

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05, 64/08 and 51/09), in plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. David Feldman,

Mr. Krstan Simić,

Mr. Mirsad Ćeman,

Having deliberated on the appeal of Mr. **Sulejman Tihić, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** in case no. **U 13/09**, at its session held on 30 January 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by Mr. **Sulejman Tihčić, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** is hereby dismissed.

It is hereby established that Article 9.1 paragraphs 2 and 3, Article 10.1 paragraph 3 and Article 11.1 paragraph 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) are consistent with lines 3, 8 and 9 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

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

REASONING

I. Introduction

1. On 16 November 2009, Mr. Sulejman Tihčić, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of constitutionality of Article 9.1 paragraphs 2 and 3 of the Election Law of Bosnia and Herzegovina ("the Election Law") and Article 79 of the Book of Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. On 3 December 2009, the applicant filed a

supplement to the request, seeking the review of constitutionality of Article 10.1 paragraph 3 and Article 11.1 paragraph 2 of the Election Law.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (“the House of Representatives”) and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the House of Peoples”) were requested to submit their respective replies to the request and the supplement to the request on 2 and 7 December 2009 respectively.

3. The Constitutional and Legal Committee of the House of Representatives submitted its opinion on the request for review of constitutionality on 14 December 2009, whereas no reply was not submitted, within the given deadline, to the supplement to the request. The Constitutional and Legal Committee of the House of Peoples submitted its opinion on the request and supplement to the request on 28 December 2009.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request submitted by the House of Representatives and the House of Peoples were communicated to the applicant on 29 December 2009.

III. Request

a) Allegations stated in the request

5. The applicant holds that the provisions of Article 9.1 paragraphs 2 and 3, Article 10.1 paragraph 3 and Article 11.1 paragraph 2 of the Election Law of Bosnia and Herzegovina, and the provision of Article 79 of the Book of Rules of the House of Representatives are not compatible with lines 3, 8 and 9 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

6. The applicant reasoned that the Election Law of Bosnia and Herzegovina in Article 9.1 paragraphs 2 and 3 did not prescribe mechanisms for securing proportional representation of constituent peoples and other citizens in the House of Representatives of the Parliamentary Assembly of BiH according to the census from 1991. He further stated that the principle of proportional representation of constituent peoples and other citizens of Bosnia and Herzegovina, according to the census from 1991, after the adoption of a Decision of the Constitutional Court of BiH “on the constituent status of peoples” (see Constitutional Court, Third Partial Decision No.

U5/98 III of 1 July 2000, *Official Gazette of Bosnia and Herzegovina*, No. 23/00) was incorporated into the Entities' Constitutions and constitutes a fundamental principle to be followed with the aim of reestablishing a multiethnic democratic society based on equal rights of Bosniacs, Croats and Serbs, as constituent peoples, and all other citizens.

7. The applicant pointed out that Article 9.1 paragraph 1 of the Election Law of Bosnia and Herzegovina carries a constitutional provision contained in Article IV(2) of the Constitution of Bosnia and Herzegovina, according to which the House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska, and that members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly of BiH.

8. In the opinion of the applicant, the principle of proportional representation of all three constituent peoples and other citizens in the number of representatives elected from the territory of the Republika Srpska (14 members), or in the number of representatives elected from the territory of the Federation of BiH (28 members) to the House of Representatives was not applied in paragraphs 2 and 3 of Article 9.1 of the Election Law. The applicant explained that in the present structure of the Parliamentary Assembly of BiH, in the House of Representatives, out of 14 representatives elected from the territory of the Republika Srpska 12 is of Serb, 2 are of Bosniac ethnicity, and no representative of Croat ethnicity, as well as no representative from among Others. The applicant also stated that out of 28 representatives from the Federation of BiH 20 are of Bosniac ethnicity, 7 of Croat and 1 of Serb ethnicity and none from among Others.

9. The applicant concludes that out of the total of 42 representatives in the House of Representatives 22 are of Bosniac ethnicity, 13 of Serb ethnicity and 7 of Croat ethnicity, and no representative from among the Others. According to the applicant, the election procedure resulting in such an ethnic structure of the House of Representatives, as a house of citizens, would not be so disputable had not the Book of Rules of the House of Representatives in Article 79 prescribed the "entity vote", which is a condition for decisions to be made by the House. The applicant alleges that the mechanism which has been envisaged and created as a means for protection of equal status of the Entities within the House of Representatives, is being used for ethnic domination and homogenization, which is inconsistent with fundamental principles and the spirit of the General Framework Agreement for Peace in Bosnia and Herzegovina. Namely, the "entity vote" prescribed by Article IV(3)(d) of the Constitution of Bosnia and Herzegovina turned into the "ethnic vote", and accordingly transformed the House of Representatives, as a house of citizens, into a house where

ethnic majority from one or the other entity may profile their respective interests, contrary to the interests and will of the other two constituent peoples from either of the Entities, as well as to the will of Other citizens from the territory of these Entities.

10. In the opinion of the applicant, when it comes to the protection of the interests of the Entities within the House of Representatives, representatives of all three constituent peoples and Other citizens, who should be proportionally represented within one third of the elected representatives from the territory of the Republika Srpska, as well as within two thirds of the representatives elected from the territory of the Federation of BiH, should have a say about it. Therefore, failure to specify in the Election Law the principle of proportional representation of all three constituent peoples and Other citizens regarding the number of representatives elected from the territory of the Republika Srpska (14) and the territory of the Federation of BiH (28) into the House of Representatives of the Parliamentary Assembly of BiH, constitutes a violation of the Constitution of Bosnia and Herzegovina which prescribes that “Bosnia and Herzegovina is a democratic state”, and that “democratic authorities and fair procedures best generate peaceful relations within a pluralist society”.

11. The applicant further stated that the Election Law in Article 10.1 paragraph 3 stipulated that a minimum number of 4 members of each constituent people shall be represented in the House of Representatives of the Parliament of the Federation of BiH. The applicant further stated that this provision of the Election Law, indeed, did not make it impossible for more than 4 members of each constituent people to be represented in the House of Representatives of the Parliament of the Federation of BiH which numbers 98 members, as the provision reads “a minimum of four”, however it is certain that compliance with the principle of proportional representation of constituent peoples and Other citizens in the House of Representatives of the Parliament of the Federation of BiH was not secured as per the 1991 census. As the result of the application of the mentioned provision of the Election Law and failure to apply the principle of proportional representation as per the 1991 census, out of the total number of 98 representatives in the present structure of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina, 72 are of Bosniac ethnicity, 21 are of Croat ethnicity, 4 are of Serb ethnicity, and 1 is from among ethnic minorities.

12. Also, Article 11.1 paragraph 2 of the Election Law of Bosnia and Herzegovina stipulates that a minimum number of 4 members of each constituent people shall be represented in the National Assembly of the Republika Srpska. The applicant emphasizes that this provision too, as

the provision of Article 11.1 paragraph 3, solely secured a minimum representation of a minimum of 4 members of each constituent people shall be represented in the National Assembly of the Republika Srpska, but failed to secure compliance with the principle of proportional representation of constituent peoples and Other citizens in the National Assembly of the Republika Srpska. Namely, out of the total number of 83 members of the National Assembly of the Republika Srpska, 71 are of Serb ethnicity, 8 are of Bosniac ethnicity, 4 are of Croat ethnicity, and none from among ethnic minorities, or from among Other citizens of Bosnia and Herzegovina.

13. The applicant stated that the principle of proportional representation was observed in the executive authority of the Federation of BiH and in the executive authority of the Republika Srpska, and that it was applied in the public authority bodies and the courts in the Federation of BiH and in the Republika Srpska. However, the applicant concludes that when it comes to the legislative authority in BiH, the principle of proportional representation of constituent peoples and Other citizens, as per the 1991 census, was not observed. In the opinion of the applicant, the mentioned provisions of the Election Law do not represent an obstacle for a legislator to provide for mechanisms in the Election Law so that a number of members of each constituent people is higher than four and that it corresponds to their respective proportional representation from 1991. Therefore, a failure to specify in the Election Law of Bosnia and Herzegovina mechanisms for the election of members to the House of Representatives of the Parliament of the Federation of BiH and the National Assembly of the RS where all 3 constituent peoples and representatives of ethnic minorities, i.e. of Other citizens of BiH would be proportionally represented, constitutes a violation of the Constitution of Bosnia and Herzegovina, as concluded by the applicant.

14. The applicant emphasized that in the above-referenced decision No. *U 5/98* the Constitutional Court concluded as follows: “in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I(2) of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble. Territorial delimitation, thus, must not serve as an instrument of ethnic segregation, but – quite to the contrary – must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such” (*ibid, U 5/98 III, paragraph 57*).

b) Reply to the request

15. The opinion of the Constitutional and Legal Committee of the House of Representatives reads that the Committee, following the discussion, with three votes “in favor”, three votes “against”, and no “abstaining” vote, did not support the relevant request for review of constitutionality of Article 9.1 paragraphs 2 and 3 of the Election Law.

