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## **Department for Legal Affairs**



# **CONSTITUTIONAL COURT DECISION U-23/14 (ELECTION LAW)**

**“Official Gazette of Bosnia and Herzegovina”, 1/17**

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59 (1) (2) and (3) and Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mirsad Ceman, President

Mr. Mato Tadic, Vice-President

Mr. Zlatko M. Knezevic, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galic,

Mr. Miodrag Simovic,

Ms. Constance Grewe,

Ms. Seada Palavric,

Having deliberated on the request filed by **Dr Bozo Ljubic, the Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request** in case no. **U-23/14**, at its session held on 1 December 2016, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The request of **Dr Bozo Ljubic, the Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request** is partially granted.

It is established that the provision of Sub-chapter B, Article 10.12 (2), in part stating that *each of the constituent peoples shall be allocated one seat in every canton* and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), items a-j of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 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, 18/13, 7/14 and 31/16) are not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to harmonise, in accordance with Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, not later than six months from the day of delivery of this decision, the provision of Sub-chapter B, Article 10.12 (2), in part stating that *each of the constituent peoples shall be allocated one seat in every canton*, and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A(2) items a-j of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 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, 18/13, 7/14 and 31/16) with Article I (2) of the Constitution of Bosnia and Herzegovina.

The request of **Dr Bozo Ljubic, the Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request** for review of constitutionality of the remaining part of the provisions of Sub-chapter B, Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina, 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, 18/13, 7/14 and 31/16) is dismissed as ill-founded.

It is established that the remaining part of the provisions of Subchapter B - Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina, 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, 18/13, 7/14 and 31/16) are in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in *the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina, the Official Gazette of the Republika Srpska and the Official Gazette of the Brcko District of Bosnia and Herzegovina*

## **REASONING**

### **I. Introduction**

1. On 20 September 2014, Dr Bozo Ljubic, the Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of request (“the applicant”), filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for review of the constitutionality of Articles 10.10, 10.12, 10.15 and 10.16 of the Subchapter B of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 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, 18/13,



7/14 and 31/16, hereinafter: “the Election Law”) and provisions of Article 20.16A under Chapter 20 – Transitional and Final Provisions of the Election Law.

## **II. Procedure before the Constitutional Court**

2. Pursuant to Article 23 (2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 2 October 2014 to submit their respective replies to the request.
3. On 5 March 2015 the Commission on Constitutional and Legal Affairs of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted the reply to the request. The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina failed to submit the reply to the request.
4. At the plenary session held on 26 May 2016, the Constitutional Court, pursuant to Article 46 of the Rules of the Constitutional Court, decided to hold a public hearing in this case.
5. Pursuant to Article 16(3) of the Rules of the Constitutional Court, the Constitutional Court requested the European Commission for Democracy through Law (the Venice Commission) on 10 June 2016 to submit its opinion in writing on the request in question.
6. On 17 October 2016, the Venice Commission submitted the *Amicus Curiae* Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission at its 108<sup>th</sup> Plenary Session held on 14-15 October 2016.
7. The public hearing was held on 29 September 2016.

## **III. Request**

### **a) Allegations from the Request**

8. The applicant stated that the challenged provisions of the Election Law are not in conformity with Articles I (2), II(1) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for Protection of Human Rights and Fundamental Freedoms (“the European Convention”), Article 25 of the International Covenant on Civil and Political Rights (1966) (“the International Covenant”) and Optional Protocols (1996 and 1989) in conjunction with

Article 3 of Protocol No. 1 and Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which make an integral part of the Constitution of Bosnia and Herzegovina (Annex I to the Constitution of Bosnia and Herzegovina). The applicant points out that the provisions of the Election Law of BiH, (Articles from 10.10 through 10.18) have regulated the matter of the election of delegates to the House of Peoples of the Parliamentary Assembly of the Federation of BiH (the House of Peoples”), while the allocation of seats by constituent people to each canton has been determined in accordance with Article 20.16A.

9. The applicant quoted Article I (2) of the Constitution of BiH: *Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.* The applicant also noted that that this constitutional norm foresees that there is a law regulating certain field and it also provides that the said law is in harmony with the highest standards of the fundamental human rights and freedoms in a democratically organised society. Therefore, that law must be in compliance with the Constitution of BiH and also in accordance with the Entity Constitutions because of the complex organisation of Bosnia and Herzegovina. Furthermore, the applicant points out that this norm particularly requires that the elections are free and democratic, which implies that there must be no limitations to the expression of will of the voters and that that process should be organised in a democratic manner and the outcome of that process should express the will of the voters, rather than the *imposition of the will that was stipulated a priori by law.* The system proclaimed by the Constitution of BiH and Entity Constitutions implies that that there should be the proportionality with regards to the will of voters, in which case there are certain rules that must be complied with when it comes to the total representation in the House of Peoples of the Federation of BiH, which implies that the composition of that house of peoples corresponds to the basic democratic principle and that it expresses the will of the peoples. As the composition of the House of Representatives expresses the will of voters, it follows that the composition of the House of Peoples must express the will of the constituent peoples.

10. The applicant also quoted Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina and Chapter IV.A.2. of the Constitution of the Federation of Bosnia and Herzegovina, whereby the number of delegates in the House of Peoples of the Federation of BiH has been clearly determined and which provides that: *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.* The applicant is of the opinion that the constitutional amendments imposed by the High

Representative in 2002 (when the number of 30 delegates per caucus was reduced and currently that number is 17) amounted to discrimination with regards to the method of election of delegates to the House of Peoples of F BiH and deviation from the principle of proportionality. The applicant wonders whether the provision of the Election Law that *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*, although the number of the members of the respective people in that canton is negligible, is used for the purpose of electoral manipulation and violation of the provisions implied by the proportional representation.

11. The applicant further states that in the Constitution of F BiH – Section IV(A)(2) – Article 8 paragraph 1 is in direct contravention with paragraph 3 of the same Article and application of paragraph 3, the implementation of which “flagrantly violates the principle of proportionality and is in contravention of Article 3 of Protocol No. 1 to the European Convention, which is again in contravention with the provisions of the Constitution of BiH – Article I(2), Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina”. The principle of proportionality would have to be applied in a manner in which there would be no derogation from the basic meaning of proportionality and which, in a multinational and complex Bosnia and Herzegovina, constitutes one of the key elements of stability and equality of citizens and constituent peoples. The applicant also states that the application of the principle of proportionality should, through technical elements of application, serve its purpose and it must not be just a declarative provision of the Constitution and Election Law. The applicant notes that in the Constitution of FBiH, in the mentioned Article 8 paragraph 2 item 2 provides that *the number, structure and manner of election of delegates shall be regulated by law* and concludes that the provisions of the Election Law of BiH regulating this field are Article 10.12 and Article 20.16A, which are also in violation of the provisions of the Constitution of the Federation of Bosnia and Herzegovina (“the Constitution of F BiH”), the Constitution of Bosnia and Herzegovina, Protocol No. 1, Protocol No.12 and International Covenant on Civil and Political Rights. The applicant finds confirmation of his allegation in the document that was adopted by the Central Election Commission (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 48/02) titled as “Instruction for Application of Chapter 10, Subchapter B – House of Peoples”(hereinafter: the Instruction). It is stated in Article 2 of the Instruction that the allocation of posts 17 B/17 H/17 S/70, which has been determined in the amended Constitution of the Federation of BiH, is, *de facto*, not proportional to the ethnic structure of the population in the Federation of BiH (hereinafter: the Federation) as per 1991 census (32B/13H/11S/10), and neither is it proportional to the ethnic structure of the population in the cantons from which the delegates to the caucuses are selected.

The applicant states that a distinction should be made between the parity of the total representation of the constituent peoples in the House of Peoples of the Parliament of F BiH, which is regulated in a manner in which each caucus of the constituent peoples has 17 delegates, and a clear constitutional provision which implies that there is a proportional representation in each of the caucuses in accordance with the national structure of the populations in each of the respective cantons.

12. The applicant continued his explanation and pointed out that Article 10.12 of the Election Law, which was entirely quoted, additionally gives arguments on violation of the constitutional provision on proportionality. Namely, the method of application of the so-called quotients (division of digits by 1, 3, 5, 7...) clearly indicates that there is a deviation from the principle of proportionality, and the applicant considers that the application of this approach is inadequate when insofar as it concerns the issue of the proportional ethnic representation of the constituent peoples in the cantons as regards the filling of the caucuses in the House of Peoples precisely because it has a specific constitutional task towards achieving the equality of the constituent peoples. Such a method of calculation that is applied for the representative bodies, according to the applicant, could not be used in this particular case.

13. Through a further analysis of Article 10.12 of the Election Law the applicant points out that one comes to another absurd situation as regards violation of the constitutional provision on the proportional representation that is in conformity with the national structure of the population per cantons, and concludes that the mentioned article provides *inter alia* that: "Each of the constituent peoples shall be allocated one seat in every canton". However, as the applicant states, the provisions of the Constitution of BiH and Constitution of F BiH "do not determine anywhere that ... each of the constituent peoples shall be allocated one seat in every canton", but it is rather in Article 8 paragraph 3 of the Constitution of F BiH the following is written: "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", which means that it involves a conditional option and not about absolute provision as stated in Article 20.16A of the Election Law of BiH and as applied in the method of determination of mandates. The proof for this method of determining the number of the delegates in the House of Peoples of BiH is reflected in the following provision of Article 10.12 of the Election Law: "The highest quotient for each constituent people in each canton shall be deleted from that constituent peoples' list of quotients. The remaining seats shall be allocated to constituent peoples and to the Others one by one in descending order according to the remaining quotients on their respective list."

14. The applicant quoted Article 8 of the Constitution of the Federation, which regulates the matter of election of delegates in the House of Peoples of the Parliament of F BiH and pointed out that it follows from the mentioned provisions of the Constitution of the Federation of BiH that “fulfilling the requirements under paragraph 3 directly violated the item 1 – i.e. the requirement of proportional representation of the delegates in the respective cantons and which, according to theses constitutional provisions, is taken over and regulated by the Election Law of BiH. Consequently, it has become the tool with which the Constitution of BiH and international conventions are being violated.”

15. Mathematical analysis, as noted by the applicant, conforms the previous statements and he presented the manner in which the House of Peoples is filled, including the election of delegates from the cantonal assemblies and he also explained that each delegate of each of the caucuses of the constituent peoples bears the percentage - 5,88% - of the constituent people from certain area (canton) from which he/she is elected ( $17 \times 5,88 = 100$ ).

<b>Cantons</b>	<b>Bosniacs</b>	<b>Croats</b>	<b>Serbs</b>	<b>Others</b>	<b>Total</b>
<b>1. Sarajevo</b>	3	1	5	2	11
<b>2. Tuzla</b>	3	1	2	2	8
<b>3. Zenica-Doboj</b>	3	2	2	1	8
<b>4. Una-Sana</b>	2	1	2		5
<b>5. Bosnian-Podrinje</b>	1	1	1		3
<b>6. Central Bosnia</b>	1	3	1	1	6
<b>7. Herzegovina-Neretva</b>	1	3	1	1	6
<b>8. Western Herzegovina</b>	1	2	1		4
<b>9. Posavina</b>	1	1	1		3
<b>10. Herzeg-Bosnia (C 10)</b>	1	2	1		4
	<b>17</b>	<b>17</b>	<b>17</b>	<b>7</b>	<b>58</b>

16. The applicant also offered a tabular presentation of the national composition of the Federation of BiH in the cantons in numbers and percentages in accordance with the data of the Federation Institute for Statistics from 1991 and concluded that the consistent application of the provisions of the Constitution of F BiH should ensure appropriate proportional representation of the delegates in the caucuses of the House of Peoples, which corresponds to the ethnic structure of the cantons the delegates come from. However, as stated by the applicant, by application of the mentioned elements from the Election Law of BiH this allocation, in reality, is far away from any sort of proportionality when it comes to all three constituent peoples.

17. The applicant gave a tabular presentation of the manner in which the number of the delegates in the cantons is determined in accordance with Article 20.16a. He considers that the mentioned allocation of mandates in the cantons is not well-founded as in each canton one mandate is allocated in advance for each constituents people, although the Constitution of the Federation of BiH clearly states that *“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.”* Furthermore, he states that the rule relating to application of the rule on allocation of one mandate to each constituent people in each canton could not be applied until the results of elections for the cantonal assemblies become known as only then the mentioned constitutional provision could be applied: *“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.”* It is quite realistic, as considered by the applicant, that there are no representatives from some constituent people in some cantons. In this manner, the prejudging in Article 20.16A of the Election Law and assigning one delegate from each of the constituent people to each of the cantons prior to the outcome of the elections being known with regards to the cantonal assemblies and *on that wrong premise the counting of other delegates in the cantons was based, which proves*, in the opinion of the applicant, that there was a violation of the Constitution of Bosnia and Herzegovina.

18. Furthermore, the applicant gave a tabular presentation of “the real percentage of Bosniacs, Croats and Serbs in the cantons the number of allocated mandates and percentage per mandate” and pointed out that there are huge discrepancies between the elected composition of the caucuses of the constituent peoples and proportional participation of population in the cantons from which they were elected. The applicant refers to Posavina Canton where, for example, one delegate from the Bosniac people should be elected from the Posavina Canton and that represents 5.88% of the participation in the Bosniac caucus, while the real participation of the Bosniac people in that canton is 0,55%, which represents 10 times deviation. Another example is the Western Herzegovina Canton, wherein one mandate has been provided for the delegate coming from the Bosniac people and that also represents 5.88% of the participation in the Bosniac caucus, while the real participation of the Bosniac people in that canton is 0.11%, which represents 53 times deviation or 5300%. The applicant also states that there was 25.12% of Bosniacs living in the Tuzla Canton according to the 1991 census. Pursuant to the provisions of the Election Law, this canton allocates 3 delegates to the Bosniac caucus, which is 17.46% of the caucus of that constituent people, which means that it represents 7.48% deviation to the detriment of this canton. So far as the delegates from amongst the Croat people are concerned,

the applicant provides as an example the Bosnian Podrinje Canton, where the real percentage of representation of the Croat people, as per 1991 census, is 0.01%, while the planned election of one delegate is 5.88% in the Croat Caucus in the House of Peoples, which represents the difference of 588 times when compared to the real situation. As regards the election of the Serb delegates, the most drastic situation, as stated by the applicant, is in the Western Herzegovina Canton where, according to the 1991 census, 0.05 % Serbs lived and the Election Law provides for the election of one delegate which represents 5.88% of the Serb Caucus and that is almost 118 times deviation.

19. The applicant states that without questioning the right of an individual to declare him/herself as a member of “one of the constituent peoples”, it is evident that the mentioned right is abused in a manner in which “the members of another people/s ensure the election of the delegates from the peoples who do not live in adequate number in the area of some cantons”.

20. When it comes to election of the delegates from amongst the Croat people, the applicant states that it is clear that more Croat delegates are elected from the cantons with Bosniac people majority than from the cantons with the Croat people majority, which proves once again the absurdity of the election system, which should, according to the Constitution of BiH, ensure the highest level of free and democratic elections under the condition “that both Entities ensure the highest level of internationally recognized human rights and fundamental freedoms.”

<b>Cantons:</b>	<b>Bosniac</b>	<b>Croat</b>	<b>Serbs</b>	<b>Other</b>	<b>Total</b>
Cantons with Bosniac majority	12	6	12	5	35
Cantons with Croat majority	3	5	3	-	11
Mixed cantons	2	6	2	2	12
	<b>17</b>	<b>17</b>	<b>17</b>	<b>7</b>	<b>58</b>

21. Finally, the applicant underlines that this discriminatory approach escalated after the imposition of the amendments to the Constitution of F BiH by the High Representative in BiH in 2002. Until then, the caucuses of the constituent peoples in the House of Peoples of the Parliament of the Federation of BiH used to have 30 delegates so that each delegate represented 3.33% of participation in the caucus, which, in sum, represented a more realistic possibility of election of the delegates and was proportional to the composition of population within the respective cantons. The applicant considers that the challenged provisions of the Election Law relating to the election of delegates to the House of Peoples are unconstitutional and proposes that the Constitutional Court of

BiH should declare the disputable provisions unconstitutional and undertake all necessary legal steps in order to harmonise the mentioned norms with the Constitution of BiH and international conventions.

**b) Reply to the Request**

22. In its reply to the request, the Commission on Constitutional and Legal Affairs, during its session held on 4 March 2015, concluded that the Parliamentary Assembly of Bosnia and Herzegovina passed the Election Law and that on 22 September 2014 the Constitutional Court of Bosnia and Herzegovina received the applicant's request and that, following the discussion, the Commission unanimously decided to inform the Constitutional Court of Bosnia and Herzegovina about the mentioned facts and this court, in accordance with its competences, will decide whether the mentioned law is in conformity with the Constitution of Bosnia and Herzegovina.

**c) Amicus curiae brief of the Venice Commission**

23. In an exhaustive analysis of the present case, the Venice Commission first notes that the principle of equal voting power is guaranteed by Article 25 of the International Covenant as well as by Article 3 of the Protocol No. 1 to the European Convention and that inequalities of representation between constituencies are, in principle, forbidden even if there is a margin of appreciation. This leads to the question of whether or not the European Covenant and the European Convention allow for a distinction to be made between first and second chambers from the point of view of the scope of the principle of equal suffrage, to exclude, as regards the second chamber, the aspect of equal voting power. Seventeen countries in Europe, including BiH, practice bicameralism. The method of selecting a second chamber is context dependent, the purpose of the second chamber and the historical traditions of the country in question are key contextual determinants. It is not inherently undemocratic to have a second chamber that is not proportionally representative of the population. In particular, bicameralism is often practised in federal states to equally represent the sub-national authorities at a national level where this is the purpose of the second chamber, it is entirely appropriate that the members are selected by those sub-national authorities. A corollary of representing a sub-national authority in this manner is the seemingly disproportionate representation of the different populations.

24. In the case of the Federation's House of Peoples, the primary purpose is to ensure proper representation of the constituent peoples and others. The calculation for the allocation of seats in this House can be seen from two different perspectives: (1) from the perspective of an individual canton



of the Federation or of an individual citizen – either could arguably see it as disproportionate and lacking in equality; or (2) from the perspective of the Federation and the State of BiH – which can arguably see it as not arbitrary. In any case, it is designed to provide for a disproportionate reflection of mandates as across the 10 cantons. As a whole, the relevant provisions of the Election Law of BiH (i.e. Articles 10.10, 10.12, 10.15, 10.16 and 20.16A), create a system of indirect election that could be described as so circumscribed as to constitute a form of selection, respectively allocating seats to constituent peoples and cantons. The overall result is already dictated by the Constitution of the Federation as amended to comply with the Constitutional Court decision of 2002 on constituent peoples.

25. The Venice Commission further notes that the method of electing the delegates to the House of Peoples uses the cantons and their delegates, and the primary purpose of the House of Peoples is not to represent cantons, but rather to represent constituent peoples and others, and it embodies another type of equality i.e. the “collective equality” of the three constituent peoples plus a fixed representation of others. In addition, it has an important role to play in the vital interest procedure and could be seen as a “veto” chamber of the Federation’s Legislature. Therefore, as further stated, the democratic legitimacy of the method of election should not be evaluated by reference to the comparative ballot value of voters or imbalance within or between cantons. The concepts of equal-voting power and proportionality do not apply to the special parts of the BiH legislature, which are designed to represent constituent peoples – and hence are designed to meet the unique specificities of BiH.

26. Finally, in response to the question: „Is the mode of election of delegates to the House of Peoples, having regard to the specificities of the constitutional situation and the decision of the Constitutional Court on constituent peoples, compatible with the principle underlying Europe’s electoral heritage?”, the Venice Commission notes that the Constitutional Court might consider that the composition of the House of Peoples of the Federation is not merely designed to reflect the participation of its 10 cantons in the legislative process; that, it aims instead to ensure the representation of the constituent peoples on a parity basis, ensuring that each constituent people has the same number of representatives and basically acts like a “veto” chamber of the Federation’s Legislature.

27. The Venice Commission considers that although this distortion of proportionality in the electoral system might not be consistent with principles of European electoral heritage if the election was for a directly elected part of the legislature, it can be justified that the concept of equal voting

should not apply to the special parts of the BiH legislature, which are designed to ensure representation of constituent peoples and others. The Venice Commission notes that the Election Law of BiH intends to render operational the relevant provisions of the Constitution of the Federation on the allocation of seats to the House of Peoples of the Federation through the holding of two rounds of elections. The first round, under Article 10.12, is to allocate one seat per constituent peoples or others per canton and the second round, under Article 10.16, is to reallocate those seats that could not be filled to those cantons that have the necessary number of constituent peoples or others to fill the remaining seat(s). Finally, the European Commission concludes that the system under the Constitution of the Federation “seems to be in line with European and other international standards in the field of elections and since the Election Law of BiH intends to render operational the relevant provisions of the Constitution of the Federation, it also seems to be in line with these standards”. In the Venice Commission’s view, the Election Law of BiH seems to depart slightly from what is “proportionality”, as mandated by the Constitution of the Federation in the allocation of seats to the House of Peoples of the Federation. However, a solution might be envisaged by which the provision of the Election Law of BiH (“Each constituent people shall be allocated one seat in every canton”) would be interpreted as worded in the Constitution of the Federation (“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”).

#### **IV. Public hearing**

28. At the Plenary session held on 26 May 2016, the Constitutional Court decided, in accordance with Article 46 of the Rules of the Constitutional Court, to hold a public hearing with regards to this case. Pursuant to Article 47 of the Rules of the Constitutional Court the decision was made to invite the following persons to the public hearing: the applicant, the representatives of the Parliamentary Assembly of BiH (House of Peoples and House of Representatives), the representative of the OSCE Mission to BiH, the representative of the Central Election Commission of Bosnia and Herzegovina (hereinafter: the CEC), the representative of the Office of the High Representative for BiH –OHR, Prof Dr Goran Markovic, Law Faculty of the University in Istocno Sarajevo, Prof Dr Zlatan Begic, Law Faculty of University in Tuzla, Prof Dr Zvonko Miljko, Law Faculty of the University in Mostar.

29. The public hearing was held on 29 September 2016 and was attended by the representatives of the applicant, the representatives of the House of Peoples of the Parliament of the Federation of

BiH, the representatives of the CEC, the representatives of the OSCE Mission to BiH and Prof Dr Zlatan Begic – the Faculty of Law of the University in Tuzla and Prof Dr Zvonko Miljko – the Faculty of Law of the University in Mostar.

30. The representatives of the OHR did not attend the discussion. However, on 27 September 2016, the OHR delivered the written opinion which was considered by the Constitutional Court.

31. At the public hearing, the applicant remained supportive of his request for review and pointed out that the basic principle of democracy is that “government comes from the people and belongs to the people”. Therefore, the Election Law must follow the logic of legitimate representation of the constituent peoples, in particular when it comes to the houses of peoples, i.e. that body of government which is intended to protect and articulate specific interests and needs of each constituent people. The consistent application of the provisions of the Constitution of the Federation should ensure that there is the appropriate and proportional representation of the delegates in the clubs of the House of Peoples matching the national structure of the canton the delegates come from. However, by application of the challenged provisions of this law this distribution, in reality, is far away from any kind of proportionality with regards to all three constituent peoples. Furthermore, the applicant states that Bosnia and Herzegovina is a complex state, in which not only Serbs, Croats and Bosniacs are the constituent peoples, but the citizens, as people – “demos”, are also constituent. Therefore, Bosnia and Herzegovina has double constituency and there are a) three constituent peoples and b) all citizens as members of people – “demos”. In the opinion of the applicant, double constituency is expressed through bicameral system in Bosnia and Herzegovina, i.e. through the Parliament and House of constituent peoples. The Parliament reflects the equality of citizens and principle of proportionality applies therein, and House of Peoples should ensure that there is equality of three constituent peoples and that equality is expressed through the caucuses of the constituent peoples and within the House of Peoples. Furthermore, the applicant notes that not only that the Election Law, in its Article 10.12, violates but it absolutely denies the principle of democratic representation, i.e. the principle of legitimate democratic representation as the government does not originate from people, but from the legal norm.

32. The representatives of CEC did not present the position of the CEC at the public hearing but they only presented personal viewpoints about the request in question.

33. In his presentation the representative of the House of Peoples pointed out that he supports the request and he also recalled the shortcomings in the manner in which the House of Peoples functions.

34. Prof Zvonko Miljko - the Faculty of Law of the University in Mostar, in his presentation, stressed, *inter alia*, the role of legitimacy or the legitimate representatives, of the one being represented, so many say in theory that it is the basic meta-category of the constitutional law that should be acknowledged as generally accepted value in which this principle appears as the higher ranking requirement. Furthermore, he stated that out of 17 delegates in the House of Peoples more than a half are elected from the cantons, where the majority is some other ethnic group and concluded that the challenged provisions of the Election Law, while referring here primarily to the principle of constituent status of the peoples, which is supported in the number of decisions by this Court as well, and from which it also derived corresponding principles of equality, constitutionality and multinational character of the state, is in contravention with those norms which are the constituent part of the Constitution of Bosnia and Herzegovina as its Annex.

#### **IV. Relevant sources of law**

35. The provisions of the **Constitution of Bosnia and Herzegovina** as relevant read:

##### ***Preamble***

*[...]*

*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 is as follows:*

##### *Article I:*

##### *Bosnia and Herzegovina*

##### *2. Democratic Principles*

*Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.*

36. The provisions of the **Constitution of the Federation of Bosnia and Herzegovina** as relevant read:

#### ***IV. STRUCTURE OF THE FEDERATION GOVERNMENT***

*A. The Legislature*

*a) The legislative authority in the Federation of Bosnia and Herzegovina shall be exercised by the House of Representatives and the House of Peoples.*

*FEDERATION PARLIAMENT*

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

*[...]*

**2.        *The House of Peoples***

*Article 6*

*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*

*(Changed by Amendment XXXIII)*

*Article 8*

*(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.*

*(Changed by Amendment XXXIV)*

37. The **Election Law of Bosnia and Herzegovina** (*Official Gazette of BiH*, 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. 18/13 and 7/14 (for the needs of this decision the unofficial consolidated version published on [www.izbori.ba](http://www.izbori.ba) was used) as relevant reads:

**a) SUBCHAPTER B**

**b) HOUSE OF PEOPLES OF THE PARLIAMENT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA**

*Article 10.10*

*The Cantonal Legislature shall elect fifty eight (58) delegates to the House of Peoples, seventeen (17) from among Bosniacs, seventeen (17) from among Serbs, seventeen (17) from among Croats and seven (7) delegates from the rank of Others.*

*Article 10.12*

*(1) The number of delegates from each constituent people and group of Others to be elected to the House of Peoples from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census. The Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.*

*(2) For each canton, the population figures for each constituent people and for the group of Others shall be divided by the numbers 1,3,5,7 etc. as long as necessary for the allocation. The numbers resulting from these divisions shall represent the quotient of each constituent people and of the group of Others in each canton. All the constituent peoples' quotients shall be ordered by size separately, the largest quotient of each constituent people and of the Others being placed first in order. Each constituent people shall be allocated one seat in every canton. The highest quotient for each constituent people in each canton shall be deleted from that constituent peoples' list of quotients. The remaining seats shall be allocated to constituent*

*peoples and to the Others one by one in descending order according to the remaining quotients on their respective list.*

#### *Article 10.15*

*The results of vote shall be communicated to the Election Commission of Bosnia and Herzegovina for the final allocation of seats. Mandates shall be distributed, one by one, to the lists or candidate with the highest quotients resulting from the proportional allocation formula referred to in Article 9.6 of this Law. When a list wins a mandate, the mandate shall be allocated from the top of the list.*

#### *Article 10.16*

*(1) If the required number of delegates to the House of Peoples from among each constituent people or from the group of Others in a given cantonal legislature are not elected then the remaining number of Bosniac, Croat, Serb or Other delegates shall be elected from the other canton until the required number of delegates from among each constituent people is elected.*

*(2) The Election Commission of BiH shall re-allocate, immediately after completion of the first round of election of the delegates to the House of Peoples in all cantons, the seats that cannot be filled from one canton. The Election Commission of BiH shall re-allocate that seat to the non-elected candidate who has the highest quotient on all lists running for the appropriate constituent people or for the Others in all cantons.*

## **CHAPTER 20**

### **TRANSITIONAL AND FINAL PROVISIONS**

#### *Article 20.16A*

*(1) Until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, Subchapter A of this law shall be done in accordance with this Article.*

*(2) Until a new census is organized, the 1991 census shall serve as a basis so that each Canton will elect the following number of delegates:*

- 1) from the Legislature of Canton number 1, Una-Sanai Canton, five (5) delegates, including two (2) Bosniacs, one (1) Croat and two (2) Serbs shall be elected.*
- 2) from the Legislature of Canton number 2, Posavina Canton, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.*
- 3) from the Legislature of Canton number 3, Tuzla Canton, eight (8) delegates, including three (3) Bosniacs, one (1) Croat, two (2) Serbs and two (2) Others shall be elected.*
- 4) from the Legislature of Canton number 4, Zenica-Doboj Canton, eight (8) delegates, including three (3) Bosniacs, two (2) Croats, two (2) Serbs and one (1) Other shall be elected.*
- 5) from the Legislature of Canton number 5, Bosnian-podrinje Canton – Gorazde, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.*
- 6) from the Legislature of Canton number 6, Central Bosnia Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.*
- 7) from the Legislature of Canton number 7, Herzegovina-Neretva Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.*
- 8) from the Legislature of Canton number 8, West Herzegovina Canton, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.*
- 9) from the Legislature of Canton number 9, Canton Sarajevo, eleven (11) delegates, including three (3) Bosniacs, one (1) Croat, five (5) Serbs and two (2) Others shall be elected.*
- 10) from the Legislature of Canton number 10, Canton 10, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.*

## **V. Admissibility and merits**

38. First of all, the Constitutional Court notes that due to complexity of the concerned request and the issues raised thereunder, it will consider both the admissibility and the merits of the case.

39. The Constitutional Court observes that, bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court,



the concerned Request was submitted by an authorized person (the applicant was the Speaker of the House of Representative of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submitting the Request).

40. The applicant challenges the constitutionality of the provisions of the Election Law with respect to the relevant provisions of the Constitution of the Federation of BiH and the Constitution of Bosnia and Herzegovina. Bearing in mind the aforementioned facts, the Constitutional Court points out that it is indisputable that the Election Law constitutes “the decision of the institutions of Bosnia and Herzegovina” within the meaning of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina. However, pursuant to Article VI(3) of the Constitution of Bosnia and Herzegovina, its primary task is to uphold this Constitution and, according to Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina it is specifically regulated that the Constitutional Court shall have jurisdiction to decide whether any provision of the constitution or law of an Entity is in accordance with this constitution. Pursuant to Article I(2) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall be “a democratic state, which shall operate under the rule of law and with free and democratic elections.” The Constitutional Court is competent and obligated to act in each and every situation as a guardian of the Constitution of Bosnia and Herzegovina [Article VI(3)] and that is defined under one of its basic principles – the rule of law referred to in the mentioned provision. So, taking into consideration the mentioned principle of the rule of law, all constitutions, laws and other regulations that are passed must be harmonised with the constitutional principles. Therefore, the Constitutional Court considers that it has jurisdiction to examine whether the relationship between the Election Law and the Constitution of the Federation of BiH is in conformity with the constitutional principles in adherence with which the provisions are to be passed. In other words, the Constitutional Court is to examine whether the mutual relationship between the Election Law and Constitution of the Federation of BiH is in violation with the principles under the Constitution of Bosnia and Herzegovina, i.e. its relevant provisions the applicant refers to.

41. Specifically, the appellant considers that Article I(2) of the Constitution of Bosnia and Herzegovina provides that there is a law that has to be in conformity with the Constitution of Bosnia and Herzegovina but it has also to be in conformity with the Entity constitutions given the complex organisation of Bosnia and Herzegovina. Taking into consideration that the composition of the House of Representatives reflects the will of citizens, it also follows by analogy that the composition of the House of Peoples reflects the will of the constituent peoples, as concluded by the applicant. The

principle of proportionality would have to be applied in a manner in which the basic meaning of proportionality would not be derogated from as it constitutes one of the key elements of stability and equality of citizens and constituent peoples in the multinational and complex State of Bosnia and Herzegovina.

*a) As to the provision of Subchapter B, part of Article 10.12, paragraph (2) in the relevant section worded as follows: “Each constituent people shall be allocated one seat in every canton”, and the provisions of Chapter 20, Article 20.16A, paragraph 2, items a-j of the Election Law*

42. Therefore, the task of the Constitutional Court is to establish whether the mutual relationship between the Constitution of the Federation of BiH and the Election Law is in violation with the principles under the Constitution of Bosnia and Herzegovina, i.e. whether the aforesaid is in contravention to Article I(2) of the Constitution of Bosnia and Herzegovina.

43. The Constitutional Court finds that Article 8, paragraphs 1 and 2 of the Constitution of the Federation of BiH provide that the delegates to the House of Peoples shall be selected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population and the number of the delegates to be elected in each Canton shall be proportional to the population of the Canton, with the proviso that the number, structure and manner of election of the delegates shall be regulated by law. It follows that the constitution maker has established the principle of proportionality with regards to the selection of the delegates to the House of Peoples, whereby it has been provided that the number of delegates of one constituent people to the House of Peoples from certain canton is proportional to the participation of that constituent people in the number of the population of the relevant canton. The selection of the legislative body within the context of selection of delegates to the House of Peoples would have to imply that the number of delegates of certain constituent people matches the percentage of participation of that constituent people in respective canton of the Federation. The consequence of the principle of proportionality is that some cantons give more and some other cantons give less of the delegates to the House of Peoples and that is all in accordance with the national structure of the respective canton. It follows that the established principle of proportionality is in the service of ensuring as complete representation of each of the constituent peoples in the Federation as it is possible. Furthermore, in Article 8 paragraph 3, the Constitution of the Federation provides for the obligation of filling the delegates’ seats in all cantons by at least one member from each constituent people under the condition that the members of that

constituent people are present in the respective legislative body, which means that the Constitution of the Federation does not “require” that the House of Peoples is filled by members from the canton which has no members of certain constituent peoples within the respective legislative body of that canton. The Constitutional Court notes that the aforementioned condition means that the matter involves a conditional option rather than an absolute determinant. Furthermore, in Article 8, paragraph 4 of the Constitution of the Federation of BiH, the constitution maker has exclusively determined that the representatives of the constituent peoples in the legislative bodies may be elected by the representatives of the respective constituent people.

44. Furthermore, the Constitutional Court finds that the Election Law, Article 1.1 regulates the election of the members and the delegates of the Parliamentary Assembly of BiH and of the members of the Presidency of BiH and shall stipulate the principles governing the elections at all levels of authority in BiH. Ergo, the Election Law regulates the election with regards to the State institutions, while as regards the institutions of the Entities, specifically the House of Peoples, there is the determination concerning the principles applicable to the elections. The Constitutional Court notes that regardless the fact that the Constitution of the Federation has established the principle when it comes to filling the seats in the House of Peoples and has entrusted the legislator with the exclusive power to determine by operation of law the number, structure, method of election of delegates and the election of delegates from amongst Others, the legislator has also provided, under the mentioned provision, that the Election Law determines the principles that apply to the elections at all levels of authority in Bosnia and Herzegovina. The Constitutional Court finds that, under the provisions of Article 10.12 of the Election Law, the legislator has determined that the number of delegates from each constituent people and group of Others is to be proportionate to the population of the canton as reflected in the last census. Furthermore, for each canton the legislator has provided a mathematic formula with regards to the allocation of seats in the selection of the number of delegates and that formula is based on the number of population of each constituent people in all cantons, but the legislator also has provided that *each constituent people shall be allocated one seat in every canton*. Furthermore, the provisions of Article 20.16 A of the Election Law, which are transitional provisions of temporary nature, stipulate precisely that until Annex 7 of the General Framework Agreement for Peace has been fully implemented, the allocation of seats by constituent people shall be done in accordance with that Article and until a new census is organized, the 1991 census shall serve as a basis for determination of the number of delegates from amongst each constituent people and Others. The exact number of delegates from each constituent people and from amongst Others that are selected from the cantonal assemblies is defined by the mentioned Article, with the proviso that it

will be determined that minimum one delegate will be selected from each constituent people. It follows that in Article 10.12, paragraph 2 of the Election Law the legislator has determined that *each constituent people shall be allocated one seat in every canton* and, in Article 20.16 A of the Election Law, the legislator “abandoned” the principle of proportionality. Namely, under the mentioned provisions the legislator has opened a possibility that from the cantons with a negligible (but not small) participation of the members of one of the constituent peoples in the total number of the members of that constituent people, a delegate is selected to the House of Peoples from amongst that people, or in other words that instead of the principle of proportionality another principle is applicable, according to which the ratio between the number of population and number of delegates from one constituent people is much bigger compared with the ratio of the number of population and the number of delegates from some other canton. So, according to these provisions, the respective caucuses of each of the constituent peoples will be filled with the mandatory number of ten delegates coming from each of the ten cantons out of the total number of 17 delegates, regardless of the number of members of the constituent people living in some of the cantons (in theory, it is possible that only one member of the respective constituent people lives in that canton). The aforementioned indicates that the matter involves an absolute determinant rather than a conditional option. The Constitutional Court observes that the aforementioned is entirely in contravention of the principles established in the Constitution of the Federation of BiH.

45. To the effect of achieving the above assigned task, the Constitutional Court has to answer whether the Constitution of Bosnia and Herzegovina has been violated as a result.

46. The Constitutional Court recalls the text of Article I (2) of the Constitution of Bosnia and Herzegovina, as follows: “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections“, from which there ensues the principle of the rule of law according to which all constitutions, laws and other regulations that are passed must be in conformity with the constitutional principles.

47. The Constitutional Court recalls that states enjoy a wide margin of appreciation in establishing and regulating the electoral system to be applied. There are different ways of organising and administering elections and this variety is conditioned *inter alia* by the political development of a country. Therefore, the legislation regulating elections must be viewed in light of the political development of the country concerned. In addition, the Constitutional Court recalls that according to the general principle of democracy, *the right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice*

*by those represented and whose interests are represented. In this regard, the connection between those who are represented and their political representatives at all administrative-political levels is actually the one that gives the legitimacy to community representatives. Therefore, only the legitimacy of representation creates a basis for actual participation and decision-making.*

48. The Constitutional Court recalls the text of sub-paragraph 9 of the preamble of the Constitution of Bosnia and Herzegovina, reading as follows: "... Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina". In addition, the Constitutional Court recalls the text of Article IV(1) of the Constitution of Bosnia and Herzegovina, reading as follows: "The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs). a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska. b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present." Furthermore, the Constitutional Court recalls a part of the text of Article V(4)(b) of the Constitution of Bosnia and Herzegovina, reading as follows: "...The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers)", and a part of the text of Article VII(2) of the Constitution of Bosnia and Herzegovina, reading as follows: "The first Governing Board of the Central Bank shall consist of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members appointed by the Presidency, two from the Federation (one Bosniac, one Croat, who shall share one vote) and one from the Republika Srpska ...."

49. The Constitutional Court recalls once again the general principle of democracy that government of a country originates from the people and belongs to the people. It follows from the Constitution of Bosnia and Herzegovina that the Constitution of Bosnia and Herzegovina has designated, as the people, the constituent peoples who together with Others and the citizens of Bosnia and Herzegovina form a community of citizens, which exercises the authority of government equally through its representatives, and the right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice of that community of citizens which is represented and whose interests are represented by that government. However, it follows from the mentioned sub-paragraph of the preamble to the Constitution of Bosnia and Herzegovina that the makers of the Constitution have designated the constituent peoples

(Bosniacs, Serbs and Croats) as specific collectivities and awarded them equal rights, *i.e.* “underlined” the *specific and equal status* of Bosniacs, Serbs and Croats as constituent peoples. In this regard, the Constitutional Court recalls its Decision No. U-5/98 (Decision on the constituent status of peoples), wherein the Constitutional Court pointed out the following: “Again this designation in the Preamble must thus be viewed as an overarching principle of the Constitution of BiH which the Entities, according to Article III (3) (b) of the Constitution of BiH, must fully comply with.” In addition, it follows from the aforementioned provisions that the makers of the Constitution provide for the proportional representation of Bosniacs, Serbs and Croats, as constituent peoples, in the Institutions of Bosnia and Herzegovina.

50. In the present case, the subject-matter of the request relates to the election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina. According to the Constitution of Bosnia and Herzegovina, it is about one of the bodies from which the delegates are selected to the House of Peoples of the State of BiH.. However, the Constitution of Bosnia and Herzegovina does not specify the House of Peoples’ function, *i.e.* it does not specify the institutions that exercise the authority of government in the Entities, meaning that the aforementioned is specified in the Constitutions of the Entities. Thus, the Constitution of the Federation of Bosnia and Herzegovina stipulates that the House of Representatives and the House of Peoples will exercise the legislative authority in the Federation of BiH. Members to the House of Representatives are elected democratically by eligible voters in a direct, Federation-wide election. Each voter is eligible to cast a single, secret ballot for any registered party. Therefore, the House of Representatives represents the interests of all citizens residing in the Federation of BiH, and the right to participate in democratic decision-making *is exercised through legitimate political representation, which has to be based on the democratic choice by all citizens residing in the Federation of BiH, as it represents their interests.* On the other hand, the Constitution of the Federation of Bosnia and Herzegovina prescribes that the House of Peoples will be composed on a parity basis so that each constituent people will have the same number of delegates and it defines, as a fundamental issue of vital interest, the exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities. In addition to the aforementioned issues specified in the Constitution of the Federation of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina provides that other issues could be treated as of vital national interest if so claimed by 2/3<sup>rd</sup> of one of the caucuses of the constituent peoples in the House of Peoples. Therefore, it undisputedly follows from the aforementioned that the House of Peoples performs the key task of protecting the constituent status of peoples. Furthermore, according to the Constitution of the Federation of Bosnia and Herzegovina,

the Federation of BiH consists of federal units (Cantons). However, regardless of the aforementioned, the House of Peoples is not a House of federal units but a House of constituent peoples. Moreover, the Constitutional Court recalls that, as a result of the implementation of the Decision of the Constitutional Court No. *U 5/98*, amendments to the Constitution of the Federation of Bosnia and Herzegovina were passed (Article 8 of the Constitution of the Federation of Bosnia and Herzegovina) in order to harmonise the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina, according to which, as a result, the number of delegates was reduced and Serb delegates were also included to the House of Peoples, so that each constituent people has an equal number of delegates to the House of Peoples (seventeen delegates each). In addition, the Constitutional Court points out that the Constitution of the Federation of Bosnia and Herzegovina stipulates that amendments to the Constitution will be passed by the House of Peoples by simple majority, including the majority of Bosniac delegates, Croat delegates and Serb delegates (nine delegates each).

51. The above analysis shows that the right to participate in democratic decision-making, which is exercised through legitimate political representation, has to be based on the democratic election of the delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the constituent people represented and whose interests are represented. Bringing into connection the aforementioned role of the House of Peoples within the constitutional system of the Federation of Bosnia and Herzegovina with the principle of the constituent status of peoples in the Federation of Bosnia and Herzegovina, it undisputedly follows that the principle of the constituent status of peoples in the Federation of Bosnia and Herzegovina, in the context of the House of Peoples, may be realised only if a seat in the House of Peoples is filled based on the precise criteria that should ensure full representation of each of the three constituent peoples in the Federation of Bosnia and Herzegovina. Otherwise, an inadequate political representation of those represented and whose interests are represented amounts to a violation of the principle of the constituent status of peoples, i.e. leads to inequality between any of the constituent peoples, thereby violating specifically Article I(2) the Constitution of Bosnia and Herzegovina.

52. The Constitutional Court finds that the election of delegates to the House of Peoples is a combination of direct and indirect elections. In particular, the cantonal assemblies directly select the delegates to the House of Peoples from among the delegates selected by secret vote at the general direct elections held on the entire territory of the Federation when each voter is entitled to vote for any candidate from the electoral list of a political subject, regardless of his/her ethnicity and regardless of what constituent people he/she is affiliated with. The Constitutional Court notes that



Article 10.12 (2) of the Election Law in the relevant part stipulates that “each constituent people shall be allocated one seat in every canton” and Article 20.16 A of the Election Law (selection of one delegate from each constituent peoples for each canton) makes it possible for a member of a constituent people to be selected to the House of Peoples even in ultimate but possible case that such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was selected to the legislative body of that canton. Thus, that delegate was elected by the members of another constituent people at the direct elections and the members of another constituent people elected him/her to that legislative body as well. The Constitutional Court notes that in its earlier case-law it has already expressed its opinion that the inappropriate implementation of certain legislative arrangements is not a constitutional issue if such arrangements are in themselves in accordance with the Constitution. In such situations, there are other appropriate mechanisms of protection in the case of abuse in the implementation of legislative provisions. However, the present case does not relate to such a situation but the situation where the mentioned provisions, when implemented, are in themselves contrary to the Constitution of Bosnia and Herzegovina. In particular, if one takes into account the fact that these provisions make it possible for a member of a constituent people to be selected to the House of Peoples even in an ultimate but possible case where such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was elected to the legislative body of that canton at the direct elections, and that members of that constituent people do not select him/her subsequently to the House of Peoples, then it is more than obvious that the mentioned provisions make it possible for the representatives of one constituent people to afford legitimacy to the representatives of another constituent people in the cantonal legislative body. In other words, one such a delegate has the same “capacity” in the House of Peoples as any other delegate selected by the members, i.e. representatives of that constituent people alone. Thus, it is obvious that the mentioned provisions imply that the right to democratic decision-making exclusively through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina from amongst the particular constituent people that is represented and whose interest are represented by those delegates. Furthermore, the mentioned provisions violate the Constitution of Bosnia and Herzegovina, in a situation where in the direct elections the members of another constituent people may afford legitimacy to them in the predominant part, even in the case that the cantonal legislative body has more delegates from among a respective constituent people. Accordingly, the Constitutional Court finds that not only that the provisions of Article 10.12 (2), in the part reading that *each constituent people shall be allocated one seat in every canton*, and the provision of Article 20.16 A of the Election Law are not based on the precisely clear criteria but they also imply that right to democratic decision-



making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina from amongst the constituent people that is represented and whose interest are represented by those delegates. The Constitutional Court finds the above situation is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, and thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina.

53. The Constitutional Court concludes that the provision of Subsection B, Article 10.12(2) in the relevant part reading that *each constituent people shall be allocated one seat in every canton* and the provision of Section 20, Article 20.16 (2) (a) through (j) of the Election Law are not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina.

**(b) As to the provisions of Subsection B Article 10.10, the remainder of Article 10.12, 10.15 and 10.16 of the Election Law**

54. As to the provisions of Article 10.10 of the Election Law, the Constitutional Court holds the total number of delegates to the House of Peoples from among a certain constituent people may raise the issue as to whether each constituent peoples is represented with more or less credibility in that body following the elections. However, in the present case, such an arrangement is not contrary to the Constitution as the relevant provisions of the Constitution of the Federation and the Election Law determine the same number of delegates from all the three constituent peoples in the House of Peoples, so that it is obvious that it enables equal representation of all constituent peoples in the House of Peoples. The Constitutional Court reiterates that, as a result of the implementation of the Decision of the Constitutional Court No. *U 5/98*, amendments to the Constitution of the Federation of Bosnia and Herzegovina were passed in order to harmonise the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina, according to which as a result, the number of delegates was reduced and Serb delegates were included to the House of Peoples, so that each constituent people has an equal number of delegates to the House of Peoples (seventeen delegates each). Whether a greater number of delegates would enable better, i.e. more credible representation of constituent peoples and Others is the issue falling within the scope of competence of certain legislative authorities and represents a “wide margin of appreciation”, and, thus, is not the issue of constitutionality so that it does not fall within the scope of jurisdiction of the Constitutional Court.

55. As to the provisions of the reminder of Article 10.12 of the Election Law, the Constitutional Court has noted above that the legislator has determined that the number of delegates from each constituent people and from Others is proportional to the number of inhabitants according to the last census. Furthermore, the legislator provided a mathematical formula for allocation of seats in the selection of the number of delegates in respect of each canton, which is based on the number of inhabitants of each constituent people in all cantons. The Constitutional Court reiterates that the proportional representation system is one of the standard models of the electoral system. Indeed, the majority of the states of the European Union accept the proportional representation system selecting different mathematical methods for calculating the results of the vote in determining the delegate mandates. In this connection, the Constitutional Court reiterates that the election rules are subject to normative regulation by the legislator which enjoys a wide margin of appreciation when regulating it. Furthermore, such an arrangement does not disclose a departure from the principles set forth in the Constitution of the Federation, i.e. it does not make it possible in itself that the right to democratic decision-making exercised through legitimate political representation will not to be based on the democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina from amongst the particular constituent people that is represented and whose interest are represented by those delegates.

56. As to the provision of Article 10.15 of the Election Law, the Constitutional Court finds that the aforementioned provisions provide for the procedure for submitting the election results to the Central Election Commission. It follows that the mentioned provisions do not regulate the matter contested by the request in question.

57. As to the provisions of Article 10.16 of the Election Law prescribing the procedure for filling the delegates seats in the House of Peoples in case that the necessary number of delegates is not selected, the Constitutional Court finds that the mentioned provisions pursue the conditional option of filling vacant delegates seat under the Constitution the Federation, putting aside the principles of selection. It follows that the mentioned provisions do not regulate the matter which is essentially contested by the request in question.

58. Taking into account all the aforesaid, the Constitutional Court holds that the provisions of Subsection B Article 10.10, the remaining part of 10.12, provisions of Article 10.15 and provisions of Article 10.16 of the Election Law are not contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

### **Other allegations**

59. Given the conclusions with regards to Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that there is no need to specifically examine also the applicant's allegations on the violation of Article II(1), II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 25 of the International Covenant on Civil and Political Rights ("International Covenant") with regards to Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention, and Article 1 of the International Convention on Elimination of All Forms of Racial Discrimination.

## **VI. Conclusion**

60. The Constitutional Court finds that part of Subchapter B, Article 10.12 (2) reading: *each of the constituent peoples shall be allocated one seat in every canton* and the provisions of Chapter 20 – Transitional and final provisions of Article 20.16A paragraph 2 items a-j of the Election Law of Bosnia and Herzegovina are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina as the mentioned provisions manifestly imply that the right to participate in democratic decision-making exercised through legitimate political representation, will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the particular constituent people that is represented and whose interests are represented by those delegates, which is in contravention to the principle of constituent status of peoples, i.e. the principle of equality of any one of the constituent peoples.

61. The Constitutional Court holds that the remaining part of the provisions of the Subchapter B, Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina are not in contravention to Article I(2) of the Constitution of Bosnia and Herzegovina.

62. Pursuant to Article 59(1) and (2) and (3) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

63. Under Article 43(1) of the Rules of the Constitutional Court, Judge Seada Palavric gave a statement of dissent with the decision reached by the majority.

64. Under Article 43(1) of the Rules of the Constitutional Court, an annex to this Decision makes a Separate Dissenting Opinion of the President Mirsad Ceman that has partially contradicted the decision.

65. According to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

President  
Of the Constitutional Court of Bosnia and Herzegovina

Mirsad Ceman

## Dissenting Opinion

### Expressing a partial disagreement by the Court President Mirsad Ceman in Case No. U-23/14

Pursuant to Article 43 of the Rules of the Constitutional Court of Bosnia and Herzegovina – the consolidated version (“Official Gazette of Bosnia and Herzegovina”, No. 94/14), and to a certain extent contrary to the Decision in Case No. U-23/14 of 1 December 2016, with due respect to the majority opinion of my colleagues, I disagree with the opinion and the decision of the majority, which is why, by voting against, with regard to one part, I could not support the Decision.

My reasons are as follows:

*I share the opinion and the decision of the majority* insofar as they provide that “the provisions of Subchapter B of Article 10.10 and Article 10.12 *in the remaining part*, and Article 10.15 and Article 10.16 of the Election Law, are in conformity with (are not contrary to) Article I(2) of the Constitution of Bosnia and Herzegovina” – as stated in paragraph 4 and paragraph 5 of the enacting or operative part of this Decision and as explained correspondingly in the paragraphs 54-58.

**However, I cannot agree with the view that** the provisions of Subchapter B of Article 10.12 paragraph 2, in the relevant part reading: “*Each of the constituent peoples shall be allocated one seat in every canton*”, and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16.A, paragraph 2, items a-j. of the Election Law, *are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina as the mentioned provisions manifestly imply that the right to participate in democratic decision-making exercised through legitimate political representation, will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the particular constituent people that is represented and whose interests are represented by those delegates, which is in contravention to the principle of constituent status of peoples, i.e. the principle of equality of any one of the constituent peoples.*

Namely, **the key thesis of the majority opinion**, which is the starting point for and an actual foundation underlying the decision reached by the majority in the section upholding the request, **is that** “... despite the fact that under the Federation Constitution the Federation consists of federal units (cantons), *the House of Peoples, which is derived from the Cantonal Assemblies, is not a House of federal units, but exclusively (as highlighted by M. C.) a House of constituent peoples ...*” (see paragraph 50 of the Reasoning). In addition, although they make references to the principle of “*constituent status of peoples*” (same as the applicant himself), the opinion and the decision of the majority apparently continue to be based on *a reductionist understanding and an extensive “territorialisation” of the “constituent people” category*. Consequently, this has ultimately resulted in reducing the legal standing?! for political representation of a constituent people (any constituent

people) to a mainly one or possibly multiple ideologically closely affiliated political options within a certain people, *but above all* to a selection of representatives-delegates from the areas/Cantons with any, but notably a dominant majority of the population from among one of the constituent peoples. Of course, without prejudice to anyone's right to feel this way and/or to define themselves in this way (although it does not itself arise from the concept of the applicable electoral system, democratic principles, and pluralism in general in Bosnia and Herzegovina), I still think that those starting points cannot be regarded as the basis and method or a model appropriate for resolving this constitutional legal matter.

**Namely, due to the specific role of the House of Peoples** (which includes, *inter alia*, but is not only limited to the protection of vital national interests of all three constituent peoples in the Federation of Bosnia and Herzegovina, *but this is not, I emphasize, the only role - see its responsibilities defined by the Constitution*), the obvious intent of the constitution-maker and the legislator was that the House of Peoples specifically should include the representatives of the "constituent peoples" from the entire territory of the Federation of Bosnia and Herzegovina, since only in this way it is possible for *the "constituent people" category, with a simultaneous application of the principle of "positive discrimination" ("minimum one such representative") where this is necessary*, to be materialized and projected on all members of that people (any "constituent" people), and not only in the territories where that people constitutes a majority. It appears in fact that *the majority opinion* is reducing the function of the House of Peoples exclusively to a mere protection of vital national interests of the constituent peoples in the Federation of Bosnia and Herzegovina, while at the same time neglecting the fact that the House of Peoples is *de jure* a **"parallel legislator"** (i.e. one of the chambers of the legislature – the Parliament of the Federation of Bosnia and Herzegovina), given that no legislation/regulation that is adopted in the House of Representatives can take effect until such time as it is also adopted, in the identical text, in the House of Peoples and *vice versa*. Thus, the legislative capacity of the House of Peoples is the same as the one of the House of Representatives, whose representatives are elected from the territory of the entire Federation. Therefore, the caucuses of the constituent peoples should (also) in the House of Peoples be filled from the entire territory of the Federation of Bosnia and Herzegovina, because it includes the same legislative competences as those of the House of Representatives. But it is precisely this way of filling of seats that was prescribed by the provisions of the Election Law which have now been declared unconstitutional according to the majority opinion in Decision No. U-23/14?!

Nevertheless, let us start in the proper order of sequence:

**As to the totality of this truly complex matter**, one should first analyse the relationship between the provisions of Article 10.12 of the BiH Election Law (including also other disputed provisions) and the relevant provisions of Article 6 and Article 8 of the Federation Constitution in terms of whether the matter involves substantively identical provisions or the said provisions of the Election Law regulate the election of delegates to the House of Peoples of the Federation BiH differently compared with the above provision of the Federation Constitution. In this section I will not deal with the possible mutual “confrontation” between certain paragraphs of Article 8 of the Federation Constitution (this will be discussed at a later point), but I will instead analyse the section referring to the procedure of electing delegates to the House of Peoples, bearing in mind the relevant provisions of Article 8 of the Federation Constitution and the provisions of Article 10.12. of the Election Law.

**Ergo, both Article 6 and Article 8 of the Federation Constitution** define the composition and election of delegates to the House of Peoples, while the Election Law - Subchapter B - the House of Peoples defines the composition and the method of election of delegates to the House of Peoples as regulated by the provisions of Article 10.10 through Article 10.16. In this connection, *an answer is required to the question whether the relevant provisions of the Election Law concerning the composition and the method of election of the delegates to the House of Peoples are identical to the provisions of the Federation Constitution regulating the same matter. Article 6 of the Federation Constitution and Article 10.10 of the Election Law prescribe in an identical manner the number and the composition of the House of Peoples delegates.* The House of Peoples consists of 58 delegates, which is 17 delegates from each of the constituent peoples and seven delegates from among the group of Others. Furthermore, Article 8(2) of the Federation Constitution and Article 10.12 of the Election Law both stipulate the procedure of electing the delegates to the House of Peoples. Specifically, Article 8(2) of the Federation Constitution stipulates that: “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.” *Thus, the Federation Constitution makes specific references to the Election law, which establishes the principles for the election of delegates to the House of Peoples and Article 10.12 prescribes the number, structure and method of election of the delegates. Paragraph 1 of Article 10.12* of the Election Law provides that: “*The number of delegates from each constituent people and group of Others to be elected to the House of Peoples from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census.*” and that “*The Election Commission will determine, after each new census, the number of delegates*

*elected from each constituent people and from the group of Others that will be elected from each canton legislature”* Ergo, the Federation Constitution and the BiH Election Law regulate in the same way the issue of the number of delegates to be elected to the House of Peoples, by providing that this number shall be proportionate to the population of the canton, while on the other hand *the Election Law regulates this area “more broadly”, and provides that the number is proportionate to the number of population of the cantons as reflected in the last census, and that the Central Election Commission will determine, **after each new census**, the number of delegates who shall be elected from among each of the constituent peoples and from the group of Others.* Furthermore, the provision of paragraph (1) of Article 8 of the Federation Constitution, which read as follows: *“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”* is implemented in the Election Law in two ways. The first way (which is still applicable) is implemented under the provisions of Article 20.16.A of the Election Law by prescribing in the relevant paragraphs of that Article the number of delegates from each constituent people, taking into account the results of the 1991 Census. The above provision, in my opinion, is not inconsistent with the provisions of paragraph (1) of Article 8 of the Federation Constitution, since that provision fails to provide any more detailed designations with regard to whether under the term “the ethnic structure of the population” the legislator was referring to the ethnic structure of the population in 1991 or the current, i.e. the most recent relevant ethnic structure. Since the matter of this kind is not determined by this provisions of the Federation Constitution (Article 8, paragraph 1), the Election Law governs this matter under its Article 20.16.A, all the more so since it follows from paragraph (1) of this Article that this provision has a limited effective period, i.e. *“Until Annex 7 of the GFAP has been fully implemented”*. The same provision of the Federation Constitution (paragraph 1 of Article 8) will be, in my opinion, be applicable in a manner prescribed by the second sentence of paragraph 1 of Article 10.12. of the Election Law when (and if) the need for application of Article 20.16.A of the Election Law ceases to exist. Namely, this provision (a section of paragraph 1 of Article 10.12 of the Election Law) prescribes that: *“The Central Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.”* This, in my opinion, goes along the lines of the principle enshrined in paragraph 1 of Article 8 of the Federation Constitution, because the number of delegates to the house of peoples determined in proportion to the ethnic structure of the population, taking into account the results of the most recent valid population census that is to be implemented.



**Furthermore, paragraph 3 of Article 8 of the Federation Constitution** provides that: “*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*”, while the Election Law provides that: “*...each of the constituent peoples shall be allocated one seat in every canton*” (Article 10.12. paragraph 2). A comparison between the said provisions of the Election Law and the Federation Constitution shows clearly that they are essentially the same, although they are only formulated in a different way in the Election Law and in the Federation Constitution. Under paragraph 2 of its Article 10.12, the Election Law stipulates the method for calculating the distribution of seats and within this calculation: “Each constituent people shall be allocated one seat in every canton”, while the Federation Constitution prescribes a “conditional option” requiring that: “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*”. Ergo, if in the legislative body of a particular Canton there are no delegates from one constituent people (any people), that particular constituent people from that particular Canton will then not have its representative in the House of Peoples. However, Article 10.16. of the Election Law regulates a situation when the required number of delegates from among each constituent people or the group of Others has not been elected to the House of Peoples in a given cantonal legislative body since the remaining number of delegates is to be elected from another Canton until such time as the required number of delegates is elected from among each constituent people. *Thus, ultimately the representation of constituent people still be provided in the Constitution and the Law prescribed quota.*

**Furthermore, an answer is required to the question** whether the provisions of Article 20.16.A Chapter 20 - *Transitional and Final Provisions* are identical to the provisions of the Federation Constitution governing the election of delegates to the House of Peoples. As indicated above, the provisions of Article 8(2) of the Federation Constitution have “left it in the hands” of the legislator to regulate by way of the Election Law all other matters relating to the election of delegates; therefore, Article 20.16.A of the Election Law, which is a transitional provision of temporary character, provides that until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people shall be done in accordance with this Article, and that until a new census is organized, the 1991 census figures shall serve as a basis for calculation of the number of delegates that the Cantonal Assemblies shall elect from among each constituent people and the group of Others.. The exact number of delegates from each constituent peoples and the group of “Others” to be elected from the Cantonal Assemblies is determined by the said Article which, in my opinion, follows the principles enshrined in Article 8(2) of the Federation Constitution, considering that the

said Article (as highlighted at an earlier point) does not provide any detailed concretization with regard to these particular matters.

**It would also be necessary to examine** the nature of relationship between the principle of proportionality (“...delegates shall be elected in proportion to the ethnic structure of the population ...”) during the selection of delegates to the House of Peoples referred to in paragraph (1) of Article 8 of the Federation Constitution and the provisions of paragraph (3) of the same Article of the Federation Constitution, which provides that “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.” *In fact, there is the question of whether the principle of proportionality referred to in paragraph 1 of Article 8 of the Federation Constitution has essentially been called into question by the provision of paragraph 3 of the same Article of the Federation Constitution, which provides that in the House of peoples there shall be at least one member from among each of the constituent peoples who have at least one such delegate in its legislative body.*

**In this connection, first of all, it would be necessary** to point out that the provisions of Article 6 and Article 8 of the Federation Constitution were adopted on 19 April 2002 when the High Representative for Bosnia and Herzegovina (OHR) passed the Decision on Amendments to the Federation Constitution (Amendment XXXIII and Amendment XXXIV), and so with a view to implementing the four Partial Decisions of the Constitutional Court No. U-5/98 (**the so-called Decisions on the Constituent Status of Peoples**). Explaining the reasons for adoption of the aforesaid decision, the High Representative has noted that: “The Constitutional Court ruled in its third partial Decision in case no. 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 said Annex 4, which rules are designed to re-establish a multi-ethnic society based on equal rights of Bosniacs, Croats and Serbs as constituent peoples and of all citizens; and bearing in mind that the Entities of Bosnia and Herzegovina have hitherto (i.e. until then – note by M.C.) failed to take any steps to implement the said four partial Decisions of the Constitutional Court of Bosnia and Herzegovina in case no. 5/98.”

**“The OHR’s” amendments to the Federation Constitution** have made the most radical changes specifically with regard to the composition and the method of electing delegates to the House of Peoples. Earlier, this house comprised “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.A.6. of the earlier version of the Federation Constitution). Thus, before the constitutional changes were made, this chamber was made of 79 delegates. However, Amendment XXXIII has amended Article IV.A.2.6. of the Federation Constitution and established a new structure of the House of Peoples according to which this chamber is made of 17 representatives from among each of the three constituent peoples and 7 delegates from among the group of Others. As a result, the total number of delegates elected to the House of Peoples has then been reduced from 79 to 58 delegates.

**Furthermore, the Constitutional Amendment No. XXXIV** has amended the earlier Article IV(A)(2)8 of the Constitution of the Federation which regulates the procedure of electing delegates to the House of Peoples. Thus, although the said article of the Constitution has also been amended, *paragraph (1) has remained the same* (“The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton”), *while the former paragraph 3* [which read as follows: “...in the House of Peoples there shall be at least one Bosniac, one Croat and one Other delegate from each Canton which 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 IV(A)6”] *has now been amended to read as follows*: “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”. This kind of change, therefore, follows and reflects the principles set out in the Decision No. U-5/98, in which the Constitutional Court of Bosnia and Herzegovina has concluded that “...in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society.” (*op. cit. U-5/98 III*, paragraph 57).

**I also believe** that the principle of proportionality in the election of delegates to the House of Peoples has not been called into question when we analyse the provisions of paragraphs (1) and (3) of Article 8 of the Federation Constitution. Specifically, paragraph (1) of the said Article provides that “the number of delegates elected from each Canton (constituency) shall be proportionate to the number of different peoples”. However, due to uneven dispersion of the population (not an equal number of members of certain constituent people(s) live(s) in all parts of the Federation of Bosnia and Herzegovina), it is specifically paragraph (3) of Article 8 of the Federation Constitution that supplements paragraph (1) by giving an “equal opportunity” to the constituent people(s) that constitute(s) a minority in a certain Canton to have their own representative in the House of Peoples and thus protect the interests of the particular people(s) as a whole. With the legitimate right to the

protection of cultural and other distinctive properties of ethnic groups (in this case of the members of constituent peoples), which includes a ban against both their assimilation and their segregation, this is actually the best way to affirm the principle of constitutionality.

