15/92 i 19/92.

agresivnije uvođenje reformi koje su omogućavale više nadležnosti na nivou države.⁷ Iako su ove reforme bile dobrodošle i potrebne, one se nisu bavile fundamentalnim problemom – samim Ustavom.

Pokušavajući spriječiti “pucanje Ustava po šavovima” i doprinijeti da ujedinjena bosanska država bude stabilnija, u periodu od maja do oktobra 2005. godine, Bruce Hitchner (Projekat Dejtonskog mirovnog sporazuma) i Donald Hays (bivši prvi zamjenik Visokog predstavnika) okupili su predstavnike osam vodećih stranaka u Predstavničkom domu. Ova grupa je postigla grubi konsenzus o reformi Ustava, uključujući i zamjenu tročlanog predsjedništva samo jednim predsjednikom kojeg bi birao parlament, a ne narod putem glasanja na predsjedničkim izborima.⁸

Čelnici stranaka su potpisali sporazum s Državnim uredom Sjedinjenih Američkih Država u kojem su se obavezali da će paket reformi biti razmatran u Parlamentu do marta 2006. godine, što je bio skoro zadnji čas za uticaj na vlasti koje treba da budu izabrane na općim izborima u oktobru 2006. godine. Do sredine marta 2006. godine, stranke su dogovorile skroman, skoro presedan, nacrt amandmana prema kojem bi tročlano predsjedništvo bilo zamijenjeno manje moćnim jednim predsjednikom i dva rotirajuća potpredsjednika, a svu trojicu bi birala oba doma Parlamenta.

Država više ne bi morala osiguravati odobrenje entiteta za primjenu zakona vezanih za reforme koje su usmjerene ka Evropskoj uniji, a predsjedavajući Vijeća ministara bio bi stvarni premijer.⁹

Vijeće Evropske unije, Evropska zajednica, Savjet Evrope i Vijeće za implementaciju mira (PIC) podržavali su amandmane, kao i OHR (mada on i nije dao veliki doprinos) onome što je bilo prvenstveno zasnovano na nastojanjima u kojima su prednjačile SAD. Oko 53,5 procenata Bosanaca i Hercegovaca, anketiranih u aprilu 2006. godine, također, je dalo podršku predloženim promjenama.¹⁰

Do sada su reforme bile minimalne i, uglavnom, usmjerene na stvari za koje se lako mogao postići konsenzus između političkih stranaka, zato što se još uvijek ne dotiču pitanja jednakosti građana kao pojedinaca koji pripadaju društvu koje ima demokratske principe kao svoj temelj. Među tim principima, jedan koji se ističe jeste princip rodne jednakosti koji je Bosna i Hercegovina obavezna provoditi i standardizirati prema međunarodnim ugovorima i domaćem pravnom okviru. U okruženju gdje se sukobljavaju različiti navodni “vitalni nacionalni interesi”, poruka koju šalju vladajuće strukture je jednakost etničkih grupa, a ne jednakost rodova.

⁶ Član X: Amandman 1: “Ovaj ustav se može promijeniti odlukom Parlamentarne skupštine, uključujući dvotrećinsku većinu prisutnih u Predstavničkom domu.”

⁷ Od 2000. godine, interpretacije međunarodne zajednice, ove klauzule stvorile su institucije na državnom nivou, uključujući, ali ne ograničavajući Državnu graničnu službu, Sud Bosne i Hercegovine, Ured tužioca Bosne i Hercegovine, državnu carinsku agenciju, PDV i ministarstva pravde i odbrane na državnom nivou.

⁸ “Otkriveno: američki planovi za bosanski Ustav”, The Guardian, 10.11.2005.

⁹ Isto kao 15.

¹⁰ “Građani Bosne podržavaju reformu ustava”, <http://www.Dttnet.com>, 16.5.2006.

Učešće javnosti u ustavnim procesima

Kao što je navedeno, iz očiglednih razloga, nedostatak učešća javnosti nije bio striktno izbor, nego prije rezultat okolnosti u kojima je napravljen nacrt postojećih ustava tokom i nakon sukoba. Žene nisu prisustvovala stvaranju Dejtonskog mirovnog sporazuma, kao ni kasnijim pregovorima oko amandmana, niti su u dovoljnoj mjeri prisutne u sadašnjim ustavnim procesima, koji su u ćorsokaku. Ako su u tim procesima bile prisutne u prošloj deceniji, to je bilo prvenstveno da se pokaže solidarnost iza linija političkih stranaka ili u općem angažmanu u nevladinim organizacijama, čiji je cilj bio da se podigne javna svijest o ustavnoj krizi. Međutim, žene se nisu zalagale za rodnu ravnopravnost kao žene, nego više kao članice različitih grupa.

Od prije nekoliko godina prisutna je pojava u vidu polujavnih debata o tome kako bi budući ustavni okvir trebalo da izgleda. Mada ovaj proces prvenstveno vode vladajuće političke stranke u entitetima, aktivisti nevladinih organizacija i vodeći akademici postaju sve više angažovani.

Postoje tri grupe koje zagovaraju alternativna rješenja. Prvi pristup zahtijeva potpuno ukidanje Dejtonske strukture što bi u osnovi stvorilo ujedinjenu državu bez entiteta i distrikta Brčko i u kojoj bi kontrola većinske nacionalne grupe bila odbačena. Drugim riječima, decentralizacija bi bila bazirana na principima koji se razlikuju od sadašnjih etničkih principa. Drugi pristup zagovara potpunu centralizaciju u kojoj bi institucije bile transformirane prema ovom principu, što drugim riječima znači stvaranje centralizirane države. Treći pristup zagovara državu baziranu na tri entiteta i primjenu principa simetrije između etničnosti i teritorije.¹¹ U osnovi sve tri dominantne etničke grupe bi dobile vlastiti entitet. Dok su žene činile dio ove tri grupe, one nisu naglasile potrebu za rodnom jednakošću, već su se svrstale prema političkim pogledima tri različite društvene grupe.

3. PERSPEKTIVE RODNE RAVNOPRAVNOSTI U USTAVNOM PROCESU

Nedavno je Agencija za jednakost spolova formirala Radnu grupu pod nazivom "Zakon o jednakosti spolova u BiH – Područje IX – Javni život" i objavila nalaze i preporuke. U ovim preporukama traže se izmjene Ustava koje se odnose na jednako predstavljanje oba spola u zakonodavnim, izvršnim i sudskim organima.¹² Ova preporuka se, također, odnosi na ustave entiteta, kao i na kantonalne ustave. Preporuka se odnosi na postavljanje kriterija koji bi bili osnov za postizanje ovoga cilja, ali ne sadržava detalje o tome koji su to kriteriji. Sve u svemu, kao mehanizam na državnom nivou, ovo je pozitivan korak ka otvaranju debate o rodnoj ravnopravnosti i ustavnim procesima. Radna grupa je sastavljena i od muškaraca i od žena iz gender centara entiteta.

¹¹ Zoran Pajić "Bosna i Hercegovina: Državnost na prekretnici", EU Accession Monitor, <http://www.tol.org>

¹² "Zakon o jednakosti spolova u BiH – Područje IX – Javni život: Nalazi i preporuke Radne grupe", str. 62.

Analiza BiH Ustava

Pošto je Ustav Bosne i Hercegovine prilično neodređen, razmotrit ćemo odredbe i u ustavima entiteta. Kako je ranije navedeno, nedavni paket reformi ne uključuje određene odredbe o rodnoj jednakosti. Ipak, nalazi Radne grupe se mogu koristiti kao osnova za promjenu. Oba entiteska Ustava zaista priznaju Opći okvirni sporazum za Bosnu i Hercegovinu na kojem je baziran državni Ustav, s tim da se u Ustavu Republike Srpske, u članu 49, navodi da u slučaju različitosti u odredbama o pravima i slobodama između Ustava Republike Srpske i Ustava Bosne i Hercegovine, primjenjuju se one odredbe koje su za pojedinca povoljnije. To je bio amandman kojeg je uveo Ured visokog predstavnika kako bi osigurao jednakost i prenio neke ovlasti na državu, ali ova klauzula, također, izaziva konfuziju. U osnovi, moglo bi se tvrditi da je to instrument za direktnu primjenu odredaba državnog Ustava ako to traži pojedinac. Sljedeći tekst će pokazati veliki nedostatak usklađenosti između entitetskih Ustava i državnog Ustava, kao i stalno, skoro automatsko pozivanje na međunarodne standarde, kao da su oni ti koji obezbjeđuju prava, a ne država.

I) PREAMBULA

U Preambuli Ustava Bosne i Hercegovine navodi se sljedeće:

Na temelju poštivanja ljudskog dostojanstva, slobode i jednakosti,

Opredijeljeni za mir, pravедnost, toleranciju i pomirenje,

Uvjereni da demokratske institucije vlasti i poštenu postupci najbolje uspostavljaju miroljubive odnose unutar pluralističkog društva, odlučni da osiguraju puno poštivanje međunarodnog humanitarnog prava

Nadahnuti Univerzalnom deklaracijom o ljudskim pravima, međunarodnim ugovorima o građanskim i političkim te ekonomskim, socijalnim i kulturnim pravima, kao i Deklaracijom o pravima osoba koje pripadaju nacionalnim ili etničkim, vjerskim i jezičnim manjinama, te drugim instrumentima o ljudskim pravima,

Pozivajući se na Temeljna načela dogovorena u Ženevi 8.9.1995., te u New Yorku 26.9.1995.,

Bošnjaci, Hrvati i Srbi, kao konstitutivni narodi (zajedno sa ostalima), te građani Bosne i Hercegovine ovim utvrđuju Ustav Bosne i Hercegovine.

U Preambuli Ustava Federacije Bosne i Hercegovine stoji sljedeće:

Vođeni principima Povelje Ujedinjenih naroda, Univerzalne deklaracije o ljudskim pravima i Općim okvirnim sporazumom za mir u Bosni i Hercegovini i njegovim aneksima...

Bošnjaci, Hrvati i Srbi kao konstitutivni narodi, zajedno sa ostalima, i građani Federacije Bosne i Hercegovine, koja je konstitutivni dio suverene države Bosne i Hercegovine, odlučni da osiguraju punu nacionalnu ravnopravnost, demokratske odnose i najviše standarde ljudskih prava i sloboda, ovim donose Ustav Federacije Bosne i Hercegovine.¹³

Ustav Republike Srpske navodi:

Poštujući volju svojih konstitutivnih naroda i građana da formiraju i očuvaju Republiku Srpsku i da ustavno uređenje Republike utemelje na poštovanju ljudskog dostojanstva,

¹³ Amandman XXVII, u originalu: "Narodi i građani Federacije Bosne i Hercegovine, koja je konstitutivni dio suverene države Bosne i Hercegovine,* odlučni da osiguraju punu nacionalnu jednakost, demokratske odnose i najviše standarde ljudskih prava i sloboda, ovim donose Ustav Federacije Bosne i Hercegovine***" kako je izmijenjeno Am.II, u originalu **"Narodi i građani Bosne i Hercegovine" i ***"ovim stvaraju Federaciju"

slobode i jednakosti, nacionalnoj ravnopravnosti, demokratskim institucijama, vladavini prava, socijalnoj pravdi, pluralističkom društvu, garantiranju i zaštiti ljudskih sloboda i prava kao i prava manjinskih grupa u skladu sa međunarodnim standardima, zabrani diskriminacije i uvažavanju pravila tržišne ekonomije.¹⁴

Gledano po izjavama u Preambulama, niti jedna ne spominje ravnopravnost spolova. Preambule Ustava Republike Srpske i Federacije spominju "jednakost", ali se to odnosi samo na nacionalnu jednakost, čime ponovo naglašavaju etničke identitete i potrebu da se sačuva jednakost među konstitutivnim narodima. Kreatori Ustava trebali bi da pogledaju primjer iz Ustava Ruande koji u svojoj Preambuli ne navodi samo jednakost muškaraca i žena, nego i zabranjuje diskriminaciju na bazi spola. Pozivanje na ljudsko dostojanstvo treba pojačati pozivanjem na druga prava pojedinca/ki, kao što su jednakost, a posebno ravnopravnost rodova. Kod sva tri navedena ustava nedostaje obavezivanje na rodnu ravnopravnost i, u osnovi, pisani su u muškom rodu i baziraju se na kolektivnom etničkom identitetu i njegovoj zaštiti.

PREPORUKE:

- U manjoj mjeri insistirati na nacionalnim i/ili etničkim identitetima, a naglasiti prava i slobode *pojedinka/ki* u Preambuli.
- Termin "ostali" zamijeniti terminom "građani/ke" ili "svi muškarci i žene".
- Uključiti ravnopravnost rodova kao temeljni princip, kako bi se prezentirala rodna ravnopravnost kao temeljna vrijednost BiH.
- U tekstu Ustava ravnopravno koristiti jezičke oblike za oba roda, počevši od Preambule.

II) GRAĐANSKA I POLITIČKA PRAVA (prava prve generacije)

Ustav Bosne i Hercegovine navodi u članu 2. sljedeće:

Bosna i Hercegovina i oba entiteta osiguravaju najviši nivo međunarodno priznatih ljudskih prava i temeljnih sloboda. U tu svrhu postojat će Komisija za ljudska prava za Bosnu i Hercegovinu, kako stoji u Aneksu 6¹⁵ Općeg okvirnog sporazuma.

Ustav Federacije Bosne i Hercegovine navodi sljedeće:

Pošto se principi, prava i slobode utvrđeni u Ustavu Bosne i Hercegovine, sljedeće odredbe vode Federaciju.¹⁶

Ustav Republike Srpske navodi u Poglavlju II, član 10:

Građani Republike su ravnopravni u slobodama, pravima i dužnostima; jednaki su pred zakonom i uživaju istu pravnu zaštitu bez obzira na rasu, pol, jezik, nacionalnu pripadnost, vjeroispovijest, socijalno porijeklo, rođenje, obrazovanje, imovno stanje, političko i drugo uvjerenje, društveni položaj i druga lična svojstva.

Kako se vidi iz poređenja, osnovne odredbe su veoma nejasne i uglavnom se odnose na principe prava i sloboda, umjesto da eksplicitno određuju prava i slobode. U tekstu Ustava

¹⁴ Preambula izmijenjena Amandmanom LXVI www.vladars.net/en/zakoni/ustav.html. Navedeno je da su svi amandmani usvojeni 2002. godine i uvedeni Odlukom br. 150/02 Visokog predstavnika, objavljeni u "Službenim novinama Republike Srpske" 36/00.

¹⁵ **Aneks 6 je Sporazum o ljudskim pravima** koji su oba entiteta potpisala kao dio Mirovnog sporazuma.

¹⁶ Am. IV, u originalu: "Pošto se principi navedeni u donjem tekstu i prava i slobode predviđeni u instrumentima navedenim u Aneksu primjenjuju na cijeloj teritoriji Republike Bosne i Hercegovine, sljedeće odredbe rukovode Federaciju".

Republike Srpske terminologija je određenija i sadrži demokratski okvir koji strši, dok se Ustav Federacije vraća na državni Ustav, koji se poziva na Aneks 6 Općeg okvirnog sporazuma. Čini se da se tri Ustava ne slažu međusobno u formulisanju. Samo se Ustav Republike Srpske poziva na ravnopravnost i ravnopravnu zaštitu na osnovu spola, ali ne spominje rod, dok ostala dva Ustava čak i ne spominju građane, već samo ljudska prava i temeljne slobode. Oni treba da određeno navedu da su prava i slobode garantovani svim muškarcima i ženama na cijeloj teritoriji. Ako se to eksplicitno navede, onda je lakše zahtijevati ostvarenje prava. Bosna i Hercegovina još nema razvijenu automatsku jednakost rodova, a to bi ubuduće trebala biti jedna od glavnih tema ustavnih reformi, u cilju postizanja ravnopravnosti.

PREPORUKA:

- Eksplicitno se pozvati u tekstu na osnovne odredbe samog Ustava, uključujući prava na ljudsko dostojanstvo, ličnu sigurnost, i slobodu od mučenja i lošeg postupanja, a ne pozivati se na međunarodne ugovore kao što su: nepovredivost života, ljudsko dostojanstvo, pravo na lični integritet (sigurnost osobe), pravo na ličnu slobodu, zabrana mučenja kao i okrutnog i ponižavajućeg postupanja, sudska zaštita ljudskih prava i sloboda i pravo na odštetu u slučaju kršenja itd.

III) DRŽAVLJANSTVO I NACIONALNOST

U Preambuli Ustava Bosne i Hercegovine navedeno je sljedeće:

Bošnjaci, Hrvati i Srbi, kao konstitutivni narodi (zajedno sa ostalima), i građani Bosne i Hercegovine

Dalje, u članu 1., paragraf b, navodi se sljedeće:

- Nijednoj osobi se neće uskratiti državljanstvo Bosne i Hercegovine ili nekog od entiteta na proizvoljan način ili tako da ostane ostane bez državljanstva. Nijednoj osobi se neće uskratiti državljanstvo Bosne i Hercegovine ili nekog od entiteta na osnovu pola, rase, boje kože, jezika, vjere, političkog ili drugog mišljenja, nacionalnog ili socijalnog porijekla, pripadnosti nacionalnoj manjini, vlasništva, rođenja ili drugog statusa.

U Preambuli Ustava Federacije Bosne i Hercegovine navodi se sljedeće:

Bošnjaci, Hrvati i Srbi kao konstitutivni narodi, zajedno sa ostalima, i građani Federacije Bosne i Hercegovine,

U članu 5. se, također, navodi:

- Nijednoj osobi se neće uskratiti državljanstvo na proizvoljan način ili tako da ostane¹⁷ bez državljanstva.
- Nijednoj osobi se ne može uskratiti državljanstvo Federacije na bilo kom osnovu kao što je **pol**, rasa, boja kože, jezik, vjera, političko ili drugo mišljenje, nacionalna ili socijalna pripadnost, pripadnost nacionalnoj manjini, vlasništvo, rođenje ili drugi status;¹⁸

¹⁷ Dodato Amandmanom VII.

¹⁸ Dodato Amandmanom VII.

Ustav Republike Srpske navodi u članu 1.:

“Član 1. je zamijenjen Amandmanom XLIV, u pogledu sljedećeg:

“Republika Srpska će biti država srpskog naroda i svih njenih građana”.

U članu 6. se navodi:

Građanin Republike ne može biti lišen državljanstva, protjeran ili izručen.

U navedenim članovima državni Ustav pominje da se nikom ne može osporiti državljanstvo na osnovu spola, dok Federacija u paragrafu (b), po prvi put priznaje razlike u rodu i izjednačava muškarce i žene po pitanju prava na državljanstvo. Sljedeći paragraf u Ustavu Federacije, također, pominje da nikom ne može biti uskraćeno državljanstvo na osnovu spola. Samo Ustav Republike Srpske koristi opći termin građanin, pa stoga, u ovom slučaju, pisana terminologija nije ta koja eksplicitno identificira muškarce i žene kao one koji imaju jednaka prava kao građani. Ponovo ustavi nisu usklađeni u pogledu osnovnih odredaba kada se međusobno uporede. Ovo daje utisak da je, u pogledu prava na državljanstvo, jednakost na osnovu spola u većoj mjeri ugrađena u Ustav BiH i Ustav Federacije BiH, nego u Ustav Republike Srpske. Prava djece su pomenuta u Ustavu Federacije BiH i Ustavu BiH, ali ne u Ustavu Republike Srpske, ta prava se tamo ne navode eksplicitno.

Kao potpuna parodija činjenice da nijedan građanin ne može biti lišen državljanstva, svi ustavi priznaju tri tipa građana i ostale, često klauzulom koja nema smisla: “... i drugi građani”. Ova izjava je u potpunoj kontradikciji sa CEDAW-om, kao i svim drugim međunarodnim konvencijama koje je BiH ratificirala. To posebno ostavlja prostor za direktnu i indirektnu diskriminaciju i žena i muškaraca koji ne pripadaju ovim trima etničkim grupama (ne nacionalnostima), ili koji ne žele pripadati nekoj grupi da bi se smatrali potpunim građanima. Kategorija “ostali” je direktna diskriminacija za žene koje nisu rođene u BiH, nego su stekle državljanstvo živeći u BiH, udajom ili prema običajnom pravu u BiH. “Ostali” ukazuje na nekoga ko je građanin druge klase, nedefinisan, ne u potpunosti građanin i često vodi ka duploj diskriminaciji za žene, prvenstveno prema rodu, a onda i prema nacionalnom ili etničkom identitetu. Ovo je nešto što je sasvim u suprotnosti s bilo kojim principom jednakosti i pravičnosti u jednom društvu.

PREPORUKE:

- Eksplicitno se pozvati na muškarce i žene kao građani/ke koji imaju ista prava.
- Izbrisati kategoriju “ostali”, svi građani i građanke treba da budu jednaki.

IV) ODREDBE O RODNOJ RAVNOPRAVNOSTI/JEDNAKOSTI

Bosna i Hercegovina je uskladila ovaj dio CEDAW konvencije time što je donijela državni Zakon o jednakosti spolova, 2003. godine, koji pokriva sve sektore života s ciljem promoviranja rodne ravnopravnosti. U članu 3. ovog Zakona, zabranjena je i direktna i indirektna diskriminacija na osnovu spola. Ovaj član, također, predviđa specijalne mjere koje se preduzimaju s ciljem promoviranja rodne ravnopravnosti i uklanjanja postojećih nejednakosti, drugim riječima: zaštitu spolova na osnovu biološkog određenja. U postupku je usklađivanje entitetskih i kantonalnih zakona s ovim zakonom, ali proces je spor.

V) JEDNAKOST PRED ZAKONOM

Ustav BiH navodi u članu 2. sljedeće:

Sva lica na teritoriji Bosne i Hercegovine uživaju ljudska prava i slobode iz stava 2. ovog člana, što uključuje; e) pravo na pravično saslušanje u građanskim i krivičnim stvarima i druga prava u vezi sa krivičnim postupkom.

Ustav Federacije Bosne i Hercegovine navodi u članu 2.1. sljedeće:

Sve osobe na teritoriji Federacije uživaju prava na [...]

c) jednakost pred zakonom

U Ustavu Republike Srpske ne postoji klauzula u kojoj se na taj način navodi jednakost pred zakonom, ali u članu 16. navodi se sljedeće:

Svako ima pravo na jednaku zaštitu **njegovih** prava u postupku pred sudom i drugim državnim organom i organizacijom. Svakome je zajamčeno pravo na žalbu ili drugo pravno sredstvo protiv odluke kojom se rješava o njegovom pravu ili na zakonom zasnovanom interesu.

Ustav BiH ne pominje određeno "jednakost pred zakonom", nego uključuje fraze koje se odnose na pravična saslušanja. U klauzuli jednakosti pred zakonom, u Ustavu Republike Srpske, samo je pomenut jedan spol – muški, drugim riječima samo se muškarci priznaju kao jednaki pred zakonom. Tu se, međutim, u članu 49. spominje da se mogu koristiti klauzule iz državnog Ustava koje su povoljnije. U ovom slučaju, nijedan od Ustava ne navodi određeno da su muškarci i žene jednaki pred zakonom, a Ustav Republike Srpske direktno uklanja jedan rod tako što se drugi rod prožima u njegovoj terminologiji.

PREPORUKE:

- Uključiti određenu klauzulu "jednakost pred zakonom" u svim Ustavima
- Osigurati da klauzula određuje muškarce i žene, a ne samo pojedince i građane, i da koristi jezičke oblike za oba roda
- Uključiti jednak pristup zakonskim sredstvima, kao što je pravna pomoć, pravična saslušanja za sve građane

VI) KLAUZULE NEDISKRIMINACIJE

Ustav BiH navodi u članu 2., paragrafi 4 i 5 sljedeće:

Sva lica na teritoriji Bosne i Hercegovine uživaju ljudska prava i slobode iz stava 2. ovog člana, što uključuje;

- (4) Uživanje prava i sloboda, predviđenih u ovom članu ili u međunarodnim sporazumima navedenim u Aneksu I ovog Ustava, osigurano je svim licima u Bosni i Hercegovini bez diskriminacije po bilo kojem osnovu kao što je **pol**, rasa, boja, jezik, vjera, političko i drugo mišljenje, nacionalno ili socijalno porijeklo, povezanost sa nacionalnom manjinom, imovina, rođenje ili drugi status.

Ustav Federacije Bosne i Hercegovine navodi u članu 2., paragraf d sljedeće:

(1) Sve **osobe** na teritoriji Federacije uživaju prava na:

- d) zabranu svake diskriminacije zasnovane na rasi, boji kože, **polu**, jeziku, religiji ili vjerovanju, političkim ili drugim uvjerenjima, nacionalnom i socijalnom porijeklu

Ustav Republike Srpske, također, navodi u članu 49., paragraf 3 sljedeće:

U slučaju različitosti u odredbama o pravima i slobodama između Ustava Republike Srpske i Ustava Bosne i Hercegovine, primjenjuju se one odredbe koje su za pojedinca povoljnije.

Odredbe o nediskriminaciji na osnovu spola, a ne roda ugrađene su u oba Ustava, državnom i Federalnom, ali nisu striktno ugrađene u Ustav Republike Srpske, mada on uključuje klauzulu da ukoliko odredbe nisu u skladu sa državnim zakonom, primjenjivat će se ona koja je povoljnija za pojedinca. Nigdje se tu ne spominje distinkcija između direktne i indirektno diskriminacije kao kod nekih drugih ustava, naprimjer Ustav Južnoafričke Republike. Sekcija 9(4) Ustava Južnoafričke Republike eksplicitno spominje i direktnu i indirektnu diskriminaciju: "Nijedna osoba ne smije nepošteno diskriminirati direktno ili indirektno bilo koju drugu osobu", služeći se najboljom praksom praćenja u stvaranju sličnih klauzula o nediskriminaciji. Mada ne eksplicitno u ustavnim odredbama, pitanjem nediskriminacije na bazi roda, ali ne i spola i roda, bavi se Zakon o jednakosti spolova BiH. U članu 3. navedenog Zakona navodi se da:

Diskriminacija na osnovu pola, u smislu ovog zakona, predstavlja pravno, fizičko, direktno ili indirektno razlikovanje, privilegiranje, isključivanje ili ograničavanje zasnovano na polu, zbog kojeg se i muškarcima i ženama otežava ili otežava uživanje njihovih ljudskih prava i sloboda u političkom, obrazovnom, ekonomskom, socijalnom, kulturnom, građanskom i svakom drugom području javnog života.

Ovaj član nudi definicije direktne i indirektno diskriminacije. Ovaj član Zakona može se koristiti kao osnova za promjenu klauzula o nediskriminaciji Ustava od onih koje daju opće garancije nediskriminacije do određenih odredaba koje zabranjuju i direktnu i indirektnu diskriminaciju.

VII) POZITIVNA AKCIJA/POSEBNE MJERE

Mada nijedan od ustava nema odredbe za privremene mjere, Zakon o jednakosti spolova BiH, u članu 21., navodi da je obaveza nadležnih organa "usvajanje planiranih mjera izrađenih da bi se postigla jednakost spolova na svim poljima i na svim nivoima vlasti". Mada je nejasan, ovaj član barem pravno obavezuje i mogu ga koristiti mehanizmi rodne jednakosti na državnim i entitetskim nivoima, zajedno s političkim strankama, kako bi usmjerili rodnu ravnopravnost u proces reforme. Kako je naprijed navedeno, određeni pomak je postignut kroz Radnu grupu, ali potrebno je da oni istinski implementiraju zakonske odredbe u budućnosti.

PREPORUKE:

- Ubacivanje definicija direktne i indirektno diskriminacije i garancija da i žene i muškarci kao građani/ke BiH treba da žive tako da ne budu direktno ili indirektno diskriminirani po osnovu i spola i roda, a ne samo spola.
- Uključiti klauzulu koja omogućava implementiranje privremenih posebnih mjera radi postizanja *de facto* rodne ravnopravnosti koja je propisana Zakonom o jednakosti spolova BiH, u onim sferama društva koje neće biti diskriminatorne, nego će, zapravo, učiniti društvo jačim u pogledu jednakosti koja neće biti samo teoretski okvir, nego nešto što je bazično. Primjer je korištenje jezika koji treba da podrazumijeva rodno određenje, što se često zanemaruje.

VIII) POLITIČKO UČEŠĆE

Ustav BiH navodi u članu 2.2. sljedeće:

Prava i slobode predviđene u Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda, u njenim protokolima, se direktno primjenjuje u Bosni i Hercegovini. Ovi akti imaju prioritet nad svim ostalim zakonima.

Ustav Federacije Bosne i Hercegovine navodi u članu 2.2. da:

Svi građani uživaju pravo na:

- a) Osnivanje i pripadanje političkim partijama; i
- b) Politička prava: da učestvuju u javnim poslovima; da imaju jednak pristup javnim službama; da biraju i da budu birani.

Ustav Republike Srpske navodi u članu 29. da:

Građanin koji je navršio 18 godina života ima pravo birati i biti biran. Biračko pravo je opće i jednako, izbori su izravni, a glasanje tajno. [Član 29. dopunjen je tačkom 5 Amandmana LVII, koja glasi:] "Biračko pravo na osnovu člana 29. stiče se nakon prethodnog prebivališta u određenom mjestu u trajanju koje se utvrđuje zakonom."

Član 33. dalje navodi:

Građani imaju pravo sudjelovati u obavljanju javnih poslova i da pod jednakim uslovima budu primljeni u javnu službu.

Ustav BiH, kao što je gore navedeno, spominje kod prava na državljanstvo i pravo na glasanje. Iako i Međunarodna konvencija o građanskim i političkim pravima (ICCPR) i Evropska konvencija za zaštitu ljudskih prava i temeljnih sloboda stvaraju pravnu osnovu za pravo na glasanje i učestvovanje u javnim poslovima indirektno i direktno, Ustav BiH ne navodi direktno ta prava svojim građanima bez obzira na spol. U osnovi se vraća na međunarodne zakone kao na garante prava iznad bilo kojeg nacionalnog zakona. Zato Zakon o jednakosti spolova može garantovati jednako učešće u javnom životu.¹⁹ Zakon se fokusira na rodnu ravnopravnost u potpunosti, a ne samo promociju ženske jednakosti. Također, propisuje primjenu programa i politika koji će osigurati jednakost. Pored toga, BiH ima sistem kvote od 30% podzastupljenog spola kao obavezni mehanizam koji prethodi Zakonu o jednakosti spolova. Iako je ovaj mehanizam kontroverzan i cilja na podzastupljeni spol, donekle je povećao učešće žena (barem brojčano) u javnom životu u početku, a u posljednje vrijeme to više nije slučaj i brojke se smanjuju.

S druge strane, CEDAW komitet naveo je da Bosna i Hercegovina treba harmonizirati izborni zakon s Zakonom o jednakosti spolova,²⁰ te ojačati i implementirati mjere za pojačano učešće žena u izbornim i imenovanim tijelima.

PREPORUKE:

- Fraza "muškarci i žene" mora zamijeniti frazu "građani";
- Treba dodati odredbu koja ohrabruje političko učešće i žena i muškaraca na svim nivoima vlasti, što predstavlja demografiju države.

¹⁹ Član 15., Zakon o jednakosti spolova BiH

²⁰ **Kompilacija UN ugovornih preporuka za Bosnu i Hercegovinu – CEDAW Preporuka 30**, CD-ROM, Sarajevo, BiH: UNBIH i UNOCHR, 2007.

IX) PRAVO NA IMOVINU

Ustav BiH navodi u članu 2., paragraf (k) sljedeće:

Pravo na imovinu.

Ustav Federacije Bosne i Hercegovine, također, navodi u članu 2.3 (k) da svi građani uživaju:

(k) Prava na imovinu

Ustav Federacije Bosne i Hercegovine navodi u članu 3. da:

Sve izbjeglice i raseljena lica imaju pravo slobodnog povratka u prebivališta iz kojih su prognani.

Ustav Federacije Bosne i Hercegovine, također, navodi u članu 4. da:

Sve osobe imaju pravo, u skladu sa Aneksom VII Općeg okvirnog sporazuma,²¹ na povrat ukupne imovine koje su lišene tokom etničkog progona i neprijateljstva od 1991. godine, te na nadoknadu ukupne imovine koja im se ne može vratiti.²² Sve izjave i obaveze²³ date i preuzete pod prisilom, posebno one koje se tiču odricanja od prava na zemlju i drugu imovinu, ništavne su.²⁴ Ostvarivanje prava iz stava 1. ovog člana uredit će se federalnim zakonodavstvom.²⁵

Ustav Republike Srpske u članu 10. navodi:

Građani Republike su ravnopravni u slobodama, pravima i dužnostima; jednaki su pred zakonom i uživaju istu pravnu zaštitu bez obzira na rasu, pol, jezik, nacionalnu pripadnost, vjeroispovijest, socijalno porijeklo, rođenje, obrazovanje, **imovno stanje**, političko i drugo uvjerenje, društveni položaj ili drugo osobno svojstvo.

Sva tri ustava obezbjeđuju, na različit način, pravo na imovinu. Ustav Federacije BiH sadrži jedinstvenu klauzulu, koja garantuje pravo na povratak izbjeglih lica u svoje domove. Pravo žene i muškarca, kao ravnopravnih rodova, na imovinu nije navedeno u odredbi, što ponovo odražava nedostatak harmonizacije ustavnih odredbi s međunarodnim standardima. Ovo je posebno važno, jer brojne studije, naročito o bosanskohercegovačkim domaćinstvima u kojima je žena glava porodice, pokazuju da jedan od razloga zašto žene ne pokreću poslove, niti im je dozvoljeno da uzimaju velike kredite u bankama, jeste to što one obično nisu primarne vlasnice svoje imovine. Zato ova garancija nije samo promijenila pravne odredbe, nego utiče i na sam mentalitet društva, pogotovo u manje razvijenim dijelovima zemlje.

PREPORUKA:

- Odredba treba navesti da je i muškarcima i ženama potrebno zagarantovati jednaka prava na posjedovanje imovine i podjelu imovine.

²¹ Am. VI u originalu: "u skladu sa federalnim i kantonalnim zakonodavstvom".

²² Am. VI u originalu: "oduzeta u toku etničkog progona, kao i na nadoknadu sve imovine koja im ne može biti vraćena".

²³ Am. VI u originalu: "ili obaveze".

²⁴ Am. VI u originalu: "smatraju se ništavnim".

²⁵ Dodato Am. VI.

X) SLOBODA OKUPLJANJA

Ustav Bosne i Hercegovine navodi u članu 2., paragraf (i) sljedeće:

Slobodu mirnog okupljanja i slobodu udruživanju s drugima.

Ustav Federacije Bosne i Hercegovine navodi u članu 2.1., paragraf (I):

Osnovne slobode: slobodu govora i štampe; slobodu mišljenja, savjesti i uvjerenja; slobodu religije, uključujući privatno i javno vjeroispovjedanje; **slobodu okupljanja**; **slobodu udruživanja**, uključujući slobodu osnivanja i pripadanja sindikatima i **slobodu neudruživanja**; slobodu na rad;

Ustav Republike Srpske u članu 30. navodi:

Građani imaju pravo na mirno okupljanje i javni prosvjed.

Sloboda okupljanja može se zakonom ograničiti samo radi zaštite sigurnosti ljudi i imovine.

Sva tri ustava garantuju pravo na okupljanje. Ne pozivaju se na nevladine organizacije, nego na pravo na okupljanje i udruživanje, kao i neke odredbe za osnivanje sindikata. Još su uopćenije odredbe u Ustavu BiH, ali opet nisu harmonizovane i sve su napisane uopćeno odnoseći se na građane. Uprkos ovome, u Bosni i Hercegovini danas postoji veoma aktivno građansko društvo. Aktivistice nevladinih organizacija su zamijenile uloge sa političarkama i lobiraju u vladi za promjene i unapređenje situacije u pogledu rodne ravnopravnosti, kao što su i ženske nevladine organizacije počele mirovni proces i nastavljaju biti na čelu demokratizacije ovog društva.

PREPORUKA:

- U sva tri ustava trebalo bi navesti da "i žene i muškarci imaju slobodu udruživanja kao i slobodu neudruživanja".

EKONOMSKA I SOCIJALNA PRAVA (prava druge generacije)

XI) JEDNAKOST PRI ZAPOSŁJAVANJU

Ustav BiH navodi u članu 2. da:

Prava i slobode, utvrđeni u Evropskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda, te njezinim Protokolom, direktno se primjenjuju u Bosni i Hercegovini. Oni imaju prvenstvo pred svakim drugim zakonodavstvom.

Ustav Federacije navodi u članu 2.3. paragraf (I):

Osnovne slobode: sloboda govora i štampe; sloboda mišljenja, savjesti i uvjerenja; sloboda religije, uključujući privatno i javno vjeroispovijedanje; sloboda okupljanja; sloboda udruživanja, uključujući slobodu osnivanja i pripadanja sindikatima; i **sloboda na rad**

Ustav Republike Srpske navodi u članu 39.:

Svako ima pravo na rad i slobodu rada.

Prisilni rad je zabranjen.

Svako je slobodan u izboru zanimanja i zaposlenja i pod jednakim uslovima su **mu** dostupni radno mjesto i položaj. Zaposlenima može prestati radni odnos suprotno njihovoj volji na način i pod uslovima koji su utvrđeni zakonom i kolektivnim ugovorima.

Svako po osnovu rada ima pravo na zaradu, u skladu sa zakonom i kolektivnim ugovorima.

Pravo na rad je uključeno u Ustav BiH, Ustav Federacije i Ustav Republike Srpske, ali prva dva ustava samo se nejasno pozivaju na njega. Ustav Republike Srpske nudi više detalja, pozivajući se na pravo izbora profesije, jednake uslove i pravo na novčanu naknadu. Međutim, tekst počinje sa "svako", zatim nastavlja uključivanjem samo zamjenice "njegov", čime ugrožava mogućnost da ovo pravo obuhvata i žene.

S druge strane, Ustav Federacije i Ustav BiH tako su nejasni kada se radi o pravima druge generacije, da je činjenica da su ove odredbe eksplicitnije navedene u kantonalnim ustavima. Međutim, nedostatak detalja ostavlja utisak da muškarci i žene nisu jednaki u svom pravu na rad, novčanu naknadu ili beneficije. Zato Zakon o jednakosti spolova govori o jednakosti spolova i jednakosti roda na radnom mjestu u članu 7., gdje navodi da je "svako (...) jednak na osnovu roda u procesu zapošljavanja".²⁶

PREPORUKE:

- Specificirati da muškarci i žene imaju jednaka prava da odaberu profesiju;
- Koristiti jezik koji podrazumijeva rodno određenje;
- Naglasiti da pravo na rad uključuje pravo na rad pod istim uslovima, da ti uslovi budu pravični i u skladu sa međunarodnim standardima itd.

