

## **BiH Election Reform and the Key Provisions of the Constitutional Court’s Ljubić and Čolak Cases**

On 1 December 2016, the Constitutional Court of Bosnia and Herzegovina (BiH) ruled in case U-23-14 (the so-called “Ljubić Case”) that the BiH election law discriminates against its constituent peoples. The ruling also confirmed that delegates to the House of Peoples of the Federation of BiH (upper of two chambers of the FBiH legislature) are representatives of the Constituent Peoples rather than representatives of the cantons (the 10 federal units making up the Federation). The same principle applies to the members of the three-member Presidency, who must be legitimate representatives of the Constituent Peoples.

This Constitutional Court ruling required the Parliamentary Assembly of Bosnia and Herzegovina to amend the election law to ensure that delegates to the House of the Peoples of both the country and the Federation of Bosnia and Herzegovina, as well the members of the Presidency, are truly legitimate representatives of the Constituent Peoples. The Court gave the country’s parliament six months to change the election law.

Following the Court ruling, the Croat delegates introduced a proposal into parliamentary procedure during the six-month period following the ruling. The proposal passed the Constitutional Commission of the House of Peoples of Bosnia and Herzegovina, but the Bosniak delegates invoked the “vital national interest clause” on 4 May and attempted to remove the proposal from parliamentary procedure. The case was brought before the Constitutional Court of BiH on 8 May 2017, and the Court ruled in case U-3-17 (the so-called “Čolak Case”) that the vital national interest of Bosniaks was not damaged by the proposal; therefore ruling the proposal constitutional and could be voted upon.

The Constitutional Court also annulled the relevant provisions of the electoral law given that the deadline to pass electoral reform had passed.

Therefore, if electoral reform fails to pass before the May 8 2018 deadline (the latest date when the election have to be called by the central election commission), the legislatures of both BiH and the FBiH will be unable to legally function, and the country will consequently be left without a legislature and executive at multiple levels.

The following report highlights the key parts of the Ljubić and Čolak cases as a guide to help designing a new electoral code. In sum, the ruling makes clear:

- 1) That the current election law violates the rights of the Constituent Peoples to elect their legitimate representatives, as enshrined in BiH’s Constitution, as the current election law has created a system that enabled for the representatives of the Constituent Peoples to the Federation House of the Peoples to be elected without being the legitimate representatives of the Constituent People.
- 2) The right of the Constituent People to elect their legitimate representatives also applies to all other state institutions that were designed to protect the rights of the Constituent People, including the three-member Presidency.
- 3) Members of one Constituent Peoples must be able to elect their legitimate representatives by themselves, without any interference by the members of the other two Constituent Peoples.

## Relevant Provisions of the BiH Constitution

### Preamble

(...)

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 is as follows:

### Article I Bosnia and Herzegovina

(...)

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.

## Key Provision of Constitutional Court Ruling in the Ljubić Case (U-23-14), with Commentary

*[Note: the key paragraphs of the rulings are excerpted below. First there is the paragraph from the actual ruling, with the relevant text with the most important provisions in bold. Our commentary is included in italics.]*

Para 40. (...) Pursuant to Article I(2) of the Constitution of Bosnia and Herzegovina, **Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.**

So, taking into consideration the mentioned principle of **the rule of law, all constitutions, laws and other regulations must be harmonised with constitutional principles.** The Constitutional Court is competent and obliged to act as a guardian of the Constitution of Bosnia and Herzegovina (Article VI(3)) on every occasion and that is defined under one of its basic principles - the rule of law referred to in the mentioned constitutional provision. Therefore, the Constitutional Court considers that it has jurisdiction to examine whether the relationship between the Election Law and Constitution of the Federation is in conformity with the constitutional principles in adherence with which the provisions are to be passed. In other words, **the Constitutional Court is to examine whether mutual relationship between the Election Law and Constitution of the Federation is in violation of the principles under the Constitution of Bosnia and Herzegovina,** i.e. its relevant provisions the applicant refers to.

Para 44. Furthermore, the Constitutional Court finds that the Election Law, Article 1.1 regulates the election of the members and the delegates of the Parliamentary Assembly of BiH and of the members of the Presidency of BiH and **shall stipulate the principles governing the elections at all levels of authority in BiH.** So, the Election Law regulates the election with regards to the State institutions, while as regards the institutions of the Entities, i.e. the House of Peoples, the principles that apply to the elections are determined. The Constitutional Court notes that regardless of the fact that the Constitution of the Federation established the principle when it comes to filling the seats in the House of Peoples and entrusted the legislator with exclusive power to legally determine the number, structure, method of election of delegates and election of delegates from amongst Others, the legislator also provided, under the mentioned provision, **that the Election Law determines the principles that apply to the elections at all levels of power in Bosnia and Herzegovina.** The Constitutional Court finds that the legislator, under the provisions of Article 10.12 of the Election Law, determined that the number of delegates from each constituent people and group of Others is proportionate to the population of the canton as reflected in the last census. (...)

