

Information submitted by the OHR concerning the request of the applicant in Case No. U 14/12

I. Introduction

1. On 23 November 2012 the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) received a request of Mr. Željko Komšić, member of the Presidency of Bosnia and Herzegovina, for the review of constitutionality of the following provisions:

- Article 80, paragraph 2, sub-paragraph 4 (sub-paragraph 1, paragraph 2 of Amendment LXXXIII) and Article 83, paragraph 4 (sub-paragraph 5 of Amendment XL, supplemented by subparagraph 4 of Amendment LXXXIII) of the Republika Srpska Constitution ("Official Gazette of the Republika Srpska", no. 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 31/02, 31/03, 98/03 & 115/05),
- Article IV.B.1. Article 1, paragraph 2 (as amended by Amendment XLI) and Article IV.B.1. Article 2, paragraphs 1 & 2 (as amended by Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH", nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 & 88/08), and
- Articles 9.13, 9.14, 9.15, 9.16, 12.1, 12.2 & 12.3 of the BiH the Election Law ("Official Gazette of BiH", nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08 & 32/10).

2. On the 19th of February 2012, the Constitutional Court invited the Department for Legal Affairs of the Office of the High Representative to provide an opinion in writing along with all other information that the Office of the High Representative considers potentially important for the Constitutional Court to take its decision in the matter related to Case No. U 14/12. The Office of the High Representative received the following documents attached to the invitation from the Constitutional Court:

- The request for the review of constitutionality filed by the member of the Presidency of Bosnia and Herzegovina,
- The response to the request of the Republika Srpska National Assembly,
- The opinion of the Constitutional and Legislative Affairs Committee of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.

3. The Office of the High Representative welcomes the opportunity given to it by the Court to present its views concerning Case No. U 14/12 with a view to assisting the Court. However, considering the specific circumstances in which the disputed legal acts were adopted, the High Representative has decided to limit his contribution to the factual information surrounding the adoption of those acts rather than analyzing the merits of the arguments produced by the parties to the case.

4. Considering that certain provisions challenged before the Court in the present case were enacted by the High Representative and never adopted by the relevant legislatures thereafter, the issue of admissibility needs to be briefly touched upon. Following Decision of the Constitutional Court in Case No. U 9/00 of 3 November 2000, the High Representative has consistently endorsed the approach of the Court in relation to the exercise of his substitution powers. The High Representative does therefore not object, in the case at hand, to the review by the Constitutional Court of amendments to the entity constitutions.

II. Factual Background

5. On 12 February 1998, Mr. Alija Izetbegović, at the time Chair of the Presidency of Bosnia and Herzegovina, initiated proceedings before the Constitutional Court for an evaluation of the consistency of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina.

6. The four partial Decisions of the Constitutional Court of BiH in case no. U 5/98[1] related to numerous provisions of the Constitutions of the Entities of Bosnia and Herzegovina, some of which have been found to be in contravention of the Constitution of Bosnia and Herzegovina. In particular, the Constitutional Court ruled in its third partial Decision in case no. U 5/98 of 30 June and 1 July 2000 (Official Gazette of Bosnia and Herzegovina no. 23/00 of 14 September 2000) that exclusion of one or other constituent people from the enjoyment not only of citizens' but also of peoples' rights throughout Bosnia and Herzegovina was in clear contradiction with the non-discrimination rules contained in the Constitution of Bosnia and Herzegovina, which are designed to re-establish a multi-ethnic society based on the equal rights of Bosniacs, Croats and Serbs as constituent peoples and of all citizens.

7. Bearing in mind the obligation under Article XII of the Constitution of Bosnia and Herzegovina for the Entities to, "(w)ithin three months from the entry into force of this Constitution, [...] amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III(3)(b) (of this Constitution)" and bearing in mind that the Entities of Bosnia and Herzegovina had hitherto failed to take any steps to implement the said four partial Decisions of the Constitutional Court of Bosnia and Herzegovina, the High Representative enacted a Decision on 11 January 2001 to establish Constitutional Commissions in the Federation of Bosnia and Herzegovina and in Republika Srpska composed on a parity basis involving Bosniacs, Croats, Serbs and members of the group of Others in order to facilitate the implementation of the third partial Decision of the Constitutional Court with the participation of the three constituent peoples and the group of Others[2]. The work of the said Commissions resulted in their Reports of 21 December 2001 (Constitutional Commission of Republika Srpska) and of 2 February 2002 (Constitutional Commission of the Federation of Bosnia and Herzegovina).

8. Representatives of political parties of the Federation of Bosnia and Herzegovina and of Republika Srpska thereafter accepted the invitation of the High Representative to come together in the course of the month of March 2002 to negotiate under his auspices an agreement on amendments to the constitutions of the entities that could be implemented ahead of the general elections to be held the same year. The facilitation efforts undertaken by the High Representative led some of the political parties involved to conclude an Agreement on 27 March 2002 on various elements necessary to implement the said third partial Decision of the Constitutional Court of Bosnia and Herzegovina[3].

9. The said Agreement embodied the broadest possible agreement throughout the Federation of Bosnia and Herzegovina and Republika Srpska as to the inclusion of those key elements which provide for the equal protection of the rights of Bosniacs, Croats and Serbs as constituent peoples, and of the Others, and all citizens of Bosnia and Herzegovina in both Entities. Although this Agreement was signed by a vast majority of the political parties participating in the negotiations, two important political parties, the SDA and the HDZ BiH, rejected such Agreement. The Agreement reflects a number overarching political considerations that emerged from the negotiations:

1. That the political parties participating in the negotiations were largely supporting solutions that would give all constituent peoples representation within the constitutional authorities of the entities. In particular references were made to the need to align the constitutional system of the entities to that of Bosnia and Herzegovina. In that context, constituent peoples' participation in government structures was widely seen as the most suitable way to prevent ethnic dominance and to re-establish a multi-ethnic society by establishing conditions for the return of refugees and displaced persons. In political terms, this objective certainly prevailed over broader considerations regarding full participation in public life of citizens not belonging to one of the constituent peoples, thereby preventing any model that would impose democratic decision-making within the entities.
2. This trend was exacerbated by the fact that the Federation of BiH was still recovering from the political and institutional crisis that followed the HDZ BiH's boycott of Federation institutions and the establishment of so-called Croat Self-Rule, ostensibly in response to the change in the rules and regulations of the Provisional Election Commission (PEC) governing the elections to the Federation House of Peoples.
3. The request for symmetry had been one of the issues of contention in the discussion between political parties, reflecting in particular the request of certain political parties to open Republika Srpska authorities to representatives of all constituent peoples and of the Others. The

requirement set forth in the Communiqué issued by the Steering Board of the Peace Implementation Council on 21 June 2001[4] that there should be symmetry in substance with regard to the protection provided for all peoples and citizens of Bosnia and Herzegovina in both entities was also of note.

10. Bearing this in mind, the Agreement of 27 March 2002 contained the following provisions concerning the distribution of positions of President and Vice-President of the Entities between constituent peoples:

"Presidents of Entities

The President shall have two Vice-Presidents coming from different constituent peoples. They shall be elected according to the Entity constitutions."

As explained above, the emphasis was more on the need to ensure equitable distribution of these positions between constituent peoples with the aim of achieving viable power-sharing arrangements rather than on ensuring a system that would give equal chances to all candidates, regardless of their ethnic background. Said provision was therefore seen as a prohibition for representatives of one constituent people to hold more than one of the three positions covered by this provision rather than a prohibition for representatives from the rank of the Others to hold any of those positions. We note however that a strictly literal analysis of the provision, combined with an assessment of the method of election into those positions, does not support the conclusion that those positions can in fact be held by representatives from the rank of the Others.

11. Considering the obligation under Article 1.14 of the Election Law of Bosnia and Herzegovina ("Official Gazette of BiH" no. 23/01 and 7/02) for the Election Commission of Bosnia and Herzegovina to notify all competent authorities at all levels when an election shall be conducted at least one hundred and seventy (170) days prior to the holding of an election, the Peace Implementation Council Steering Board met on 27 March 2002 and concluded, *inter alia*, that the amendments to the Entity constitutions must be fully in line with the agreement reached by the political parties on 27 March 2002 and requested the Entity parliaments to adopt the amendments by the first week of April 2002.[5]

12. On 18 April 2002, the House of Peoples of the Federation of Bosnia and Herzegovina adopted amendments to the Constitution of the Federation of Bosnia and Herzegovina consistent with the four partial Decisions of the Constitutional Court of Bosnia and Herzegovina in case no. 5/98 and respecting the provisions of the 27 March 2002 Agreement. However, the House of Representatives of the Federation of Bosnia and Herzegovina failed, on the same day, to adopt the same.

13. On 19 April 2002 the High Representative issued the Decision No. 149/02 amending the Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH" no. 16/02). Amendments XXVII – LIV to the Constitution of the Federation formed an integral part of this Decision and the text of the said amendments was based on the text of amendments adopted by the House of Peoples of the Federation of Bosnia and Herzegovina.

14. Amendment XLI to the Constitution of the Federation of Bosnia and Herzegovina enacted by virtue of that Decision reflects the text of the Agreement of 27 March 2002 by providing that "[T]he President of the Federation shall have two Vice-Presidents who shall come from different constituent peoples. They shall be elected in accordance with this Constitution." In the same way, Amendment XLII, also reflects the Agreement of 27 March 2002 concerning the election of the President and Vice-President of the Federation of BiH:

"(1) In electing the President and two Vice-presidents of the Federation, at least one third of the delegates of the respective Bosniac, Croat or Serb caucuses in the House of Peoples may nominate the President and two Vice-presidents of the Federation.

(2) The election for the President and two Vice-presidents of the Federation shall require the joint approval of the list of three nominees, by a majority vote in the House of Representatives, and then by a majority vote in the House of Peoples, including the majority of each constituent people's caucus.

(3) If no list of the nominees receives the required majority in both Houses the procedure shall be repeated.

(4) If one of the Houses rejects the joint nominees' list in the repeated procedure as well, it shall be

considered that the nominated persons have been elected by approval of the list in only one house.

(5) The President and two Vice-presidents of the Federation shall be elected for a four-year term of office."

15. The amendments to the Constitution of Republika Srpska numbered LXVI to XCI adopted by the RS National Assembly were communicated to the High Representative by the President of the National Assembly of the Republika Srpska, Mr. Dragan Kalinic, on 18 April 2002. Noting the fact that changes were required to the text of certain of those amendments in order for them to fully reflect the Agreement of 27 March 2002, the High Representative, relying on the clause of the Agreement which made him the final authority in the interpretation of that document, issued a Decision Amending the Constitution of Republika Srpska ("Official Gazette of Republika Srpska" no. 21/02).[6]

16. The provisions of the Constitution of Republika Srpska which are subject to the scrutiny of the Court in the present case and which determine the modalities of elections of the President and two Vice-presidents of Republika Srpska were enacted by the Republika Srpska National Assembly and were not amended by said Decision of the High Representative Amending the Constitution of Republika Srpska ("Official Gazette of Republika Srpska" no. 21/02). However, the said provisions of the Constitution were 'authorised' by the High Representative who thereby recognized them as being in line with the substance of the Agreement of 27 March 2002 and in particular with the last item of Section II of that Agreement which is described above.[7]

III. Concluding Remarks

17. Although the differential treatment between persons belonging to the group of "Others" and persons belonging to the "Constituent Peoples" is evident in the legal provisions which are challenged before the Court, the question at stake under the specific, fairly exceptional, conditions prevailing in BiH – not only at the time of the enactment of the amendments but most importantly in the present – is whether such differential treatment may be justified. In particular, the jurisprudence of the European Court of Human Rights has made it clear that "discrimination" means treating differently, without an objective and reasonable justification, persons in similar situations. It follows that discrimination can only be assumed if there is no reasonable and objective justification for a differential treatment.

18. In the present case, the distribution of posts in the Entity Presidencies among the constituent peoples was a central element of the implementation of the historic July 2000 ruling of the Constitutional Court which required the two entities to amend their constitutions to ensure the full equality of "constituent peoples" throughout the territory of Bosnia and Herzegovina.

19. Needless to say, this power sharing agreement was also a central tenet of the General Framework Agreement for Peace which made peace in Bosnia and Herzegovina possible. The Venice Commission of the Council of Europe in its opinion on "the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative"[8] stated in this context that:

"(...) In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination.(...)"[9]

The Venice Commission however further pointed out that:

"(...) This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the ECHR and its Protocol No. 12. As set forth above, the situation in BiH has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.(...)"[10]

20. In view of the circumstances prevailing at the time, the emphasis was put on the equal representation of constituent peoples and on the need to effect this representation in both entities. As such, the focus of the political

parties participating in those negotiations was on the need to protect collective rights within the public institutions of the entities. Even though a greater emphasis on individual rights would have been welcomed, the particular circumstances and the low level of implementation of the Peace Agreement at the time seemed to justify such an outcome.

21. We note that the enactment of those amendments relied on the assumption that a certain degree of interference with the right to stand for elections could have been deemed justified in light of the margin of appreciation given to States. In this regard it is worth reminding of the European Court of Human Rights' decisions in *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987 and *Melnichenko v. Ukraine* of 19 October 2004 where it left to States a particularly wide margin of appreciation in the area of electoral legislation.

22. The aim being pursued, in particular the implementation of a constitutional court ruling that recognised the "constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples", which "prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation"[11], support that conclusion. The linkage that the Court established with other parts of the Peace Accord including Annex VII was also considered and the power-sharing arrangements sought were seen as a way to facilitate the return of refugees to their pre-war homes. According to the Court's decision, *"despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimization for ethnic domination, national homogenization or a right to uphold the effects of ethnic cleansing"*. [12]

23. The Office of the High Representative does not intend to determine whether such interference is justified in 2013, nor does it belong to it to do so. As noted in a recent decision of the Constitutional Court[13], "it is for the Court to decide whether in each case there is an objective and reasonable justification for the purpose of Article II(4)".

24. We also note that the legal situation in respect to the issue brought in front of the Court has also changed, in particular in light of the entry into force of Protocol 12 to the European Convention on Human Rights, and the fact that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law" thus introducing a general prohibition of discrimination.

Notes:

[1] Constitutional Court Decision of 28, 29 and 30 January 2000 (Official Gazette of Bosnia and Herzegovina, no. 11/00 of 17 April 2000), of 18 and 19 February 2000 (Official Gazette of Bosnia and Herzegovina, no. 17/00 of 30 June 2000), of 30 June and 1 July 2000 (Official Gazette of Bosnia and Herzegovina no. 23/00 of 14 September 2000) and of 18 and 19 August 2000 (Official Gazette of Bosnia and Herzegovina, no. 36/00 of 31 December 2000)

[2] The Decision of 11 January 2001 is attached to this Submission.

[3] Sarajevo/Mrakovica Agreement of 27 March 2002 is annexed to this submission.

[4] Communiqué of the Steering Board of the Peace Implementation Council of 21 June 2001 available at: https://www.ohr.int/pic/default.asp?content_id=5166

[5] Communiqué of the Steering Board of the Peace Implementation Council of 27 March 2002 available at: https://www.ohr.int/pic/default.asp?content_id=7241

[6] The High Representative's Decision Amending the Constitution of Republika Srpska No.150/02 of April 19, 2002 provided *inter alia*: "[T]he amendments to the Constitution of Republika Srpska numbered LXVI to XCI communicated to the High Representative by the President of the National Assembly of the Republika Srpska, Dr Dragan Kalinic, on 18 April 2002 (authenticated with the round seal of the Republika Srpska) are hereby authorised and required to be published with the changes to Amendments LXXI, LXXXII and LXXXV hereinafter set out, together with additional Amendment XCII.

All such Amendments (original, changed and further) shall be deemed duly proclaimed and promulgated by the Republika Srpska National Assembly pursuant to and in full compliance with Article 136 of the Constitution of the Republika Srpska and shall enter into force as at the date hereof, and the full text thereof including the changed text of Amendments LXXI, LXXXII, LXXXV and further Amendment XCII as hereinafter set out shall be published without delay in due form and pursuant to my Decision herein in the Official Gazette of the Republika Srpska.”

[7] See Paragraph 9 and 10 of this submission.

[8] See: European commission for democracy through law (the “Venice Commission”), document number CDL-AD(2005)004 of 11 March 2005.

[9] Ibid at para 74.

[10] Ibid at para 75.

[11] See Constitutional Court Decision U 5/98 at paragraph 59 and 60.

[12] Constitutional Court of Bosnia and Herzegovina, “Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina”, Case No. U 5/98-III, Third Partial Decision, 1 July 2000, Paragraph 61.

[13] See Constitutional Court Decision U 9/09 at paragraph 70.