

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 (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Dr Božo Ljubić, the Chairman 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 Božo Ljubić**, the Chairman 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 the 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 the 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 Božo Ljubić**, the Chairman 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 (*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) 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 (*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 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 Brčko District of Bosnia and Herzegovina*

## REASONING

### I. Introduction

1. On 20 September 2014, Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of request (“the

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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 its 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 alleges 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 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, Sub-chapter B, and Articles from 10.10 through 10.18 regulate the matter of 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 quotes 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 notes that this constitutional norm foresees that there is a law regulating certain field and it also provides that the said law is consistent 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 Bosnia and Herzegovina 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 and not the *imposition of the previously regulated will.* The system proclaimed by the Constitution of Bosnia and Herzegovina and Entity Constitutions implies 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, 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.

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10. The applicant also quotes 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 is clearly determined stipulating: *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 so that currently that number is 17, amounted to discrimination with regards to the method of election of delegates to the House of Peoples, and deviation from the principle of proportionality. The applicant wonders whether the provision of the Election Law stipulating 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 very small, is used for the purpose of electoral manipulation and violation of the provision implying the proportional representation.

11. The applicant further alleges that Article 8 paragraph 1 of Section IV(A)(2) of the Constitution of Federation of BiH is in direct contravention with paragraph 3 of the mentioned Article and that the application thereof 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 Bosnia and Herzegovina – Article I(2), Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina. The principle of proportionality, as alleged by the applicant, should 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 alleges that the application of the principle of proportionality should serve its purpose through technical elements of application and it must not be a declarative provision of the Constitution and Election Law. The applicant notes that the mentioned Article 8 paragraph 2 item 2 of the Constitution of Federation BiH stipulates that *the number, structure and manner of election of delegates shall be regulated by law* and concludes that the provisions of the Election Law 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 the Federation”), the Constitution of Bosnia and Herzegovina, Protocol No. 1, Protocol No.12 to the European Convention and International Covenant. The applicant finds confirmation of his allegation in the document that was adopted by the Central Election Commission titled Instruction for Application of Chapter 10, Subchapter B – House of Peoples of the Parliament of the Federation

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of BiH – of the Election Law of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 48/02). Article 2 of the Instruction stipulates that allocation of posts 17 B/17 H/17 S/7O, which has been determined in the amended Constitution of the Federation, is not proportional to the ethnic structure of the population in the Federation of BiH as per 1991 census (32B/13H/11S/10), and nor is it proportional to the ethnic structure of the population in the cantons from which the delegates to the caucuses are selected. The applicant alleges that a distinction should be made between the parity of the total representation of the constituent peoples in the House of Peoples, 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 further notes that Article 10.12 of the Election Law, which he entirely quoted, additionally gives arguments on violation of the constitutional provision on proportionality. In particular, 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. The applicant considers that the application of this approach is not adequate when it comes to the issue of the proportional national representation of the constituent peoples in the cantons as regards the filling the caucuses in the House of Peoples as the House of Peoples has a specific constitutional task in realization of the equality of the constituent peoples and the method of calculation applied for the representative bodies could not be used in this case.

13. In further analysis of Article 10.12 of the Election Law, the applicant points to “another absurd situation as regards the violation of the constitutional provision on the proportional representation which is in conformity with the national structure of the population per cantons”, and concludes that the mentioned article provides, *inter alia*: “Each of the constituent peoples shall be allocated one seat in every canton”. However, as the applicant alleges, the provisions of the Constitution of BiH and Constitution of the Federation “do not determine that each of the constituent peoples shall be allocated one seat in every canton”, but Article 8(3) of the Constitution of Federation stipulates 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”, which means that it involves a conditional option and not an absolute provision as stated in Article 20.16A of the Election Law 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 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 quotes Article 8 of the Constitution of the Federation, which regulates the matter of election of delegates to the House of Peoples and points out that it follows from the mentioned provisions of the Constitution of the Federation that “fulfilling the requirements under paragraph 3 directly violates paragraph 1 – i.e. the requirement of proportional representation of delegates in the respective cantons, which, according to these constitutional provisions, is taken over and regulated by the Election Law. Consequently, it has become the arms with which the Constitution of BiH and international conventions are being violated.