*COMMENTARY: In the merits of the decision, the Constitutional Court states in Paragraph 40 that all the constitutions, laws and other regulations must be harmonized with the constitutional principle of BiH being a democratic state which operates under the rule of law and with free and democratic elections. In other words, every law (including the election law, which is at the*

*state level rather than entity level) and every constitution (including FBiH's constitution) must be harmonized with this principle of the BiH constitution. This means that not only does the election law of BiH have to be harmonized with the below court rulings and reformed, but so should the constitution of FBiH after the election law reform in order for it to comply with the new election law. Elections could still be held even without constitutional changes, as the election law is at the state level, and as the BiH's constitution takes precedence and is of higher importance than entity constitution. We have seen many other Constitutional Court decisions result in changes to the entity constitutions. Most prominently, with the historic decision U-5-98 from 2000, the so-called "Decision on the constituency of peoples," resulted in fundamental changes to the RS and FBiH constitutions.*

*In practice, this means that the Constitution of FBiH and its stipulations must be harmonized with the Ljubić ruling and reformed election law, rather than the other way around. This is explicitly reiterated in Paragraph 44 of this ruling. The argument, that because Constitution of FBiH's Article 8 (3) states "In the House of Peoples there shall be at least one Bosniak one Croat, one Serb from each canton which has at least one such delegate in its legislative body," there should still be at least one delegate of all three peoples elected from each canton regardless of the Constitutional Court of BiH decision, is not valid, as FBiH's constitution is of lower order than BiH's constitution (as well as the fact that entity laws are of lower order than state laws).*

*Therefore, the SDA proposal introduced to the Parliamentary Procedure (which was subsequently voted down on 31 January 2018) would be found unconstitutional by the Constitutional Court of BiH, as it did not adhere to the Constitutional Court decision. Moreover, it also means that the SDP/DF proposal introduced in the FBiH Parliament is also unconstitutional, as the election law is at the state level and it can only be reformed by the Parliamentary Assembly of BiH. The FBiH Parliament does not have that authority; therefore it is impossible to fix the electoral law through FBiH Parliament, as envisioned in the SDP/DF proposal. SDP/DF proposal had the exact same issue as the SDA proposal – it did not implement Constitutional Court ruling which require at least one Bosniak, Croat and Serbs to be elected in every canton.*

Para 47. The Constitutional Court recalls that states enjoy a wide margin of appreciation in establishing and regulating the electoral system to be applied. There are different ways of organising and administering elections and this variety is conditioned *inter alia* by the political development of a country. Therefore, the legislation regulating elections must be viewed in light of the political development of the country concerned. In addition, the Constitutional Court recalls that **according to the general principle of democracy, the right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice by those represented and whose interests are represented. In this regard, the connection between those who are represented and their political representatives at all administrative-political levels is actually the one that gives the legitimacy to community representatives. Therefore, only the legitimacy of representation creates a basis for actual participation and decision-making.**

*COMMENTARY: In Paragraph 47, the Constitutional Court explicitly states that, in accordance to the general principle of democracy and the right to participation in a decision-making through legitimate political representation, political representatives must be elected by those who they represent in order to actually have legitimacy. In practice, this means that in the case of community representation of the FBiH's House of Peoples (as well as at all administrative-political levels, which includes House of Peoples of BiH and the Presidency of BiH), the voters from one of the three constituencies must be able to freely and independently elect their own representatives. This means that Bosniaks should not elect Croat or Serbs delegates to the FBiH's House of Peoples, as those delegates would not have legitimacy, as they would be elected by members of another constituent peoples rather than by member of the constituent people they were supposed to represent. This means that if a Serb delegate is elected by Croat or Bosniak vote, that delegate would not have legitimacy and therefore the Serbs would not have equal and full participation and decision-making ability in the FBiH, which is against the Constitution of BiH.*

*The most important part of Paragraph 47 is that the same principle is valid for all administrative-political levels. This means that it is valid for all Croat (or Bosniak or Serb) delegates in the House of Peoples of BiH, as well as for the three members of the Presidency, as Croat member of the Presidency cannot have legitimacy and represent Croats if he was elected by Bosniak voters.*

*In this sense, the Constitutional Court ruling did not just create strict and clear criteria of what the election principles for the election of the delegates in the FBiH's House of Peoples should be, but it also defined the same principles for other administrative-political levels intended for the representation of the three constituent peoples, which includes the House of Peoples of BiH and the Council of Peoples of RS, in addition to the Presidency of BiH.*

*Together with the much-needed implementation of the ECHR rulings, this is why it is necessary to include the Presidency of BiH into any election law reform. If the election law reform does not include the Presidency reform, as it is currently advocated by certain political and media figures in BiH, that would simply mean that Croat representatives can file a case to the Constitutional Court, and the Court would then have to strike down the Presidency portion of the election law (as this ruling created a precedent for all administrative-political levels which are intended for representation of constituent peoples). Therefore, this is why it is necessary to solve both issues in a package now, rather than only try to solve one, thus potentially triggering another Constitutional Court case before the October elections.*

*Finally, the Constitutional Court was very clear that there has to be a relationship between those who are supposed to be represented and those who are representing them. However, it is not mentioned that the representative should be the same ethnicity as those who elected them. As legitimacy is gained from the voters electing their representative, rather than from representative's ethnicity (i.e. Serb representative elected by Bosniaks is not legitimate, even though he is ethnically a Serb), then there is no reason why a Jew, a Roma, an Albanian, a person who does not identify at all nationally or ethnically, a person who identifies as a Jedi, or any other citizen of BiH cannot represent Croats either in the House of Peoples of BiH or in the Presidency of BiH. If they win the majority Croat vote, they would have legitimacy of the Croat constituency, and would therefore be able to represent Croats even though they are not a Croat. This is akin to the fact that in nation states a member of a national minority can be elected president and represent all citizens, even if he does not belong to the ethnic group which makes up 90+% of the population. BiH, as many other countries, is a representative democracy, and this is exactly what the Constitutional Court reminded us with this ruling.*

Para 49. The Constitutional Court recalls once again the general principle of democracy that **state power originates from the people and belongs to the people**. It follows from the Constitution of Bosnia and Herzegovina that the **Constitution of Bosnia and Herzegovina designated, as the people, the constituent peoples** who together with Others and the citizens of Bosnia and Herzegovina form a community of citizens, which exercises power equally through its representatives, and the **right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice by those represented and whose interests are represented**. However, it follows from the mentioned sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina that the **framers of the Constitution designated the constituent peoples (Bosniacs, Serbs and Croats) as specific collectivities and awarded them equal rights, i.e. "underlined" the specific and equal status of Bosniacs, Serbs and Croats as constituent peoples**. In this regard, the Constitutional Court recalls its Decision No. U-5/98 (Decision on the Constituent Status of Peoples), wherein the Constitutional Court pointed out the following: **"Again this designation in the Preamble must thus be viewed as an overarching principle of the Constitution of Bosnia and Herzegovina which the Entities, according to Article II (3)(b) of the Constitution of BiH, must fully comply with."** In addition, it follows from the aforementioned provisions that the framers of the Constitution provide for the proportional representation of Bosniacs, Serbs and Croats, as constituent peoples, in the institutions of Bosnia and Herzegovina.

*COMMENTARY: The Constitutional Court of BiH in Paragraph 49 of the ruling further stresses that the framers of the Constitution designed Bosniaks, Croats and Serbs as constituent peoples and awarded them equal rights. This means that all three constituent peoples have equal rights, and regardless of their population size, should be able to enjoy all rights in the exact same way, including the right to freely and independently elect their own representatives, without any interference from other constituent peoples.*

*Furthermore, the Constitutional Court recalls its decision U-5-98 “Again this designation in the Preamble must be viewed as an overarching principle of the Constitution of Bosnia and Herzegovina which the Entities, according to Article II (3)(b) of the Constitution of BiH, must fully comply with,” which established that the constituency and mutual equality of all three constituent peoples on the whole territory of BiH is the overarching principle of BiH’s constitution.” In practice, this means that all laws and acts have to harmonize with this overarching principle. One constituent people cannot be truly equal if they cannot elect all of their representatives by themselves, so there must be electoral and legal mechanisms to ensure the enforcement of this overarching principle. Without it, there is no true equality of constituent peoples in BiH, and without it, the country is de facto in a constitutional crisis until the issue is fixed for all levels of government.*

Para 50. (...) Members to the House of Representatives are elected democratically by eligible voters in a direct, Federation-wide elections. Each voter is eligible to cast a single, secret ballot for any registered party. Therefore, the House of Representatives represents the interests of all citizens residing in the Federation of BiH, and the right to participate in democratic decision-making *is exercised through legitimate political representation, which has to be based on the democratic choice by all citizens residing in the Federation of BiH, as it represents their interests.* On the other hand, the Constitution of the Federation prescribes that the House of Peoples will be composed on a **parity basis so that each constituent people will have the same number of delegates and it defines, as a fundamental issue of vital interest, the exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities.** In addition to the aforementioned issues specified in the Constitution of the Federation of Bosnia and Herzegovina, other issues could be treated as vital national interest if so claimed by 2/3<sup>rd</sup> of one of the caucuses of the constituent peoples in the House of Peoples. Therefore, it undisputedly follows from the aforementioned that the **House of Peoples performs the key task of protecting the constituent status of peoples.** Furthermore, according to the Constitution of the Federation, the Federation consists of federal units (cantons). However, **regardless of the aforementioned, the House of Peoples is not the house of federal units but the house of constituent peoples.** (...)

Para 51. The above analysis shows that the **right to participate in democratic decision-making, which is exercised through legitimate political representation, has to be based on the democratic election of the delegates to the House of Peoples of the Federation by the constituent people represented and whose interests are represented.** Bringing into connection the aforementioned role of the House of Peoples within the constitutional system of the Federation with the principle of the constituent status of peoples in the Federation, **it undisputedly follows that the principle of the constituent status of peoples in the Federation, in the context of House of Peoples, may be realised only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation.** Otherwise, an inadequate political representation of those represented and whose interests are represented amounts to a violation of the principle of the constituent status of peoples, i.e. **leads to inequality between any of the constituent peoples, thereby violating Article I(2) the Constitution of Bosnia and Herzegovina.**

Para 52. The Constitutional Court finds that the election of delegates to the House of Peoples is the combination of direct and indirect elections. In particular, the cantonal assemblies directly select delegates to the House of Peoples from among delegates selected by secret vote at the general direct elections held on the entire territory of the Federation when each voter is entitled to vote for any candidate from the electoral list. The Constitutional Court notes that Article 10.12 (2) of the Election Law stipulates that each constituent people shall be allocated one seat in every canton and Article 20.16 A of the Election Law (selection of one delegate from each constituent peoples for each canton) makes it possible for a member of a constituent people to be selected to the House of Peoples even in the case that such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was selected to the legislative body of that canton. **Thus, that delegate was elected by the members of another constituent people at the direct elections and the members of another constituent people elected him/her to that legislative body as well.**

The Constitutional Court notes that according to its hitherto case-law the implementation of certain law arrangements is not a constitutional issue if such arrangements are in themselves in accordance with the Constitution. In such situations, there are other appropriate protection in case of erroneous implementation of law provisions. However, the present case does not relate to such a situation but the situation where the mentioned provisions, when implemented, are in themselves contrary to the Constitution of Bosnia and Herzegovina. In particular, if one takes into account the fact that these provisions make it possible for a member of a constituent people to be selected to the House of Peoples even in the case that such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was elected to the legislative body of that canton at the direct elections, and that members of that constituent people do not select him/her subsequently to the House of Peoples, then it is more than obvious that the **mentioned provisions make it possible for the representatives of one constituent people to afford legitimacy to the representatives of another constituent people in the cantonal legislative body. In other words, one such a delegate has the same “capacity” in the House of Peoples as any other delegate selected by the members, i.e. representatives of that constituent people.** Thus, it is obvious that the mentioned provisions imply that the **right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates.**

Furthermore, the mentioned provisions violate the Constitution of Bosnia and Herzegovina even in the case that the cantonal legislative body has more delegates from a constituent people, since the members of another constituent people may afford legitimacy to them at the direct elections. Accordingly, the Constitutional Court finds that not only that the provisions of Article 10.12(2), in the part reading that *each constituent people shall be allocated one seat in every canton*, and the provision of Article 20.16 A of the Election Law are not based on the precisely clear criteria but they also imply that right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates. The Constitutional Court finds that the mentioned is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina.

*COMMENTARY: In Paragraphs 50 to 52, the Constitutional Court of BiH further explains their ruling, offering vivid examples and clear definitions to justify why the current election law is unconstitutional and why it allows discrimination against constituent peoples. The Constitutional Court, once again, reiterates that there should be parity basis so that each constituent people has the same number of delegates in the House of Peoples of the FBiH. This does not only secure parity, but it also implies that those delegates are exclusively elected by, and exclusively represent, the constituent peoples (Bosniaks, Croats and Serbs respectively). The Court also states that constituent peoples have the right to be adequately represented in legislative, executive and judicial authorities, once again confirming that the same principle for the election of the House of Peoples delegates is valid for the election of the Members of the Presidency.*

*The reason why it is so important for the delegates in the House of Peoples to be elected by members of that constituent people is that the House of Peoples performs the key task of protecting the constituent status of peoples (as well as the member of the Presidency does) through veto powers, so it is crucial that those delegates have legitimacy. Once again, this means that both the Presidency and the House of Peoples have to be reformed. The reason why the Constitutional Court did not directly order the Parliamentary Assembly of BiH to apply this to the Presidency is that the plaintiff only lodged a case with regards to the House of Peoples, while also clearly establishing the same principle for the Presidency too.*

*The Court also states that any proposal that does not set a precise criteria that should ensure full representation of each constituent people would lead to inequality between constituent peoples, and thereby violating Article I(2) of the Constitution of BiH.*

*This is why the SDA proposal would not have passed the Constitutional Court test, as it kept the old provisions when it comes to the election of the House of Peoples delegates, which were clearly marked as unconstitutional by the Court, given that they do not give a precise criterion which ensures full representation of each constituent people. Furthermore, given the number of seats in the House of Peoples of the FBiH (17), the mode of their election (indirect election through cantonal delegates) and the population distribution by cantons, it is clear that the current system in which each canton elects a predetermined number of delegates cannot ensure two main principles: a) That all three constituent peoples are equal, or in other words, that members of one of the peoples do not elect members of another people, and b) that the vote within each of the constituencies (each of the three constituent peoples) is worth exactly the same, or in other words, that one Bosniak voter in West Heržegovina Canton has the exact same vote value as one Bosniak voter in Sarajevo (the same being true for Croat and Serb voters). Only the proposal which satisfies both of these requirements and gives precise criteria for election can be implemented and pass the Constitutional Court requirements and test.*

*The SDP/DF proposal in the Federation House of the Peoples is not only unconstitutional (as the Parliament of the FBiH does not have the authority to resolve this issue), but it also failed to satisfy either of these two criteria. The SDA proposal, while addressing the issues at the Parliamentary Assembly of BiH, failed to satisfy both of the basic requirements of equality between the peoples and equality within one people. The main issue was that SDA proposed the exact same criteria for the election of delegates as the one which was dismissed by the Constitutional Court. In Paragraph 52, the Court clearly explains why that system allows members of one people to elect members of another people, thus making the system unconstitutional and in violation with the Article I(2) of BiH Constitution. The Court is clear that the system at the time of the ruling (later re-introduced in the SDA proposal) is unconstitutional as it does not ensure legitimate political representation of constituent peoples.*

*Finally, the HDZ proposal, which was also voted down in the BiH Parliamentary Assembly, went a step further than the SDA proposal, as it partially (but not fully) satisfied requirement A (equality of all three constituent peoples), but it also failed to satisfy requirement B (equality within the constituent people). It discriminated against Croats in Una-Sana, Sarajevo and Bosniak Podrinje cantons, and it gave different vote value to the Croats in West Heržegovina Canton and Zenica-Doboj Canton (30% vote value difference), which was higher than the 10% allowed deviation as recommended by the Venice Commission.*

*Therefore, it becomes clear that the current system, no matter how many delegates are elected in each of the cantons, cannot satisfy both requirements and fix the issue. A new electoral model is needed to do so, rather than just the fix in the formula which awards a certain number of delegates to each of the cantons. It would appear that the domestic politicians have still not fully grasped the gravity of the Constitutional Court decision, given that they failed to offer a proposal that adhere to both requirements of the constitutional court ruling.*

**Para 60. The Constitutional Court finds that the part of Subchapter B, Article 10.12 (2) reading: *each of the constituent peoples shall be allocated one seat in every canton* and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A paragraph 2 items a-j of the Election Law are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina as the mentioned provisions manifestly imply that the right to participate in democratic decision-making exercised through legitimate political representation will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the constituent people that is represented and whose interests are represented by those delegates. Therefore, the aforesaid is in contravention of the principle of constituent status of peoples, i.e. the principle of equality of all constituent peoples.**

*COMMENTARY: In their conclusion, the Constitutional Court found that parts of the election law were unconstitutional; therefore they must be amended. The Court gave the Parliamentary Assembly of BiH six months to do so. The Central Election Committee, which would normally adjust the numbers of delegates from each canton after each census, does not have the authority to do so until this Constitutional Court ruling is implemented and the election law is reformed through the Parliamentary Assembly of BiH. While the ruling itself was specifically about the House of Peoples of the FBiH (as that was the case brought forward by*

*plaintiff, Dr. Ljubić), the principles in this ruling also apply to other political-administrative levels, including the Presidency. The Court was very explicit about this in Paragraph 47, and as such, this ruling, in addition to the U-5-98 ruling from 2000, has sweeping and much deeper effects on BiH than some media outlets and politicians in BiH want to acknowledge.*

## **Amicus Curiae Brief of the Venice Commission**

*[Note: The Venice Commission submitted an Amicus Curia brief to the Constitutional Court. This brief was considered by the Court and given strong consideration as part of the ruling. The key portions of the brief are below.]*

Para 23. In an exhaustive analysis of the present case, the Venice Commission first notes that the **principle of equal voting power is guaranteed by Article 25 of the International Covenant as well as by Article 3 Protocol No. 1 to the European Convention and that inequalities of representation between constituencies are, in principle, forbidden even if there is a margin of appreciation.** (...)

**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. A corollary of representing a sub-national authority in this manner is the seemingly, disproportionate representation of the different populations.

Para 25. The Venice Commission further notes that the method of electing the delegates to the House of Peoples uses the cantons and their delegates, and **the primary purpose of the House of Peoples is not to represent cantons, but rather to represent constituent peoples and others, and it 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. Therefore, as further stated, 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 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.**

*COMMENTARY: The brief makes clear that there is nothing undemocratic about a second (upper) chamber which is not proportionally representative of the population. In the specific case of BiH, this means that there is nothing undemocratic with Bosniaks, Croats and Serbs electing an equal number of delegates to the upper chamber (both at state and entity levels), despite having differences in population sizes. The Venice Commission explained that upper chambers are in place for protection of constituent peoples and therefore constituent peoples themselves are constituencies, and each constituency should elect the same amount of delegates. Therefore, the principle of equal voting power should be guaranteed under Article 25 of the International Covenant, in addition to Article 3 Protocol No. 1 to the European Convention, which forbids unequal representation (such as one constituent people electing representatives of another constituent people, or one constituent people having more delegates designated than another constituent peoples) between constituencies for the upper house, which in case of BiH, are constituent peoples themselves.*

*The Venice Commission further notes that the primary purpose of the House of Peoples is not to represent cantons, but to represent constituent peoples and others, so it embodies “collective equality” of all three constituent peoples. This means that, regardless of their respective populations, all three constituent peoples must be equal and must elect their own representatives from each canton based on their own proportionality, rather than based on the total population in that canton (i.e. each canton should elect the number of delegates of one of the constituent peoples equal to the number of that constituent people in that canton divided by the total number of the same constituent people in the FBiH, or in other words, a percentage of that constituent peoples in that canton out of total population of that constituent peoples in the FBiH). In practice, this means that because the concept of equal voting*

*is based on collective equality of constituencies rather than equality of all voters regardless of their constituency (as the principle for the House of Representatives is), one Croat vote in Canton 1 should be worth exactly the same as one Croat vote in Canton 2 for the election of Croat delegates to the House of Peoples, as opposed to the Croat, Serb and Bosniak vote valued exactly the same in Canton 1 based on the total population of that canton.*

*Again, Bosniaks, Croats and Serbs are separate electoral constituencies. Therefore, it can happen that in Canton 6 (Central Bosnia) where there is roughly 147,000 Bosniaks and 98,000 Croats, Bosniaks elect 9.39% of their delegates (as 9.39% of all Bosniaks in FBiH lives in this Canton), or in practice, one to two delegates to the House of Peoples, and Croats elect 19.61% of their delegates (as 19.61% of all Croats in FBiH lives in this canton), or in practice three to four of their delegates to the House of Peoples. Therefore, Croats (or Serbs) can elect more delegates from a certain canton than Bosniaks, even if there are more Bosniaks than Croats in that canton (and vice versa), as the delegates to the House of Peoples are representatives of constituent peoples rather than cantons.*

*This also answers the wrong interpretation and critique of a part of the BiH politicians and media who wondered why some cantons with Bosniak majority give more Croat delegates than Bosniak delegates. The simple answer is that those delegates are representing constituent peoples and not the canton itself, so their number depends on how many members of one of the constituent peoples live in that canton out of the total population of that constituent people in the FBiH, rather than the ratio between the number of members of three constituent peoples within one canton.*

## **Key Provision of Constitutional Court Ruling in the Čolak case (U-3-17), with Commentary**

*[Note: On 8 May 2017, Mr. Bariša Čolak, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicant”) lodged a request for review with the BiH Constitutional Court when one of the Bosniak political parties, SDA, attempted to veto the HDZ proposal to reform the election law, claiming it was “against the vital interest” of the Bosniak people. This decision is in response to that request.]*

Para 29. (...) Therefore, according to the case-law of the Constitutional Court, the efficient participation of constituent peoples in adopting political decisions in terms of prevention of absolute domination of one people over the other, represents the vital national interest of each constituent people. (...)

Para 38. Furthermore, the Constitutional Court notes that the Proposal for the Law was not submitted with the aim of implementing that judgment (*Sejdić and Finci*) but it rather relates to the issues of electoral procedure provided for in the present Election Law. This clearly follows from Reasons for the Proposal for the Law, wherein the proponents indicate the enforcement of the Decision of the Constitutional Court, No. U 23/14 of 1 December 2016 (available at [www.ustavnisud.ba](http://www.ustavnisud.ba)), and compliance with the general principle of democracy, **namely that one people does not elect the representative of the other one, as the reason for its adoption.**

*COMMENTARY: The Constitutional Court, in their decision to determine whether the HDZ proposal introduced in BiH Parliamentary Assembly threatened the vital national interest of Bosniaks, provides additional justification on this case and further explains key concepts of the Ljubić case ruling in relation to this Čolak case.*

*The Court notes that prevention of absolute domination of one people over the other reflects the vital national interest of each constituent people. As a result, the Court must examine this case and rule whether the national vital interest of Bosniaks is violated by the proposal. Further, it also implies that ensuring legitimate representation and preventing one constituent people dominating another (through elections of that peoples’ representatives, either in the Presidency or in the House of Peoples) would constitute vital national interest. This gives a response mechanism for Croats if the legislation and any proposals do not solve both the Presidency and the House of Peoples issues in accordance with the Ljubić ruling requirements.*

*In Paragraph 38, the Court also addresses the question of the ECHR. While we believe that any election law reform should solve all ECHR rulings within the framework of the Constitution (or as many as possible given the political circumstances), the Court deems it necessary to only solve the Ljubić case to have full implementation of election results and to comply with the general principle of democracy that one people does not elect representatives of another people. Still, the Court does not think that the implementation of the ECHR rulings is necessary in the same proposal, as it is not the reason why the Court ordered the changes in the first place. Still, we firmly believe that after nine years of inaction and stalled EU accession talks (caused by the lack of implementation of the Sejdić-Finci ruling of the ECHR), the ECHR rulings and the Courts rulings should both be part of any valid proposal.*

*Further, as the legitimacy of the Presidency candidate is gained through the voters rather than through the ethnicity of the candidate, nothing is stopping the political parties from amending the discriminatory parts of the electoral law which require candidates to self-identify as members of the three constituent peoples. After all, the Court interpreted that “one Bosniak” elected to the Presidency is a representative of Bosniak constituent people, rather than necessary ethnically Bosniak. It is Bosniak voters who give him legitimacy, not his own ethnicity. Therefore, not only is the implementation of the ECHR rulings relatively simple, but it goes hand in hand with the implementation of the Ljubić case and should be part of any valid proposal.*

Para 39. Furthermore, the Proposal for the Law is based on the same principles provided for in the Constitution of BiH and Election Law as the current solution, according to which one Bosniak and one Croat from the territory of the Federation are elected to the Presidency of BiH. **Only the procedure for their election is regulated differently by the proposed solution, which should ensure, as stated in the Reasons for the Proposal for the Law, the general principle of democracy, namely that one people does not elect the representatives of the other one, i.e. that each constituent people elects by itself its own representatives of the legislature.**

*COMMENTARY: Paragraph 39, even more explicitly than the Ljubić ruling, states that the election of the Members of the Presidency must adhere to the general principle of democracy, namely that one people cannot elect the representative of another people. In other words, Bosniaks are not supposed to participate in the election of the Croat member of the Presidency (and vice versa). Moreover, the Court confirms that as long as one Bosniak and one Croat member of the Presidency are elected from the territory of the Federation, it does not matter which procedure or solution is used, as long as it allows each constituent people to elect their representative. We interpret this that the Croat representative should be elected by a majority of Croat electoral will, but that Others and Serbs in FBiH can choose whether they want to vote for a Croat or a Bosniak representative (as they do not have their own representative). Since Bosniaks have their own representative, they cannot participate in the election of the Croat representative (and vice versa). Still, anyone, including Bosniaks, Jews, Serbs, Roma or “citizens,” can run for the Croat member of the Presidency, and they can be elected as the Croat member of the Presidency, as long as they received a majority of Croat votes in FBiH. This not only solves the Ljubić ruling, but it also solves the Zornić and Sejdić-Finci rulings of the ECHR. Any electoral reform should (and could easily) be comprehensive.*

Para 44. However, para 2 of the mentioned Article is amended so as to stipulate that the number of delegates from each constituent people and group of Others per cantons, taking into account the last census, shall be arranged as follows: (...)

The determination of the cantons wherein 17 delegates from each constituent people are elected or wherein delegates for each constituent people will not be elected **is based on the proportional representation of each constituent people in cantons, taking into account the last census.**

*COMMENTARY: In Paragraph 44 of the ruling, the Court confirmed that the only way to ensure legitimate representation is if the delegates’ distribution is based on the actual distribution of the population, which can only be (approximately) accomplished using the latest census data. This definitely answers the question whether the 1991 or 2013 census should be used as a basis for population and representative distribution. While para 1 of the 20.16 Article of the election law says that “Until*

*Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, Subchapter B of this law shall be done in accordance with this Article,” the para 2 also states that “Until a new census is organized, the 1991 census shall serve as a basis so that each canton will elect the following number of delegates: (...)” meaning that given that the new census was organized (2013 census), the delegate distribution has to be changed according to the new census. In any case, it is not possible to adhere to the basic principle of democracy that each constituent people get to elect their own legitimate delegates (and that members of said people have to have the exact same vote value) if the mathematical formula for that calculation is not based on the real representation. The census data from 27 years ago certainly cannot ensure the enforcement of that principle, and hence, only 2013 census should be used to create any new proposal or solution.*

Para 45. The Constitutional Court notes that the reason for the proposed solution, as indicated in the Reasons for the Proposal for the Law, is the enforcement of the decision of the Constitutional Court, No. U 23/14 so as to ensure that **House of Peoples of the Parliament of the Federation of BiH is a house of legitimate and legal representatives of peoples.**

*COMMENTARY: In Paragraph 45, the Court once again reaffirmed that the House of Peoples is a house of constituent peoples (represented through three caucuses/clubs) rather than the House of Cantons. Simply, cantons are just used as a proxy for election, but the constituencies are the constituent peoples themselves. This tells us that a proposal, in which the delegate designation would not be by cantons, would still be constitutional, so there is no need to adhere to the past system in which at least one Bosniak, Croat and Serb were elected from each of the cantons.*

*The Constitutional Court ruled that the proposal does not violate the vital national interest of the Bosniaks, and as such, it should be allowed to continue under Parliamentary procedure. It is important to point out that the Court did not rule on the merits of the proposal itself (and whether it is constitutional or not), but rather whether it violates the vital national interest of the Bosniaks. In this sense, we believe that the proposal itself would still be dismissed by the Court if the case was brought forward, on the basis that it did not ensure that all voters within each of the three constituencies have the exact same vote value, and therefore, a more comprehensive proposal, which does not discriminate on either of the two principles of the Ljubić case, is needed to pass the bar put by the Constitutional Court. Finally, there is no reason why such a proposal could not also solve the ECHR rulings in one comprehensive package. This would not only solving the constitutional crisis, but also move BiH closer to the EU and NATO integrations and deliver a more equal election system.*

## **The Impact of the Parliamentary Assembly’s Failure to Implement the Ruling in the Ljubić Case**

As the Parliamentary Assembly of BiH did not amend the election law according to the Constitutional Court ruling in the Ljubić case within the six-month period ordered by the Court (the only proposal introduced during this period was HDZ proposal, which was blocked by the Bosniak delegates through the national vital interest until the Čolak ruling on 6 July 2017), the Court released a four page update to the Ljubić case on 6 July 2017 alongside its ruling in the Čolak case.

The Constitutional Court of BiH ruled that the part of Subchapter B, Article 10.12 (2) reading: “each of the constituent peoples shall be allocated one seat in every canton,” and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A paragraph 2 items a-j of the Election Law - are invalid, starting the next day.

In practice, this means that if there is no election law reform by 8 May 2018, which is the latest day that the Central Electoral Commission has to call for the elections (elections have to be called 150 days before the election date, which is 7 October 2018), it will be impossible to fully implement election results.

Delegates to House of Representatives of BiH and FBiH, the Members of Presidency of BiH, delegates to the RS National Assembly, delegates to the Republika Srpska (RS) Council of Peoples, the RS President and the delegates to the Cantonal Assemblies in the FBiH will be elected. It will be possible to form government in RS, elect Vice-Presidents and elect five Serb delegates to the Serb caucus in the House of Peoples of BiH. However, it will not be possible to elect delegates to the House of Peoples of the FBiH, and consequently, it will not be possible to elect Bosniak and Croat caucus members in the House of Peoples of BiH. Furthermore, it will not be possible to elect or confirm the President (and Vice-Presidents) of the FBiH and FBiH government, as well as BiH Council of Ministers. Both FBiH and BiH Parliaments will not be able to function. As a result, FBiH will be completely paralyzed, while at the BiH level, the only partially functioning body will be the Presidency (but they, or at least Bosniak and Croat members, will not be able to use vital national interest, as there will be no caucuses in the House of Peoples), effectively paralyzing BiH as well. The only functioning part of BiH would be RS and cantons (assuming that all of the cantons form their governments and secure majority in the midst of political chaos).

This would create an unprecedented political and constitutional crisis in BiH. It is even more worrisome when we take into consideration that the current Parliamentary Assembly will be dismissed after the election, effectively meaning that there will be no one with legal authority to fix the election law issue. This could mean the end for BiH, or at least, the end for the FBiH which would leave the cantons in a new relationship with both RS and BiH.

This is exactly why it is necessary to fix this issue on time. After all, the Constitutional Court was very clear what the issue was and how to fix it. Political will and responsibility is urgently required to reach a compromise within the framework of the BiH Constitution and Constitutional Court ruling. If certain political parties keep dismissing the verdict of the Constitutional Court, they have to keep in mind that they are doing two things – defying the constitution and pushing the whole country into chaos. Failure to reform election law on time will push the whole country into disorder and might even end BiH as we know it. It will certainly end FBiH as we know it. If anyone is still wondering what the consequences of inaction look like, they just need to look at the case of Mostar.