XII) JEDNAKO PLAĆANJE ZA JEDNAKI RAD

U Ustavu Republike Srpske navodi se u članu 39.:

Svaka zaposlena osoba ima pravo na novčanu naknadu u skladu sa zakonom i kolektivnim ugovorima.

Iako Ustav RS spominje pravo na novčanu naknadu, on ne specificira pravo na jednaku novčanu naknadu za rad jednake vrijednosti. Ovo je veoma važno za osiguranje rodne ravnopravnosti. Ustav Federacije i Ustav BiH uopće se ne pozivaju na novčanu naknadu, što predstavlja veliku prazninu u ovim ustavima. Zakon o jednakosti spolova BiH, također, intervenira ovdje. U članu 8., zabranjuje se diskriminacija prilikom plaćanja na osnovu spola i navodi: "Diskriminacija na bazi pola u radu i na radnom mjestu je zabranjena u sljedećem: nejednako plaćanje i druge beneficije za isti posao ili drugim riječima, vrijednost izvršenog posla".

PREPORUKA:

- U svim Ustavima uključiti odredbu da i žene i muškarci imaju pravo na jednako plaćanje za jednaki rad.

XIII) BRAK/PORODICA

Djeca:

Ustav Federacije navodi u članu 2.1. paragraf (j):

Sve osobe na teritoriji Federacije uživaju prava: Na zaštitu porodice i djece;

U Ustavu Republike Srpske navodi se u članu 36. sljedeće:

Porodica, majka i dijete uživaju posebnu zaštitu.

Djeca rođena izvan braka imaju jednaka prava i dužnosti, kao i djeca rođena u braku.

²⁶ Član 7. Zakona o jednakosti spolova BiH: "Svako je jednak na osnovu pola u procesu zapošljavanja".

Maloljetnici o kojima se roditelji ne brinu, kao i osobe koje nisu u mogućnosti da se same brinu o sebi i zaštiti svojih prava i interesa, uživaju posebnu zaštitu.

Ustav RS navodi u članu 36.:

Roditelji imaju pravo i dužnost da se brinu o odgoju i obrazovanju svoje djece.

Mada Ustav Republike Srpske navodi u množini da roditelji imaju pravo i obavezu da obezbijede razvoj svoje djece, što je pohvalno, on ne navodi "muškarci i žene", već daje izjavu u generičkoj množini. Međutim, dobra je praksa to da obezbjeđuje jednaka prava za djecu rođenu u i izvan braka, te da se obezbjeđuju posebne mjere da bi se zaštitila porodica. Ovaj Ustav, međutim, ne specificira na šta se odnosi "posebna zaštita" i postoji rizik da obezbjeđivanjem posebne zaštite majci može ostaviti utisak da je to jedina svrha i uloga žene u društvu. Ustav Federacije BiH se poziva na zaštitu porodice i djece, ali je formulacija Ustava uopćena i prilično nejasna.

Brak:

Ustav BiH navodi u članu 3. sljedeće:

Sve osobe unutar teritorije Bosne i Hercegovine uživaju ljudska prava i temeljne slobode pomenute u prednjem paragrafu (2), koje uključuju:

j) pravo na brak i osnivanje porodice.

Ustav Republike Srpske navodi u članu 36.:

Brak i zakonski odnosi u braku i porodici regulišu se zakonom.

Ustav BiH garantuje svim osobama, ne specificirajući spol, pravo na brak. Ustav Federacije BiH ne uključuje ni opće ni određene odredbe, ali se automatski vraća na garancije prava navedenih u državnom Ustavu. Očigledno, ovaj segment je ponovo odgovornost kantona ili je naveden u Zakonu. Mada, unutar odredbi ne stoji da i muškarci i žene imaju isto pravo da sklope brak, odredba Republike Srpske barem navodi da će to biti regulisano zakonom. Nema odredbe u pogledu jednakosti odgovornosti i obaveza, osim u odgoju djece kako je naprijed navedeno.

PREPORUKA:

- Mora se uključiti odredba koja specificira da muškarci i žene imaju jednako pravo da sklope brak po njegovoj ili njenoj vlastitoj volji, da će sklapanje braka i njegovo poništenje biti regulisano građanskim zakonom, te pozvati se na jednake dužnosti i odgovornosti u braku.

Trudnoća:

Ustav Republike Srpske u članu 36. navodi sljedeće:

Porodica, majka i dijete imaju posebnu zaštitu.

Ustav Federacije BiH i Ustav BiH ne naglašavaju status "majčinstva" i njegove zaštite, mada su ova prava garantirana raznim međunarodnim konvencijama, a Zakon o jednakosti spolova BiH ne spominje majčinstvo određeno, već se poziva na zdravlje žena u članu 13., koji jasno kaže "da svako ima pravo na odgovarajuću zdravstvenu zaštitu, pristup zdravstvenim ustanovama, uključujući i one koji se odnose na planiranje porodice, bez obzira na njihov pol". Nedostaje usklađenost tamo gdje su prava žena naročito potrebna, često se direktna

diskriminacija dešava ženama na radnom mjestu i one ne mogu u potpunosti ostvariti svoja prava na porodiljsko odsustvo. Ovo bi trebalo biti posebna, ujednačeno navedena klauzula u svim ustavima. Odredba Republike Srpske garantira da će majka uživati posebnu zaštitu, ali ne specificira da je to tokom trudnoće i da se to, također, odnosi i na prava poslije rađanja.

PREPORUKA:

- Definitivno je potrebno uključiti odredbu koja se odnosi na prava i žena i muškaraca u pogledu reproduktivnog zdravlja i planiranja porodice. Naročito kod žena, pošto to otvara vrata za pravo žena na abortus.

Nasilje:

Mada se svi ustavi pozivaju na ličnu sigurnost i integritet, u Zakonu o jednakosti spolova BiH, u članu 17., stoji da je "zabranjen svaki oblik nasilja u javnom i privatnom životu na osnovu pola".

PREPORUKA:

- Odredba iz Zakona o ravnopravnosti spolova BiH treba da stoji i u svim ustavima, ali treba da specificira da se radi o nasilju na osnovu spola i roda.

XIV) ABORTUS

Ustav Republike Srpske u članu 36. navodi sljedeće:

Svako ima pravo da slobodno odlučuje o rađanju djece.

Pravo na privatnost i pravo na život navedeni su u Ustavu Federacije BiH i Ustavu BiH, ali ne navode pravo na slobodu rađanja djece. Pravo na abortus još uvijek je kulturni tabu u Bosni i Hercegovini, pa stoga nije uključen u postojeće ustave eksplicitno, mada Zakon o jednakosti spolova BiH ima odredbu o reproduktivnoj zdravstvenoj zaštiti za žene, što je navedeno u članu 13. Ustavni amandmani ne pominju reproduktivna prava. Ustav Republike Srpske navodi da svako ima pravo na slobodu rađanja djece bez pravljenja razlike između muškaraca i žena. Pitanja usklađenosti se ponovo javljaju i zahtijevaju proces revizije.

PREPORUKA:

- Odredba Ustava Republike Srpske trebalo bi da se proširi i na muškarce i na žene, te uključi i u druge ustave.

XV) ZAKON O VJERI/OBIČAJNI ZAKON

U ustavima nisu navedene odredbe u pogledu Zakona o vjeri i običajima, pošto je sekularizam prisutan u bh. društvu i političkom životu još od prošlog sistema.

XVI) OBAVEZE IZ MEĐUNARODNIH UGOVORA

O međunarodnim standardima Ustav BiH, u članu 2.2., navodi sljedeće:

Prava i slobode utvrđeni u Evropskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda, te njezinim Protokolima, direktno se primjenjuju u Bosni i Hercegovini. Oni imaju prvenstvo pred svakim drugim zakonodavstvom.

Ustav Federacije BiH navodi u Sekciji VII pod nazivom Međunarodni odnosi, član 3. sljedeće:

Međunarodni ugovori i drugi međunarodni sporazumi na snazi u pogledu Bosne i Hercegovine i²⁷ Federacije, i opća pravila međunarodnog prava, sastavni su dio zakonodavstva Federacije. U slučaju bilo kakve nesaglasnosti između međunarodnih ugovora i zakonodavstva, prevagnut će međunarodni ugovori.

U Ustavu Republike Srpske u članu 49., koji je ranije spomenut, navodi se da ukoliko u njegovom Ustavu ne postoje odredbe, pojedinac može izabrati onu odredbu iz Ustava BiH koja je povoljnija za njega. U njemu se, također, spominje Evropska konvencija za zaštitu ljudskih prava i temeljnih sloboda. Možemo pretpostaviti da, generalno, međunarodni standardi ovdje mogu imati prioritet nad nacionalnim, ali to nije jasno navedeno.

Pošto je sadašnji politički sistem proizvod jednog međunarodnog sporazuma i, što se često koristi kao opravdanje za nesprovođenje ustavne reforme, u budućnosti bi se moglo koristiti kao dobar argument za lobiranje, ali samo argument, ne data činjenica koja vodi ka trajnom statusu quo. Drugim riječima, moraju postojati precizno određene garancije pojedinačnih prava u tekstovima ustava, a ne kao što je slučaj sa sadašnjim imaginarnim odredbama koje većina građana, bez obzira na spol i rod na koji se primjenjuju, ne razumije i za koje ne zna.

4. PREGLED PLATFORMI POLITIČKIH STRANAKA U POGLEDU NJIHOVIH OBAVEZA PREMA PITANJU SPOLOVA I PROCJENA STANJA IMPLEMENTACIJE OVIH OBAVEZA

U oktobru 2006. godine održani su opći izbori u Bosni i Hercegovini. Ovo su bili prvi izbori koje su lokalne vlasti same realizovale nakon rata. U Bosni i Hercegovini je ukupno certificirano 56 političkih subjekata: 36 stranaka, 8 koalicija i 12 nezavisnih kandidata takmičili su se na državnom i entitetskom nivou.²⁸ Registriranih birača je bilo 2.733.063 od kojih je 49,77 posto žena. Od ukupnog broja registriranih birača, stvarno je glasalo 49,92 posto žena i 57,61²⁹ posto muškaraca. Ukupan broj registriranih birača koji su glasali bio je 1.469.883 od kojih je 46,20 posto žena, a 53,79 posto muškaraca. Činjenica da postoji razlika od sedam do osam posto između spolova među onima koji su glasali može se objasniti na dva načina: da je politika još uvijek arena u kojoj dominiraju muškarci i da političari u Bosni i Hercegovini ne ciljaju ozbiljno na žene glasače, nego samo kao na dio etničke skupine.

Pravni zahtjevi u vezi sa balansom spolova na listama kandidata su zadovoljeni i 37 posto od svih kandidata na ovim izborima su bile žene, a ipak je udio žena u novom sazivu Parlamentarne skupštine BiH opao sa 26 posto na 14 posto. Uloga žena tokom kampanje bila je limitirana. U Centralnoj izbornoj komisiji Bosne i Hercegovine, jedna od sedam članova je bila žena, a 30 posto predsjedavajućih u općinskim izbornim komisijama bile su žene.

²⁷ Am. CXII, originalno: "Međunarodni odnosi Federacije moraju biti u skladu s kontinuitetom, suverenitetom, teritorijalnim integritetom i međunarodnom osobnošću Bosne i Hercegovine, u skladu s članom III Ustava Bosne i Hercegovine".

²⁸ Statistički podaci preuzeti s web lokacije Centralne izborne komisije BiH www.izbori.ba.

²⁹ Statistički podaci Agencije za statistiku Bosne i Hercegovine: **Tematski izvještaj o jednakosti polova u 2007**, str. 73, 2007.

Među kandidatima za Predsjedništvo Bosne i Hercegovine, bošnjački kandidat je bio iz Stranke za BiH (SBiH), koji je dobio 62,10 posto glasova, drugi kandidat za hrvatskog člana Predsjedništva, po prvi put nije bio iz nacionalističke stranke, nego iz Socijaldemokratske partije Bosne i Hercegovine (SDP BiH) i dobio je 40,83 posto glasova, a kandidat za srpskog člana Predsjedništva bio je iz Saveza nezavisnih socijaldemokrata (SNSD) sa 54,80 posto glasova iz ove etničke grupe. Nijedna žena nije predložena kao potencijalni član Predsjedništva BiH, niti je bilo ženskih kandidata nakon rata.

U entitetu Federacija BiH, za Parlamentarnu skupštinu Bosne i Hercegovine, Stranka demokratske akcije dobila je 22,51 posto glasova, a odmah nakon su Stranka za BiH (SBiH) sa 17,95 posto, Hrvatska koalicija HDZ sa 13,51 posto i Socijaldemokratska partija BiH (SDP BiH) sa 11,68 posto, pa zatim Hrvatska demokratska zajednica 1990 (HDZ 1990) sa 11,40, te Koalicija Đapić-Jurišić-Nova hrvatska inicijativa sa 4,19 posto i Narodna stranka Radom za boljitak sa 3,51 posto. U entitetu Republika Srpska, većinu glasova za državni Parlament dobila je stranka Savez nezavisnih socijaldemokrata sa 50,18 posto glasova, a iza nje Srpska demokratska stranka sa 19,22 posto, Partija demokratskog progresa sa 6,02 posto, Srpska radikalna stranka sa 3,43 posto i Demokratski narodni savez sa 3,38 posto.

Izabrani delegati/kinje za Predstavnički dom na državnom nivou, podijeljeni prema strankama kojima pripadaju i spolu jesu sljedeći: Stranka demokratske akcije (SDA) ima devet delegata od kojih nijedan nije žena, Stranka za BiH ima osam delegata od kojih su dvije žene, Savez nezavisnih socijaldemokrata (SNSD) ima sedam delegata od kojih su dvije žene. Socijaldemokratska partija BiH ima pet delegata od kojih je jedna žena. HDZ-Hrvatska koalicija-HSP ima tri delegata od kojih je jedna žena. Srpska demokratska stranka ima tri delegata, među njima nije nijedna žena. Ostale stranke s istim brojem delegata nemaju ženskog predstavnika.

U Republici Srpskoj kandidat za Predsjednika u vodećoj političkoj partiji bio je iz Saveza nezavisnih socijaldemokrata (SNSD) i dobio je 51,93 posto glasova. Oba njegova potpredsjednika su muškarci koji pripadaju bošnjačkoj i hrvatskoj etničkoj grupi. Vodeća stranka u slučaju entitetskog Parlamenta u Republici Srpskoj prema rezultatima izbora jeste Savez nezavisnih socijaldemokrata sa 46,71 posto glasova, zatim dolazi Srpska demokratska stranka sa 17,87 posto i Partija demokratskog progresa sa 4,40 posto, te konačno Srpska radikalna stranka sa 3,26 posto glasova.

U Parlamentu Federacije BiH, od 98 predstavnika, Stranka demokratske akcije ima 30 delegata, a Stranka za BiH 25, Socijaldemokratska partija BiH ima 16, Hrvatska demokratska zajednica BiH (HDZBiH) oko 13, Hrvatska demokratska unija 1990 (HDZ 1990) 8, a preostalih 6 mandata je podijeljeno između HSP i Narodne stranke Radom za boljitak, te Bosanske patriotske stranke (BPS).

Što se tiče kantonalnih nivoa, zastupljenost žena u zakonodavnoj vlasti varira od 22,8% u Kantonu Sarajevo do 4% u Kantonu Livno. Ni u izvršnoj vlasti situacija nije bolja, na entitetskom nivou nema žena na ministarskim pozicijama, niti u Federaciji BiH, ni u RS. Jedina pozitivna činjenica jeste što je predsjednik Federacije BiH žena, ali to se desilo više usljed njene pripadnosti određenoj etničkoj grupi, a ne zato što je žena.

Analiza političkih platformi vodećih stranaka u odnosu na pitanja ravnopravnosti spolova

Neprihvatanje prijedloga ustavnih promjena Parlamentarne skupštine BiH, u aprilu 2006. godine, značajno se odrazilo na izbornu kampanju. Predložene promjene podržala je većina političkih stranaka koje predstavljaju sva tri konstitutivna naroda, ali one nisu dobile potrebnu dvotrećinsku većinu u državnom Parlamentu. To je dovelo do vrlo "opasne" debate o ustavnoj strukturi države koja se nastavila dobrim dijelom tokom trajanja izborne kampanje. U skladu s odredbama o spolnoj kvoti iz izbornog zakona, 37 posto od svih kandidata na izborima bile su žene. Prvo, na kandidatskim listama za mjesta u Parlamentarnoj skupštini BiH bilo je 67 žena i 460 muškaraca. Tri žene su, također, predstavljale nezavisne kandidate za Predsjedništvo BiH; dvije su povukle svoju kandidaturu pred same izbore da bi dale podršku drugim muškim kandidatima. Dok su se žene kandidati mogle vidjeti na predizbornim plakatima u Sarajevu (većinom na kantonalnom nivou), ukupno učešće žena u izornoj kampanji bilo je ograničeno. Kandidatkinje iz raznih stranaka dobile su pet posto vremena u elektronskim medijima i dva posto pokrivenosti u štampanim medijima.

U teoriji, sve stranke podržavaju rodnu jednakost i kada se postavi pitanje vezano za ovu problematiku, njihovi pripadnici uvijek ponavljaju "istu priču o podršci". Međutim, u stvarnosti, i politička klima i prioriteti izbornih i političkih kampanja, odražavaju drugačiju sliku. Većina stranaka koje su ranije spomenute imaju potencijal da naprave skok sa *de facto* na *de jure* ravnopravnost, posebno Savez nezavisnih socijaldemokrata i Socijaldemokratska partija BiH, međutim potrebno je uraditi intenzivno profiliranje i strateško planiranje. Sve druge stranke nisu baš voljne da ovo postave kao glavni prioritet, ili zato što je njihova retorika pretjerano nacionalistička, ili nisu dovoljno jake da utiču i skreću pažnju ženskim i muškim glasačima na važnost ravnopravnosti rodova i ustavne reforme.

PREPORUKE ZA DALJI RAD/ZAKLJUČAK:

- U kontekstu jednakosti rodova i ustavnih reformi, stranke koje su u stanju da utiču na reforme trebale bi da se intenzivnije fokusiraju na rješavanja ovih obaveza;
- Rad sa parlamentarcima i parlamentarkama na ovom pitanju;
- Potreban je intenzivniji rad na promociji ovog pitanja u kompletnoj sferi civilnog društva, u oba entiteta;
- Jačanje podrške akademskih institucija za ovaj vid ustavnih reformi;
- Uspostava mreže organizacija koja će lobirati među parlamentarcima/kama da preporuke postanu prioritet;
- Rad sa ekspertima/cama na formulisanju tekstova ustava u oba entiteta i na državnom nivou;
- Medijska kampanja radi podizanja svijesti građana/ki o ovoj tematici.

Gender equality/equity and constitutional changes

INTRODUCTION

Constitutional reform, as one of the main issues of present day Bosnia and Herzegovina, affects concretely on the future of democratic development of this complex society. One of the questions which has not been raised so not been asked directly is “Is gender equality a part of the process of reform?” This text primarily is a part of a project which has a end goal of trying to answer this question. The text contains comparative analysis (entity and state constitutions) and gives concrete recommendations. The concrete recommendations are put in a way that this text can be used as a toolkit for activists from the non-governmental, governmental and academic sectors who wish to deal with this issue.

1. OVERVIEW OF POLITICAL ENVIROMENT IN BOSNIA AND HERZEGOVINA

Complexity of the political system

Although Bosnia and Herzegovina is attempting to follow the EU road map to accession, the process will not be easy since the process of reform has been currently stopped due to “vital national interests”. To understand what the term means we have to look at how the system has been created and why public participation is not at the forefront of reform, thus leading to the lack of an engendered approach to constitutional reform.¹

Present day Bosnia and Herzegovina is a creation of the international community. Among the “local signatories” of the Peace Agreement, not one woman was present. The result of this agreement was the Dayton Peace Accords. The Dayton Peace Accords, i.e., the General Framework Agreement for Peace in Bosnia and Herzegovina,² marked the end of the military conflict in Bosnia and Herzegovina and thus created a new multi-ethnic state. The

¹ As two main terms sex and gender differ in meaning. Sex refers to the biological differences between men and women. Gender refers to the social differences between men and women or in other words the different responsibilities of men and women in a given culture, time and location. These roles are learned and change over time

² Adopted in Paris on December 14th, 1995

Dayton Peace Accords are comprised of a General Framework Agreement for Peace followed by annexes dealing with the following topics: Military Aspects of the Peace Settlement (1A), Regional Stabilization (1B), Inter-Entity Boundary Line and Related Issues (2), Elections (3), **Constitution, (4)**, Arbitration (5), Human Rights (6), Refugees and Displaced Persons (7), Commission to Preserve National Monuments (8), Establishment of Bosnia and Herzegovina Public Corporations (9), Civilian Implementation of Peace Settlement (10), and International Police Task Force (11).

The Dayton Peace Accords laid down the foundations of the new Bosnia and Herzegovina Constitution, electoral law, and judicial system, essentially targeting solutions to **inter-ethnic problems by way of a balance of power between the three main ethnic blocs (Croats, Muslims, and Serbs)**. As such, they fail to address directly many other crucial issues for the functioning of a democratic, pluralistic state based on the principles of the United Nations Charter. The state was divided into two entities (Federation and Republika Srpska), and one district (Brčko).

The basic principle in BiH is to balance the national representation. In a few cases, this is the official rule, but in most cases, this is an informally agreed upon principle that must always be carefully considered during negotiations. For example, if the minister is from one of the constituent nationalities, his/her deputy will be from another, or an equivalent position will be given to the third. Keeping the balanced matrix of nationalities is still the most important consideration.

Existence of institutional mechanisms for the promotion of gender equality in Bosnia and Herzegovina

In such a system gender equality needed additional mechanisms that would ensure that this crucial aspect was not overlooked. Presently, mechanisms exist at all levels of both legislative and executive authorities. At the executive level commissions have been established.³

Within the executive authority, under the portfolio of the Ministry for Human Rights and Refugees of Bosnia and Herzegovina, there is the Agency for Gender Equality of Bosnia and Herzegovina; on the entity level, there are the previously-established Gender Centre of the Federation of Bosnia and Herzegovina and the Gender Centre of the Republika Srpska; on the cantonal level in the Federation of Bosnia and Herzegovina, there have been established the cantonal councils that consist of the nominated persons for gender issues from the different ministries. Under the offices of the head of municipality, there have been also formed commissions for gender equality. All institutional mechanisms have precisely defined mandates. Their clearly defined mandates show at least a theoretical commitment of the government to gender issues.

³ Under the Parliamentary Assembly of Bosnia and Herzegovina at the state level; within House of People of the Parliament of Federation of Bosnia and Herzegovina and the National Assembly of Republika Srpska at the entity level; in the cantonal assemblies, municipal councils and municipal assemblies at the local level.

International legal framework in Bosnia and Herzegovina

Bosnia and Herzegovina is a signatory of 16 international Conventions. All of these conventions are listed in the Constitution. Among all these international documents, a special position has been given to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Beijing Declaration and Platform for Action. CEDAW was adopted by a Resolution of the General Assembly No. 34/180 in December 1979, and it came into force on 3 September 1981. It was ratified by Bosnia and Herzegovina in 1993 and subsequently integrated into the State Constitution. Bosnia and Herzegovina signed the Beijing Declaration together with 179 other governments in September 1995.

The international framework is a constant referral point especially in regard to gender equality. All public institutions constantly refer to various international conventions that guarantee many rights, but this has created a state where basically people believe in the power of the international over the national. This includes the women's movement in Bosnia and Herzegovina.

Domestic legal framework (The Law on Gender Equality)

A move forward in the direction of achieving de facto gender equality was the passage of the Law on Gender Equality in 2003. After the constitutional provisions on non-discrimination and the international instruments for protection of human rights were integrated into the Constitution of Bosnia and Herzegovina, this national instrument was a step in the right direction. For the first time a law was passed emphasizing both men and women as *individuals* in a society that should have equal rights and responsibilities, rather than as members of a specific *group* of constituent people. The Law aims at the establishment of full equality of men and women in all aspects of life, especially in the areas in which women are traditionally disadvantaged in comparison with men. Those areas include education, economy, labour and employment, social and health security, sport, culture, public life and the media.

2. CONSTITUTIONAL PROCESSES

Interestingly, both the Constitution of the Federation of BiH and that of the Repulika Srpska predate the BiH Constitution. The Constitution of the Federation of BiH was adopted in June 1994,⁴ while the Constitution of Republika Srpska was adopted in 1992.⁵

The Constitution of Bosnia and Herzegovina is actually Annex 4 of the Dayton Peace Agreement. In order to change it both entities and their representatives have to agree to the change.⁶ Hence, the political deadlock that currently prevails. In the past there have

⁴ "Official Gazette of the Federation of BiH", number 1/94, March 30th, 1994.

⁵ The Constitution of Republika Srpska, "Official Gazette Republika Srpska, no. 3/92, 6/92, 8/92, 15/92 and 19/92

⁶ Article X: Amendment 1: This Constitution may be amended by a decision of the Parliamentary Assembly, including two thirds majority of those present in the House of Representatives.

been attempts by various political parties to move towards change but without a wide consensus.

During the past decade, the OHR⁷ presented different alternatives to improve the situation. Two alternatives in particular are noteworthy: one that was based upon a restrictive and the other on an extensive interpretation of the Dayton Peace Agreement. The result of this involvement was changes that have been reflected in the strengthening of the state level without actually rewriting the constitutions.

Over time the Dayton agreement itself has emerged as the main obstacle to reform. The international community both viewed that changing it would lead to renewed conflict and engaged in state-building activities. In 2000, it began more aggressively introducing reforms under a section that allowed the granting of more power to the state.⁸ While these reforms were welcome and needed, they did not address the fundamental problem – the constitution itself.

In an attempt to stop the constitution from splitting at the seams and to make a unified Bosnian state more viable, between May and October 2005 Bruce Hitchner (Dayton Peace Accords Project) and Donald Hays (former principal deputy HR) brought together the representatives of the eight leading parties in the House of Representatives. This group reached a rough consensus about constitutional reform, including replacing the three-man presidency with a single president elected by the parliament rather than popular vote.⁹

The party leaders signed an agreement with the State Department to push for a reform package in parliament by March 2006, almost the latest it could affect the governments to be elected in the October 2006 elections. By mid-March 2006, the parties had agreed modest but precedent-setting draft amendments that would replace the three-man presidency with a less-powerful, single president and two rotating vice presidents, all three of whom would be elected by both houses of parliament. The state would no longer have to secure entity approval to implement laws dealing with EU-directed reforms, and the chairman of the council of ministers would become a real prime minister.¹⁰ The EU Council, the EC, the Council of Europe and the PIC backed the amendments, as did the OHR, although it had not made a major contribution to what was primarily a US-led effort. Some 53.5 percent of Bosnians polled in April 2006 also supported the proposed changes.¹¹

So far, the reforms have been minimal and mostly oriented at things that can easily achieve a consensus amongst political parties, because they still do not address the issue of the equalization of citizens as individuals belonging to society that has democratic principles as its foundation. Among these principles one that stands out is the gender equality principle that BiH is obligated by international treaties and domestic legal framework to

⁷ Office of the High Representative.

⁸ Since 2000, international community interpretations of this clause have created state-level institutions, including but not limited to the State Border Service, the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, a state-level customs agency, VAT, and the State-level justice and defense ministries.

⁹ "Revealed: US plans for Bosnian constitution", *The Guardian*, 10 November 2005.

¹⁰ Ibid: 15

¹¹ "Bosnia citizens support constitutional reform", <http://www.Dtt.net.com>, 16 May. 2006.

mainstream and standardize. In an environment where differing supposed “vital interests” are colliding the message sent from the government structures is equality of groups and not equality of genders.

Participation of the public in constitutional processes

As stated for obvious reasons the lack of public participation was not strictly a choice, but was rather the result of the circumstances in which the existing constitutions were drafted during and following the conflict. No women were present in the creation of the Dayton Peace Accords, nor were they present in the follow up during the amendment negotiations nor are they strongly present in the current constitutional processes which are at an impasse. If they were present in the past decade it was primarily to show solidarity behind political party lines or in general NGO activism which was aimed at raising public awareness of the constitutional crisis. However, women did not advocate for gender equality as such, but rather as members of the different constituent groups.

In the past year there has been some movement in forms of semi-public debates on how the future constitutional framework should look like. Although it is primarily driven by the leading political parties in the entities, NGO activists and leading academics have become increasingly involved.

There are three groups that advocate alternate solutions. The first approach calls for a total abolishment of the Dayton structure, that would basically create a unified state without entities and the district of Brčko, and in which the majority national group control would be rejected. In other words, decentralization would be based on principles different from the current ethnic ones. The second approach advocates total centralization in which the institutions would be transformed according to this principle, meaning in other words creating a centralized state. The third approach advocates a state based upon three entities and the implementation of the principle of symmetry between ethnicity and territory.¹² Basically all three dominant ethnic groups would get their own entity. While women formed part of these three groups, they have not emphasized the need for gender equality but have rather taken sides according to the political views of the three different groups.

3. GENDER PERSPECTIVES IN THE CONSTITUTIONAL PROCESS

Recently the Agency for Gender Equality formed a Working Group entitled “Law on Gender Equality in BiH – Area IX – Public Life” and has published the findings and recommendations. In their recommendations changes to the constitutions are requested that refer to equal representation of the sexes in legislative, executive and judicial bodies.¹³ This

¹² Zoran Pajić “Bosnia and Herzegovina: Statehood at a Crossroads,” *EU ACCESSION MONITOR*, <<http://www.tol.org>>.

¹³ “The Law on Gender Equality in BiH – Area IX – Public Life: Findings and Recommendations of the Working Group”, p. 62.

recommendation also refers to the entity constitutions and cantonal entities as well. The recommendation refers to set criteria that would be a basis for achieving this but those not go in detail as to what these criteria are. All in all, as a mechanism at the state level, this is a positive step towards opening the debate on gender equality and constitutional processes. The Working Group was made up of both men and women, from the entity Gender Centres.

Analysis of the BiH Constitutions

Since the Constitution of Bosnia and Herzegovina is pretty vague, here we shall also look at the provisions in the entity constitutions as well. As mentioned above, the recent package of reforms does not include specific provisions on gender equality. Yet the findings of the Working Group could be used as a basis for change. Both the entity constitutions do recognize the General Framework Agreement for Bosnia and Herzegovina upon which the State Constitution is based, with Republika Srpska stating in Article 49 that if there are differences in the provisions of rights and freedoms of the Constitution of Republika Srpska and those of the Constitution of Bosnia and Herzegovina the provisions which are most favorable to the individual shall apply. This was an amendment introduced by the OHR, to ensure equality and transfer some power to the state, but this clause also causes confusion. Basically it could be argued that this is an instrument for applying the state constitution provisions directly if an individual seeks to. The following text will show a great lack of harmonization between the entity constitutions and the state constitution as well as the constant, almost automatic referral to international standards, as if they are the providers of rights rather than the domestic state.

I) PREAMBLE

The Preamble of Bosnia and Herzegovina states the following:

Based on respect for human dignity, liberty, and equality,
Dedicated to peace, justice, tolerance, and reconciliation,
Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,
Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,
Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,
 Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina

The Preamble of the Constitution of the Federation of Bosnia and Herzegovina states the following:

Guided by the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the General Framework Agreement on Peace in Bosnia and Herzegovina and its Annexes

Bosniacs, Croats and Serbs as constituent peoples, along with Others, and citizens of the Federation of Bosnia and Herzegovina, which is a constitutive part of the sovereign state of Bosnia and Herzegovina, determined to ensure full national equality, democratic relations and the highest standards of human rights and freedoms, hereby pass the Constitution of the Federation of Bosnia and Herzegovina.¹⁴

The Constitution of Republika Srpska states:

Respecting the will of its constituent peoples and citizens to establish and preserve the Republika Srpska and to base the constitutional establishment of the Republic upon the respect for human dignity, freedom and equality, national equality, democratic institutions, rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms and rights, as well as the rights of minority groups in line with the international standards, ban on discrimination and respect for the rules of market economy.¹⁵

As seen by the statements of the Preambles none of them mention gender equality. The Preambles of the Republika Srpska and Federation Constitutions both mention “equality” but refer only to national equality, thereby emphasizing once again ethnic identities, and the need to preserve equality amongst the constituent peoples. The constitutional drafters should look to the example provided by the Rwandan constitution, which not only specifies equality of men and women but also prohibits discrimination based on gender in its Preamble. The reference to human dignity should be strengthened by reference to other individual rights, such as equality and specifically gender equality. All three constitutions mentioned above fall short of the commitment to gender equality, and basically are written in masculine form and base themselves on collective nationalistic identity and the protection of this.

RECOMMENDATIONS:

- To de-emphasize references to national and/or ethnic identities and stress *individual* rights and freedoms instead in the Preamble.
- To delete reference to “Others” and replace with the term “citizens” or “All men and women”.
- To include *gender* equality as a founding principle, in order to present gender equality as a founding value of BiH.
- To incorporate gender-sensitive language throughout the text, beginning with the Preamble.

II) CIVIL AND POLITICAL RIGHTS (First Generation Rights)

The Constitution of Bosnia and Herzegovina states in Article II the following:

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall

¹⁴ Am. XXVII, originally “Peoples and citizens of the Federation of Bosnia and Herzegovina, which is a constitutive part of the sovereign state of Bosnia and Herzegovina,* determined to ensure full national equality, democratic relations and the highest standards of human rights and freedoms, hereby pass the Constitution of the Federation of Bosnia and Herzegovina***” as amended by Am. II, originally “The peoples and citizens of Bosnia and Herzegovina” and “***hereby create a Federation”

¹⁵ Preamble as amended by Amendment LXVI www.vladars.net/en/zakoni/ustav.html, It is stated that all amendments were adopted in 2002 and imposed by Decision no.150/02 of the High Representative published in the “Official Gazette of Republika Srpska 36/00”.

be a Human Rights Commission for Bosnia and Herzegovina as provided for in [Annex 6](#)¹⁶ to the General Framework Agreement.

The Constitution of the Federation of Bosnia and Herzegovina states the following:

As the principles, rights and freedoms specified in the Constitution of Bosnia and Herzegovina, the following provisions govern the Federation.¹⁷

The Constitution of the Republika Srpska states in Chapter II Article 10:

Citizens of the Republic shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, **sex**, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status and other personal attributes.

As seen in comparison basic provisions are very vague and mostly refer to principles of rights and freedoms, rather than specifying the rights and freedoms explicitly. In the text of the constitution of Republika Srpska there is more specific terminology and it contains an overarching democratic framework, while the Federation Constitution reverts to the State Constitution which refers to Annex 6 of the General Framework Agreement. The three constitutions seem to be at odds with each in wording. Only the Repulika Srpska constitution refers to equality and equal protection based on sex but does not mention gender, the other two do not even mention citizens but just mentions human rights and fundamental freedoms. They should specifically state that rights and freedoms are guaranteed to all men and women on the whole territory. If it is explicitly stated it is easier to claim rights. Bosnia and Herzegovina is not yet at the evolved state of automatic gender equality and this should be a one of the main subjects of the constitutional reforms in the future with the goal of achieving equality.

RECOMMENDATION:

- To make explicit reference to basic provisions in the text of the Constitution itself, including rights to human dignity, personal security, and freedom from torture and ill-treatment, rather than referring to international treaties such as: the inviolability of life, human dignity, the right to personal integrity (security of person), the right to personal liberty, the prohibition of torture as well as cruel and degrading treatment, judicial protection of human rights and freedoms and the right to redress in instance of violation, etc.

III) CITIZENSHIP AND NATIONALITY

The Constitution of Bosnia and Herzegovina in the Preamble states the following citizens:

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina

Furthermore in Article 1 paragraph b states the following:

- b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as **sex**, race, color,

¹⁶ **Annex 6 is the Agreement on Human Rights** that was signed as part of the peace agreement by both entities.

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Constitution of the Federation of BiH in its Preamble states the following:

Bosniacs, Croats and Serbs as constituent peoples, along with Others, and citizens of the Federation of Bosnia and Herzegovina,

It also states in Article 5 the following:

- a) No person shall be deprived of citizenship arbitrarily or in such a way as to leave **him or her**¹⁸ stateless.
- b) No persons can be deprived of the Federation citizenship on any ground such as **sex**, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status;¹⁹

The Constitution of the Repulika Srpska states in Article1:

"Article 1 has been replaced by Amendment XLIV, reading as follows:

"Republic of Srpska shall be the State of Serb people and of all its citizens".

It also states in Article 6:

A citizen of the Republic may not be deprived of the citizenship, exiled or extradited.

In the above mentioned articles the State Constitution mentions that nobody can be denied citizenship based on sex, while the Federation in paragraph (b), for the first time acknowledges gender differences and makes men and equal in citizenship rights. The following paragraph in the Federation constitution also mentions that nobody can be deprived of citizenship based on sex. Only the Republika Srpska Constitution uses the general term citizen, therefore in this case it is not written terminology which explicitly identified men and women as equal rights holders as citizens. Again the constitutions are not harmonized regarding basic provisions when compared to each other. This gives the impression that regarding citizenship rights gender equality is more enshrined in the State and Federal Constitution than in the Republika Srpska Constitution. The rights of children are mentioned in the Federal Constitution and the State Constitution but not in the Republika Srpska Constitution, it is not mentioned explicitly.

As an totally parody of the fact that no citizens can be deprived of their citizenship, all the constitutions recognize three types of citizens and others, often with non-sense clause and other citizens. This statement is in total contradiction with CEDAW as well as all other international conventions that BiH has ratified. It especially leaves room for both direct and indirect discrimination for both women and men who do not belong to those three ethnic groups (not nationalities) or do not feel that they want to belong to a group to be considered full citizens. The category "others" is a direct discrimination for women, who were not born in BiH, but have gained their citizenship by living in BiH, or are married or common law in BiH. "Others" suggest someone who is a second class citizens, not defined, not fully a citizen and often this leads to double discrimination for women, primarily by

¹⁷ Am. IV, originally "As the principles set out below and the rights and freedoms provided in the instruments listed in the Annex are to be applied throughout the territory of the Republic of Bosnia and Herzegovina, the following provisions govern the Federation".

¹⁸ Added by Am. VII.

¹⁹ Added by Am. VII.

gender and then by national or ethnic identity. This is something that is totally against any principle of equality and equity in a society.

RECOMMENDATIONS:

- To explicitly refer to men and women as equal rights holders as citizens.
- Eradicate the "Others" category, all citizens are to be equal.

IV) GENDER EQUALITY PROVISIONS

Bosnia and Herzegovina complied with this part of the CEDAW convention by passing a State Law on Gender Equality in 2003 that covers all sectors of life with the aim of promoting gender equality. In Article 3 of the Law, both direct and indirect discrimination based upon sex is prohibited. This article also allows for special measures to be taken with the aim of promoting equality of the sexes and eliminating existing inequalities, in other words the protection of the sexes based upon biological determination. It is in the process of harmonizing entity and cantonal laws with this law, but the process is slow.

V) EQUALITY BEFORE THE LAW

The State Constitution states in Article 3 the following:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include in paragraph (e) the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

The Constitution of the Federation of Bosnia and Herzegovina states in Article 2.1 that:

All persons within the territory of the Federation shall enjoy rights [...]
c) To equality before the law

The Republika Srpska Constitution does not have a specific equality before the law clause but states the following in Article 16:

Everyone shall be entitled to the equal protection of **his rights** in the proceeding before the court and other state and organizations. Everyone shall be guaranteed the right to appeal or other legal remedy against the decision concerning his right or interest determined by law.

The BiH constitution does not specifically mention "equality before the law", but it includes phrases regarding fair hearings. In the equality before the law clause in the Repulika Srpska Constitution only one sex is mentioned, the male sex, in other words only the male is recognized as equal in front of the law. It does mention, however, in Article 49 that more favorable clauses in the State Constitution can be used; however, as the State constitution does not contain an explicit equality before the law clause, this Article is not very helpful in securing equality before the law for both men and women in the RS. The Federation Constitution states that all persons have equality before the law as well as the State Constitution. In this case none of the Constitutions specifically state that men and women are equal before and the Repbulika Srpska Constitution directly eliminates one gender and by extension the other sex in its terminology.

RECOMMENDATIONS:

- To de-emphasize references to national and/or ethnic identities and stress individual rights and freedoms instead in the Preamble.
- To delete reference to "Others" and replace with the term "citizens" or "All men and women".
- To include gender equality as a founding principle, in order to present gender equality as a founding value of BiH.
- To incorporate gender-sensitive language throughout the text, beginning with the Preamble.

VI) NON-DISCRIMINATION CLAUSES

In the State Constitution Article 2, paragraphs 4 and 5 state the following:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

- (4) The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as **sex**, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In the Federation Constitution, Article 2 paragraph d states the following:

- (1) All **persons** within the territory of the Federation shall enjoy the rights:
- (d) To freedom from discrimination based on race, color, **sex**, language, religion or creed, political or other opinions, and national or social origin

The Republika Srpska Constitution also states in Article 49, paragraph 3 the following:

In the case there are differences between the provisions on rights and freedoms of the Constitution of the Republic of Srpska and those of the Constitution of Bosnia and Herzegovina, the provisions which are more favorable for the individual shall be applied.

Non-discrimination provisions based on sex and not gender are embedded in both the State and Federal Constitutions but are not strictly embedded in the Repbulika Srpska Constitution, although it includes a clause that if the provisions are not in accordance with the state law the one preferable to the individual shall be applied. Nowhere is there mentioned a distinction between direct and indirect discrimination as some other constitutions, for example the South African Constitution. Section 9(4) of the South African Constitution explicitly mentions both direct and indirect discrimination: "No person may unfairly discriminate directly or indirectly against anyone", making it a best practice to follow in designing similar non-discrimination clauses. Although not explicit in the constitutional provisions, non-discrimination based on gender but not sex and gender is dealt with in the BiH Law on Gender Equality Article 3, which states that

Discrimination based on sex, in the sense of this law, represents any legal, factual, direct and indirect differentiation, privilege, exclusion or restriction based upon sex, which causes both male and females hinders or makes it more difficult to enjoy their human rights and freedoms in the political, educational, economic, social, cultural, civil and any other sphere of public life.

The article offers definitions of direct and indirect discrimination. This article of the Law can be used as a basis for changing the constitutions' non-discrimination clauses from ones which grant general guarantees of non-discrimination to specific provisions prohibiting both direct and indirect discrimination.

VII) POSITIVE ACTION/SPECIAL MEASURES

Although none of the Constitutions have provisions for temporary measures, the Law on Gender Equality in Article 21 states that an obligation of the authorities is the "adoption of planned measures designed to achieve gender equality in all fields and at all levels of governance". Although vague it is at least legally binding and this can be used by the gender equality mechanisms at the state and entity levels along with political parties to mainstream gender equality in the reform process. As mentioned above some movement has been achieved through the Working Group but they need to really implement the legal provisions in the future.

RECOMMENDATIONS:

- Insertion of direct and indirect discrimination definitions and the guarantees of that both women and men as citizens of BiH are to live without being both directly or indirectly discriminated based on both sex and gender and not just sex.
- The inclusion a clause that allows for temporary special measures to be implemented to achieve de facto gender equality that are prescribed by the Law on Gender Equality, in the spheres of society that would be not be discriminatory but in fact would make the society stronger in respect to equality not being just a theoretical framework but something that is the foundation. An example is gender sensitive language measures that are often overlooked.

VIII) POLITICAL PARTICIPATION

The State Constitution states in Article 2.2.

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

The Federation Constitution states in Article 2.2 that:

All citizens shall enjoy the rights to:

- (a) To form and belong to political parties; and
- (b) To political rights: to participate in public affairs; to have equal access to public service; to vote and stand for election.

The Republika Srpska Constitution states in Article 29:

A citizen who has reached the age of eighteen years shall have the right to vote and to be elected. The right of suffrage shall be universal and equal; elections shall be direct and by secret ballot. [*Article 29 has been amended by Item 5 of Amendment LVII, reading as follows:*] "A person shall acquire the right of suffrage, subject to Article 29, after having resided in a certain place for the period determined by law."

Article 33 further states that:

Citizens shall have the right to take part in the conduct of public affairs and have access to public service under equal conditions.

The BiH Constitution as mentioned above in Citizenship Rights mentions the right to vote. Although both the ICCPR and the European Convention on Human Rights and Fundamental Freedoms do provide for the right to vote and to participate in public affairs both indirectly and directly, the State Constitution does not state guarantee directly those rights to its citizens regardless of gender or sex. It basically reverts to international laws as the guarantor of rights above any domestic law. Therefore the Law on Gender Equality takes over in guaranteeing equal participation in public life.²⁰ The law focuses on real gender equality and not merely the promotion of women's equality. It also prescribes the enactment of programs and policies that will ensure equality. In addition, BiH has a quota system of 30% of the underrepresented gender as mandatory mechanism which predates the Law on Gender Equality. Although a controversial mechanism which aims at the underrepresented sex, it has somewhat increased the participation of women at least in numbers in public life in the beginning and more recently has boomeranged and the numbers have gone down.

On the other hand the CEDAW committee has stated the BiH has to harmonize its electoral law with the Law on Gender Equality²¹ and to strengthen and implement measures for the increased participation of women in elected and appointed bodies.

RECOMMENDATIONS:

- The phrase "men and women" has to replace "citizens".
- A provision must be included that encourages the political participation of both women and men at all levels of government, which represents the demographics of the country.

IX) RIGHT TO PROPERTY

The State Constitution states in Article 3 paragraph (k):

The right to property.

The Federation Constitution also states in Article 2.3 (k) states that all citizens have the:

(k) The right to property

The Federation Constitution states in Article 3 state that:

All refugees and displaced persons have the right to freely return to their homes of origin.

The Federation Constitution also states in Article 4:

All persons shall have the right, in accordance with Annex VII to the General Framework Agreement for Peace,²² to have restored to them any property of which they have been

²⁰ Article 15, BiH Law on Gender Equality

²¹ **Compilation of UN Treaty Body Recommendations Bosnia and Herzegovina – CEDAW Recommendation 30**, CD-ROM, Sarajevo, BiH: UNBIH and UNOCHR, 2007.

²² Am. VI, originally "to be implemented in accordance with Federation legislation and Cantonal legislation consistent therewith".

deprived in the course of ethnic cleansing and hostilities since 1991 and rights to be refunded for all their property that cannot be returned.²³ All statements and obligations²⁴ made under duress, particularly those relating to the relinquishment of rights to land or property, shall be null and void.²⁵ The exercise of the right specified in item I of this Article shall be regulated by Federal legislation.²⁶

The Republika Srpska Constitution states in Article 10:

Citizens of the Republic shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, **property status**, political and other beliefs, social status and other personal attributes.

All three constitutions provide for, in different terms, a right to property. A unique clause is included in the Federation constitution, which guarantees the right to return to their homes of origin to refugees. The right of women and men as equals to property is not stated in the provision which reflects again the lack of harmonization of constitutional provisions with international standards. This is especially important since numerous studies especially for Female Headed Households in BiH, show that one of the reasons why women do not start up businesses nor are they given access to large credits at banks is that they are not usually the primary owners of their property. Therefore this guarantee needs not only changed legal provisions but the mentality of the society itself especially in the lesser developed areas of the country.

RECOMMENDATION:

- The provision should state that both men and women should be guaranteed equal rights to property ownership and division of assets.

X) FREEDOM OF ASSOCIATION

The BiH Constitution states in Article 3 paragraph (i):

Freedom of peaceful assembly and freedom of association with others.

The Federation Constitution in Article 2.1. paragraph (I) states:

To fundamental freedoms: free speech and press; freedom of thought, conscience, and belief; freedom of religion, including private and public worship; **freedom of assembly**; **freedom of association**, including to form and belong to and labor unions and the **freedom not to associate**; and freedom to work;

The Repbulika Srpska Constitution states in Article 30:

Citizens shall have right to peaceful assembly and public protest.

Freedom of association shall be restricted by law only for the purpose of protection of the safety of persons and property.

All three constitutions guarantee the right to association. They do not make a reference to

²³ Am. VI, originally "they were deprived in the course of ethnic cleansing and to be compensated for any property which cannot be restored to them".

²⁴ Am. VI, originally "or commitments".

²⁵ Am. VI, originally "shall be treated as null and void."

²⁶ Added by Am. VI.

non-governmental associations but to the right to assemble and associate as well as some provisions to form labour unions. Even more general are the provisions in the BiH Constitution but again the provisions are not harmonized, and all are in written in general terms referring to citizens.’ Despite this a very active civil society exists in Bosnia and Herzegovina today. Women NGO activists have switched roles with female politicians, as the one’s lobbying the government to change and improve the situation regarding gender equality, it was the women’s NGO’s that started the peace and reconciliation process, and they continue to be at the forefront of democratization of this society.

RECOMMENDATION:

- All three constitutions should of course state that both “women and men have the freedom to associate as well as the freedom not to associate”

ECONOMIC AND SOCIAL RIGHTS (Second Generation Rights)

XI) EMPLOYMENT EQUALITY

The State Constitution states in Article 2 that:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

The Federation Constitution states in Article 2.3. paragraph (I):

To fundamental freedoms: free speech and press; freedom of thought, conscience, and belief; freedom of religion, including private and public worship; freedom of assembly; freedom of association, including to form and belong to and labor unions and the freedom not to associate; and **freedom to work**.

The Republika Srpska Constitution states in Article 39:

Everyone shall have the right to work and the freedom to work.

Forced labor shall be prohibited.

Everyone shall be free to choose his vocation and occupation and all work places and duties shall be accessible to everyone under the same conditions.

Employment may be terminated contrary to the will of employed persons in the manner and under conditions specified by law and collective agreements.

Every employed person shall have the right to remuneration in accordance with law and collective agreements.

The right to work is included in the BiH, Federation and RS constitutions, but in the first two it is only vaguely referred to. The Republika Srpska constitution provides more detail, referring to the right to choose one’s profession, to equal conditions, and the right to remuneration. However, while it begins by stating “everyone”, it then proceeds to include the pronoun “his” only, thereby jeopardizing the extension of this right to women as well.

On the other hand the Federation and the BiH Constitution are so vague when it comes to second generation rights that it could be the fact that these provisions are more explicitly stated in cantonal constitutions. However, their lack of detail gives the impression that men and women are not equal in their right to work, remuneration or benefits. The Law on Gender Equality therefore addresses the equality of sexes and gender equality in the

workplace in Article 7, where it states that “Everyone shall be equal on the basis of gender in the employment process”.²⁷

RECOMMENDATIONS:

- To specify that men and women have equal rights to choose one’s profession.
- To ensure gender-sensitive language is incorporated.
- To stress that the right to work includes right to work under the same conditions, that these conditions be fair and in line with international standards, etc.

XII) EQUAL PAY FOR EQUAL WORK

The Republika Srpska Constitution states in Article 39:

Every employed person shall have the right to remuneration in accordance with law and collective agreements.

Although the RS Constitution mentions right to remuneration, it does not specify a right to equal remuneration for work of equal value. This is very important to ensuring gender equality. The Federal and BiH Constitutions make no reference to remuneration at all, which is a very big gap in these constitutions. The Law on Gender Equality steps in here as well. Where in Article 8 it prohibits discrimination in pay based on sex and it states “Discrimination based on sex in work and the workplace is forbidden in the following : Non-equal pay and other benefits for the same work, or in other words value of the work performed”.

RECOMMENDATION:

- The provision for both women and men has the right to equal pay for equal work should be included in all the constitutions.

XIII) MARRIAGE/FAMILY

Children:

The Federation Constitution states in Article 2.1. paragraph (j):

All persons within the territory of the Federation shall enjoy the rights: To protection of the family and of children;

The Republika Srpska Constitution states in Article 36 the following:

The family, mother and child shall enjoy special protection.

Children born out of wedlock shall have the same rights and duties as those born in wedlock.

Minors who are parentally neglected and persons unable to look after themselves and the protection of their rights and interests shall enjoy special protection.

The RS Constitution states in Article 36:

Parents shall have the right and duty to take care of the upbringing and education of their children.

²⁷ Article 7 of the BiH Law on Gender Equality “Everyone shall be equal on the basis of gender in the employment process”

Although the Republika Srpska Constitution states that parents in plural have the right and duty to provide for the development of their children and this is commendable, it does not state men and women but gives a generic plural statement. However, it is a good practice that it provides equal rights for children born in and out of wedlock, and that special measures are provided for in order to protect the family. It does not specify what this “special protection” refers to, however, and there is a risk that providing special protection to a mother may give the impression that this is a woman’s sole purpose and role in society. While the Federation constitution refers to the protection of family and children, the constitution’s wording is generic and rather vague. .

RECOMMENDATIONS:

- The provisions should be included that state that children born in and out of wedlock enjoy equal rights;
- A provision stating t that parents have equal rights and responsibilities, as in the RS Constitution should be included as well.

Marriage:

The State Constitution states in Article 3 states the following:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(j) The right to marry and to found a family.

The Republika Srpska Constitution states in Article 36:

Marriage and legal relations in marriage and family shall be regulated by law.

The BiH constitution gives all persons not specifying gender the right to marry. The Federation Constitution does not include general nor specific provisions but it automatically reverts to guarantees of rights stated in the State Constitution. Obviously this is again a responsibility of the cantons or is stated in the laws. Although by provisions there is no statement that both men and women have the same right to enter into a marriage, the Republika Srpska provision at least states that it will be regulated by law. There is no provision regarding equality of responsibilities and duties except in the upbringing of children as stated above.

RECOMMENDATION:

- A provision specifying that men and women have equal right to enter into marriage of his and her own will, that the marriage and its dissolution shall be regulated by civil law, and refer to equal duties and responsibilities within marriage must be included.

Pregnancy:

The Republika Srpska Constitution in Article 36 states the following:

The family, mother and child shall enjoy special protection.

The Federation and BiH Constitution do not emphasize the status of “motherhood” and its protection although the rights are guaranteed by various international conventions and the Law on Gender Equality does mention specifically motherhood but does refer to the health of women in Article 13 which clearly states “That everyone has the right to adequate

healthcare, access to health institutions, including family planning regardless of their sex". Harmonization lacks in an area where women's rights are especially needed since so often the direct discrimination occurs to women in the workplace and they cannot fully access their maternity leave rights. This should be a specific equally stated clause in all the constitutions. The Republika Srpska provision guarantees that the mother shall enjoy special protection but does not specify that this is during the pregnancy and refers as well to post-birth rights.

RECOMMENDATION:

- A provision referring to the rights of both women and men regarding reproductive health and family planning should definitely be included. Especially for women, since this opens the door for women's rights to abortion.

Violence:

All though all Constitutions refer to the to personal security and integrity, the Law on Gender Equality in Article 17 states "That all forms of violence in the public and private sphere based on sex is prohibited"

RECOMMENDATION:

- The provision in the Law should be reflected in all the constitutions but should state based on sex and gender.

XIV) ABORTION:

The Republika Srpska Constitution in Article 36 states the following:

Everyone shall have the right to decide freely to have children.

The right to privacy and the right to life are stated in the Federation and BiH Constitution but do not state the right to freely have children. Abortions rights are still a cultural taboo in Bosnia and Herzegovina and therefore were not included in the existing constitutions explicitly although the Law on Gender Equality has a provision on reproductive healthcare for women mentioned above which is Article 13. The constitutional amendments do not mention reproductive rights. The Repulika Srpska states that everyone has the right to freely have children without making the distinction between men and women. Harmonization issues arise again calling for a process of revision.

RECOMMENDATION:

- The Republika Srpska provision should be widened to both men and women and included in the other constitutions as well.

XV) RELIGIOUS/CUSTOMARY LAW

No provisions are stated in the Constitutions regarding religious and customary laws since there is a history of secularism dating from the previous system, specifically, although the Law on Gender Equality deals with violence.

XVI) INTERNATIONAL TREATY OBLIGATIONS

The State Constitution states in Article 2.2 on International Standards the following:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

The Federation Constitution States in Section VII International Relations Article 3 the following:

International treaties and other agreements in force in respect of *Bosnia and Herzegovina and*²⁸ the Federation, and the general rules of international law shall form part of the law of the Federation. In case of any incompatibility between a treaty and legislation, the former shall prevail.

The Republika Srpska Constitution already states in Article 49, mentioned above, that if provisions do not exist in their constitution that one more favorable in the state constitution can be chosen by the individual. It also mentions the European Convention for the Protection of Human Rights and Fundamental Freedoms. We can assume that generally international standards can override domestic here but it is not stated so clearly.

Since the current system is a product of an international agreement, and as seen above most of the time it is used to explain the lack of constitutional reform thus far, in the future it can be used as good lobbying tool, but just a tool, not a given fact that leads to perpetual status quo, in other words, there has to be guarantees in domestic texts specifically rather than so far imaginary provisions that most of the citizens regardless of sex and gender it applies to do not know about. Although state of emergency is mentioned since the current state was designed during the state of emergency in the future such provisions should be guaranteed explicitly and not overlooked.

4. REVIEW OF POLITICAL PARTY PLATFORMS FOR COMMITMENT TO GENDER AND ASSESSMENT OF THE IMPLEMENTATION STATUS OF THESE COMMITMENTS

In October 2006 general elections were held in BiH. These elections were the first completely administered by local authorities after the conflict. A total of 56 political subjects were certified to stand; 36 parties, 8 coalitions, and 12 independent candidates competed at the state and entity levels.²⁹ The number of voters registered was 2,733,063, out of which 49,77 percent were women registered voters. Out of the total number of registered voters, 49,92 women actually voted and 57,61³⁰ percent of men actually voted.

²⁸ Am. CXII, originally "International relations of the Federation shall have to be in accordance with continuity, sovereignty, territorial integrity and international personality of Bosnia and Herzegovina, according to Article III of the Constitution of Bosnia and Herzegovina".

²⁹ Statistics accessed from the Central Election Commission website www.izbori.ba.

³⁰ Statistics gathered from the Bosnia and Herzegovina Agency for Statistics of Bosnia and Herzegovina **Thematic Report on Gender in 2007**, p. 73, 2007.

It is notable that the total number of registered and the number that came out to vote are not the same. The total number of registered voters that came out was 1,469,883 out of which 46,20 were women, and 53,79 were men. That there is a 7 to 8 percentage difference between the genders in terms of voter turnout can be explained in two ways: firstly, that politics is still a male dominated arena, and secondly, that politicians in Bosnia and Herzegovina are not targeting female voters seriously, but only as part of an ethnic group.

Legal requirements regarding gender balance in candidate lists were met, and 37 percent of all candidates in the elections observed were women, yet the share of women in the new parliament has decreased from 26 percent to 14 percent. The role of women during the campaign was limited. In the Central Election Commission, one member out of seven was a woman and 30 percent of Municipal Election Commission (MECs) chairpersons were female.

For the Presidency of BiH, the Bosniak candidate was from the Party for Bosnia (SBIH), who won 62,10 percent of the vote, the second candidate from the Croatian member of the presidency was for the first time from a non-nationalistic party, the Social Democratic Party (SDP), and won 40,83 percent of votes from this ethnic vote and finally the Serbian member of the presidency was from the Alliance of Social Democrats (SNSD) with 54,80 percent of votes from this ethnic group. No women were put forth as potential members of the state presidency nor has there been a female candidate since the war.

In the Federation of BiH entity for the State Parliament, the Party for Democratic Action won 22,51 percent of the vote, followed by the Party for BiH (SBIH) with 17,95 percent, the Croatian Coalition HDZ with 13,51 percent, and the Social Democratic Party with 11,68 percent, followed by the Croatian Unity (HDZ 1990) with 11,40, the Coalition Dapic-Jurisc-New Croatian Initiative with 4,19 percent, and the Popular Party Working for Welfare with 3,51 percent. In the Republika Srpska entity the most votes for the State Parliament were won by the Alliance of Independent Social Democrats with 50,18 percent of the vote followed by the Serb Democratic Party with 19,22 percent, the Party for Democratic Progress with 6,02 percent, the Serb Radical Party with 3,43 percent and the Democratic People's Union with 3,38 percent.

The elected delegates for the House of Representatives for the State level divided by party and gender are the following: the Party for Democratic Action (SDA) has 9 delegates out of which none are women, the Party for BiH has 8 delegates out of which 2 are women, the Alliance of Independent Social Democrats (SNSD) has 7 delegates out of which 2 are women. The Social Democrat Party has 5 delegates; out of which 1 is a woman. The HDZ-Croatian coalition-HSP has 3 delegates; out of which 1 is a woman. The Serb Democratic Party has 3 delegates, out of which none are women. The parties that followed with the same number of delegates have no female representatives.

In the Republika Srpska the leading political party candidate for the President was from the Alliance of Independent Social Democrats (SNSD), winning 51,93 percent of the vote, and both his vice-presidents are male as well, coming from the Bosniak and Croat ethnic groups. The main party for the Entity Parliament in Republika Srpska is the Alliance for Independent Social Democrats with 46,71 percent of the vote, followed by the Serb Democratic Party with 17,87 percent and the Party for Democratic Progress with 4,40 percent and finally the Serb Radical Party with 3,26 percent of the vote.

In the Parliament of the Federation of BiH, of 98 representatives the Party for Democratic Action has 30 delegates and the Party for BiH has 25, the Social Democratic Party has 16, Croatian Democratic Union (HDZBIH) around 13, Croatian Democratic Union 1990 (HDZ 1990) 8, and the remaining 6 mandates are divided between the HSP and the Popular Party Working for Welfare and the Bosnian-Patriot Party.

Regarding the cantonal levels the percentage varies from 22, 8% in the Sarajevo Canton to 4% in the Livno Canton. In the executive the situation is not brighter; at the entity level no women ministers exist in either the Federation or the RS. The only positive aspect is that the president of the Federation is a women, but this is due more to the fact that she belongs to an ethnic minority than to the fact that she is a woman.

Analysis of the political platforms of the leading parties related to gender issues

The state parliament's failure to pass constitutional changes in April 2006 had a significant impact on the campaign. The proposed changes were supported by the majority of political parties representing all three constituent peoples, but did not achieve the necessary two-thirds majority in the state parliament. This led to a highly divisive debate on the constitutional structure of the state, which continued through much of the campaign period.

In line with gender quota provisions in the election law, 37 percent of all candidates in the elections observed were women. 67 women and 460 men were in first place on candidate lists for parliamentary seats. Three women also stood as independent candidates for the state presidency; two of them withdrew their candidacy shortly before the elections, in support of other male candidates. While women candidates were visible on posters in Sarajevo (mostly at cantonal level), the overall participation of women in the election campaign was limited. Women candidates received five percent of airtime in the electronic media and two percent of coverage in the print media.

The parties in theory all support gender equality, and when addressed on the topic reiterate this support, but in reality both the political climate and campaign priorities have given a different picture. Most of the parties mentioned above have the potential to jump from de facto to de jure equality, especially the Union for Independent Social Democrats and the Social Democrat Party, but intensive profiling and strategic planning needs to be done. All the other parties are not very willing to put this as a top priority either because their rhetoric is overly nationalistic or they are not strong enough to influence and speak to the female and male voters on the importance of equality and constitutional reform.

RECOMMENDATIONS FOR FUTURE ACTIVITIES/CONCLUSIONS:

- Within the context of gender equality and constitutional reform, the parties that are able to influence the reforms should focus more intensively on solving this obligation.
- Work with parliamentarians (both men and women) on this issue.
- More intensive work on the promotion of this issue within the whole civil society in both entities is needed.
- Strengthening the support of academic institutions for this issue within the constitutional reform process.
- Setting up a network of organizations which will lobby the parliamentarians (both men and women) to put forward the recommendations as priorities.
- Collaboration with experts in the formulation of texts in both entities and at the state level.
- Media campaign for the raising of awareness among the citizens about this issue.

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