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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

**AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA
ON THE MODE OF ELECTION OF DELEGATES
TO THE HOUSE OF PEOPLES
OF THE PARLIAMENT
OF THE FEDERATION OF BOSNIA AND HERZEGOVINA**

**Adopted by the Venice Commission
at its 108th Plenary Session
(Venice, 14-15 October 2016)**

on the basis of comments by

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I. Introduction

1. The Venice Commission received a request by letter dated 10 June 2016 from the Constitutional Court of Bosnia and Herzegovina for an *amicus curiae* brief on the mode of election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina.
2. The context of this request is a claim brought before the Constitutional Court of Bosnia and Herzegovina in Case no. U 23/14 “*for review of the constitutionality of certain provisions of the Election Law of Bosnia and Herzegovina relating to the election of delegates to the House of Peoples of the Parliamentary Assembly of the Federation of Bosnia and Herzegovina*”, introduced on 24 September 2014 by Professor Dr Bozo LJUBIC, then acting chairman of the House of Representatives of Bosnia and Herzegovina, pursuant to Article VI-3-a of the Constitution of Bosnia and Herzegovina. In this request, the applicant alleges that Articles 10.10, 10.12, 10.15, 10.16 and 20.16 A of the Election Law of Bosnia and Herzegovina (see CDL-REF(2016)050) are not in line with Articles I.2 (democratic principles), II.1 (human rights) and II.4 (non-discrimination) of the Constitution of Bosnia and Herzegovina and, amongst others, Article 25 (right to political participation) of the International Covenant on Civil and Political Rights (hereinafter, the “ICCPR”), Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter, the “ECHR”) in conjunction with Article 3 (right to free elections) of Protocol No. 1 as well as Protocol No. 12 (on general prohibition of discrimination) to the ECHR.
3. The applicant alleges that the Election Law of Bosnia and Herzegovina violates the provision on proportional representation of the Constitution of Bosnia and Herzegovina and the above-mentioned international treaties by providing that each constituent people shall be allocated one seat in every canton, even if the number of members of the respective peoples in a specific canton is very small. The application of the Constitution of the Federation should ensure the appropriate proportional representation of delegates in the Federation’s House of Peoples, which corresponds to the ethnic structure of the cantons the delegates come from. According to the applicant, the Election Law distorts this proportionality with respect to all three constituent peoples.
4. The question addressed to the Venice Commission is the following: “*Is the mode of election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, having regard to the specificities of the constitutional situation and the decision of the Constitutional Court on constituent peoples, compatible with the principles underlying Europe’s electoral heritage?*”
5. Mr Barrett, Mr Scholsem and Mr Vilanova Trias acted as rapporteurs for this *amicus curiae* brief.
6. This *amicus curiae* brief was adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016).

II. General remarks

7. This is an *amicus curiae* brief for the Constitutional Court of Bosnia and Herzegovina. As such, it does not have the intention of taking a final stand on the issue of the constitutionality of certain provisions of the Election Law of Bosnia and Herzegovina, but merely to provide the Court with material as to the compatibility of the relevant provisions with European standards and with elements of comparative constitutional law, so as to facilitate the Court’s consideration of these provisions under the Constitution of Bosnia and Herzegovina. It is the Constitutional Court of Bosnia and Herzegovina that has the final say on the binding interpretation of the Constitution of Bosnia and Herzegovina and the compatibility of national laws with this text.

8. The *amicus curiae* brief is based on an unofficial English translation of the Election Law of Bosnia and Herzegovina. Errors may occur in this *amicus curiae* brief as a result of an incorrect or inaccurate translation.

III. Legal provisions and electoral system of the Federation of Bosnia and Herzegovina

A. Relevant legal provisions

9. The relevant national legal texts for this *amicus curiae* brief are the Constitution of Bosnia and Herzegovina, the Election Law of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina (Bosnia and Herzegovina will be referred to hereinafter as “BiH”).

10. Articles 10.10, 10.12, 10.15 and 10.16 of the **Election Law of BiH** provide for the election to the House of Peoples in the Federation of BiH, *inter alia*, that the cantonal assembly elects 58 delegates to the House of Peoples: 17 Bosniacs, 17 Serbs, 17 Croats and 7 others. The provisions also set out that the number of delegates from each constituent people and of others shall be proportionate to the population of the canton, as reflected in the last census¹ and that for each canton, population figures for each constituent people and others shall be divided by 1, 3, 5, 7 etc. as long as necessary for the allocation – the result shall represent the quotient of each constituent people and others in each canton. Each constituent people shall be allocated one seat in every canton.

11. The **Constitution of the Federation of BiH** stipulates, in provision IV.A. 6-8, that the House of Peoples of the Federation shall be composed on a parity basis, so that each constituent people has the same number of representatives (17), while “others” have 7. The delegates shall be elected by the cantonal assemblies from among their representatives in proportion to the ethnic structure of the population and there shall be *at least* one Bosniac, one Croat and one Serb from each canton which has at least one such delegate in its legislative body.

B. Structure of Parliament of the Federation

12. The Federation of BiH (hereinafter, the “Federation”) is one of two entities that form the State of BiH² and is composed of 10 cantons.³ The Federation has a bicameral legislative system that comprises the House of Peoples, which is the upper house (hereinafter, “second chamber”) of parliament, and the House of Representatives, which is the lower house/first chamber of parliament.

¹ Article 20.16A is a transitional provision that implements Article 10.12 on the basis of the results of the 1991 census until the 2013 census is in force (provisionally expected at the end of 2016). At the moment, any electoral process in any part of BiH is based on a census taken in 1991, i.e. before the 1992-1995 civil war, which has resulted in great human loss and a huge population displacement and refugees. This has, of course, distorted and changed the composition of the country’s population and hence, the 1991 census is unlikely to accurately reflect BiH’s current composition. However, a recent population census has taken place from 1 to 15 October 2013, the first after the civil war. The 2013 census was based on the Law on Census of Population, Households and Dwellings in Bosnia and Herzegovina in 2013 (Official Gazette of BiH, 10/12 and 18/13), and the partial results were published in June 2016, see <http://www.popis2013.ba/>. The final results of the 2013 census should be published by the end of 2016.

² Article I-1(1) of the Constitution of the Federation of BiH.

³ Ibid., Article I-2.

13. The Constitution of the Federation was amended⁴ by the High Representative in 2002 as a result of the Constitutional Court's decision on the constituent peoples⁵ in 2000 so as to include, on a parity basis, all constituent peoples and to make room for seven delegates from the others in the House of Peoples of the Federation. At the same time, the number of Bosniac and Croat delegates in that House had been reduced from 30 to 17 by the decision of the High Representative in 2002.

14. The House of Representatives of the Federation consists of 98 members, elected by eligible voters in direct, Federation-wide elections.⁶ As a result of the decision of the High Representative in 2002, the overall number of delegates in the House of Peoples of the Federation was reduced from 60 to 58 delegates, elected by the cantonal assemblies from among their representatives in proportion to the ethnic structure of the population and the number of delegates in each canton shall be proportional to the population of that canton.

15. In principle, both Houses have equal legislative powers,⁷ with the exception that the House of Peoples has a distinct role to play in the "vital interest procedure".⁸ The Venice Commission will not analyse this any further as this is not relevant to the questions posed.

C. Election system

16. The election system of the Federation is governed by norms from two levels, one at the State level and one at the Entity level of the Federation.

17. At the **Entity level**, under the Constitution of the Federation, if a canton has at least one delegate in its cantonal assembly from a particular constituent people, then that canton must send a representative of that constituent people to the House of Peoples of the Federation.

18. At the **State level**, under the mechanism laid down in the Election Law of BiH (Article 10.12), a number of issues arise. One of them may appear technical, but is nonetheless important and is as follows: the number of delegates is fixed i.e. 58, comprising 17 Bosniacs, 17 Croats, 17 Serbs and seven representing the others. Of the 17 seats allocated to each constituent people only 7 are not allocated automatically to cantons since the other 10 are allocated by law to each canton; these delegates are not directly elected, but are elected by the 10 cantonal assemblies and the problem is to ensure the distribution of the 7 seats among the 10 cantons (Article 10.12 (1)) and, in each of the cantons, to allocate the seats amongst the three constituent peoples and others (Article 10.12 (2)). Once this is done, the overall result for

⁴ See also ibid., Article I-1 (2).

⁵ Constitutional Court of Bosnia and Herzegovina, Decision U-5/98 (30 June and 1st July 2000), Official Gazette of BiH, 14/9/2000; http://www.jus.unistr.it/download/gestione/jens.woelk/20111028_1108U-5-98-DO-2.pdf : This decision redefined the principle of the constituency of peoples and following this decision, three constituent ethnic groups were created in the entire territory of BiH.

⁶ Ibid., Article IV-3.

⁷ Ibid., Article IV-17.

⁸ Ibid., Articles IV-17a to 18a.

Article 17a

Vital national interests of constituent peoples are defined as follows:

- exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities;

- identity of one constituent people;

- constitutional amendments;

- organisation of public authorities;

- equal rights of constituent peoples in the process of decision-making;

- education, religion, language, promotion of culture, tradition and cultural heritage;

- territorial organisation;

- public information system,

and other issues treated as of vital national interest if so claimed by 2/3rd of one of the caucuses of the constituent peoples in the House of Peoples.

the Federation must still be 17 delegates for each of the 3 constituent peoples (i.e. $17 \times 3 = 51$) and 7 delegates for others ($51+7=58$), giving a total of 58 delegates.

19. Article 10.12 (2) fourth sentence of the Election Law of BiH provides that "*Each constituent people shall be allocated one seat in every canton*". Article 20.16A of this Law implements Article 10.12 of the Election Law of BiH on a provisional basis, based on the 1991 census, while Article 10.16 was also applicable during the transitional period. It clearly spells out that one representative of each constituent people from each canton is to sit in the House of Peoples. It is, however, important to underline that the Election Law of BiH, through the application of both Article 10.12 and 10.16, intends to render operational the relevant provisions of the Constitution of the Federation regarding the allocation of seats to the House of Peoples of the Federation, through the holding of two rounds of elections. The first round, under Article 10.12, is to allocate one seat per constituent peoples or others per canton and the second round, under Article 10.16, is to reallocate those seats that could not be filled to those cantons that have the necessary number of constituent peoples or others to fill the remaining seat(s) (see Article 10.16(1)).

20. Therefore, contrary to what one might expect in a federal entity, the composition of the House of Peoples does not mainly reflect the participation of the cantons in the legislative process. In reality, it primarily represents the constituent peoples on a parity basis,⁹ ensuring that each constituent people has the same number of representatives and represents the population of the cantons proportionally.

21. In the claim before the Constitutional Court of BiH, the voting procedure itself is not questioned by the applicant, but the allocation of seats to constituent peoples insofar as this does not ensure the appropriate proportional representation of delegates in the Federation's House of Peoples, which corresponds to the ethnic structure of the cantons the delegates come from.

22. If the House of Peoples is, in essence, the House of constituent peoples (and others), it seems to be clear that any alteration to the system of the allocation of seats by the Sainte-Laguë method (as provided by the Election Law of BiH) – will lead to distorted or even absurd results.

23. The applicant does not seem to contest the Sainte-Laguë method, which is currently being used for distributing seats (dividing by 1, 3, 5, 7, etc.), and is usually favourable to small lists (in this case, numerically small populations).

24. It seems that the distortions the applicant is referring to result from the election system trying to combine principles that may not be fully compatible. These principles relate to equal representation of the 3 constituent peoples, minimum representation with at least one constituent people from each canton (i.e. $17 \times 3 + 7$ and at least one per constituent people per canton, where possible) and proportional representation of the population. It is clear that requiring a minimum of one per constituent people per canton will lead to overrepresentation of constituent peoples in some cantons to the detriment of others. This is also true for the $17 \times 3 + 7$ rule, which could lead to a distortion in the representation of cantons that should – in theory – be proportional to their population.

25. Finally, this distortion of proportionality in the electoral system may be thought to clash with principles of European electoral heritage when the election is for a directly elected part of the legislature, but the concepts of equality of ballot strength and proportionality do not necessarily apply to the special parts of the BiH legislature, which are designed to represent constituent peoples and others. This issue will be addressed in more detail below.

⁹ Ibid, Article IV-6(1).

IV. State / Entity legislative competences in the electoral field

26. The differences between the Election Law of BiH and the Constitution of the Federation lead to the question of the distribution of competences between the State and the Entities in the field of elections.

27. The system for the allocation of seats for the House of Peoples of the Federation is governed by norms from two levels. On the Entity level, Article IV.8(3) of the Constitution of the Federation provides that if a canton has any delegate in its cantonal assembly from a particular constituent people, then that canton must send a representative of that constituent people to the House of Peoples of the Federation. On the State level, Article 10.12(2) of the Election Law of BiH provides that each canton must send a minimum of one delegate from each constituent people. This leads to the question of which norm prevails.

28. In a federal system, it is up to the federal state to delegate powers to the entities that compose it. However, in the unusual BiH structure, the reverse is true – it is often the Entities that delegate powers to the State level – sometimes directly and sometimes tacitly. While there is no provision in the Constitution of BiH that expressly allocates competence in the electoral field to the State to deal with the Entities' elections, the question nevertheless arises whether or not this competence was delegated to the State by the Entities. Article III(3) of the Constitution of BiH provides for the principle that competence not expressly assigned to the State belongs to the Entities. There is no general electoral competence listed among state competences. But, according to Article III(5) of the Constitution of BiH, the State may assume responsibility for other matters on the basis of a joint agreement by the Entities.¹⁰

29. Such delegation may be found in Annex 3 of the General Framework Agreement for Peace (hereinafter, the “GFAP”), which stipulates for an institution (i.e. the Permanent Election Commission), independent of the Entities (Federation and Republika Srpska), but competent to conduct all BiH’s elections and gives the Provisional Election Commission¹¹ the power to adopt rules and regulations which applied to all elections in BiH as long as no statute, in a formal sense, has been adopted. The Entities thereby tacitly accepted that the legislative framework for elections would be adopted at the State level.¹² This means that a certain competence was given to the state legislator over electoral matters in both Entities, which was considered to be in line with the Constitution of BiH.¹³

30. Although the Venice Commission has always ascribed general competence in electoral matters to the State of BiH (as this competence stems from Annex 3 to the GFAP) it has also admitted some limited intervention by the Entities, as long as basic principles laid down by federal law are followed.¹⁴

31. Taking this into account, the Election Law of BiH seems to depart slightly from what is “proportionality”, as mandated by the Constitution of the Federation. To overcome this issue, the Constitutional Court of BiH might envisage that the provision of the Election Law of BiH (“*Each constituent people shall be allocated one seat in every canton*”) be interpreted as worded in the Constitution of the Federation (“*In the House of Peoples there shall be at least*

¹⁰ See Opinion on the competence of Bosnia and Herzegovina in electoral matters (CDL-INF(98)16), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(1998\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1998)016-e), p.3 II.

¹¹ Annex 3 of the General Framework Agreement for Peace provided that the Provisional Election Commission (Article III) would be replaced by a Permanent Election Commission (Article V) with responsibilities to conduct future elections in Bosnia and Herzegovina.

¹² Ibid., pp.2-3.

¹³ Ibid, p. 3.

¹⁴ Ibid., pp. 4-5.

one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body'), although the wording of the Election Law of BiH and that of the Federation's Constitution are basically the same.

32. The present situation could be considered to be a specific one, which allows for the interpretation of State law in conformity with the Entities' law to the extent that it results from a delegation by the Entities. Such delegation should not in itself be interpreted as allowing the State to go against an Entity's constitution and organisational autonomy.

33. It should also be pointed out that Article 10.12 should be read in conjunction with Article 10.16 of the Election Law of BiH, as Article 10.16 provides for the procedure to be applied if the required number of delegates from each constituent people or from among others are not elected in a given cantonal assembly. Under this procedure, the Central Election Commission reallocates seats that are not filled to other cantons, ensuring in this way that the requirement to have one representative of each constituent people in each canton is limited to cantons in which there are such representatives, as required by the Federation's Constitution. This seems to provide a balanced system for the allocation of seats to the Federation's House of Peoples.

V. Election standards: the reach of the principle of equal suffrage

34. The question arises whether the manner in which the delegates are elected to the Federation's House of Peoples complies with international human rights requirements relating to equal suffrage.

A. Relevant international standards

35. Article 3 of Protocol No. 1 to the ECHR provides the following: "*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.*" (For the applicability of this Article to second chambers and entities' parliaments, see below).

36. Article 1 (on general prohibitions) of Protocol No. 12 to the ECHR provides the following in its paragraph 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.*"

37. The International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, the "ICERD") is also relevant here. Article 1.1 of the ICERD provide that: "in this Convention, the term '*racial discrimination*' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

38. Article 2.1.a-d of the ICERD set out that: "*States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:*

(a) *Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;*

- (b) *Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;*
- (c) *Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*
- (d) *Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”*

39. Article 25 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:*

- (a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) *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; (...).*

40. Article 21(3) of the Universal Declaration on Human Rights (UDHR) provides the following: “*The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*”

41. While the above-mentioned international conventions as well as the UDHR neither refer to first nor to second chambers, the Venice Commission’s Code of good practice in electoral matters,¹⁵ in point I.2.2 entitled “Equal voting power” states that “*seats must be evenly distributed between the constituencies i) this must at least apply to elections to lower houses of parliament and regional and local elections,*” thus excluding, in principle, second chambers.

42. The issue of second chambers is also addressed by paragraph 7(2) of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (commonly referred to the Copenhagen Document 1990) provides: “*To ensure that the will of the people serves as the basis of the authority of government, the participating States will... (7.2) — permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote.*”¹⁶

43. The question now arises whether or not the international conventions’ silence on the issue of second chambers means that they should be elected according to the principle of equal voting power.

B. Analysis

44. The principle of equal voting power is guaranteed by Article 25 ICCPR,¹⁷ as well as by Article 3 Protocol No. 1 ECHR.¹⁸ Inequalities of representation between constituencies are, in principle, forbidden even if there is a margin of appreciation.

45. This leads to the question of whether or not the ICCPR and the ECHR (or more precisely its protocols) allow for a distinction to be made between first and second chambers from the point of view of the scope of the principle of equal suffrage, to exclude, as regards second chambers, the aspect of equal voting power. This issue cannot be settled without examining

¹⁵ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)

¹⁶ <http://www.osce.org/odihr/elections/14304?download=true>

¹⁷ General Comment 25, paragraph 21.

¹⁸ Bompard v. France (dec.) (2006) : “such differences [of population between one-member constituencies] may exist only to a limited extent and must be based on precise and strictly determined imperatives”,

whether these provisions apply to second chambers, including those of entities of federal states and the composition of second chambers.

46. It is not clear whether Article 3 of Protocol No. 1 to the ECHR actually applies to indirectly/non-elected second chambers. Indeed, in *Sejdic and Finci v. Bosnia and Herzegovina*, the European Court of Human Rights commented: “*Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system* (see Case of *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113; Case of *Py v. France*, 11 January 2005, §§36, 46-47). At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament’s chambers to be filled through direct elections.”¹⁹

47. However, the European Court of Human Rights considered that Article 3 Protocol No.1 applies to the House of Peoples of BiH due to its large legislative powers.²⁰ *Mutatis mutandis* this should also be the case for the House of Peoples of the Federation, since Article 3 Protocol No.1 applies to elected assemblies of sub-national entities with substantive legislative power.²¹

48. Seventeen countries in Europe, including BiH, practice bicameralism.²² The method of selecting a second chamber is context dependent, the purpose of the second chamber and the historical traditions of the country in question are key contextual determinants. The Venice Commission has reported: “*It is very difficult to identify a pattern and there is an extraordinary heterogeneity of models for selecting the members of Second Chambers. Decision on how to select a Second Chamber is context-dependent and it results from pondering, on the one hand, the functions assigned to the chamber with the historical traditions or institutional representation, on the other hand.*”²³ With respect to the selection of Second chambers being context-dependent, the Constitutional Court of BiH held in the **constituent peoples case** (U-5/98), pointing to the special context BiH, that “*Minimum or proportional representation in the Federation legislature must be interpreted from a different angle. To the extent that there is a bicameral parliamentary structure in the first Chamber based on universal and equal suffrage without any ethnic distinctions and that the second Chamber, the House of Peoples, also provides for the representation and participation of others, there is not *prima facie* a system of total exclusion from the right to stand as a candidate*”.

49. It is not inherently undemocratic to have a second chamber that is not proportionally representative of the population. In particular, bicameralism is often practised in federal states to equally represent the sub-national authorities at a national level; where this is the purpose of the second chamber, it is entirely appropriate that the members are selected by those sub-national authorities.²⁴ A corollary of representing a sub-national authority in this manner is the,

¹⁹ *Sejdic and Finci*, paragraph 40.

²⁰ *Sejdic and Finci*, paragraphs 40-41.

²¹ See for example *Mathieu-Mohin and Clerfayt* (1987), par. 53; *Py v. France* (2005), par. 36.

²² Belarus, Belgium, Bosnia and Herzegovina, Germany, France, Ireland, Italy, Netherlands, Austria, Poland, Romania, Russia, Slovenia, Spain, Czech Republic, United Kingdom and Switzerland. See *Report on Second Chambers in Europe* (CDL(2006)059rev); see also *Bicameralism in the world*, Sénat, France, <http://www.senat.fr/senatsdumonde/introenglish.html>; *Bicameral Legislatures – An international comparison*, Betty Drexhage, Ministry of the Interior and Kingdom Relations, The Hague, 2015,

<https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwi-4vuV7O3OAhVKBBoKb9JAPwQFgg1MAM&url=https%3A%2F%2Fwww.government.nl%2Fbinaries%2Fgovernme>

nt%2Fdocuments%2Freports%2F2015%2F10%2F01%2Fbicameral-legislatures-an-international-comparison%2Fbicameral-parliamentary-new.pdf&usg=AFQjCNFxvkYlo-tQqCJSPlGYlwW8ZKK0drw&sig2=wzHL_L3uTHqjKtcaBXmVPQ

²³ Carlos Closa Montero, member of Spain for the Venice Commission, *Report on forms of representation in second chambers: election procedures* (CDL(2008)018),

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2008\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2008)018-e)

²⁴ Patrice Gélard, *Report on Second Chambers in Europe - Parliamentary complexity or democratic necessity?* (CDL(2006)059rev),

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059rev-e)

seemingly, disproportionate representation of the different populations. IDEA International comments that where a second chamber exists to represent sub-national authorities, there tends to be an assumption this will generally involve disproportionate representation of the population: “*190. The structures of these vary widely, but in general the most common use of second chambers is in federal systems to represent the constituent units of the federation. For example, the states in the USA and Australia, the Länder in Germany and the provinces in South Africa are all separately represented in an upper house. Typically, this involves a weighting in favour of the smaller states or provinces, as there tends to be an assumption of equality of representation between them. In addition, many second chambers feature staggered elections: half the chamber is elected every three years in Australia and Japan; one-third of the chamber is elected every second year in the USA and India, and so on.*”²⁵

50. In summary, second chambers seem to be intended generally to ensure some representation of sub-national entities, in particular in federal states. This seemingly permanent feature was present at the time of the drafting of the ECHR and of the ICCPR and still is present today. It is therefore very unlikely that these treaties could be interpreted as requiring a radical change of the constitutional order of most countries with a bicameral system. At least, systems ensuring no equal representation of the population in second chambers, but aiming to ensure other aspects of the principle of equality, should be considered in conformity with these treaties.

51. Thus, where the purpose of a second chamber is to represent sub-national authorities, the assumption is that equality operates between those authorities, not between the populations of those authorities.

52. In the case of the Federation’s House of Peoples, the primary purpose is to ensure proper representation of the constituent peoples and others.

53. The calculation for the allocation of seats in this House can be seen from two different perspectives: (1) from the perspective of an individual canton of the Federation or of an individual citizen – either could arguably see it as disproportionate and lacking in equality; or (2) from the perspective of the Federation and the State of BiH – which can arguably see it as not arbitrary. In any case, it is designed to provide for a disproportionate reflection of mandates as across the 10 cantons. As a whole, the relevant provisions of the Election Law of BiH (i.e. Articles 10.10, 10.12, 10.15, 10.16 and 20.16A), create a system of indirect election that could be described as so circumscribed as to constitute a form of selection, respectively allocating seats to constituent peoples and cantons. The overall result is already dictated by the Constitution of the Federation as amended to comply with the Constitutional Court decision of 2002 on constituent peoples.

54. The societal value of ensuring representation of different components of society²⁶ in second chambers, particularly in multi-ethnic democracies, has been recognised.²⁷ Arend Lijphart recommends a federalised system in multi-ethnic countries and notes that a second chamber that is not proportionate to the population of the sub-national authority works well when groups are geographically concentrated.²⁸ However, where distinct groups are not geographically concentrated, it is evident that strict equality amongst the sub-national authorities will not produce a proportionate representation of those groups in the second chamber.

²⁵ IDEA International *Electoral System Design: The New International IDEA Handbook* (2008).

²⁶ In the context of BiH it is the constituent peoples.

²⁷ Arend Lijphart *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977); Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984). It might also be noted that the author favoured an effective veto system being available to protect the vital interests of each ethnicity.

²⁸ Arend Lijphart *Constitutional Design for Divided Societies* (2004) 15(2) Journal of Democracy 96.

55. The Federation's House of Peoples does not have the role of a directly elected House of Representatives, but rather has a membership designed to reflect the constitutionally designed equality (proportionality) as between constituent peoples and the inclusion of others. The method of electing the delegates to the House of Peoples uses the cantons and their delegates. While this has the added advantage of a geographical spread, the primary purpose of the House of Peoples is not to represent cantons, but rather to represent constituent peoples and others. It therefore embodies another type of equality i.e. the "collective equality" of the three constituent peoples plus a fixed representation of others. In addition, it has an important role to play in the vital interest procedure and could be seen as a "veto" chamber of the Federation's Legislature.²⁹

56. Therefore, the democratic legitimacy of the method of election should not be evaluated by reference to the comparative ballot value of voters or imbalance within or between cantons. The institutional and structural imbalance within the BiH electoral system might clash with principles of European electoral heritage if the election was for a directly elected part of the legislature, such as the Presidency or the different Houses of Representatives. But, the concepts of equal-voting power and proportionality do not apply to the special parts of the BiH legislature, which are designed to represent constituent peoples – and hence are designed to meet the unique specificities of BiH.

57. Furthermore, the system under the Constitution of the Federation, set out above, seems to comply with the Attachment to Annex 3 of the GFAP which aims to "*permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote*".³⁰

58. The situation is different from that dealt with by the European Court of Human Rights' judgments in *Sedjić and Finci*³¹ as well as in *Zornić*,³² where the Court applied certain human rights guarantees to the selection of representatives to the House of Peoples of BiH. In *Sejdić and Finci* as well as in *Zornić*, the European Court of Human Rights decided that the Convention rights were violated, because individuals were excluded from running for selection and this contravened the freedom from discrimination contained in Article 14 of the ECHR.

59. In both *Sejdić and Finci* as well as in *Zornić*, the European Court of Human Rights was quite prepared to accept that there is a relatively wide degree of latitude in relation to the election of the second chamber; the problem was that the total disenfranchisement of certain persons was not required to effect a politically acceptable settlement. This difficulty is not applicable to a scenario where no community is excluded from representation; indeed the Election Law of BiH guarantees the equal representation of all constituent peoples and the representation of others.

60. The selection of members of the Federation House of Peoples should not, therefore, be evaluated by reference to the prohibition against discrimination in Article 14 of the ECHR in the same way as happened in *Sejdić and Finci* as well as in *Zornić*, nor of Protocol No. 12 to the ECHR, which sets out a general prohibition on discrimination in its Article 1.1.

61. Whether the selection of members of the Federation House of Peoples is in line with Article 25 of the ICCPR, which recognises and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to

²⁹ See Article IV.A.18.1 of the Constitution of the Federation.

³⁰ <http://www.nato.int/ifor/gfa/gfa-an3.htm>

³¹ *Sejdić and Finci v. Bosnia and Herzegovina* (2009), <http://hudoc.echr.coe.int/eng?i=001-96491>

³² *Case of Zornić v. Bosnia and Herzegovina* (2014), <http://hudoc.echr.coe.int/eng?i=001-145566>

public service³³ – is another question, but the reasoning could be similar. The people's rights within the constitutional structure must comply with the norms in Article 25 including the right to vote, equal suffrage and the prohibition against unreasonable discrimination. These rights are clearly not absolute, but General Comment to that Article (1996) states that any restrictions on the right to vote must be established by law and based on reasonable and objective criteria. The grounds with respect to the right to vote and to be elected in the BiH system are established by law, therefore the question is whether the BiH system is deemed objective and reasonable. But, it might be inferred from the above that the concepts of equal voting power do not apply to the special parts of the BiH legislature, since they are to represent constituent peoples – and hence are designed to meet the unique specificities of BiH.

62. The BiH system also seems to be consistent with Article 2.1 of the ICERD, which provides protection against discrimination also for groups, not only individuals.

VI. Conclusion

63. The question addressed to the Venice Commission in this *amicus curiae* brief was: "*Is the mode of election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, having regard to the specificities of the constitutional situation and the decision of the Constitutional Court on constituent peoples, compatible with the principle underlying Europe's electoral heritage?*"

64. It will be up to the Constitutional Court of BiH to decide whether this mode of election is compatible with the Constitution of BiH and with Europe's electoral heritage. It might however consider that the composition of the House of Peoples of the Federation is not merely designed to reflect the participation of its 10 cantons in the legislative process; that, it aims instead to ensure the representation of the constituent peoples on a parity basis, ensuring that each constituent people has the same number of representatives and basically acts like a "veto" chamber of the Federation's Legislature.

65. The Venice Commission considers that although this distortion of proportionality in the electoral system might not be consistent with principles of European electoral heritage if the election was for a directly elected part of the legislature, it can be justified that the concept of equal voting should not apply to the special parts of the BiH legislature, which are designed to ensure representation of constituent peoples and others.

66. As regards the system for the allocation of seats for the House of Peoples of the Federation of BiH, this is governed by norms from two levels:

- On the Entity level, the Constitution of the Federation provides that if a canton has any delegate in its cantonal assembly from a particular constituent people, then that canton must send a representative of that constituent people to the House of Peoples of the Federation.
- On the State level, the Election Law of BiH provides that each canton must send a minimum of one delegate from each constituent people.

67. It is, however, important to point out that the Election Law of BiH intends to render operational the relevant provisions of the Constitution of the Federation on the allocation of seats to the House of Peoples of the Federation through the holding of two rounds of elections. The first round, under Article 10.12, is to allocate one seat per constituent peoples or others per canton and the second round, under Article 10.16, is to reallocate those seats that could not be

³³ See UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (*Participation in Public Affairs and the Right to Vote*), *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <http://www.refworld.org/docid/453883fc22.html>, p. 1.

filled to those cantons that have the necessary number of constituent peoples or others to fill the remaining seat(s) (Article 10.16(1)).

68. The system under the Constitution of the Federation seems to be in line with European and other international standards in the field of elections. Since the Election Law of BiH intends to render operational the relevant provisions of the Constitution of the Federation, it also seems to be in line with these standards.

69. The Venice Commission has always recognised a general competence in electoral matters to the State of BiH, since this stems from Annex 3 to the General Framework Agreement for Peace. However, the Venice Commission also admitted some limited intervention by the Entities, as long as basic principles laid down by federal law were heeded. This delegation should not in itself be interpreted as allowing the State to go against an Entity's constitution and organisational autonomy.

70. In any case, it will be up to the Constitutional Court of BiH to provide an authoritative assessment of the Election Law of BiH. In the Venice Commission's view, the Election Law of BiH seems to depart slightly from what is "proportionality", as mandated by the Constitution of the Federation in the allocation of seats to the House of Peoples of the Federation. However, a solution might be envisaged by which the provision of the Election Law of BiH ("*Each constituent people shall be allocated one seat in every canton*") be interpreted as worded in the Constitution of the Federation ("*In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body*").

71. The Venice Commission remains at the disposal of the Constitutional Court of Bosnia and Herzegovina for any future assistance it may need.