15. Mathematical analysis, as alleged by the applicant, confirms the previous allegations. He submitted a tabular presentation of 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 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>	<b>3</b>	<b>1</b>	<b>5</b>	<b>2</b>	<b>11</b>
<b>2. Tuzla</b>	<b>3</b>	<b>1</b>	<b>2</b>	<b>2</b>	<b>8</b>
<b>3. Zenica-Doboj</b>	<b>3</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>8</b>
<b>4. Una-Sana</b>	<b>2</b>	<b>1</b>	<b>2</b>		<b>5</b>
<b>5. Bosnian Podrinje</b>	<b>1</b>	<b>1</b>	<b>1</b>		<b>3</b>
<b>6. Central Bosnia</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>6</b>
<b>7. Herzegovina-Neretva</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>6</b>
<b>8. Western- Herzegovina</b>	<b>1</b>	<b>2</b>	<b>1</b>		<b>4</b>
<b>9. Posavina</b>	<b>1</b>	<b>1</b>	<b>1</b>		<b>3</b>
<b>10. Canton 10</b>	<b>1</b>	<b>2</b>	<b>1</b>		<b>4</b>
	<b>17</b>	<b>17</b>	<b>17</b>	<b>7</b>	<b>58</b>

16. The applicant also offered a diagram presentation of the national composition of the Federation in the cantons in numbers and percentages in accordance with the data of the Federation Institute for Statistics from 1991 and concludes that the consistent application of the provisions of the Constitution of the Federation should ensure appropriate proportional representation of the



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delegates in the caucuses of the House of Peoples, which corresponds to the ethnic structure of the cantons the delegates come from. However, as alleged by the applicant, this allocation, in reality, is far away from any sort of proportionality when it comes to all three constituent peoples by the application of the mentioned elements set forth in the Election Law.

17. The applicant submitted a tabular presentation of the manner in which the number of the delegates in the cantons is determined in accordance with Article 20.16.A 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 clearly states 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*. Furthermore, he alleges that the rule related the allocation of one mandate to each constituent people in each canton could not be applied until the results of elections for the cantonal assemblies became known as only then the mentioned constitutional provision could be applied: *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 the applicant's opinion, the prejudging in Article 20.16.A of the Election Law and assigning one delegate from each constituent people to each canton prior to knowing the outcome of the elections to the cantonal assemblies and "the counting of other delegates by cantons on the basis of that wrong premise" prove a violation of the Constitution of Bosnia and Herzegovina.

18. Furthermore, the applicant submitted 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 he points 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 the Posavina Canton where, for example, one delegate from the Bosniac people should be elected from the Posavina Canton, which 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 alleges 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, that 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 at the detriment of that canton. The applicant also alleges that when it comes to the delegates from amongst the Croat people, there is even a more drastic deviation when compared to the real situation. Thus, in the Bosnian Podrinje Canton, the real percentage of the 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 alleged 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 alleges 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. As to the election of the delegates from amongst the Croat people, the applicant alleges 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>Bosniacs</b>	<b>Croats</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 the Federation by the High Representative in BiH in 2002. Until then, the caucuses of the constituent peoples in the House of Peoples had 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 in proportion 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 seeks that the Constitutional Court of BiH declare the disputable provisions unconstitutional and undertake all necessary legal steps in order to harmonise the mentioned norms with the Constitution of Bosnia and Herzegovina and international conventions.

**b) Reply to the request**

22. In its reply to the request, the Commission on Constitutional and Legal Affairs alleged that it had considered the request during its session held on 4 March 2015 when it had concluded that the Parliamentary Assembly of Bosnia and Herzegovina had passed the Election Law, that on 22 September 2014 the Constitutional Court of Bosnia and Herzegovina had received the applicant's request and that, following the discussion, the Commission had unanimously decided to inform the Constitutional Court of Bosnia and Herzegovina about the mentioned facts and that that court would decide whether the mentioned law was 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 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 second chambers, 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 (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 particularities 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 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 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 (“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 - CEC, the representative of the Office of the High Representative for

BiH – OHR, Prof Dr Goran Marković, Law Faculty of the University in Istočno Sarajevo, Prof Dr Zlatan Begić, Law Faculty of the University of 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 Begić - 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 public hearing. 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 was that the power came from the people and belonged 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 power 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 caucuses of the House of Peoples matching the national structure of the canton the delegates come from. However, by application of the challenged provisions of that law this distribution, in reality, is far away from any kind of proportionality with regards to all three constituent peoples. Furthermore, the applicant alleges 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, there is a two-fold constituent status a) three constituent peoples and b) all citizens as members of people – “demos”. In the opinion of the applicant, two-fold constituent status 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 the principle of democratic representation but it absolutely denies

that principle, i.e. the principle of legitimate democratic representation as the power does not originate from people, but from the legal norm.

32. The representatives of the 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 supported 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 representing himself, so many say in theory that it is the basic category of 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 Croat delegates in the House of Peoples more than a half are elected from the cantons in which 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 the corresponding principles of equality, constitutionality and multinational character of the state derived, are in contravention with those norms which, as an Annex, form integral part of the Constitution of Bosnia and Herzegovina.

## **V. Relevant 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 (the unofficial revised version published on [www.izbori.ba](http://www.izbori.ba) was used for the purpose of this decision) 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**

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*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:*

- a) 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.*
- b) 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.*
- c) 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.*
- d) 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.*
- e) from the Legislature of Canton number 5, Bosnian-podrnije Canton – Gorazde, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.*
- f) 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.*
- g) 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.*
- h) 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.*
- i) 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.*
- j) 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.*

## **VI. Admissibility and Merits**

38. First of all, the Constitutional Court notes that due to the complexity of the request and issues raised 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 request was submitted by an authorized person (the Chairman 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 and Constitution of Bosnia and Herzegovina. Bearing in mind the aforementioned, 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, 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. So, taking into consideration the mentioned principle of the rule of law, all constitutions, laws and other regulations must be harmonised with constitutional principles. The Constitutional Court is competent and obliged to act as a guardian of the Constitution of Bosnia and Herzegovina (Article VI(3)) on every occasion and that is defined under one of its basic principles - the rule of law referred to in the mentioned constitutional provision. Therefore, the Constitutional Court considers that it has jurisdiction to examine whether the relationship between the Election Law and Constitution of the Federation 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 mutual relationship between the Election Law and Constitution of the Federation is in violation of 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 to be also in conformity with the Entity constitutions given the complex organisation of Bosnia and Herzegovina. Taking into consideration that the composition of the House of Peoples reflects the will of citizens, it also follows that the House of Peoples reflects the will of the constituent peoples, as concluded by the applicant. The principle of proportionality must be applied in a manner in which the basic meaning of proportionality is not derogated from, since 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 Subchapter B, Article 10.12, paragraph 2, in the part reading as follows: Each constituent people shall be allocated one seat in every canton, and 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 and Election Law is in violation of the principles under the Constitution of Bosnia and Herzegovina, i.e. whether the aforesaid is in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina.

43. The Constitutional Court finds that the provisions of Article 8, paragraphs 1 and 2 of the Constitution of the Federation 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 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. It follows that the framer of the constitution 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 must 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 certain canton give more and other canton give less of the delegates to the House of Peoples and that is in accordance with the national structure of the respective canton. It

follows that the established principle of proportionality is in the service of 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 means that it is about a conditional option and not about absolute determinant. Furthermore, in Article 8, paragraph 4 of the Constitution of the Federation the author of the constitution 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. So, the Election Law regulates the election with regards to the State institutions, while as regards the institutions of the Entities, i.e. the House of Peoples, the principles that apply to the elections are determined. The Constitutional Court notes that regardless of the fact that the Constitution of the Federation established the principle when it comes to filling the seats in the House of Peoples and entrusted the legislator with exclusive power to legally determine the number, structure, method of election of delegates and election of delegates from amongst Others, the legislator also provided, under the mentioned provision, that the Election Law determines the principles that apply to the elections at all levels of power in Bosnia and Herzegovina. The Constitutional Court finds that the legislator, under the provisions of Article 10.12 of the Election Law, determined that the number of delegates from each constituent people and group of Others is proportionate to the population of the canton as reflected in the last census. Furthermore, for each canton the legislator provided mathematic formula with regards to 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 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, precisely stipulate 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

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census shall serve as a basis for determination of number of delegates from amongst each constituent people and Others. 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, in which case it will be determined that minimum one delegate will be selected from each constituent people. It follows that the legislator, in Article 10.12, paragraph 2 of the Election Law reading *each constituent people shall be allocated one seat in every canton* and, in Article 20.16 A of the Election Law, essentially “gave up” the principle of proportionality. Namely, under the mentioned provisions the legislator provided that as regards the cantons with 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. That means that the mentioned provisions provide that instead of the principle of proportionality another principle is applied, according to which the ratio between the number of population and number of delegates from one constituent people is much bigger when 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 the constituent people will be filled with the required 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 is about an absolute determinant and not about conditional option. The Constitutional Court observes that the aforementioned is entirely in contravention of the principles established in the Constitution of the Federation.

45. As to the aforementioned task, the Constitutional Court has to answer whether it amounts to a violation of the Constitution of Bosnia and Herzegovina.

46. The Constitutional Court recalls the text of Article I(2) of the Constitution of Bosnia and Herzegovina, which reads 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 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

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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: “(...) 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, which reads 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 the 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 the 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 state power 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 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 power equally through its representatives, and the right to participate in democratic decision-making is exercised through legitimate political representation,



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which has to be based on the democratic choice by those represented and whose interests are represented. However, it follows from the mentioned sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina that the framers of the Constitution 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 Bosnia and Herzegovina which the Entities, according to Article II (3)(b) of the Constitution of BiH, must fully comply with.” In addition, it follows from the aforementioned provisions that the framers 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. According to the Constitution of Bosnia and Herzegovina, delegates to the House of Peoples of the State of BiH are selected from amongst delegates to the House of Peoples. 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 power in the Entities, meaning that the aforementioned is specified in the Constitutions of the Entities. Thus, the Constitution of the Federation stipulates that the House of Representatives and the House of Peoples will exercise the legislative powers in the Federation. Members to the House of Representatives are elected democratically by eligible voters in a direct, Federation-wide elections. 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 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, other issues could be treated as 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, the Federation consists of federal units (cantons). However, regardless of the aforementioned, the House of Peoples is not the house of federal units but the 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 were passed (Article 8 of the Constitution of the Federation of Bosnia and Herzegovina) to harmonise the Constitution of the Federation with the Constitution of Bosnia and Herzegovina. As a result, the number of delegates was reduced and Serb delegates were included in 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 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 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 with the principle of the constituent status of peoples in the Federation, it undisputedly follows that the principle of the constituent status of peoples in the Federation, in the context of House of Peoples, may be realised only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation. 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 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 the combination of direct and indirect elections. In particular, the cantonal assemblies directly select delegates to the House of Peoples from among 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. The Constitutional Court notes that Article 10.12 (2) of the Election Law 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 the 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 according to its hitherto case-law the implementation of certain law arrangements is not a constitutional issue if such arrangements are in themselves in accordance with the Constitution. In such situations, there are other appropriate protection in case of erroneous implementation of law 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 the 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 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. Thus, it is obvious that the mentioned provisions imply that the 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 from amongst the constituent people that is represented and whose interest are represented by those delegates. Furthermore, the mentioned provisions violate the Constitution of Bosnia and Herzegovina even in the case that the cantonal legislative body has more delegates from a constituent people, since the members of another constituent people may afford legitimacy to them at the direct elections. 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 from amongst the constituent people that is represented and whose interest are represented by those delegates. The Constitutional Court finds that the mentioned is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples,

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 part reading *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 that the total number of delegates to the House of Peoples from a constituent people may raise the issue 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 to harmonise the Constitution of the Federation with the Constitution of Bosnia and Herzegovina. 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 who enjoy 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 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 accepts the proportional representation system selecting different mathematical methods for calculating the results of the vote in determining the 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 for the right to democratic decision-making not to be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the 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 CEC. 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 seats under the Constitution the Federation. 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 examine 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, Article 25 of the 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.

## VII. Conclusion

60. The Constitutional Court finds that the 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 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 constituent people that is represented and whose interests are represented by those delegates. Therefore, the aforesaid is in contravention of the principle of constituent status of peoples, i.e. the principle of equality of all 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 are consistent with 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 Palavrić gave a statement of dissent.

64. Under Article 43(1) of the Rules of the Constitutional Court, annex to this Decision makes a Separate Partially Dissenting Opinion of the President Mirsad Ceman.

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

### **Separate Partially Dissenting Opinion of President Mirsad Ćeman**

With all due respect for the majority opinion of my colleagues, I do not agree with it, which was the reason why I voted against as I could not support a part of the decision. Therefore, pursuant to Article 43 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of BiH*, 94/14), I hereby state the following partially dissenting opinion on Decision U 23/14 of 1 December 2016 for the following reasons:

**I agree with the majority opinion** that “the provisions of Subchapter B Article 10.10, the remaining part of 10.12, the 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” – as stated in paragraphs 4 and 5 of the enacting clause of the Decision and in respect of which the appropriate reasons were given in paragraphs 54-58.

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**However, I could not agree** with the view that the provision of Subchapter B, Article 10.12(2), in the part reading *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 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 constituent people that is represented and whose interests are represented by those delegates, which is in contravention of the principle of constituent status of peoples, i.e. the principle of equality of all constituent peoples.*

In particular, **the key notion** of the majority opinion, which is the starting point of the granting part of the majority decision and the basis thereof, is that “(...) according to the Constitution of the Federation, the Federation consists of federal units (cantons). However, regardless of the aforementioned, the House of Peoples, *deriving from the cantonal assemblies, is not the house of federal units but exclusively (remark by M. Č.) the house of constituent peoples (...)*” (paragraph 50 of the reasoning). Furthermore, although the majority opinion (just like the applicant) invokes the principle of “constituent status of peoples”, the view and decision of the majority are obviously based on the *reductionist understanding and extensive “territorialization” of the category of “constituent people”*. Consequently, this finally results in the reduction of the legitimacy of the political representation of the constituent people (any people) to mostly one or possibly several political options within a people that are close to each other in terms of ideology, but above all to the election of representatives/delegates from the areas/cantons with the constituent people constituting majority or dominant majority. Without questioning anyone’s right to feel so and/or to define himself/herself so (although it does not follow from the concept of the current electoral system, democratic principles or pluralism in Bosnia and Herzegovina), I believe nevertheless that the mentioned starting points cannot be the basis, the manner or the model for resolving this constitutional issue.

**In particular, given the special role of the House of Peoples** (which is, *inter alia*, the protection of vital national interests of all the three constitutional peoples of the Federation of BiH, *although it is not, I should stress, its only role – see its responsibilities defined in the Constitution*), the aim of the framer of the Constitution and the legislator was obviously to have the representatives of the constituent peoples from the whole territory of the Federation of BiH in the House of Peoples, *since only then the category of “constituent peoples”, along with the*



*application of the principle of “positive discrimination” (“at least one such a representative”), if necessary*, could be exercised and could be reflected on all members of that people (any constituent people), and not only on the areas where that people constitutes majority. In fact, it appears that the majority opinion reduces the function of the House of Peoples exclusively to the protection of vital national interest of the constituent peoples in the Federation of BiH, whereas it disregards the fact that the House of Peoples is *de iure* a “**parallel legislator**” (i.e. one of the houses of the legislature - the Parliament of the Federation of BiH), as none of the laws/regulations adopted by the House of Representatives can become effective until adopted, with the same wording, by the House of Peoples and *vice versa*. Thus, the legislative capacity of the House of Peoples is the same as that of the House of Representatives whose members are elected from entire territory of the Federation. Thus, the caucuses of the constituent peoples (i) in the House of Peoples should be filled from the whole territory of the Federation of BiH, since it has the same legislative responsibility as that of the House of Representatives. Such a manner of filling the seats was prescribed by the provisions of the Election Law, which were declared unconstitutional by the majority opinion in Decision No. U 23/14?!

Nevertheless, let us put first things first:

**As to this very complex issue seen as a whole**, the relation between the provisions of Article 10.12 of the Election Law (including other challenged provisions) and the relevant provision of Article 6 and Article 8 of the Constitution of the Federation should be analysed first in terms of the question whether they are essentially identical provisions or the relevant provisions of the Election Law differently regulate the election of delegates to the House of Peoples of the Parliament of the Federation of BiH in comparison to the mentioned provision of the Constitution of the Federation. I will not deal in this part with possible mutual “confrontation” between certain paragraphs of Article 8 of the Constitution of the Federation (which will be dealt with below), but I shall rather analyse the part related to the procedure for the election of delegates to the House of Peoples by taking into account the relevant provisions of Article 8 of the Constitution of the Federation and provision of Article 10.12 of the Election Law.

**Thus, Articles 6 and 8 of the Constitution of the Federation** determine the composition and election of delegates to the House of Peoples, whereas Articles 10.10 through 10.16 of the Election Law – Subchapter B - the House of Peoples - regulate the composition and manner of selection of delegates to the House of Peoples. In this connection, it is necessary to answer the question whether the relevant provisions of the Election Law that relate to the composition and the

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manner of selection of delegates to the House of Peoples are identical to the provisions of the Constitution of the Federation that regulate the same issue. **Article 6 of the Constitution of the Federation and Article 10.10 of the Election Law prescribe in an identical manner the number and composition of delegates of the House of Peoples.** The House of Peoples shall be composed of 58 delegates, out of which 17 delegates from among each constituent people and 7 delegates from among Others. Furthermore, Article 8(2) of the Constitution of the Federation and Article 10.12 of the Election Law stipulate the procedure for the election of delegates to the House of Peoples. In particular, Article 8(2) of the Constitution of the Federation 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 Constitution of the Federation refers exactly to the Election Law which determines the principles applicable to the election of delegates to the House of Peoples and Article 10.12 which prescribes the number, structure and manner of election of delegates.* **Article 10.12 paragraph 1 of the Election Law** stipulates 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 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.* Thus, the Constitution of the Federation and the Election Law regulate in an identical manner the number of delegates elected to the House of Peoples, and this in the manner that this number is proportionate to the number of inhabitants of cantons, where the *Election Law regulates this field more broadly and prescribes that this number 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.* Furthermore, the provision of Article 8(1) of the Constitution of the Federation, which stipulates 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,* is implemented in the Election Law in two manners. In the first manner, which is still applicable, it is implemented through the provisions of Article 20.16A of the Election Law as the relevant paragraphs of that Article stipulates the number of delegates from each constituent people as reflected in the 1991 census. In my opinion, the aforementioned is not contrary to the provision of Article 8(1) of the Constitution of the Federation, since that provision does not specify the issue whether “in proportion to the ethnic structure of the population” was meant by the legislator the ethnic structure existing in 1991 or the current ethnic structure, i.e. the

last relevant one. As that provision of the Constitution of the Federation (Article 8(1)) does not determine it, Article 20.16A of the Election Law regulates that issue, all the more so since paragraph 1 of that Article stipulates that that provision is of limited temporal validity, i.e. until Annex 7 of the GFAP has been fully implemented in Bosnia and Herzegovina. In my opinion, the same provision of the Constitution of the Federation (Article 8(1)) will apply in the manner prescribed by the second sentence of paragraph 1 of Article 10.12 of the Election Law when (even if) it is no longer necessary to apply the provisions of Article 20.16 of the Election Law. In particular, that provision (a part of paragraph 1 of Article 10.12 of the Election Law) stipulates 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*. In my opinion, this is in compliance with the principle set forth in Article 8(1) of the Constitution of the Federation, as the number of delegates to the House of Peoples shall be determined in proportion to the ethnic structure of the population as reflected in the last valid census to be conducted.

**Furthermore, Article 8(3) of the Constitution of the Federation** stipulates 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 stipulates that (...) *each constituent people shall be allocated one seat in every canton* (paragraph 2 of Article 10.12). If one compares the mentioned provisions of the Election Law and Constitution of the Federation, it follows that essentially they are the same ones, although formulated in a different manner. In particular, paragraph 2 of Article 10.12 of the Election Law prescribes the method for calculation of allocation of seats and, within the framework of such a calculation, it prescribes that *each constituent people shall be allocated one seat in every canton*, while the Constitution of the Federation prescribes “a conditional option”, namely 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*. Thus, if there are no delegates from a constituent people (any of the constituent peoples) in a legislature of a canton, that constituent people from the respective canton will not have a representative in the House of Peoples. However, Article 10.16 of the Election Law regulates the situation where 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, as the remaining number of delegates shall be elected from the other canton until the required number of delegates from among each constituent people is elected. *Thus, representation of a constituent people shall finally be ensured in a quota as prescribed by the Constitution and law.*

**Furthermore, the question to be answered** is whether the provision of Article 20.16.A of Chapter 20 – Transitional and Final Provisions - is identical with the provisions of the Constitution of the Federation that regulate the election of delegates to the House of Peoples. As previously noted, the Constitution of the Federation, in the provision of Article 8 paragraph 2, “left” to the legislator to regulate all other issues related to the election of delegates in the Election Law so that the provision of Article 20.16.A of the Election Law, which is a transitional provision and of temporary character, stipulates that until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people shall be done in accordance with that Article and that until a new census is organized, the 1991 census shall serve as a basis to calculate the number of delegates from each constituent people and Others that shall be elected by the Cantonal Assemblies. The exact number of delegates from each constituent people and Others elected by the cantonal assemblies is determined in the mentioned Article, which is, in my opinion, in compliance with the principle set forth in Article 8(2) of the Constitution of the Federation, as the mentioned Article (as noted above) does not specify these issues.

**It is also necessary to examine** the relation between the principle of proportionality (... *delegates shall be elected by the Cantonal Assemblies in proportion to the ethnic structure of the population*) in electing delegates to the House of Peoples under Article 8(1) of the Constitution of Federation and provisions of paragraph 3 of the same Article of the Constitution of the Federation, which stipulates 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, the question arises whether the principle of proportionality referred to in Article 8(1) of the Constitution of the Federation was brought into question by the provision of paragraph 3 of the same Article of the Constitution of the Federation that prescribes that *in the House of Peoples there shall be at least one member from each constituent people which has at least one such delegate in its legislative body*.

**In this connection, it is first necessary** to note that the provisions of Articles 6 and 8 of the Constitution of the Federation were passed on 19 April 2002 when the High Representative for BiH (OHR) took a Decision Amending the Constitution of the Federation (Amendment XXXIII and Amendment XXXIV) in order to enforce four partial decisions in Case No. U 5/98 (so-called Decisions on the Constituent Status of Peoples). In giving the reasons for taking the mentioned decision, the High Representative noted that “the Constitutional Court ruled in its third partial decision in Case No. U 5/98 of 30 June and 1 July 2000 (*Official Gazette of BiH*, 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 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 [until then - remark by M.Ć] failed to take any steps to implement the said four partial decisions of the Constitutional Court of Bosnia and Herzegovina in case no. U 5/98.”

“**The OHR’s Amendments to the Constitution of the Federation** resulted in most radical changes in the composition and manner of election of delegates to the House of Peoples. At an earlier point, that house was composed of “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 former Constitution of the Federation). There were 79 delegates in that house until the constitutional amendments. However, Article IV.A.2.6. of the Constitution of the Federation was amended by Amendment XXXIII and a new structure of the House of Peoples was established so that that House comprises 17 delegates from among each of the constituent peoples and 7 delegates from among the Others. The total number of delegates of the House of People was thus reduced from 79 to 58 delegates.

**Furthermore, former Article IV.A.2.8 of the Constitution of the Federation**, regulating the procedure for election of delegate to the House of Peoples, was modified in Amendment XXXIV to the Constitution of the Federation. According to that amended Article of the Constitution of the Federation, paragraph 1 thereof remained the same (*the number of Delegates to be allocated to each Canton shall be proportional to the population of the Canton*), whereas the former para 3 (which read *In the House of Peoples there shall be at least one Bosniac, one Croat, and one Other Delegate from each Canton that has at least one such member in its Legislature, and the total number of Bosniac, Croat, and Other Delegates shall be in accordance with Article IV.A.6*) was amended reading 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*. That modification thus follows and reflects the principles set forth in Decision No. U 5/98, wherein the Constitutional Court 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

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segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society” (*op.cit.* U 5/98 III, paragraph 57).

**I also hold** that the principle of proportionality was not brought into question in electing delegates to the House of Peoples if one analyzes the provisions of Article 8, paragraphs 1 and 3, of the Constitution of the Federation. In particular, according to paragraph 1 of the said Article, *the number of delegates to be elected in each canton (constituency) shall be proportional to the population*. However, due to unequal dispersion of population (the number of members of certain peoples living in different parts of the Federation is not the same) Article 8 paragraph 3 of the Constitution of the Federation supplements paragraph 1 and gives “equal opportunity” to the constituent peoples constituting minority peoples in certain cantons to have their representative to the House of Peoples and to protect their interests. Along with the legitimate right to protect cultural and other particularities of ethnic groups (in the instant case, the members of the constituent peoples), which implies the prohibition of their assimilation and segregation, this is in fact the best way of affirmation of the principle of the constituent status of peoples.

**The answer to the question whether the proportionality** referred to in Article 8(1) of the Constitution of the Federation was brought into question by the wording “at least one”, as provided for in paragraph 3 of the same Article of the Constitution of the Federation, depends on the position regarding the implementation of the “decision on the constituent status”, i.e. the answer to the question whether it was necessary to amend the former paragraph 3 of Article 8 of the Constitution of the Federation in the manner as it stands now. I remind that the part of the provision reading “at least one” existed even before the implementation of the Decision on the Constituent Status of Peoples, but it was limited to Bosniacs and Croats, which indicates that from the outset the aim of the Entity Constitution was to have a minimum number of certain constituent peoples represented in the House of Peoples. Taking into account all what the “Decision on the Constituent Status” speaks of, it was certainly not possible to keep the provision of the former paragraph 3 of Article 8 of the Constitution of the Federation, which meant only Bosniac and Croats by “at least one”. However, whether the part of the provision that reads “at least one” should exist at all in paragraph 3 of Article 8 of the Constitution of the Federation, given the principle of proportionality referred to in paragraph 1 of the same Article of the Constitution of the Federation, is a question at the discretion of the assessment of the competent author of the Constitution, so that the Constitutional Court of BiH should not deal further with this matter. *In particular, that provision (such as it stands) has its objective and logical justification which has been mentioned above (“unequal dispersion of*

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*population”, “the same number of members of certain constituent peoples does not live in all parts of the Federation of BiH”, “gives “equal opportunity” to the constituent peoples constituting minority peoples in certain cantons to have their representative to the House of Peoples and to protect their interests”) and as such, that provision, in my opinion, does not question the fundamental human rights.*

**It should be noted and accordingly determined** that the applicant stressed that the caucuses of constituent peoples at the House of Peoples comprised 30 delegates from each constituent peoples before “the imposition of the Amendments to the Constitution of the Federation” so that each delegate represented 3.33% share in the caucus, which was, in total, a more realistic possibility of election of delegates in proportion to the structure of population in individual cantons. In this connection, I reiterate that according to the former provision of the Constitution of the Federation, the House of Peoples comprised 30 Bosniac and 30 Croat Delegates as well as an appropriate percentage of Other Delegates. However, in order to ensure equality, i.e. the constituent status of all the three peoples in the field of exercise of legislative power, the relevant provision of the Constitution of the Federation was amended so that all the three peoples (Bosniacs, Croats and Serbs) obtained 17 seats each in the House of Peoples. Certainly, the total number of delegates in the House of Peoples from a constituent people may raise the issue whether a constituent people is represented more or less credibly in that body following the elections. However, in the instant case, such a solution, in my opinion, is not contrary to the Constitution as the relevant provisions of the Constitution of the Federation and the Election Law as well determine the same number of delegates to the House of Peoples in the Federation as a whole. Would a higher number of delegates render better, i.e. more credible representation of constituent peoples and Others is also a question falling within the scope of competence of appropriate legislative authorities and constitutes a “wide margin of appreciation”, and is not a question of constitutionality.

**A very important and sensitive question** is whether the hitherto manner of election of delegates to the House of Peoples of the Federation respects the will of voters? In other words, does that manner enable abuse, i.e. allows for the representatives of one constituent people to elect the representatives of another constituent people to the cantonal legislature at the direct elections, since their number is disproportional in some cantons, which affects further procedure and results of the election of delegates to the House of Peoples and respect for the principle of constituent status. I believe that it does not affect. In particular, if such a logic was accepted, then this would be a drastic departure from the concept and *model of electoral system in BiH, which nevertheless incorporates*

*“compromises” and a kind of passable, although necessary, balance between civic and ethnic model.* The election of delegates to the House of Peoples, I should reiterate, is essentially a combination of direct and indirect elections. In particular, delegates of the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives selected at the direct-general elections by secret ballot (by canton on the whole territory of the Federation of BiH) in proportion to the ethnic structure when every voter, regardless of ethnic affiliation and regardless of the constituent people he/she is affiliated to, has the right to vote for any candidate on the electoral list of the political subject or independent candidate.

**Furthermore, the applicant submitted a mathematical analysis and diagram presentation** of, as he alleged, “deviation from the elected composition of the constituent peoples at the House of Peoples and proportional representation of population in the cantons from which they are elected”. As an example he alleged the Posavina Canton where 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 Bosnian Podrinje Canton where the real percentage of the 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 delegate, the most drastic situation, as alleged 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. It is not hard to notice that the applicant’s allegations are reduced to the mathematical presentation of proportionality, where he indicates the examples of “deviation from the elected composition of the caucuses of constituent peoples and proportional share of population in the cantons from which they are elected. The manner in which the applicant expressed his understanding of the principle of proportionality related to the election of delegates to the House of Peoples does not mean that the law arrangement is unconstitutional or that the mentioned manner of election of delegates to the House of Peoples does not reflect the will of voters. Moreover, it cannot be seen from the aforementioned whether the representatives of a constituent people are elected by another constituent people, since the electoral lists are nor made to show the ethnic affiliation of the one that votes. Thus, it is not possible, at least in formal terms, to claim exactly that the delegates of a constituent people were elected at the direct elections by the members of another constituent people.



**However, in my opinion, the crucial moment in this regard** is that the election of delegates to the House of Peoples is the combination of direct and indirect elections. Equal number of members of certain constituent peoples does not live in all parts of the Federation so that the mentioned law arrangement, in constituting the cantonal assemblies and then, directly, in electing the delegates to the House of Peoples, gives a real opportunity to the constituent peoples constituting minority peoples in certain cantons to have their representatives in the House of Peoples that will protect their interest - both within the canton and in the Federation of BiH as a whole. Indeed, in this manner, the constituent peoples which do not constitute majority in a canton do not have exclusive right to elect delegates to the House of Peoples from the respective constituent peoples. One of the basic principles of the election right is guaranteed in that manner – equality of the weight of a vote, since the value of individual vote must not be affected by the factors of segregation, class or electoral geometry. This is the reason why it is appropriate here to mention the view expressed in Decision *No. U 5/98*: “(...) 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 regards to the views of the European Court**, namely, that states enjoy a wide margin of appreciation in establishing and regulating the electoral system to be applied, I would like to note that the model of electoral system which applies in the instant case to the principles and procedure for electing delegates to the House of Peoples (allocation of seats by cantons, election of delegates to the House of Peoples that are elected by the Cantonal Assemblies and the rule of filling in) is the exact result of the free margin of appreciation of the legislator and discretionary right of the state to select and organize its electoral system. The question to know whether a different law arrangement and an electoral system differently designed would make it possible for the constituent peoples to be represented in the House of Peoples in a more credible manner is the question falling within the scope of the relevant legislative authorities and is not the issue of constitutionality. Therefore, in my opinion, taking as a starting point the fact that the House of Peoples of the

Parliament of the Federation is not exclusively **the house of the constituent peoples** but it is also the house of federal units/cantons and that the principle of “constituent status of peoples” should be understood more broadly than it was understood by the majority, with due respect for the majority opinion of my colleagues, I could not support a part of the decision.

**Finally, I must note and add** that the majority opinion did not give any reasons, or they are almost negligible, in respect of two very important issues for adopting such a significant decision.

*The first one*, the reasons are obviously and exclusively related to the provisions of Sub-chapter B, Article 10.12 (2), in the part reading *each of the constituent peoples shall be allocated one seat in every canton*, although Transitional and Final Provisions of Article 10.16.A para 2 of the Election Law, which were declared unconstitutional in the relevant part, apply as the key provisions. However, it does not follow in itself that these provisions are unconstitutional as well, and so for the same reasons as those for which, in the opinion of the majority, the provisions of Sub-chapter B, Article 10.12, in the relevant part, are unconstitutional, since these are absolutely different provisions. The majority opinion actually disregards the fact that the elections for the House for Peoples are carried out on the basis of Transitional and Final Provisions, Article 20.16.A, paragraph 2, item a) through j) (until Annex 7 of the GFAP has been fully implemented). Next, the question as to why the provisions which are at any rate of temporary character are quashed (order for harmonization) remains without answer.

Moreover, I also point to the lack of reasons related to the opinion of the Venice Commission which explicitly noted (upon prior request of the Constitutional Court for giving an opinion on this case) that the principles underlying Europe’s electoral heritage do not apply to the elections for the upper house as the elections for such houses are not conducted at the direct election as their function is to meet certain special requirements of Member States. The Council of Europe has 17 states of this kind, the legislative authority of which is composed of two houses. This, perhaps, questions the admissibility of the request for review of constitutionality (although this was not a disputable issue), since, in the Venice Commission’s opinion, as I conceive it, the standards of “Europe’s electoral heritage”, which the applicant refers to in his request, cannot apply to the election of delegates to the House of Peoples. The majority opinion simply ignores that opinion, since it does not fit into the granting part of the decision.