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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. The question posed by the applicants is a strictly constitutional one: an application before the constitutional Court of Bosnia and Herzegovina, which basically claims that some provisions are contrary to some international agreements with Constitutional strength in Bosnia and Herzegovina. In particular, the main point refers to a breach of the principle of equality

2. In these terms, the only possible answer has to respect the constitutional system in force. Therefore, it has to take into account the exceptional arrangement expressed in the Bosnia and Herzegovina Constitution which, as Mr Scholsem perfectly explains, allows practically all exceptions to the general principles of the European electoral heritage. The only question which, as Mr. Scholsem also points out, may be problematic – or, better to say, rightly unconstitutional - is that regarding the voters in the Central part of the City of Mostar.

3. Anyway, it is obvious that the question once more arises of the difficulties inherent to those (obviously exceptional) constitutional, institutional and political arrangements in force in Bosnia and Herzegovina. The Constitutional problem is not only constitutional, because “in addition to being a state constitution, [the Constitution] is part of a peace accord, whose annexes qualify as international treaties under the Vienna Convention on the Law of Treaties.”¹

4. In particular, it obliges to consider that “the main point is of course that of the concept of representation, and the desirability of the idea of ethnic representation in the field of electoral rules. The idea of equality, but also some general concepts such as that of political representation, or the integrating role inherent to political parties, deserve to be taken into account when treating this issue. National minorities may require some kind of affirmative action rules. But their acceptance may lead other minorities to build similar demands, and will possibly lead to a segmented political life, that will in the end underline the “particular” points of view instead of the “common interests”. This is not the place to treat this issue, but it cannot be ignored that the fragmentation of representation will not reinforce the survival of the political entity as it is now defined.”²

5. It has also to be recalled that “both the OSCE/ODIHR and the Venice Commission have expressed concern on numerous occasions regarding the specific limitations on the [electoral] right[s] based on ethnicity(...). These limitations are based in part on Article V of the Constitution [and, therefore]... it must be recognized that this problem can only be addressed by amending both the Constitution and the Election Law.”³

6. In that “unique” constitutional and legal framework, the OSCE/ODIHR and the Venice Commission have already affirmed that “the constitutional ethnicity-based limitations to the electoral rights violate several international documents, including the ICCPR, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and of the commitments made to the Council of Europe, as well as article 7.3 of the OSCE 1990 Copenhagen Document.”⁴

¹ Cfr. CDL-AD(2008)012 (Joint Opinion on Amendments to the Election Law of Bosnia and Herzegovina by the Venice Commission and OSCE/ODIHR, on the basis of comments by Mr A. Sánchez-Navarro, H. Torfason and J. Pilgrim, par. 4.

² Cfr. CDL-EL(2005)014 (Comments on the Draft Law on Amendments to the Election Law of Bosnia and Herzegovina, by Mr Ángel J. Sánchez-Navarro), paragraph 8.

³ Cfr. CDL-AD(2008)012, cit., par. 7.

⁴ *Ibidem*, par. 8.

7. The problem is thus a constitutional one, and thus it is very unlikely to be solved through constitutional review of the existing laws. In this sense, even if the applicants express powerful arguments, most of them have to be rejected considering the already mentioned exceptionality of the whole political system, based not on citizens, but on "constituent peoples... and citizens"; and therefore capable of justifying almost any exceptional measure which considers collective (here, ethnical or national) interests rather than individual rights.

8. Once that has been said, I do absolutely agree on Mr Scholsem's opinion (which is substantially similar to Mr. Tuori's, a bit more descriptive). I think it is almost impossible to expose it better, and with better arguments. In fact, as he puts it, the only remaining questions are the final ones about the government of the City of Mostar, the statute of its Central Zone and the extension of the right to participate of its residents. And after reading the Constitutional Court explanation, I do also agree with Mr Scholsem when considering that those residents seem to be discriminated with regard to the residents of the other six areas.

9. However, it has to be also recalled that the same 2008 Joint Opinion "*recommended* that provisions of the constitution and of the Election Law that discriminate against certain citizens on the basis of their ethnicity should be eliminated. All citizens of Bosnia and Herzegovina should have the right to stand for any office or to vote on equal terms". Exceptions cannot become norms, and exceptionality cannot become normal. And this has to be highlighted very particularly when international organizations aimed at the protection of individual human rights are called to give an opinion. Certainly, the constitutional problem may be quite clear. But the same answer cannot be valid (at least, not endlessly) from the perspective of protection of fundamental rights.