16. The opinion of the Constitutional and Legal Committee of the House of Peoples reads that the Committee, with two votes “in favor”, two votes “against”, and one “abstaining” vote, did not support the request and the supplement to the request.

IV. Relevant Law

17. Constitution of Bosnia and Herzegovina

Preamble - lines 3, 8 and 9

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,

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.

Article I(2) of the Constitution of Bosnia and Herzegovina reads as follows:

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.

Article IV(2)

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

[...]

18. **Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08)

Article 9.1 paragraphs 2 and 3

(2) Of the twenty-eight (28) members who shall be directly elected by voters registered to vote for the territory of the Federation of BiH, twenty-one (21) shall be elected from multi-member constituencies under the proportional representation formula set forth in Article 9.5 of this law, and seven (7) shall be compensatory mandates elected from the territory of the Federation as a whole according to Article 9.6 of this law.

(3) Of the fourteen (14) members who shall be directly elected by voters registered to vote for the territory of the Republika Srpska, nine (9) shall be elected from multi-member constituencies under the proportional representation formula set forth in Article 9.5 of this law, and five (5) shall be compensatory mandates elected from the territory of the Republika Srpska as a whole according to Article 9.6 of this law.

Article 10.1 paragraph 3

A minimum number of four (4) members of each constituent people shall be represented in the Federation House of Representatives.

Article 11.1 paragraph 2

A minimum number of four (4) members of each constituent people shall be represented in the National Assembly of Republika Srpska.

19. **Book of Rules of the House of Representatives of the Parliamentary Assembly of BiH** (*Official Gazette of Bosnia and Herzegovina*, Nos. 33/06, 41/06, 81/06, 91/06 and 91/07)

Article 79

All decisions in the House shall be made by majority of vote of those present and voting. Members and representatives shall do their best so that the majority includes a minimum of one third of votes of members or representatives from the territory of each entity. If the majority vote fails to include one third of votes from the territory of each entity, the chair person and his/her deputies shall convene as a commission and try to secure consensus within three days after the vote. If this fails, decisions shall be made by majority vote of those present and voting, provided that those against must not amount to two thirds or more members or representatives elected from each entity.

V. Admissibility

20. While examining the admissibility of the request the Constitutional Court considered the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- *Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*

- *Whether any provision of an Entity's constitution or law is consistent with this Constitution.*

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

21. As to the challenged provisions of the Election Law, the Constitutional Court states that, albeit the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not provide explicit jurisdiction to the Constitutional Court to review the constitutionality of laws or provisions of the laws of Bosnia and Herzegovina, the substantial jurisdiction specified by the Constitution of Bosnia and Herzegovina itself, indicates that the Constitutional Court is entitled to exercise such jurisdiction, particularly having in mind the role of the Constitutional Court as the body which upholds the Constitution of Bosnia and Herzegovina. The position adopted by the

Constitutional Court in its jurisprudence in such cases clearly points to the conclusion that the Constitutional Court is competent to review the constitutionality of a law, or particular provisions of the laws of Bosnia and Herzegovina (see Constitutional Court, Decision No. *U 14/02* of 30 January 2004, *Official Gazette of Bosnia and Herzegovina* No. 18/04).

22. Furthermore, the respective request for the review of constitutionality of the challenged provisions of the Election Law was filed by the Chairman of the House of Peoples of the Parliamentary Assembly of BiH, which means that the request was filed by the authorized applicant under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

23. In view of the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 of the Rules of the Constitutional Court, the Constitutional Court establishes that the request for review of constitutionality of the provisions of the Election Law is admissible, as it was filed by the authorized applicant and that there is no single formal reason under Article 17 of the Rules of the Constitutional Court rendering it inadmissible.

VI. Merits

24. The applicant stated that the challenged provisions of the Election Law are not compatible with lines 3, 8 and 9 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant first and foremost holds that the challenged provisions of the Election Law did not secure proportional representation of constituent peoples and of Other citizens in the legislative bodies of the House of Representatives of BiH, the House of Representatives of the Parliament of the Federation of BiH and the National Assembly of the RS according to the census from 1991.

25. The Constitutional Court states that the applicant requested the review of constitutionality of the challenged provisions of the Election Law in relation to the constitutional principles contained in the lines 3, 8 and 9 of the Preamble of the Constitution of Bosnia and Herzegovina. In this respect the Constitutional Court recalls that it took the following stance in the mentioned decision No. *U 5/98*: “the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles delineating [...], spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as a sound standard of judicial review for the Constitutional Court” (*ibid*, *U 5/98 III*, paragraph 26). In view of the stance it already took, the Constitutional Court shall review the constitutionality of the

challenged law under the mentioned constitutional principles stated in the Preamble and Article I(2) of the Constitution of Bosnia and Herzegovina.

26. The Constitutional Court notes that the applicant challenged the mentioned provisions of the Election Law as they did not provide mechanisms securing proportional representation of constituent peoples and of Other citizens in the House of Representatives of BiH, the House of Representatives of the Parliament of the Federation of BiH and the National Assembly of the RS according to the census from 1991. The applicant holds that the failure to provide mechanisms in the Election Law securing proportional representation of constituent peoples in the aforementioned legislative organs amounted to a violation of the constitutional principle of constituent status of peoples. In this respect, the applicant referred to the mentioned decision of the Constitutional Court “on the constituent status of peoples” No. *U 5/98*.

27. The Constitutional Court states it articulated the following stance in Decision No. *U 5/98* “the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation” (*ibid*, *U 5/98 III*, paragraph 60). “Despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation, or a right to uphold the effects of ethnic cleansing” (*ibid*, paragraph 61).

28. As to the institutional structure of the House of Representatives, the mentioned Decision No. *U 5/98* reads that under the Constitution of BiH two thirds, out of 42 members, are elected from the territory of the Federation of BiH, one third from the territory of the Republika Srpska; “However, these provisions do not prescribe the ethnicity of the candidates and there were actually some Bosniac Members who were elected from the territory of the RS and some Serb Members from the territory of the Federation in the last general election of 1998. Insofar as a certain number of Ministers shall be appointed from the territory of the Federation or the RS according to Article V(4) (b), whereas certain Members of the Constitutional Court have to be elected by respective parliamentary bodies of the Entities according to Article VI(1)(a), all these provisions demonstrate nothing but the fact that either the territory or specific institutions of the Entities serve as the legal point of reference for the election of members of the institutions of BiH. This fact is again evident for the Ministers who are finally elected by the House of Representatives of BiH, which certainly

does not represent one, two, or even all of three constituent peoples only, but all the citizens of BiH regardless of their ethnic origin” (*ibid*, *U 5/98 III*, paragraph 67).

29. The applicant stated that the relevant election procedure resulted in a situation where out of the total of 42 representatives of the House of Representatives, 22 are of Bosniac ethnicity, 13 of Serb ethnicity and 7 of Croat ethnicity, and none representative from among Others. According to the applicant, such an ethnic structure of the House of Representatives, as a house of citizens, is not proportional to the 1991 census. The applicant added that such an ethnic structure would not be so disputable had not the Book of Rules of the House of Representatives in Article 79 prescribed the “entity vote”, which in practice turned into the “ethnic vote”. Likewise, the applicant stated that by prescribing that a minimum number of 4 members of each constituent people shall be represented in the legislative bodies of the Federation of BiH and the Republika Srpska, the Election Law failed to secure the compliance with the constitutional principle of constituent status of peoples and Other citizens.

30. In its earlier practice, the Constitutional Court clearly indicated that “efficient participation of constituent peoples in state authorities” is an element inherent to the notion of vital interest of one constituent people (see *mutatis mutandis* Decision of the Constitutional Court No. *U 8/04* of 25 June 2004, *BiH Official Gazette* No. 40/04).

31. In case No. *U 7/05*, the Constitutional Court established that the Statutes of the Town of Istočno Sarajevo and the Town of Banja Luka are in conformity with the Constitution of Bosnia and Herzegovina. In the mentioned case the applicant challenged the constitutionality of the mentioned statutes as they failed to provide by their respective provisions minimum representation of constituent peoples of Bosnia and Herzegovina, namely Bosniacs, Serbs, Croats and members of Others in the assemblies of the mentioned towns. The Constitutional Court held that it was evident that consistent application of democratic principle of one voter – one vote in the present political circumstances in Bosnia and Herzegovina carries a potential risk for a mono-ethnic authority to be elected in the environments where one of the constituent peoples has majority (see Constitutional Court, Decision No. *U 7/05* of 2 December 2005, *Official Gazette of BiH* No. 45/06, paragraph 39). “Namely, Bosniacs and Croats as well as Serbs, have the right to vote, to stand for election and the right to participate in elections, the exercise of power being dependent on the election results. The failure to stipulate the provisions guaranteeing a minimum of representation may possibly lead to a situation in which any of the constituent peoples has absolute majority at the level of a Town, which would always depend on the election results. Taking into account all the aforesaid, the Constitutional Court holds that the failure to prescribe a guaranteed minimum of representation in

