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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON CERTAIN PROVISIONS
OF THE ELECTION LAW OF BOSNIA AND HERZEGOVINA,
OF THE CONSTITUTION OF THE FEDERATION
OF BOSNIA AND HERZEGOVINA
AND OF THE STATUTE OF THE CITY OF MOSTAR**

By

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. On 16 September 2009, the Caucus of Croat people in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted to the Constitutional Court of Bosnia and Herzegovina an application of for review of constitutionality of Articles 19.1, 19.2, 19.3, 19.4, 19.5, 19.6, and 19.7 of the Election Law of Bosnia and Herzegovina; of paragraphs 4) and 7) of Article VI.C of the Amendments to the Constitution of the Federation of Bosnia and Herzegovina; and of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar. The Constitutional Court has requested an amicus curae opinion of the application from the Venice Commission.
2. The above-mentioned articles allegedly discriminate against persons belonging to Croatian ethnicity.
3. According to the application, the provisions in the Election Law of Bosnia and Herzegovina, Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and the Statute of the City of Mostar, regulating the election of the councilors to the City Council of the City of Mostar, are not in conformity with Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention on Human Rights (ECHR), Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 and 1989 Optional Protocols and Article 3 of the Protocol 1 to the 1966 International Covenant on Civil and Political Rights, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.
4. According to Art. II(4) of the Constitution of Bosnia and Herzegovina “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”. The list in Annex I includes the international instruments referred to in the application.
5. Reference to Article 3 of the Protocol 1 to the 1966 International Covenant on Civil and Political Rights seems to be a mistake. Evidently, the relevant provision meant by the applicants is Article 3 of the Protocol 1 to the ECHR.
6. Art. 14 of the ECHR does not contain any general prohibition of discrimination but lays down that “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”. Electoral rights are not included in the Convention. By contrast, Art. 3 of Protocol 1 to the Convention does contain a provision according to which “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. However, the provision is not applicable to elections of non-legislative bodies of local self-government, such as the City Council of the City of Mostar. According to the Constitution of the Federation of Bosnia and Herzegovina the City of Mostar is “a territorial unit of administration and local self-government”. Furthermore, the Constitution provides that “the City of Mostar shall have the competencies of a Municipality, unless otherwise provided by law” (Art. VI.C. para. 1 and 2).
7. Art. 25 para. b) of the 1966 ICCPR provides that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.

8. In its General Comment on Art. 25. the UN Human Rights Committee has stated that “any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria” (para. 4) and that “the right to vote at elections and referenda must be established by law and be subject only to reasonable restrictions” (para 10). Furthermore, the principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely. (Para. 21)

9. Art. 19.4-19.6. of the Election Law of BiH, which regulate the election of the City Council of Mostar, deviate from the principle of equal weight of each vote. The provisions aims to guarantee the representation of all constituent peoples and the group of Others, and to prevent the dominance of the Council by one constituent people (or the group Others). Decisive in the assessment of these provisions is whether the restrictions on the principle of equal weight can be regarded as reasonable and based on objective criteria. Reasonability requires the legitimacy of the aims pursued by the restrictions and the proportionality of the restrictions with regard to legitimate aims. Attention should be paid to both the general circumstances in the BiH and the particular circumstances in the City of Mostar.

10. The Constitutional Court has in several previous decisions invoked the principle of constituent peoples. In its decision U 4/05 on the electoral system of the City of Sarajevo, the Court held that it was necessary for all three constituent peoples to be “given minimum guarantees for the participation on the city council irrespective of the election results since that is the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina”. In its Third Partial Decision No. 5/98, the Court stated that “... the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits (...) any domination in governmental structures (...)”. The Court also noted that “a consistent application of the democratic principle - one elector one vote, in the existing political circumstances in Bosnia and Herzegovina, is running a risk of creating mono-ethnic authority elected in the areas in which one of the constituent peoples is in majority”.

11. In its opinion on the Election Law of BiH (CDL(2001)106fin), the Venice Commission reminded that “the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination.” (Para. 74) However, the Commission added that “this justification has to be considered, however, in the light of developments in Bosnia and Herzegovina since the entry into force of the Constitution. Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the European Convention on Human Rights and Protocol No. 12 thereto. As set forth above, the situation in Bosnia and Herzegovina has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.” (Para. 23-24)

12. In the general circumstances of the BiH, guaranteeing the representation in elected bodies of all constituent peoples and the group of Others as well as preventing any of the groups from dominating such bodies remain legitimate aims, although the development should

move towards the majoritarian principle. As to the specific circumstances in Mostar, the history of the ethnic violence in the war of 1992-1994, the consequent ethnic divisions and the incomplete return of refugees and displaced persons¹ make the said objectives particularly vital. The deviations from the principle of equal weight of each vote are proportionate to the legitimate aim pursued and, thus, meet the criteria of reasonability and objectivity, set by Art. 25 of the ICCPR and the General Comment of the UN Human Rights Committee.

13. According to Art. 38 of the Statute of the City of Mostar, there shall be a Committee of the City Council for each City Area. Each Committee comprises the three City Councilors elected from the City Area at issue. Because the provisions on the Committee organization and the composition of the Committees follow the same criteria as the electoral provisions, there is no need of a separate assessment.

14. The applicants also allege that provisions of Article 19.7 of the Election Law of Bosnia and Herzegovina, paragraph 7) of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and Articles 44 and 45 of the Statute of the City of Mostar are not in conformity with the Constitution of Bosnia and Herzegovina and the above mentioned international instruments insofar as the citizens in the City of Mostar are not allowed to elect directly their Mayor as are other citizens in BiH.

15. Neither the Constitution of BiH nor the international instruments invoked by the applicants address the election of the Mayor but allow for both direct and indirect election. In decisions on the modus of election, local circumstances can be taken into consideration. As a comparison, indirect elections have been adopted, in addition to the City of Mostar, in the City of Sarajevo, as well as the Brčko District.

¹ The Decision of the Constitutional Court of BiH No. U 5/98 clearly stated that " it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination".