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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**

**Mr Hjörtur TORFASON (Substitute Member, Iceland)**

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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. The Constitutional Court of Bosnia and Herzegovina (BiH) has invited the Venice commission to submit an *amicus curiae* opinion in a case (No. U-9/09) initiated by an application from the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina dated 16 September 2009, requesting a review of the constitutionality of certain legislative provisions concerning the City of Mostar, namely 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 2001 as amended to date), Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar (of 2004), and Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, adding new paragraphs (4) and (7) to Article VI.C (Organisation of Mostar) to the Constitution. It is alleged by the applicants that the provisions of these Articles discriminate against citizens of Croat ethnicity and are incompatible with principles expressed in Article II(4) of the Constitution of BiH and in the international agreements on fundamental rights and freedoms which are annexed to the Constitution and form an integral part thereof.

2. The documents presented to the Commission for purposes of the Opinion primarily include, beside the legislative texts, the application to the Court of 16 September 2009 (submitted as a Request for Review and Protection of Constitutionality) and an Opinion from the Legal Department of the Office of the High Representative for Bosnia and Herzegovina containing observations on the application, presented [on ....] as an *amicus curiae* submission at the invitation of the Court.

3. The legislative provisions challenged by the application all specifically relate to the organisation and administration of the City of Mostar as a distinct unit of local self-government, and provide for a municipal election regime and administration system particular to the City, within the framework of the overall constitutional structure and electoral system of the country. The provisions were all enacted by decisions of the High Representative on 28 January 2004, in the light of circumstances obtaining at the time within the city and the country, and are interconnected structurally and by way of a common aim.

4. In assessing the validity of these provisions, it is appropriate to consider their historical background and the context of their development, which is strongly emphasised by the High Representative in the preamble to his Decision enacting the Statute of the City of Mostar, directly and by reference to the work of the Commission for Reforming the City of Mostar established by him in September 2003, and to other sources. As there affirmed, this Statute was enacted in order to replace the Interim Statute adopted on 7 February 1996 on the basis of the Dayton Peace Agreement of 10 November 1995, which included a set of principles for such Statute reflecting a concept of support for the unity of the City under an interim structural agreement. The six City Areas now forming constituencies were created under that Statute (as provisional "City Municipalities"), with boundaries reflecting demarcation lines existing between opposing factions at the close of the armed conflict in the country, while the Central Zone in the traditional commercial and tourist centre of the city was to be administered directly by a city-wide administration. It appears, therefore, that an aim for a delimitation of such Central Zone and the redevelopment of its area by way of unified or collective effort was a distinct element of the peace agreement achieved.

5. As also stated in its preamble, the Decision to enact the Statute of 2004 was made in response to pressing requirements of regional and national importance concerning the situation of Mostar, including a failure in development towards the aim of unification of the City under the Interim Statute, and also with a view to providing solutions reflecting the broadest possible consensus with respect to the reorganization of the City. According to the Statute, the six City Areas were to be maintained as constituencies in municipal elections and as administrative units on a limited scale. However, no direct mention was made of the Central Zone except in Article 56 concerning the distribution of revenues derived from allocated construction land in the City, which provides in para. 4 that such revenues derived from land "within the former Central Zone" shall be determined by the City Council and shall be reinvested in the Zone to the extent

of 80% (a similar ratio being applicable to revenues from each of the six City Areas, with the distribution being dealt with by their respective Committees under the Statute).

6. The situation to which the new Statute was addressed is reflected in the second of the three paragraphs of the Decision resolving its enactment and entry into force, which provides that "[T]he Statute shall be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached". In the application to the Court (para. 2), this paragraph is cited as being contrary to Article I(2) of the Constitution of Bosnia and Herzegovina. While that argument certainly does not appear tenable in matter of form, the paragraph perhaps may be cited as a reminder to the effect that it may be appropriate for the Court to consider the validity of the legislative provisions contested not only with reference to their history, but also in the light of developments with respect to the situation in Mostar and in the country occurring since their enactment, as such and as compared with the basic aims of the provisions. In this connection, it may perhaps be relevant that the Statute for Mostar appears to remain on an interim basis, in the sense that it has not yet been adopted by the City Council as referred to in the above paragraph. And to the extent that the position of the former Central Zone is in issue, it appears that the aim of formal delimitation of the Zone as a territorial and/or organisational unit within the City has not yet been realized.

7. In any case, the history affirms that the City of Mostar has been an object of specific consideration at constitutional level since the establishment of the Dayton Agreement of 1995 and related instruments. Pursuant to Article VI.C (Organisation of Mostar) of the Constitution of the Federation of BiH, the City shall constitute "a territorial unit of administration and local self-government" (para. 1) and shall have the competencies of a Municipality, unless otherwise provided by law" (para. 2). The object of the legislative provisions being challenged before the Court is the constitution of the governing bodies of the City under Chapter II of the Statute of 2004, the City Council and the Mayor, and the electoral system under which they are to be elected. This system is specific to Mostar, a fact which accords with the special status or consideration given to the City under the Dayton Agreement as above noted. A summary description of the system is given in comments already forwarded to the Secretariat by Mr. Jean-Claude Scholsem, and need not be repeated here.

8. In completing these comments, I have had the benefit of observing the said comments of Mr. Scholsem and those similarly forwarded by Mr. Kaarlo Tuori, and am pleased to confirm that I basically agree with their observations to the extent that they coincide. Accordingly, I will limit myself at this point to the further observations given below.

9. In their submission to the Court, the applicants refer to Article I(2) of the Constitution of BiH, proclaiming that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", as well as to Article II(1), which provides that "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms", and is followed by Article II(2), stating that the rights and freedoms set forth in the ECHR and its Protocols shall apply directly in Bosnia and Herzegovina, having priority over all other law. In challenging the contested provisions on the basis of discrimination, the applicants primarily rely upon Article II(4) of the Constitution of BiH, which prohibits discrimination on any ground in respect of all rights and freedoms provided for in Article II and in the international agreements listed in Annex 1 to the Constitution. They cite specific provisions of these agreements as referred to by my colleagues, including Article 14 of the ECHR and Article 25 of the ICCPR, which is more comprehensive with respect to the matter of fundamental electoral rights. As Mr. Scholsem, I believe that while the general Protocol 12 of the ECHR (which has been ratified by Bosnia and Herzegovina) is not cited by the applicants, it should be possible to take its provisions into account in the case in conjunction with the pertinent provisions of the Constitution of BiH.

10. The challenges raised by the applicants against the constitutionality of the respective legislative provisions in issue are partly based on the contention that they involve discrimination as between the inhabitants of Mostar and other inhabitants of the country, including those of other cities. This applies not only to the fact of the municipal election system for Mostar being specific to the City, but also to several integral elements of the system, such as the principle of indirect election of the Mayor and the particular characteristics of the subdivision into city areas. Furthermore, they are criticised as being in breach of the principle of collective equality of the constituent peoples (Bosnians, Croats, Serbs) recognised by the Constitution of the Federation of BiH, both at the national and the local level. Finally, they are criticised for involving discrimination as between the inhabitants of Mostar, by reason of deviation from the principle of equal weight of votes and other strains on equality.

11. It seems evident that the emergence of these criticisms largely corresponds with the fact that the legislation in issue appears to constitute an exceptional arrangement designed for an exceptional situation. Accordingly, the validity of the legislation will need to be assessed in terms of its relative consistency with the social and political situation and development prevailing in Bosnia and Herzegovina in general and Mostar in particular. In this, it may be assumed that the need for pacification and the consequent recognition of the constituent peoples as pillars within the community should be balanced against the risk of fragmentation (properly highlighted in the comments of Mr. Sanchez Navarro) and the aim for unification of the country and a return to a multi-ethnic society as existing prior to the war of 1992-1994. At the same time, as rules for the City of Mostar, the several provisions should meet the test of being reasonable and based on objective criteria, with effects proportionate to a legitimate aim pursued.

12. With respect to international and national jurisprudence pertinent to the consideration of these issues, I take the liberty of referring to the comments in hand from my colleagues, including their references to past Opinions of the Venice Commission and materials there cited. I would merely add that the experience in Belgium as illustrated by Mr. Scholsem in clear terms obviously is of high interest for comparative purposes. At the same time, I assume it is proper to note (also as a matter of law) that the constitutional environment there is somewhat different in that Belgium is a country traditionally divided by nations, without professed aims of unification such as those expressed in the Dayton Agreement.

13. With respect to views concerning the individual provisions (which also should be viewed collectively), I also refer to the observations made by my colleagues. It is necessary to add, however, that I tend to share the concerns of Mr. Scholsem with respect to the position of inhabitants of the former Central Zone of Mostar as to voting rights, which seems to call for very special explanation. As noted above, it has also occurred to me (as presently informed) that the lack of express treatment of the Central Zone in the Statute may represent an inherent weakness in the organisational system affecting its validity. I assume that the existence of this problem may largely be traced to the overall municipal and national interest attached to the old City center, but the question is there to be considered.

14. Finally, and partly by way of reference to paragraphs 5 and 6 above, I wish to add that it seems to me appropriate to view the provisions in issue not only in the light of circumstances prevailing at the time of their enactment, but also of developments since then, under consideration of both the general circumstances in the country and the particular circumstances of Mostar. Such approach would seem in full accord with the principle of proportionality, which seems eminently applicable in any event.