

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1), (2) and (3), and Article 62 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nußberger, and

Ms. Helen Keller

Having deliberated on an appeal of **the Association “Vaša prava Bosne i Hercegovine”** (“the Association Vaša prava BiH”), in the case no. **AP 166/18**, at its session held on 15 July 2021, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the Association “**Vaša prava Bosne i Hercegovine**” is hereby partially granted.

A violation of the right to non-discrimination referred to in Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established in conjunction with the right to education referred to in Article II (3) (I) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and a violation of Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 51 0 P 054522 16 Rev of 3 October 2017 is hereby repealed.

The case shall be referred back to the Supreme Court of the Federation of Bosnia and Herzegovina, which shall expeditiously make a new decision in accordance with Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in connection with the right to education referred to in Article II (3) (I) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 12 to the European Convention.

The Supreme Court of the Federation of Bosnia and Herzegovina is hereby ordered to notify the Constitutional Court of Bosnia and Herzegovina, within 60 days from the date of delivery of this Decision, about the measures taken with a view to enforcing this Decision, in accordance with Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of the Association “**Vaša prava Bosne i Hercegovine**” is hereby dismissed as unfounded in respect of the allegations about a violation of the right to a trial within a reasonable time referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the proceedings concluded by the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 51 0 P 054522 16 Rev of 3 October 2017.

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*.

## REASONS

### I. Introduction

1. On 5 January 2018, the Association “Vaša prava Bosne i Hercegovine” from Sarajevo (“the appellant”), represented by the Executive Director Emir Prcanović, filed the appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Judgment

of the Supreme Court of the Federation of Bosnia and Herzegovina (“the Supreme Court”) no. 51 0 P 054522 16 Rev of 3 October 2017, the Judgment of the Cantonal Court in Novi Travnik (“the Cantonal Court”) no. 51 0 P 054522 15 Gž 3 of 30 December 2015 and the Judgment of the Municipal Court in Travnik (“the Municipal Court”) no. 51 0 P 054522 13 P 3 of 4 March 2015.

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

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Supreme Court, the Cantonal Court, the Municipal Court, and the Canton of Central Bosnia/Central Bosnia Canton (“the CBC”), the Ministry of Education, Science, Culture and Sports, represented by the Cantonal Attorney’s Office (“the respondent”) and an intervener on the part of the respondent Parents’ Council of Vitez High School, Vitez Primary School, Bugojno First Primary School, Busovača High School, Uskoplje High School, Jajce Primary School “13<sup>th</sup> September”, Primary School “Gromiljak” from Gromiljak, Uskoplje High School and Vitez High School, represented by Jasna Dunder, a lawyer practicing in Novi Travnik, were requested on 3 and 4 September 2019 to submit their respective replies to the appeal.
3. The requested replies were submitted to the Constitutional Court in the period between 10 and 27 September 2019.

## **III. Facts of the Case**

4. The facts of the case, as they appear from the appellant’s assertions and the documents submitted to the Constitutional Court, may be summarized as follows.

### **The course of the proceedings**

5. In the present proceedings, the appellant filed a lawsuit with the Municipal Court on 19 October 2011.
6. On 3 October 2012, the Municipal Court rendered the Judgment no. 51 0 P 054522 11 P, dismissing the appellant’s claim.
7. Deciding on the appellant’s appeal against the judgment mentioned in the previous paragraph, on 29 March 2013 the Cantonal Court rendered the Ruling no. 51 0 P 054522 12 Gž, revoking the judgment concerned and referring the case back to the Municipal Court for retrial. The case-file was forwarded to the Municipal Court on 5 June 2013.
8. Thereafter, on 11 October 2013, the Municipal Court rendered the Ruling no. 51 0 P 054522 13 P2 rejecting the appellant’s lawsuit as untimely.

9. Deciding on the appellant's appeal, on 30 June 2014 the Cantonal Court rendered the Ruling no. 51 0 P 054522 13 Gž revoking the first-instance ruling referred to in the previous paragraph and referring the case back to the first instance court for retrial. The case-file was forwarded to the Municipal Court on 18 July 2014.

### **Challenged Judgments**

10. Deciding in the renewed proceedings, by rendering the Judgment no. 51 0 P 054522 13 P 3 of 4 March 2015 the Municipal Court dismissed the appellant's claim requesting that it be established that the respondent, by giving consent and organizing schools on ethnic principle and by issuing and implementing ethnic-based school curricula, allowed the segregation of students in primary and secondary schools in the territory of CBC on the basis of their ethnic affiliation, thereby discriminating against them. In addition, the appellant's claim requested that the respondent be ordered to take the necessary and legally prescribed steps and actions in line with the legitimate and specific goals of education in accordance with the regulations in Bosnia and Herzegovina, all with the aim of ending further segregation and discrimination of children in schools in the territory of the CBC based on their ethnic affiliation, by immediately establishing single integrated multicultural educational institutions-schools with a single curriculum for the established enrolment areas, including full respect for the children's right to education in their mother tongue, all within 30 days from the day of adjudication under the threat of forced execution.

11. According to the reasoning for the challenged judgment, as well as according to the previous course of the proceedings, it follows that the appellant pointed out in the lawsuit that the practice of separating children in schools based on ethnic principle has existed in the territory of the CBC for almost a decade already and that that concept has been named "two schools under one roof". In such schools, Bosniak and Croat children are physically separated, as are their teachers, and have no shared contacts whatsoever, and according to the report of the working group, the mentioned phenomenon exists in the CBC territory in 13 schools listed by name, which was corroborated by the 2008 Report of the Human Rights Commissioner. The lawsuit further alleges that in 2006 the Committee on the Elimination of Racial Discrimination, in considering the Report on Bosnia and Herzegovina, recommended to Bosnia and Herzegovina, as a Member State, to end segregation in public schools, *i.e.* to eliminate single-ethnicity schools structured as two schools under one roof, as soon as possible. The aforementioned is specified in the 7<sup>th</sup> Periodic Report on the Implementation of the International Convention on the Elimination of All Forms of Racial and Other Discrimination in Bosnia and Herzegovina of June 2008, prepared by the Ministry of Human Rights and Refugees, without denying the existence of segregation. The Report of the Committee for the Elimination of

Racial Discrimination of 27 August 2010 was also referred to in the course of the proceedings. Considering that the Cantonal Ministry of Education, in accordance with its constitutional and legal powers, is obliged to ensure that curricula do not discriminate against or segregate children on the basis of their ethnicity, the appellant deemed that the respondent, tolerating segregation contrary to the provisions of the law and of the Constitution, committed an act of discrimination in relation to the right to education. The appellant referred to the provisions of Article 2 of the Law on Prohibition of Discrimination, Article 3 of the Framework Law on Primary and Secondary Education in Bosnia and Herzegovina (“the Framework Law”), and the provisions of Article 4 of the Decision of the High Representative for BiH Enacting the Law on Amendments to the Law on Primary Education in Schools in the CBC and harmonizing it with the provisions of the Framework Law, according to which separate schools result in segregation in educational process.

12. In the course of the proceedings, the respondent pointed out that the allegations in the lawsuit were not true that it was about the practice of separation, and that there was no ethnic separation in the CBC, rather there were two curricula adopted and implemented in schools (primary and secondary), which complied with the provisions of the FBiH Constitution, the Framework Law and international conventions. The Framework Law leaves a possibility for the existence of several curricula, and no cases of discrimination were reported, nor was the right of parents to choose an educational institution violated. The respondent also referred to the provisions of Articles 28, 29 and 30 of the Convention on the Rights of the Child, which affirm the right of the child to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language, and pointed to Annex I of the Constitution of Bosnia and Herzegovina and the European Charter for Regional or Minority Languages.

13. The interveners on the part of the respondent pointed out that it was contradictory to demand the children’s right to be educated in their mother tongue, while at the same time to have a single curriculum. The existence of two curricula in the Bosnian and Croatian language cannot be considered discrimination, and no ethnic school has been established in the Canton, nor has the respondent agreed to organize the school on ethnic principles, *i.e.* such schools do not exist in the CBC. They also pointed out that the documents from 2008 and 2009, referred to in the lawsuit by the appellant, were outdated, and that it was obvious that certain structures in the Federation of BiH Ministry of Education did not agree with the constitutional system of education, which was transferred to the cantons.

14. Based on all the evidence presented, the Municipal Court found that in CBC there were two curricula in Bosnian and Croatian languages with a common core of 70%, as a mandatory part, and 30% that was subject to change, pursuant to the provisions of Articles 15, 15a and 16 of the Law on Primary Education, as well as the provisions of Article 26 of the Law on Secondary Education, (*Official Gazette of CBC*, 11/01 and 17/04) in conjunction with the provisions of Articles 6, 23, 26 and 43 of the Framework Law, including the respect for the right to attend classes in the mother tongue, and as provided by the provisions of Articles 28, 29 and Article 30 of the 1989 Convention on the Rights of the Child, also including the right of parents and children to choose a curriculum taught in a school attended by their child. The possibility and the existence of two curricula in the Bosnian and Croatian languages with a common core of 70% is also in line with the Convention against Discrimination in Education, ratified by Bosnia and Herzegovina on 12 July 1993, which, in Article 2, sets out situations which should not be deemed to constitute discrimination, within the meaning of Article 1, namely the establishment or maintenance, for religious or linguistic reasons, of separate educational institutions or systems. In addition, it was established that the BiH Report for the second cycle of the periodic review, in accordance with paragraph 5 of the annex to Human Rights Committee Resolution 16/21, adopted at the session of the Council of Ministers of 30 July 2014, showed that there were improvements, and that there was 70% common core content in the curricula, thereby removing the elements of segregation.

15. The Municipal Court dismissed the appellant's claim that the respondent should immediately establish single integrated educational institutions - schools with a single curriculum for the established enrolment areas. In addition, the Municipal Court took the legal position that the claim had not been made within the meaning of Article 4a of the Law on Primary Education of the CBC, which stipulates that the school management and administration, on the day of entry into force of this Law, will be unified in all schools that use the same school building and in the branch schools in which the management and administration are not unified with the central school or if classes are taught according to several curricula, and the schools referred to in paragraph 1 will have one school principal and one deputy school principal (....). The Municipal Court pointed out that administrative unification did not apply to the curriculum (the classes were carried out according to the curriculum encompassing the common core), as stated in the seventh and eighth periodic reports on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD") in Bosnia and Herzegovina, (Sarajevo, June 2008), which the appellant proposed and presented as evidence. Moreover, the Municipal Court concluded that the cited provision of the Law did not determine the obligation of the competent authority, the CBC, the

Ministry of Education, Science, Culture and Sports, to establish immediately single integrated, multicultural institutions, but the provisions of the Law on Amendments to the Law on Primary Education of the CBC, enacted by the High Representative, relate to the unification of the school management and administration.

16. Also, the Municipal Court concluded that the appellant's reference to the Judgment of the Supreme Court no. 58 0 Ps 085653 13 Rev of 29 August 2014, which upheld the first instance judgment of the Municipal Court in Mostar establishing the existence of discrimination in schools in the territory of the Herzegovina-Neretva Canton ("HNC"), had no impact on the present case, since the schools in the CBC territory were not sued at all in the particular legal matter, including also the schools utilizing the same school building, the so-called "two schools under one roof."

17. The Judgment of the Cantonal Court no. 51 0 P 054522 15 Gž 3 of 30 December 2015 dismissed the appellant's appeal as unfounded and upheld the first instance judgment. The Cantonal Court accepted the factual finding and the legal conclusion of the first instance court that the evidence adduced by the appellant did not make it probable that the respondent's conduct violated the right to equal treatment of a large number of persons mainly belonging to the group whose rights are protected by the appellant and that, in the opinion of the Cantonal Court, the first instance court acted correctly when it dismissed, by its decision, the appellant's claim as unfounded. The Cantonal Court also pointed to the Decision of the Constitutional Court no. *U-26/13* of 26 March 2015, in which the Constitutional Court concluded that that the provisions of the challenged laws in the context of the request in question were not inconsistent with the provisions of Articles II (1), II (4) and III (3) (b) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") in conjunction with the provisions of Article 2 of Protocol No. 1 to the European Convention.

18. The appellant's petition for review was dismissed by the Judgment of the Supreme Court no. 51 0 P 054522 16 Rev of 3 October 2017. In the opinion of the Supreme Court, the Municipal Court and Cantonal Court correctly applied the substantive law, the provision of Article 2, paragraph 1 and of Article 15, paragraph 1 of the Law on Prohibition of Discrimination, where they dismissed the claim in its entirety, and provided the reasons for their judgments, which were accepted as correct by the Supreme Court.



19. The Supreme Court stated that the appellant's basic objection raised in the revision appeal with regard to the erroneous application of the substantive law was that the lower instance courts did not address the issue of segregation as a form of discrimination through physical separation of children of different ethnicities in the CBC educational system in the form of "two schools under one roof". In this connection, the Supreme Court assessed that the allegation made in the petition for review was unfounded where it was stated that the existence of segregation in the CBC education was a well-known fact, since the allegations of the interveners' representatives on the part of the respondent (parents' councils of primary and secondary schools in the territory of the Canton) showed that there was no segregation on ethnic grounds. In addition, it was also pointed out that the legal position taken in the case of the FBiH Supreme Court no. 58 0 Ps 085653 13 Rev was not applicable to the present case, since the schools, which had possibly physically separated children in the educational process, were not sued in the specific case, nor were the facts of physical separation of children on ethnic grounds in the CBC educational system proven. Therefore, it was concluded, contrary to the appellant's objection raised in the petition for review, that the lower instance courts' conclusion was correct that the appellant did not make probable the existence of discrimination in the form of segregation and that the legal position taken in the aforementioned judgment of the Supreme Court was not applicable to the present case.

## **IV. Appeal**

### **a) Allegations stated in the appeal**

20. The appellant holds that the challenged judgment of the Supreme Court is in violation of the right to a fair trial referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention, Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention – prohibition of discrimination in connection with the right to education referred to in Article 2 of Protocol No. 1 to the European Convention, and Article 1 of Protocol No. 12 to the European Convention - prohibition of discrimination.

21. Namely, the appellant deems that several segments of the right to a fair trial referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention have been violated by the challenged judgments of the ordinary courts, owing to a violation of the principle of legal certainty, an arbitrary application of the provisions of the

substantive and procedural law, a violation of the right to a reasoned court decision, as well as a violation of the right to a trial within a reasonable time.

22. In this connection, the appellant underlines that the challenged judgment of the Supreme Court dismissing the appellant's petition for review as unfounded is in violation of the principle of legal certainty given that the Supreme Court, in the case of the same type between the same litigants (only in another canton), with the same factual and legal basis and with the same claim, by its Judgment no. 58 0 Ps 085653 13 Rev of 29 August 2014, upheld the first instance Judgment of the Municipal Court in Mostar no. 58 0 Ps 085653 11 Ps of 27 April 2012, which established that the respondents, by organizing schools on ethnic principle, and by issuing and implementing the school curricula on ethnicity-based principle, segregated students in schools in the HNC territory on the basis of their ethnic affiliation, which resulted in discrimination. The second paragraph of the enacting clause of the judgment ordered the first respondent (HNC) to undertake necessary and legally prescribed steps and actions harmonized with the legitimate and specific goals of education in accordance with the regulations of Bosnia and Herzegovina in order to end further discrimination against children in schools in the HNC on the basis of their ethnic affiliation, by establishing, by 1 September 2012 at the latest, single integrated multicultural educational institutions - schools with a single curriculum for the established enrolment areas, including full respect for the children's right to education in their mother tongue. In addition, the second respondent and third respondent (schools that were also sued in that proceeding) were ordered to create, through integration, within the same deadline, the basis for the multiculturalism of the school and the education of children regardless of their ethnic affiliation, according to a single curriculum in the mother tongue. It was also pointed out that the Constitutional Court, by the Decision no. *AP-4348/14* of 15 June 2017, dismissed as unfounded the appeal of the HNC filed against the Judgment of the Supreme Court no. 58 0 Ps 085653 13 Rev of 29 August 2014. In view of the above, the appellant concludes that it is completely unacceptable that the two Review Panels in the Supreme Court take diametrically opposed legal positions and render substantially different decisions in the cases involving identical facts and legal issues relating to the segregation of children on ethnic grounds in the educational system in the HNC and CBC, as segregation manifests itself in absolutely the same forms and occurs continuously in the same way for many years in both cantons. In the present case, in the course of the proceedings it was undisputedly established, and these are the well-known facts, that children and teachers in the same school are physically separated on ethnic grounds, that children and teachers do not enter the school building using the same entrance, that teachers have different teachers' rooms and use different curricula, that children of different ethnic affiliation never go together on trips or excursions, and never take classes outside the classroom together, and such like,

that is to say that the educational process in the CBC is conducted on the segregation principle through the system of “two schools under one roof”.

23. In addition, the appellant states that the fact that in the present case the lawsuit did not include schools, but only the CBC - Ministry of Education, Science, Culture and Sports, does not change anything substantially, just the same as in the previously mentioned case where the Ministry of Education, Science, Culture and Sports of that Canton had been sued in the identical segregation case in the HNC. The reason being that both respondent Ministries of Education, Science, Culture and Sports in both Cantons have the same constitutional and legal position and competence. In the present case, the Supreme Court was absolutely inconsistent in taking legal positions regarding the segregation of children in education in the CBC which is based on ethnic and religious affiliation compared to its previous legal position taken in the identical case relating to the segregation of children in education on ethnic grounds in the HNC, which actually reflects the violation of the principle of legal certainty as an element of the right to a fair trial referred to in Article 6 of the European Convention. In that sense, the appellant referred to the legal position taken by the Constitutional Court in the Decision no. *AP 2338/15* of 17 February 2016.

24. In view of the above, the appellant holds that the challenged judgments and the reasons provided therein do not satisfy the standards as required by the right to a reasoned court decision, as an integral element of the right to a fair trial, for the challenged judgments are arbitrary, especially for the reason that the Supreme Court failed to state the reasons why it departed from the legal position taken in its earlier decision where in an identical case it modified the decisions of lower instance courts and clearly established discrimination - segregation of children in education on ethnic grounds by educational institutions in the HNC. Furthermore, the appellant holds that the challenged decisions are also in violation of the right to a fair trial in terms of the arbitrary application of procedural and substantive law, as the ordinary courts did not find discrimination against - segregation of children in education on ethnic grounds in the CBC despite clearly established facts of the case and the clear and explicit mandatory legal provisions referred to in Article 2 in conjunction with Article 4, paragraph 4 of the Law on Prohibition of Discrimination, which explicitly prescribe that segregation as a special form of discrimination shall be considered to be an offense by which a natural or legal person separates other persons on the basis of one of the grounds specified in Article 2 of this Law, in line with the definition of discrimination, as provided under Article 2 of this Law. In the challenged decisions, the ordinary courts took positions that were completely contrary to the concept and goal of the Law on Prohibition of Discrimination. The respondents in the proceedings before the ordinary courts failed to prove that discrimination did not

exist, nor did they prove the legitimate goal of separating children in education based on ethnic affiliation. The ordinary courts arbitrarily applied also the provisions of Article 15 of the Law on Prohibition of Discrimination, which explicitly stipulated that in cases when a person or group of persons provide facts in all proceedings specified under this Law, based on the evidence available to them, making it probable that discrimination has occurred, the burden of proof that discrimination has not occurred shall lie with the opponent party.

25. Finally, the appellant holds that the challenged judgments of the ordinary courts are in violation of the right to a fair trial which includes the right to a trial within a reasonable time, contained in Article II (3) (e) of the Constitution of BiH and Article 6 (1) of the European Convention. The appellant highlights that the proceedings before the ordinary courts lasted for an unreasonably long period of time, despite the explicit provision of Article 12 (2) of the Law on Prohibition of Discrimination, which stipulates that the court and other bodies conducting the proceedings are obliged to take urgent action in the proceedings, ensuring that all allegations of discrimination are examined as soon as possible.

26. In addition to the aforementioned violations of the right to a fair trial, the appellant points out that the ordinary courts acted in violation of the principle of non-discrimination referred to in Article II (4) of the Constitution of BiH and Article 14 and Article 1 of Protocol No. 12 to the European Convention, in respect of the segregation of children in education on ethnic grounds, as one of the most severe forms of discrimination.

#### **b) Reply to the appeal**

27. The Supreme Court, Cantonal Court and Municipal Court, as well as the respondent and the interveners on the part of the respondent, held that the appellant's rights referred to in the appeal were not violated in the present case.

28. The interveners' authorized representative particularly pointed out that the work in schools under two curricula, in two official languages of the constituent peoples, where the students *i.e.* their parents choose curriculum according to which children would be educated, could not be considered discrimination within the meaning of Article 12 of the Law on Prohibition of Discrimination. It is especially absurd to claim that in this way segregation on ethnic grounds is implemented, for it achieves a legitimate goal, and that is the right to education in the mother tongue, which, according to Article 5 of the mentioned Law, is an exception to the principle of equal treatment. It was also highlighted that the obligation to unify administratively the schools operating

in the same buildings has no effect on the assertions that schools are separated on ethnic principle, nor does it entitle the appellant to seek the unification of schools through the courts, since the appellant has no legal standing to do so, nor can administratively separated schools in certain cases result in any discrimination against students.

## **V. Relevant Law**

29. The **Law on Prohibition of Discrimination** (*Official Gazette of BiH*, 59/09 and 66/16), as relevant, reads:

The **Law on Prohibition of Discrimination** (*Official Gazette of Bosnia and Herzegovina*, 59/09), which was applicable at the time of the adoption of the challenged decisions, is applied in the present case, and it reads in its relevant part as follows:

### *Article 2 (1)*

#### *(Discrimination)*

*Discrimination, in terms of this Law, shall be every different treatment including every exclusion, limitation or preference based on real or assumed features towards any person or group of persons on grounds of their race, skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life.*

### *Article 4 (4)*

#### *(Other Forms of Discrimination)*

*Segregation shall be an act by which (natural or legal) person separates other persons on basis of one of the grounds referred to in Article 2 of this Law, in compliance with the definition of discrimination referred to in Article 2 of this Law.*

### *Article 11 (1) and (2)*

#### *(Protection in Existing Proceedings)*

*Every person or group of persons who consider to be discriminated shall be able to seek protection of his/ her rights through existing judicial and administrative proceedings. In cases when a violation of a right to the equal treatment comes out of an administrative decision, appeal in administration proceeding and eventual initiation of an administrative dispute based on protection from discrimination, requesting annulment of such administrative decision, shall not prevent a person referred to in paragraph 1 of this Article to initiate a judicial proceeding for protection from discrimination.*

*Article 12 (1), subparagraphs a) and b)*

*(Special Lawsuits for Protection from Discrimination)*

*A person or group of persons exposed to any form of discrimination in accordance with provisions of this Law shall be authorized to submit a lawsuit and claim:*

- a) To determine that a respondent violated a plaintiff's right to equal treatment i.e. that the action s/he undertaken or failed to undertake can directly lead to violation of a right to equal treatment (lawsuit for determining discrimination);*
- b) To prohibit undertaking actions that violate or can violate plaintiff's right to equal treatment, i.e. to perform actions to remove discrimination or its consequences (lawsuit for prohibiting or ending discrimination); (...)*

*Article 15 (1) and (2)*

*(Burden of Proof)*

- (1) In cases when a person or group of persons provide facts in proceedings referred to in Article 12 of this Law, corroborating allegations that prohibition of discrimination is violated; alleged offender shall have a duty to prove that the principle of equal treatment or prohibition of discrimination has not been breached.*
- (2) In cases when a person considers that s/he suffered consequences of discrimination, as an evidence for realization of the right referred to in paragraph 1 of this Article, statistical data or database can be used.*

*Article 17*

*(Collective Lawsuit for Protection from Discrimination)*

*Associations, bodies, institutions and other organizations established in compliance with appropriate regulations, and have a justified interest for protection of interest of a certain group, or they deal with protection from discrimination of a certain group of persons in scope of their activities, can file a lawsuit against a person who violates the right to equal treatment, if it is probable that acting of respondent violates the right to equal treatment of a larger number of persons largely belonging to a group whose rights are protected by a plaintiff.*

30. **The Framework Law on Primary and Secondary Education in Bosnia and Herzegovina** (*Official Gazette of BiH*, 18/03), as relevant, reads:

*Article 1 (1), (3) and (4)*

*This Law governs the principles of preschool, primary and secondary education and upbringing, education of adults and establishment and functioning of institutions for provision of services in education in Bosnia and Herzegovina, [...]*

*The authorities in charge of organizing the education systems in the Brčko District, Republika Srpska, Federation of BiH and in cantons, in line with the constitution (hereinafter referred to as: the competent education authorities), the institutions that pursuant to the applicable laws in Bosnia and Herzegovina are registered for provision of services in the area of preschool, primary and secondary education (hereinafter referred to as: schools), and other expert institutions in the area of education, shall be obligated to apply and honor the principles and norms determined in this law and to ensure education under equal conditions for all students.*

*The principles and standards determined in this law and pursuant to this law may not be reduced.*

*Article 2*

*The purpose of education is to contribute, through optimum intellectual, physical, moral and social development of individuals, in line with their abilities and skills, to creation of a society based on the rule of law and respect for human rights, and to contribute to its economic development, which shall ensure the best living standards for all citizens.*

*Article 3 (1) and (2) (c), (d) and (e)*

*The general goals of education arise from the generally accepted, universal values of the democratic society, and from proper value systems based on the specific qualities of the ethnic, historical, cultural and religious traditions of the peoples and ethnic minorities living in Bosnia and Herzegovina.*

*The general goals of education are:*

*[...]*

*c) promotion of respect for human rights and basic freedoms, and preparation of each person for life in a society that respects the principles of democracy and rule of law,*

*d) development of awareness of belonging to the state of Bosnia and Herzegovina, proper cultural identity, language and tradition, in the manner appropriate to civilization heritage, by learning about and respecting others and different ones, respecting diversity and fostering mutual understanding, tolerance and solidarity among all the people, nations and communities in Bosnia and Herzegovina and worldwide;*

*e) ensurance of equal opportunities for education and opportunity of choice at all levels of education, regardless of sex, race, ethnic affiliation, social status, religion, psycho-physical and other personal features; [...]*

*Article 4 (1)*

*Every child shall have equal right of access and equal opportunities for participation in appropriate education, without discrimination on any grounds.*

*Article 6*

*Schools shall be responsible to contribute, both in their own environment and in such environment it affects, to creation of such culture that respects human rights and fundamental freedoms for all citizens, as enshrined in the Constitution and other international human rights documents signed by Bosnia and Herzegovina.*

*Article 7*



*The languages of the constituent peoples of Bosnia and Herzegovina shall be used at all schools, in accordance with the Constitution of Bosnia and Herzegovina.*

*All students at schools shall learn the alphabets that are in official use in Bosnia and Herzegovina.*

#### *Article 9*

*Schools shall promote and protect religious freedoms, tolerance and the culture of dialogue.*

*Having in mind the diversity of convictions/faiths in Bosnia and Herzegovina, the students shall attend religious classes only if they are in line with their conviction or convictions of their parents.*

*Schools may not undertake any measures or actions to restrict the freedom of expression of proper and learning about other and different religious convictions.*

*The students who do not wish to attend religious lessons shall not be in any way brought into a less favorable position in relation to other students.*

#### *Article 10*

*During teaching and other activities at schools, no didactic or other materials may be used or presented, nor may statements be given by teachers or other school staff, that could be on a justified basis considered insulting for the language, culture or religion of students belonging to any national, ethnic group or religion.*

*It is in the competency of the entity, cantonal and education authorities of the Brčko District of Bosnia and Herzegovina to establish bodies that will supervise any violations that may occur at schools, through violation of the principle referred to in the previous paragraph.*

*The authorities and bodies referred to in paragraph 2, of this Article shall pass binding decisions and recommendations. The composition, method of work and other issues of relevance to the work of such bodies shall be governed in their foundation documents.*

#### *Article 23*

*Parents shall have the right and obligation to ensure education of their children.*

*It shall be the right of parents, in line with their convictions of what is in the best interest of their children, as much as this may be accessible, to select the type of education to be acquired by their children, provided that such selection ensures the exercise of the child's right to appropriate education.*

*Article 34*

*Students shall be taught at schools and their education progress shall be regularly monitored and evaluated, in order to ensure the necessary education appropriate with their needs and abilities.*

*Schools shall exercise their role and obligations in an environment which develops incentive for acquisition of knowledge, which respects and supports the individual qualities of each student, as well as their cultural and ethnic identity, language and faith, which shall be safe and which shall not include any form of intimidation, abuse, physical penalization, insult, humiliation or degradation or harm to health, including the harm caused by smoking or use of other narcotic and outlawed substances.*

*Article 35 (1)*

*Schools must not exert discrimination in the children's access to education or their participation in the education process, based on race, color, sex, language, religion, political or other opinion, ethnic or social origin, based on the children being those with special needs, or on any other grounds.*

*Article 42*

*The common core curriculum shall be established and applied at all public and private schools in Bosnia and Herzegovina.*

*Article 43*

*The common core curriculum shall consist of the teaching curricula with as broad as possible common core for all subjects in the scope of primary and general secondary education.*

*The common core curriculum shall be developed by a separate ad hoc interim body. The members of this body shall be appointed by the ministers of education of the entities,*

*cantons and the Brčko District of Bosnia and Herzegovina, and one member shall be appointed by the Minister of Civil Affairs.*

*Upon the proposal of the interim body referred to in the previous paragraph, the agreement on the common core curriculum shall be adopted and signed by the ministers of education of the entities, ministers of education of all cantons from the Federation of Bosnia and Herzegovina, and the representative of the Brčko District of Bosnia and Herzegovina.*

*The common core curriculum shall:*

- a) ensure development of a positive approach and a sense of belonging to the state of Bosnia and Herzegovina through the upbringing and education process;*
- b) guarantee and ensure quality education for all children, and reaching of satisfactory levels of knowledge, skills and abilities;*
- c) ensure consistency in the quality of education standards at all schools and at all education levels;*
- d) ensure satisfactory harmonization of the curricula and their adaptability in line with the specific needs of schools and local communities;*
- e) ensure application of curricula that correspond to the development needs of children they pertain to, and their age and special interest, with a focus on promotion of the healthy life style as the highest interests of students, parents, teaching staff and the society;*
- f) ensure freedom of movement and equal access to education;*
- g) guarantee the economy and efficiency in financing and operation of schools.*

#### *Article 44 (1)*

*The large majority of pedagogical activities at schools shall consist of the subjects and curricula envisaged in the common core curriculum.*

#### *Article 59 (3) and (4)*

*All laws in the entities, cantons and the Brčko District of Bosnia and Herzegovina, as well as other appropriate regulations in the area of education, shall be harmonized with the provisions of this Law, no later than within six months from the effectiveness of this Law.*

*In order to accomplish the appropriate level of education and knowledge standards, and their comparability at domestic and international levels, the competent education authorities shall be obligated to ensure that until the beginning of the 2003/2004 school year the implementation of the teaching process at all schools in Bosnia and Herzegovina based on the common core curriculum as determined in this Law.*

31. **The Law on Cantonal Ministries and Other Bodies of Cantonal Administration of the Central Bosnia Canton** (*Official Gazette of Central Bosnia Canton*, 8/03 and 14/03)

An unofficial revised text prepared at the Constitutional Court of BiH will be used for the purpose of this decision, which reads as follows:

*Article 9*

*The Ministry of Education, Science, Culture and Sports shall perform administrative and other professional tasks, as established under the law, related to the following:*

- *pre-school, primary, secondary and higher education,*
- *special education,*
- *adoption of curricula for preschool education, primary, secondary and special education at the proposal of the Institute for Education*

*[...]*

32. **The Law on Primary School** (*Official Gazette of CBC*, 11/01 and 17/04)

An unofficial revised text prepared at the Constitutional Court of BiH will be used for the purpose of this decision, which reads as follows:

*Article 15 (1)*

*Educational work shall be carried out based on curricula for primary schools, including a common core curriculum.*

*Article 16 (1)*

*Curricula for all types of schools shall be adopted by the Minister in accordance with the common core curriculum, as prescribed by the Curriculum Agency, and shall be published in the prescribed official gazette in Bosnia and Herzegovina.*

33. **The Law on Secondary School** (*Official Gazette of CBC*, 11/01 and 17/04)

An unofficial revised text prepared at the Constitutional Court of BiH will be used for the purpose of this decision, which reads as follows:

*Article 26 (2)*

*Curricula for all types of secondary schools shall be adopted by the Ministry, on the proposal of the Education Institute in accordance with the Common Core Curriculum developed by the Curriculum Agency and in accordance with Articles 42, 43 and 48 of the Framework Law.*

## **VI. Admissibility**

34. Pursuant to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

35. Pursuant to Article 18 (1) of the Rules of the Constitutional Court, the Court shall examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is filed within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy he/she used.

36. In the present case, the subject-matter of the appeal is the Judgement of the Supreme Court no. 51 0 P 054522 16 Rev of 3 October 2017, against which there are no other effective remedies available under the law. On 4 September 2019, the Municipal Court was requested to submit a copy of the delivery note on the service of the challenged judgment to the appellant, but the Municipal Court failed to comply with the request of the Constitutional Court. Given that the appeal was filed on 5 January 2018 and that the appellant's allegation was not contested that he had received the challenged judgment on 6 November 2017, the Constitutional Court considers that the appeal was

filed within the 60-day time limit as provided for by Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements set out in Article 18 (3) and (4) of the Rules of the Constitutional Court for there is no formal reason that would render the appeal inadmissible, nor is it neither manifestly (*prima facie*) ill-founded.

37. Having regard to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal in question meets the admissibility requirement.

## **VII. Merits**

38. The appellant challenges the aforementioned judgments, claiming that they are in violation of the right to a fair trial referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention, Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention – prohibition of discrimination in relation to the right to education referred to in Article 2 of Protocol No. 1 to the European Convention, and Article 1 of Protocol No. 12 to the European Convention (General prohibition of discrimination).

### **Prohibition of discrimination in relation to the right to education**

39. Having regard to the allegations stated in the appeal, the Constitutional Court will first examine the appellant's allegations about a violation of the prohibition of discrimination referred to in Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to education referred to in Article II (3) (l) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention, and the allegations about a violation of the general prohibition of discrimination referred to in Article 1 of Protocol No. 12 to the European Convention.

40. Article II (4) of the Constitution of Bosnia and Herzegovina reads:

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

41. Article 14 of the European Convention reads:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

42. Article 1 of Protocol No. 12 to the European Convention reads:

*Article 1*

*General prohibition of discrimination*

*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

43. Article II (3) (l) of the Constitution of Bosnia and Herzegovina reads:

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

*l) The right to education.*

44. Article 2 of Protocol No. 1 to the European Convention reads:

*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

45. The Constitutional Court primarily points out that according to the case law of the European Court and the Constitutional Court, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be

achieved (see, *e.g.* ECtHR, *Burden v. the United Kingdom*, Judgment of 29 April 2008, paragraph 60).

46. In the present case, the Constitutional Court observes that the subject matter challenged by the appeal is the judgments of the ordinary courts passed in the proceedings deciding on the appellant's claim relating to the determination that the respondent, by giving consent and organizing schools on an ethnic principle, and by issuing and implementing school curriculum based on ethnic principle, allowed the segregation of students in primary and secondary schools in the CBC territory based on their ethnic affiliation, which amounted to discrimination, and that the respondent should be ordered to take the necessary and legally prescribed steps and actions in line with the legitimate and specific goals of education in accordance with the regulations in Bosnia and Herzegovina, all with the aim of ending further segregation and discrimination of children based on their ethnic affiliation in schools in the CBC, by immediately establishing single integrated multicultural educational institutions - schools with a single curriculum for the established enrolment areas, including full respect for the children's right to education in their mother tongue.

47. The Constitutional Court further observes that the courts at all three instances based their reasoning as to why the claim was unfounded on the finding and conclusions that there were two curricula in the Bosnian and Croatian language in the CBC with a common core of 70%, as a mandatory part and 30% that is subject to change, which is in conformity with the provisions of the Law on Primary School, the Law on Secondary School and the Framework Law. In the opinion of the courts, the possibility and the existence of two curricula in the Bosnian and Croatian language with a common core of 70%, including the right of parents and children to choose the curriculum according to which the children will attend classes, is in line with the Convention on the Rights of the Child and the Convention against Discrimination in Education. Furthermore, it was established that it follows from the Report for BiH for the second cycle of periodic overview, in accordance with paragraph 5 of Annex of the Resolution 16/21 of the Human Rights Committee, which was adopted at the session of the Council of Ministers on 30 July 2014, that improvements occurred in education, and that 70% of the contents in the curriculum constitute a common core, thereby removing the elements of segregation.

48. In addition, the Constitutional Court observes that the courts also referred to the Decision of the Constitutional Court no. U-26/13 of 26 March 2015 in which the Constitutional Court concluded that the provisions of the challenged laws in the context of the request in question were not inconsistent with the provisions of Articles II (1), II (4) and III (3) (b) of the Constitution



of Bosnia and Herzegovina, Article 14 of the European Convention, in conjunction with the provisions of Article 2 of Protocol No. 1 to the European Convention.

49. In this connection, the Constitutional Court first points out that it did establish in the Decision no. *U 26/13* that the laws on primary education and upbringing and the laws on secondary education and upbringing in all 10 Cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia Canton, Herzegovina-Neretva Canton, Sarajevo Canton and Canton 10) are consistent with the Constitution of Bosnia and Herzegovina. However, in the mentioned Decision, the Constitutional Court also highlighted that “in case that the executive authorities failed to comply with the established legal principles, in the context of the prohibition of discrimination and respect for human rights and freedoms, when designing curricula or adopting any decisions in that respect, the persons whose rights are violated by the decisions of the executive authorities have the possibility to seek the protection of their rights before the relevant ordinary courts” (see Constitutional Court, Decision on Admissibility and Merits no. *U-26/13* of 27 March 2015, published in *the Official Gazette of BiH*, 33/15, paragraph 55). The Constitutional Court points out that the appellant sought precisely such protection in the claim filed in the present case.

50. Furthermore, the Constitutional Court observes that, by the Decision on Admissibility and Merits no. *AP 4348/14*, in which the same factual and legal issues were raised, the Constitutional Court dismissed as unfounded the appeal of the HNC against the Judgment of the Supreme Court no. 58 0 Ps 085653 13 Rev of 29 August 2014 (which the appellant refers to in the appeal, and which he also referred to during the proceedings completed by the challenged judgments). The Constitutional Court did not find arbitrariness in the reasoning for the aforementioned judgment as to the application of the provisions of the Law on Prohibition of Discrimination and the conclusion on the existence of discrimination.

51. In the reasoning of the Decision no. *AP 4348/14*, paragraph 36 reads: “The Constitutional Court notes that the plaintiff [in the present case the appellant] provided numerous pieces of evidence to corroborate his allegations of discrimination. Namely, it follows from the reasoning of the first instance court’s judgment that evidence of those circumstances was adduced during the proceedings (by reading the report of Commissioner for Human Rights, the seventh and eighth periodic reports, the report of the Ministry of Human Rights and Refugees on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the report of the Special Rapporteur to the UN General Assembly, the Concluding Observations of the

Committee on the Elimination of Racial Discrimination...). In view of the aforementioned, the plaintiff, as reasoned by the first instance court in its decision, which was upheld by the final decision of the Supreme Court in the present legal matter, made the allegations of discrimination probable and, therefore, the burden of proof rested on the appellant [HNC] and other respondents, which had to prove that there had been no discrimination, meaning that they should have submitted school curricula to prove the uniformity thereof. In this connection, the Constitutional Court notes that the Supreme Court pointed out that the respondents failed to prove that discrimination did not occur, nor did they prove the legitimate aim of separating children by ethnicity and, for that reason, it considered that the petition for review rightly pointed out that the challenged judgment took a position in contravention of the concept and goal of the Law on Prohibition of Discrimination. Therefore, taking into account the factual findings of the ordinary courts and the relevant provisions of Articles 17 and 15 of the Law on Prohibition of Discrimination, according to which the plaintiff, as the plaintiff in the collective action for protection against discrimination, made it probable that the respondent's conduct violated the right to equal treatment of a large number of persons who mainly belong to the group whose rights the plaintiff protects, whereby the appellant [HNC], as the alleged offender, was obliged to prove that it did not violate the principle of equal treatment or prohibition of discrimination, the Constitutional Court finds no arbitrariness in the given reasoning."

52. The Constitutional Court affirmed the aforementioned position in the Decisions on Admissibility and Merits no. *AP 4814/14* and no. *AP 4984/14* of 18 July 2017, dismissing as unfounded the appeals of O.Š. "Čapljina" and O.Š. "Stolac", while entirely referring to the reasoning and reasons articulated in the Decision no. *AP 4348/14*.

53. In this connection, the Constitutional Court observes that the appellant, in the proceedings that were concluded by the decisions that are the subject matter of the present appeal, while providing the reasons for the claim in the lawsuit and during the proceedings, referred to a series of reports made on the issue by international organizations, primarily the report of the Committee on the Elimination of Racial Discrimination, wherein the concept of "two schools under one roof" was marked as a form of segregation in education. However, the Constitutional Court observes that the courts did not address these documents at all, but found that the Report of Bosnia and Herzegovina, adopted at the session of the Council of Ministers on 30 July 2014 and sent to the United Nations Human Rights Committee, showed that there had been an improvement in education, and that 70% of the content in the curricula had a common core, thereby eliminating the elements of segregation.

In addition, the Constitutional Court indicates that concern about the continued existence of the practice “two schools under one roof” despite previous recommendations is also expressed in the recent reports made by the Committee on the Elimination of Racial Discrimination (Report from the session that took place from 6 to 30 August 2018). The United Nations Committee on the Rights of the Child came to the identical conclusion (Report from the session that took place from 9 to 27 September 2019). In view of the above, it follows that the issue of the existence of “two schools under one roof” has continuously existed and that that practice is still indisputably evident, *i.e.* also in the period after the challenged judgments were passed. In order for the respondent to defend itself successfully against the appellant’s allegations about discrimination, it must prove with certainty that those allegations are unfounded. In this connection, the Constitutional Court emphasizes that the Law on Prohibition of Discrimination stipulates that where the plaintiff “based on the evidence available to him, makes it probable” that he has been discriminated against, the respondent is the one who must prove with certainty that discrimination has not occurred. This is a procedural rule the violation of which also constitutes a violation of the right to a fair trial (see, *mutatis mutandis*, the Constitutional Court, Decision on Admissibility and Merits no. *AP-1093/07* of 25 September 2009, published in the Official Gazette of BiH, 23/10, paragraph 29).

54. In view of all the above, particularly its position taken in the mentioned Decision no. *AP-4348/14*, which was confirmed also in the Decisions no. *AP-4814/14* and no. *AP-4984/14*, the Constitutional Court holds that the ordinary courts’ conclusion is arbitrary in that the appellant’s claim is unfounded in connection with the assertion that the respondent discriminated against students in primary and secondary schools in the CBC territory in the manner described in the claim. Namely, according to the reasoning for the challenged judgments, it follows that evidence concerning the mentioned circumstances was adduced during the proceedings (by reading the report of the Human Rights Commissioner, the seventh and eighth periodic reports, the report of the Ministry of Human Rights and Refugees on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the report of the Special Rapporteur to the UN General Assembly, the Concluding Observations of the Committee on the Elimination of Racial Discrimination...) and it follows that the appellant, contrary to the position taken by the Supreme Court, made its allegations about discrimination probable and, therefore, the burden of proof lied with the respondent to prove that no discrimination occurred, which, as the facts show, the respondent failed to do. Furthermore, the courts did not deny the fact of the existence of two schools in one school building, but interpreted it exclusively as an administrative issue and not as an issue of segregation of children on ethnic principle in the education process. Therefore, the

respondents did not prove that there was no segregation of children in schools in the territory of CBC, nor did they prove that there was an objective and reasonable justification for that, *i.e.* that a legitimate goal was sought to be achieved.

55. In this connection, while taking into account that the appellant referred also to a violation of the right referred to in Article 1 of Protocol No. 12 to the European Convention, the Constitutional Court points out that the jurisprudence of the European Court clearly specifies that “discrimination” within the meaning of Article 14 of the European Convention means treating differently, without an objective and reasonable justification, persons in similar situations. However, according to the case law of the European Court: “Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court does not, therefore, see any reason to depart from the settled interpretation of “discrimination”, noted above, in applying the same term referred to in Article 1 of Protocol No. 12” (see ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, judgment of 22 December 2009, paragraph 55). In view of the above, it follows, for the same reasons set out in the preceding paragraphs of the present decision, that there is a violation of the right to a general prohibition of discrimination safeguarded by Article 1 of Protocol No. 12 to the European Convention.

56. Therefore, the Constitutional Court concludes that the challenged decisions are in violation of the prohibition of discrimination referred to in Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to education referred to in Article II (3) (l) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention, as well as the general prohibition of discrimination referred to in Article 1 of Protocol No. 12 to the European Convention.

### **Right to a fair trial**

57. The appellant also pointed to a violation of the right to a fair trial referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, and in this connection raised the issue relating to legal certainty, the right to a reasoned decision, the arbitrary application of law and also pointed to a violation of the right to a trial within a reasonable time. However, given the circumstances of the present case, the Constitutional Court considers it purposeful first to consider the appellant’s allegations regarding the violation of the right to a trial within a reasonable time.

58. Article II (3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

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

*[...]*

*e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

59. Article 6 (1) of the European Convention, as relevant, reads as follows:

*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]*

**a) Right to a trial within a reasonable time**

60. The appellant holds that there is a violation of its right to a trial within a reasonable time referred to in Article 6 paragraph 1 of the European Convention.

61. In this connection, the Constitutional Court primarily emphasizes that, according to the consistent case-law of the European Court and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case at hand and having regard to the criteria laid down in the European Court's case-law, in particular the complexity of the case, the conduct of the parties to the proceedings and of the relevant court or other public authorities, and the importance of what is at stake for the applicant in the litigation (see, European Court, *Mikulić v. Croatia*, Application no. 53176/99 of 7 February 2002, Report no. 2002-I, paragraph 38).

62. In that context, the Constitutional Court notes that the case at hand is a relatively complex case and that it was initiated by the filing of a lawsuit on 19 October 2011 and completed before the ordinary courts by the rendering of the challenged Judgment of the Supreme Court no. 51 0 P 054522 16 Rev of 3 October 2017. Accordingly, the proceedings in question lasted for less than six years, and that period will be the subject of the assessment by Constitutional Court.

63. The appellant holds that the length of the proceedings in question does not satisfy the reasonable time requirement. However, the Constitutional Court observes that over a period of four years, three first instance decisions were rendered and repealed on appeal and the case was referred back for retrial and that, after the case was referred back for the third time for retrial, the first

instance judgment was rendered seven months later. In the same period, it was decided on the appeal against the first instance decision, and the review proceedings lasted for nine months. The proceedings at three instances lasted for little less than six years in total, which in the circumstances of the present case cannot be assessed as an inappropriate length of proceedings, especially having in mind that these are complex factual and legal issues that had to be examined. In addition, it cannot be concluded from the aforementioned that the courts unnecessarily delayed the decision, *i.e.* that they did not act in a way that would enable the prompt completion of the proceedings, irrespective of the fact that amendments to the Law on Prohibition of Discrimination passed in 2016 stipulate that in all proceedings involving allegations of discrimination, the urgency principle should be applied by the court and other authorities (Article 11, paragraph 4 of the Law).

64. In view of the aforementioned, the Constitutional Court finds that the appellant's allegations are unfounded where it claims a violation of its right to a trial within a reasonable time referred to in Article 6 paragraph 1 of the European Convention.

#### **b) Other segments of the right to a fair trial**

65. Given the conclusion on the violation of the prohibition of discrimination referred to in Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to education referred to in Article II (3) (1) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention, as well as the general prohibition of discrimination referred to in Article 1 of Protocol No. 12 to the European Convention, the Constitutional Court holds that it is not necessary to examine separately the appellant's allegations relating to other segments of the right to a fair trial (the principle of legal certainty, the right to a reasoned decision, and allegations concerning the arbitrary application of the law).

### **VIII. Conclusion**

66. The Constitutional Court concludes that there is a violation of the prohibition of discrimination referred to in Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to education referred to in Article II (3) (1) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 1 to the European Convention, as well as of the general prohibition of discrimination referred to in Article 1 of Protocol No. 12 to the European Convention. This is the case where the courts, contrary to the standards prescribed by the Law on Prohibition of Discrimination, reached an arbitrary conclusion

that the appellant's claim was unfounded and gave the reasoning that the appellant did not make it probable that the respondent discriminated, in the manner described in the claim, against students in primary and secondary schools in the CBC.

67. On the other hand, the Constitutional Court concludes that the appellant's allegations of a violation of the right to a trial within a reasonable time as part of the right to a fair trial referred to in Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention are unfounded, since the proceedings at three instances lasted for a total of six years. In addition, the appellant failed to prove in any way that the courts unjustifiably delayed the adoption of the decision.

68. Having regard to Article 59 (1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the operative part of the present decision.

69. Within the meaning of Article 43 Article of the Rules of the Constitutional Court, a Separate Dissenting Opinion of the President Mate Tadić makes an annex to this decision. Judge Valerija Galić gave a statement of dissent.

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

Mato Tadić  
President  
Constitutional Court of Bosnia and Herzegovina

/signed/

**SEPARATE DISSENTING OPINION OF PRESIDENT MATO TADIĆ**

In this case, I disagreed with the majority in finding a violation for the following reasons:

1. The issue of education in BiH is regulated through a number of laws at the levels of the State, Entities and Cantons in the Federation of BiH, as stated in the decision itself. According to all these regulations, while having regard for multiethnicity, multiculturalism and multilingualism in Bosnia and Herzegovina, the criteria were determined, according to which the curriculum should be composed of two segments. One segment, which would be common for all the students attending primary and secondary schools, and the other – special one, according to which the special features of one people would be studied.
2. In the present case, the courts established that this was precisely done in the Central Bosnia Canton. Namely, 70% of the curriculum is common, while 30% is special and that is how the teaching takes place. None of the parents and children had any objections to such curriculum. Namely, they have that right under Articles 28, 29 and 30 of the 1989 Convention on the Rights of the Child.
3. The issue of dual administration is not something the Constitutional Court should have to deal with. That is the responsibility of other authorities.
4. When deciding this case the Constitutional Court had to take into consideration other situations (cases) pending before the Constitutional Court. I hereby refer to the cases nos. *AP 190/19* and *AP 1198/19*, which decisions the Constitutional Court adopted at the session of 23 June 2021 and established a violation because the parents and children in the Republika Srpska precisely sought the solution that is in place in the Central Bosnia Canton, which they do not have. Indeed, they do not have the ethnic segment of the curriculum, or the teaching in their own language.

I was unable to support this decision for the aforementioned reasons.