the Statute of the Town of Istočno Sarajevo and Statute of the Town of Banja Luka regardless of the elections results does not privilege Serbs in comparison to Bosniacs and Croats as such a privileged position has not been given to any of the constituted peoples by the challenged statutes” (*ibid.*, paragraph 49).

32. Also, the Constitutional Court recalls that in case No. *U 10/05* it established that the Proposal of the Law on Public Broadcasting System of Bosnia and Herzegovina was not destructive of the vital national interest of the Croat people in Bosnia and Herzegovina for failing to provide that representatives of all constituent peoples and Others must be elected to the Board of the Public Broadcasting System of Bosnia and Herzegovina (see Constitutional Court, Decision No. *U 10/05* of 22 July 2005, *Official Gazette of BiH* No. 64/05).

33. However, the Constitutional Court wishes to emphasize its already taken stance that the issue of interpretation of the notion of “efficient participation of constituent peoples in state authorities”, which was already mentioned in this decision, by applying it outside of the constitutional provisions quoted above, should be applied functionally and in line with Article IX(3) of the Constitution of Bosnia and Herzegovina, according to which “officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina”. On one hand, this means that the state authorities should, in principle, be a representative reflection of advanced co-existence of all peoples in Bosnia and Herzegovina, including ethnic minorities and Others. On the other hand, “efficient participation of constituent peoples in the authorities”, if it falls outside the constitutional framework, must never be carried out or imposed at the expense of efficient operation of the state and its authorities (*ibid.*, *U 8/04*, paragraph 33). To that end, the Constitutional Court reasoned that “no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied also to other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, [...] they are legitimized solely by their constitutional rank and therefore have to be narrowly construed. In particular, it cannot be concluded that the Constitution of BiH provides for a general institutional model which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination according to Article II(4) of the Constitution of BiH or the constitutional principle of equality of constituent peoples” (*ibid.*, *U 5/98 III*, paragraph 68). “Accordingly, a correct conclusion to be inferred from this is that this is the only way to establish a compromising relationship between affiliation with one constituent people and a citizen’s option” (*ibid.*, *U 8/04*, paragraph 33.).

34. The Constitutional Court observes that the challenged articles, nor the Election Law as a whole, do not contain a single provision bestowing upon any of the constituent peoples a privileged status. Also, the Constitutional Court observes that there is not a single provision in the Constitution of Bosnia and Herzegovina imposing on a legislator an obligation that the Election Law includes a provision of mechanisms securing proportional representation of constituent peoples regardless of election results. As far as the request of the applicant for the review of the constitutionality of the challenged articles of the Election Law for not containing provisions, which, in the applicant's opinion, they must have contained, the Constitutional Court states that the review of constitutionality cannot relate to something that the legislator did not provide.

35. In view of the aforementioned, the Constitutional Court considers that by failing to provide in the Election Law the mechanisms securing proportional representation of constituent peoples and Others in the House of Representatives of BiH, House of Representatives of the Federation of BiH and the RS National Assembly, as per the 1991 census, where the mentioned constitutional provisions do not impose an obligation for such a norm, the principle of constituent status is not violated. This is to say that the challenged provisions of the Election Law are in line with lines 3, 8 and 9 Preamble of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

Other allegations

36. In view of the conclusions relating to the constitutionality of the challenged provisions of the Election Law, the Constitutional Court holds that there is no need to consider the allegations with regards to the constitutionality of Article 79 of the Book of Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.

VII. Conclusion

37. The Constitutional Court holds that the provisions of Article 9.1 paragraphs 2 and 3, Article 10.1 paragraph 3 and Article 11.1 paragraph 2 of the Election Law are not inconsistent with lines 3, 8 and 9 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina for failing to provide mechanisms securing proportional representation of constituent peoples of BiH, as per the 1991 census, during direct election by citizens – voters of the representatives to the House of Representatives of BiH, the House of Representatives of the Federation of BiH and the RS National Assembly.

38. Having regard to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Prof Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina