

Information submitted by the OHR concerning the request of the applicant in Case No. U 23/14

I. Introduction

1. On 22 September 2014 the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) received a request of Dr. Božo Ljubić, Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of the request, for the review of constitutionality of the provisions of the Election Law of Bosnia and Herzegovina, Subchapter B, and in particular Article 10.10, 10.12, 10.15, 10.16, and 20.16A (Official Gazette of Bosnia and Herzegovina, 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 and 37/08; hereinafter: the Election Law).
2. On 14 July 2016, the Constitutional Court invited the Office of the High Representative to attend the public hearing scheduled for 29 September and invited the Department for Legal Affairs of the Office of the High Representative to provide written observations with regard to the Request and the specific questions determined by the Constitutional Court important for rendering its decision related to Case No. U 23/14 attached to the invitation letter.
3. The Office of the High Representative welcomes the opportunity given to it by the Constitutional Court to present its views concerning Case No. U 23/14 with a view to assisting the Constitutional Court, particularly on issues arising out of the Amendments to the Constitution of the Federation of Bosnia and Herzegovina that were enacted by the High Representative on 19 April 2002 (Official Gazette of the Federation of BiH, No. 16/02)
4. The Office of the High Representative notes however that it belongs to the Constitutional Court to decide on the request of the Applicant and to decide whether the challenged provisions are in line with the Constitution of Bosnia and Herzegovina.

II. Factual Background

1. The request submitted to the Constitutional Court relates to the manner of selection of the delegates of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (hereinafter: the Federation House of Peoples). In particular, it contends that the rule according to which each Canton must elect at least one representative of each Constituent people if it has one such representative in the Cantonal Assembly is contrary to the Article I(2), II(1) and II(4) of the Constitution of Bosnia and Herzegovina (hereinafter: the BiH Constitution).
2. The factual background provided below aims to explain the evolution of the provisions of the Constitution of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Constitution) related to the Federation House of Peoples and the relevant rules provided in the Election Law. We hereby wish to note that the applicant did not call into question the relevant provisions of the FBiH Constitution.
3. The FBiH Constitution was adopted by the Constitutional Assembly of the Federation of BiH, at the session held on June 24, 1994. It was published in the "Official Gazette of the Federation of Bosnia and Herzegovina", No. 1/94. It provided the following concerning the composition of the Federation House of Peoples and the selection of its delegates:

Article IV.6.

There shall be a House of Peoples, comprising 30 Bosniac and 30 Croat Delegates as well as Other Delegates, whose number shall be in the same ratio to 60 as the number of Cantonal legislators not identified as Bosniac or Croat is in relation to the number of legislators who are so identified.

Article IV.8.

The number of Delegates to be allocated to each Canton shall be proportional to the population of the Canton. Within that number, the percentage of Bosniac, Croat, and Other Delegates of a Canton shall be as close as possible to the percentage of the Bosniac, Croat, and Other legislators in the Canton. However, there shall be at least one Bosniac, one Croat, and one Other Delegate from each Canton that

has at least one such member in its Legislature, and the total number of Bosniac, Croat, and Other Delegates shall be in accordance with Article 6. Bosniac, Croat, and Other Delegates from each Canton shall be elected by the respective legislators in that Canton's Legislature.

Article IX.7.

The published results of the 1991 census shall be used as appropriate in making any calculations requiring population data.

8. 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 FBiH Constitution with the BiH Constitution.

9. The four partial Decisions of the Constitutional Court in case no. U 5/98[1] were 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 BiH Constitution. 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 BiH Constitution, 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.

10. Representatives of political parties of the Federation of Bosnia and Herzegovina (hereinafter: the Federation of BiH) and of Republika Srpska 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[2].

11. The said Agreement embodied the broadest possible agreement throughout the Federation of BiH 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.

12. Bearing this in mind, the Agreement of 27 March 2002 contained the following provisions concerning the composition of the Council of Peoples and the Federation House of Peoples and selection of its members:

Article 3. Composition of the Council of Peoples and the House of Peoples and selection of members

The Council of Peoples and the House of Peoples shall be composed on a parity basis so that each constituent people shall have the same number of representatives.

A minimum number of 8 and a maximum number of 17 members shall come from a single constituent people. The Others shall be represented by a number not exceeding one half of the representatives of a single constituent people in the CoP and HoP respectively.

Others have the right to participate equally in the majority voting procedure.

13. Considering the obligation under Article 1.14. of the Election Law (Official Gazette of BiH, Nos. 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.[3]

14. On 18 April 2002, the Federation House of Peoples adopted amendments to the FBiH Constitution consistent with the four partial Decisions of the Constitutional Court in case No. U 5/98 and respecting the provisions of the 27

March 2002 Agreement. However, the House of Representatives of the Federation of BiH failed, on the same day, to adopt the same.

15. 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 Federation House of Peoples. Amendments XXXIII and XXXIV to the Constitution of the Federation of Bosnia and Herzegovina enacted by virtue of that Decision provide:

AMENDMENT XXXIII

Composition of the House of Peoples and Selection of Members

- (1) The House of Peoples of the Federation Parliament shall be composed on a parity basis so that each constituent people shall have the same number of representatives.
- (2) The House of Peoples shall be composed of 58 delegates; 17 delegates from among each of the constituent peoples and 7 delegates from among the Others.
- (3) Others have the right to participate equally in the majority voting procedure.

This Amendment shall amend Article IV.A.2.6 of the Constitution of the Federation of BiH.

AMENDMENT XXXIV

- (1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population.
- (2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law.
- (3) In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.
- (4) Bosniac delegates, Croat delegates and Serb delegates from each Canton shall be elected by their respective representatives, in accordance with the election results in the legislative body of the Canton, and the election of delegates from among the Others shall be regulated by law.
- (5) No delegate of the House of Representatives or councilor of the Municipal Council may serve as a member of the House of Peoples.

This Amendment shall replace Article IV.A.2.8 of the Constitution of the Federation of BiH.

16. The Law on Amendments to the Election Law adopted by the Parliamentary Assembly of BiH in July 2002 (Official Gazette of Bosnia and Herzegovina, No. 20/02) introduced provisions regulating the selection of delegates to the Federation House of Peoples consistent with the provisions of the FBiH Constitution as set forth in Amendment XXXIII and XXXIV to the FBiH Constitution.

III. Arguments

17. As mentioned earlier, the matter raised in the request relates to the composition of the Federation House of Peoples and the method of selection of its members. These matters do not constitute “principles applicable to the elections at all levels of power in Bosnia and Herzegovina” nor “pertain to elections of members and delegates of the Parliamentary Assembly or Presidency of BiH”. As such, pursuant to the case law of the Constitutional Court^[4], they do not fall within the exclusive responsibilities of Bosnia and Herzegovina but are rather responsibilities falling within the organisational autonomy of the Federation of BiH. It is therefore important to emphasize that it belongs to the FBiH Constitution to determine the composition of the Federation Parliament and set the principles applying to the selection of its members whereas the Election Law must reflect and ‘operationalize’ those rules contained

therein.

18. We note in this respect that the applicant challenged certain provisions of the Election Law without challenging the provisions of the FBiH Constitution. We hereby contend that the provisions of the Election Law are in line with the principles established by the FBiH Constitution and that the various provisions of the FBiH Constitution have an internal consistency and have to be applied concomitantly, including in particular through the Election Law.

19. Article IV.2.6. and IV.2.8. of the FBiH Constitution regulate the composition and election to the Federation House of Peoples and establish four principles in that respect:

- a. The Federation House of Peoples is composed on a parity basis so that each constituent people has 17 delegates and the Others have 7 delegates;
- b. The number of delegates to be elected by a canton is proportional to its population;
- c. The delegates elected by each canton reflect the ethnic structure of the population in that canton;
- d. At least one representative of each constituent people is elected from each canton having such representatives in its legislative body.

Article IX.7. of the FBiH Constitution provides that the published results of the 1991 census are used for all calculations requiring demographic data, until Annex 7 is fully implemented.

20. Every one of these requirements has its own rationale and, applied together, they reflect the fact that the Federation House of Peoples mixes equal representation of constituent peoples (and representation of Others) and territorial representation of cantons proportional to their population.

21. In the present case, the applicant submits that the application of the requirement under which at least one representative of each constituent people be elected from each canton whenever there is such a representative in the Cantonal Assembly leads to a violation of the other requirements which amounts to a violation of the Constitution of BiH and, in particular, Article I(2) thereof.

22. As mentioned above, the requirement that at least one representative of each constituent people be elected from each canton whenever there are such representative in the Cantonal Assembly was part of the Washington Agreement concerning the FBiH Constitution from March 1994[5]. While the Entity Constitutions were amended to reflect the Mrakovica Agreement which resulted from negotiations to implement the Decision of the Constitutional Court in the case No. U 5/98 (Constituent Peoples Decision), the broad features of the system of selections of the delegates were kept untouched.

23. At the time, it was seen important to ensure that any cantons where representatives of constituent peoples are elected get a chance to send at least one of those representatives to sit in the Federation House of Peoples. This was seen as a way to highlight the constitutional principle of collective equality of constituent peoples throughout the territory of BiH often put forward by the Constitutional Court of BiH (see Constitutional Court, Third Partial Decision, No. U 5/98 of 1 July 2000). It was also a way to fulfil one of the overarching objectives of the Dayton Peace Agreement i.e. the return of refugees and displaced persons to their homes of origin and to re-establish the multi-ethnic society that had existed prior to the war.

24. We note that the Constitutional Court has already had the opportunity to examine the manner of selection of the delegates to the Federation House of Peoples in its Case No. U 5/05 of 27 January 2006 when, after examining the Amendments XXXIII and XXXIV to the FBiH Constitution[6], it stated that:

[D]e iure, based on the mentioned Decision on Constituent Peoples, the principle of collective equality of all three peoples throughout the territory of the Federation of Bosnia and Herzegovina has been established [by these Amendments], and, consequently, within the authorities of this Entity as well as within the House of Peoples of its Parliament.

25. It is the same intention to give constituent peoples the possibility to defend their national interests wherever they are represented in political authorities that later led to the adoption of Amendment LXXIX to the FBiH Constitution related to Article V.7. of the FBiH Constitution under which a caucus of constituent people is constituted when **at least one** delegate from a constituent people is elected to a cantonal assembly. This rule

enables constituent people that constitute a minority in a particular canton to have their “vital national interest” protected in that canton.

26. The four above-mentioned requirements or are of equal rank and must be interpreted as a consistent whole and applied concomitantly. The strict application of only one of those principles, would lead to a breach of other principles. To give an obvious example, the strict application of the requirement that the representation of cantons in the Federation House of Peoples be proportional to their population and of the requirement that the delegates selected by each canton represent constituent peoples proportionally to their population in that Canton would inevitably oblige to depart from the principle of equal representation of constituent peoples in the Federation House of Peoples or from the principle that at least one representative of each constituent people be elected from each canton whenever there are such representative in the Cantonal Assembly. In other words, it is clear that the principle “minimum one representative per constituent people and canton if possible” leads to over-representation of constituent peoples in some cantons to the detriment of others. In the same way, the principle of parity between constituent peoples also leads to a distortion in the representation of cantons which should in theory be proportional to their population as well as in the representation of constituent peoples which also means that, in the selection of delegates to the Federation House of Peoples, a Croat vote has more weight than a Bosniak vote and less weight than a Serb vote. .

27. This is what led to the adoption of Article IV.2.8. of the FBiH Constitution which provides, in its paragraph 2 that:

(2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law.

28. The number, structure and manner of election of delegates has been further determined in detail under Chapter 10, Subchapter B and Article 20.16 A of the Election Law that operationalizes all the principles set forth by the FBiH Constitution.

29. To do so, the law applies the Sainte-Lagüe formula of proportional representation, which is a method, used to convert votes into seat in a proportional manner. In this case, the method is used in order to translate population figures into seat representation by canton. Although the method is not the only one possible when allocating seats to cantons and constituent peoples, it is a well-recognised formula that is applied in many countries around the globe. It was selected to the detriment of other representation formulas such as the D’Hondt method because it tends to be more favourable to smaller cantons.

30. It is also worth noting that the formulation used in Article 10.12 paragraph 2 of the Election Law according to which “each constituent people shall be allocated one seat in every canton” could be seen, taken in isolation, not to be in line with the requirement under Article IV.8. (3) of the FBiH Constitution which provides the need to have one representative of each constituent people **whenever there is such a representative in the cantonal assembly** [emphasis added]. However, Article 10.16 complements Article 10.12 by providing for the procedure to be applied if the required number of delegates from each constituent people or from among the others in a given cantonal legislature are not elected. Under this procedure, the Central Election Commission of Bosnia and Herzegovina reallocates the seats that were not filled in a particular canton to other cantons. This procedure ensures that the requirement to have one constituent people representative in each canton is limited to cantons where there are such representatives, as required under the FBiH Constitution.

31. Article 20.16 of the Election Law allocates seats to Cantons and constituent peoples in accordance with the 1991 census. This is also an attempt to respect the FBiH Constitution under which the published results of the 1991 census are used for all calculations requiring demographic data, until Annex 7 is fully implemented[7]. It is clear however that this initial allocation is subject to the subsequent procedure of re-allocation of seats provided for in Article 10.16 of the Election Law if these seats could not be filled.