**The answer to the question whether the “proportionality”** referred to in paragraph (1) of Article 8 of the Federation Constitution has essentially been called in question by the provision “at least one”, as set out in paragraph (3) of the same Article of the Federation, will depend on how we look at the implementation of the “decision on the constituent status of peoples”, or in other words, it will depend on the answer to the question whether it was really necessary to amend the former paragraph (3) of Article 8 of the Federation Constitution in such a way as it reads now. *I wish to remind that the section of the provision which reads “at least one” had existed even before the Decision on the Constituent Status of Peoples was implemented, but it had been restricted to Bosniacs and Croats, which indicates that the original intent of the Entity’s Constitution was to enable that a required minimum number of particular constituent peoples had to be represented in the House of Peoples. If one bears in mind everything that is provided in the “Decision on the Constituent Status of Peoples”, it is indeed quite clear that it was impossible to keep the former provision of paragraph (3) of Article 8 of the Federation Constitution, which provided that “at least one” had actually included Bosniacs and Croats only. However, the issue of whether the provision “at least one” should even exist in paragraph (3) of Article 8 of the Federation Constitution in the first place, bearing in mind the principle of proportionality as set out in paragraph (1) of the same Article of the Federation Constitution, ought to be addressed within the domain of an assessment made by the competent constitution-maker and therefore the Constitutional Court should not deal with this matter any further. Namely, this provision (such as it stands now) contains an objective and logical justification which has been previously discussed (“uneven dispersion of the population”, “not an equal number of members of certain constituent people(s) live(s) in all parts of the Federation of Bosnia and Herzegovina”, “by giving an equal opportunity to the constituent people(s) that constitute(s) a minority in a certain Canton to have their own representative(s) in the House of Peoples and thus protect the interests of the particular people(s)”) and, as such, in my opinion, this provision does not call in question the fundamental human rights.*

**It is particularly worth observing and making a clear point of view in this regard** that the applicant has stressed that before “the amendments to the Federation Constitution were imposed” each of the caucuses of the constituent peoples in the House of Peoples had counted 30 delegates, as a result of which each delegate represented a 3.33% share in the respective caucus, which, taken cumulatively, represented a more realistic possibility of electing the delegates in proportion to the

composition of the peoples in each particular canton. In that regard, I wish to reiterate that under the earlier provisions of the Federation Constitution the House of Peoples was composed of 30 Bosniac and 30 Croat delegates, including an appropriate percentage of delegates from among the group of “Others”. However, in order to ensure equality and the constituent status of peoples for all three peoples in the domain of exercising legislative authority, the constitutional amendments have amended the relevant provision of the Federation Constitution and, as a result, all three constituent peoples (Bosniacs, Croats and Serbs) have each received 17 seats in the House of Peoples. Of course, the total number of delegates in the House of Peoples elected from among a particular constituent people can raise the question of whether each constituent people is represented with more or less “*credibility*” in that particular body after the elections are held. However, in the specific case, in my opinion, this kind of solution is not unconstitutional, because the relevant provisions of both the Federation Constitution and the Election Law have established the same number of representatives of all three constituent peoples in the House of Peoples, which enables equal representation of all constituent peoples in the House of Peoples Federation as a whole. Whether a possibly larger number of delegates would enable a better and more reliable representation of the constituent peoples and “Others” is also an issue that falls within the responsibility of the appropriate legislative bodies and it constitutes a “wide margin of appreciation” rather than a question of constitutionality.

**There is a particularly important and sensitive issue** about whether the current method of electing delegates to the House of Peoples of the Federation is in line with the will of the voters?, or in other words *whether it is has thus opened up a possibility for potential abuse*, i.e. by creating a situation where representatives of one constituent people are elected to the Cantonal Legislature by representatives of another constituent people in direct elections, since their number is disproportionate in the respective Canton(s), which in turn has an impact on the further procedure and the results of election of delegates to the House of Peoples but also on the compliance with the principle of constitutionality? I do not think that such a kind of impact is actually real; since, if we were nevertheless to accept this logic, it would then lead to a drastic derogation from the concept and model of *the electoral system in BiH, which still incorporates the required “compromises” including also some kind of a minimally acceptable but necessary balance between the civil and ethnic models*. For the sake of reminder, the election of delegates to the House of Peoples is essentially a combination of direct and indirect elections. The House of Peoples delegates are elected indirectly by the Cantonal Assemblies from among their members who are elected in the direct-general elections by secret ballot (across the Cantons throughout the entire territory of the

Federation of BiH) when each voter, regardless of his/her ethnicity and regardless of his/her affiliation with any particular constituent people, is entitled vote for any candidate from the electoral list of a political party or an independent candidate.

**The applicant has also offered a mathematical analysis and tabular presentation,** as he claimed, of a “deviation in the selected composition of the constituent peoples in the House of Peoples and the proportional share of the population in the Cantons from which they were elected.” To that effect, he takes as an example the case of Posavina Canton, where the election of one of Bosniac candidate is planned, which represents 5.88% share in the Bosniac Caucus, while the actual representation of the Bosniac people in that Canton is only 0.55%, which represents, as he claims, a “10 times deviation”. He takes as an example also the case of Bosnian Podrinje Canton, where the actual percentage of the Croat people according to the 1991 Census is 0.01%, while the intended selection of one delegate amounts to 5.88% in the Croat Caucus in the House of Peoples, which represents a 588 times deviation compared with the actual situation. The situation with respect to the election of Serb delegates is, as the applicant claims, most drastic in the West Herzegovina Canton, where, according to the 1991 Census, among the residents of that Canton there were 0.05% Serbs, and the Election Law provided for the election of one delegate representing 5.88% of the Serb Caucus, which constitutes a deviation of nearly 118 times. *It is quite easily observable that the claims made by the applicant boil down to a mere mathematical presentation of proportionality by indicating the examples of “deviation in regard of both the elected composition of the caucuses of constituent peoples and the proportional share of the population in the Cantons from which they were elected.”* The way in which the applicant has expressed in the request his own understanding of the principle of proportionality in the election of delegates to the House of Peoples does not mean that the legislative solution is unconstitutional and that this method of election of delegates fails to reflect the free will of the voters. In addition, it is not observable from the above considerations whether the representatives of one constituent people have been elected by another constituent people, because the voter lists were not formed by the criterion of ethnicity of the person who votes. Therefore, it is entirely impossible, at least formally, to come up with an exact claim that the delegates of one constituent people were elected in the direct elections by members of another constituent people.

**However, with respect to all these concerns, in my opinion,** the crucial point is nevertheless that the election of delegates to the House of Peoples is in fact a combination of direct and indirect elections. The number of members of specific constituent peoples residing in all parts of the Federation is not identical. Therefore, during the formation of the Cantonal Assemblies and then,

indirectly, during the election of delegates *to the House of Peoples*, it is precisely the said legal solution that gives a genuine opportunity to the constituent people(s) that constitute(s) a minority in a certain Canton to have their own representatives in the House of Peoples and thus protect the interests of the particular people(s) – specifically within the Canton(s), but also in the Federation as a whole. **Indeed**, in this way these constituent peoples who have a majority in a given canton do not have exclusive rights to be the only peoples delegating representatives to the House of Peoples from among the respective constituent people. This is precisely how one of the basic principles of electoral law is guaranteed – i.e. the equal weight of voting power, because the value of an individual vote must not be infringed by the factors of segregation, class or electoral geometry. That is why it is also at this point very useful to bring to mind a paragraph of the Decision No. U 5/98 reading in its relevant part as follows: “...in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I.2 of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble. *Territorial delimitation thus must not serve as an instrument of ethnic segregation, but – quite to the contrary – must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.*”

**Also, with regard to the views of the European Court** “that the state enjoys a wide margin of appreciation with regard to organization of its electoral system”, I wish to point out that *the model of the electoral system, which in this particular case is applicable to the principles and procedures of the election of delegates to the House of Peoples (the allocation of seats across the Cantons, the election of delegates to the House of Peoples within the Cantonal Assemblies and the rule of filling the seats) are just the result of a wide appreciation by the legislator and of the State's discretionary right in selecting and organizing the electoral system.* Whether an eventually different legal solution and a differently designed electoral system would allow the more reliable representation of the constituent peoples in the House of Peoples constitutes an issue that falls within the responsibility of the appropriate legislative bodies rather than an issue of constitutionality. Therefore, *by taking as a starting point, in my opinion, that the House of Peoples of the Federation is not only a **House of the constituent peoples**, but also a House of federal units/Cantons, and that the principle of “constituent status of peoples” should be understood in a much broader sense compared with what*

has been concluded by the majority of judges, with all due respect to the majority opinion of my lady and gentleman colleagues, I could not support the decision insofar as one part of it is concerned.

**Finally, I have to observe and add** that the majority opinion has failed to provide any or it has provided an almost negligible explanation with regard to two very important things that are relevant for making such an important decision.

*Firstly*, an explanation is clearly and exclusively focused on the provisions of Subchapter B of Article 10.12. paragraph (2), in the relevant section reading: “*each of the constituent peoples shall be allocated one seat in every canton*”, even though implemented here as a key provision is the Transitional and Final Provisions of Article 20.16.A paragraph (2) of the Election Law that are otherwise declared unconstitutional in the relevant section. However, one cannot conclude simply by default that these provisions are unconstitutional for the same reasons for which, in the opinion of the majority, the provisions of Subchapter B of Article 10.12 are unconstitutional in the relevant section, because what we have here are two absolutely differing provisions. The majority opinion is ignoring, nonetheless, the fact that the elections for the House of Peoples are actually conducted in line with the Transitional and Final Provisions of Article 20.16.A paragraph (2), under items. a-j. (until such time as Annex VII has been fully implemented). *Then, in particular, there remains unanswered the question* of why repeal (by the Order for Harmonization) the provisions that are anyway provisions of transitional character in the first place?

In addition to this, I also wish to bring to attention the absence of any reasoning with regard to the opinion of the Venice Commission, which has stated very explicitly (following a prior request of the Constitutional Court asking for the Commission’s opinion about this particular case) that the rules of the so-called “European electoral heritage” do not apply to the elections in the upper houses of the legislature because the election to these houses is not conducted through direct elections and their function is to meet specific requirements of those Member States, the number of which in the Council of Europe is at least 17, whose legislative bodies and systems are inherently bicameral. This is what, perhaps, calls in question also the admissibility of the applicant’s request for the review of constitutionality (even though it was not raised as a contentious issue) because, in the opinion of the Venice Commission, such as I see it, the election of delegates to the House of Peoples cannot be subject to application of such standards as are those of the “European election heritage” that are clearly referred to in the applicant’s request. The majority is simply ignoring this opinion because it does not fit neatly into the section upholding the request in the Constitutional Court’s decision.

END