32. As such, the figures put forward by the Applicant, which are those provided for by Article 20.16 of the Election Law, do not reflect the final allocation of seats to the Cantons and the constituent peoples.[8]

33. The applicant further argues that the challenged provisions of the Election Law violate the right to elections by

establishing constituencies with significantly different numbers of voters, resulting in the value of individual votes being significantly different. This would allegedly violate the principle of equal suffrage under Article 25.b) of the International Covenant on Civil and Political Rights.

34. In its decision in case No. U 9/09, the Constitutional Court of BiH noted that it considers that the need to deal with post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, continues to represent a legitimate aim which might justify departing from the normal, democratic principle that, so far as possible, each elector's vote should have similar weight.

35. As explained above, the rules concerning representation of cantons and constituent peoples within the upper house of the Federation Parliament is relying on a number of principles that reflect the political considerations prevailing when they were adopted. The principle which is challenged by the applicant, i.e. the need for constituent peoples to get their delegates elected from all cantons when they have such delegates in the cantonal assembly, sought to promote the representation of constituent peoples even from cantons where they constitute a numeric minority in order to promote return of refugees and displaced persons but also to give effect to the principle that the peoples are constituent throughout the territory of the Federation. As such, the principle does not stem "from a desire for administrative simplicity" but rather from "necessary, reasonable or proportionate steps to develop a power-sharing structure or a multi-ethnic community" throughout the Federation of BiH.

36. We further note that arrangements that lead to the over-representation of territorial or other communities are not uncommon in Europe.

37. The Council of Europe's 'European Commission for Democracy Through Law' issued guidelines on elections^[9], which elaborated on the meaning of equal suffrage:

"a. Equal voting rights: each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes.

b. Equal voting power: seats must be evenly distributed between the constituencies.

This must at least apply to elections to lower houses of parliament and regional and local elections:

[...]

iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.

iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).

[...]"

38. The wording used specifically enables exceptions in respect to upper houses of Parliament. This seems to be justified insofar as upper houses of Parliament are often designed to ensure "diversification of representation and the integration of all members of the nation"^[10]. To achieve this, the members of the second chambers are often selected by local or regional authorities in a way that over-represents the smaller regions. By way of illustration, the members of the German second legislative chamber, the Bundesrat, are appointed by their respective *Land* governments according to a formula that affords greater representation per inhabitant to the smaller *Länder*, i.e. those that have less than two million inhabitants. In the same way, the members of the Spanish Senate are elected through a system that mixes direct election with indirect election by the regional parliaments in a manner that ensures that every region has a minimum representation in the Senate, regardless of its size or population.

39. The wording used in the above mentioned guidelines on elections indicate that it belongs to countries to decide whether to apply the principle of equal voting power to the elections of the members of the upper chamber. However, we believe that, even in that situation, the system put in place by the FBiH Constitution which, as we have seen earlier, tries to combine territorial and constituent peoples representation, could also fall under the special circumstance under the item b.iv. of these guidelines.

IV. Concluding remark

40. We have outlined to the Court the relevant circumstances that led to the adoption of the system in place for the selection of delegates to the Federation House of Peoples. We believe that these circumstances show that the provisions included in the FBiH Constitution served a legitimate aim at the time of their adoption and that the practice of over-representing regions or ethnic component of the society is inherent to the existence of upper chambers in federal states. It belongs to the Parliament of the Federation to determine whether these circumstances have changed to a point where reforming the manner of selection of the delegates to the Federation House of Peoples has become necessary. The provisions of the Election Law, which are challenged in the present case, were adopted pursuant to the FBiH Constitution in an attempt to give effect to the principles set forth therein. The method used to do so is not the only one available and the legislator could decide to amend the FBiH Constitution to reflect new priorities.

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

[3] 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

[4] Decisions in Case No U 4-11 of 27 May 2011 and U 4-12 of 26 May 2012.

[5] Article IV.8. of the FBiH Constitution quoted in paragraph 6 above.

[6] Article IV.6. and Article IV.8. of the Constitution of FBiH.

[7] Article IX.7. of the FBiH Constitution

[8] A table showing the final allocation of mandates after re-allocation by the CEC pursuant to Article 10.16 of the Election Law is attached.

[9] Code of Good Practice in Electoral Matters, adopted by the European Commission for Democracy Through Law at its session held 18-19 October 2002, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)

[10] See "Second Chambers in Europe, Parliamentary Complexity or Democratic Necessity?", CDL(2005)059rev