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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON PROPOSED VOTING RULES
FOR THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA**

**on the basis of comments by
Mr J. M. CARDOSO DA COSTA (Member, Portugal)
Mr J. C. SCHOLSEM (Member, Belgium)**

1. *By letter dated 30 May 2005, the Head the Department for Legal Affairs of the High Representative in Bosnia and Herzegovina, Mr d'Aoust, requested an opinion from the Venice Commission relating to the issue whether decisions of the Constitutional Court of Bosnia and Herzegovina should be valid only if at least one judge from each constituent people supported the decision. Such a proposal had come up during discussions within a working group on the reform of the Constitutional Court. Mr d'Aoust asked in particular whether such a system would be in line with European practice and Council of Europe standards, whether the particular situation of Bosnia and Herzegovina could justify a departure from such standards and whether there were practical reasons why such a solution would not be recommendable.*

2. *The Commission requested Messrs Cardoso da Costa (CDL(2005)056) and Scholsem to act as rapporteurs. The present opinion, prepared on the basis of their comments, has been adopted by the Venice Commission at its ... Plenary Session on*

General remarks

3. From the outset, it should be underlined that the introduction of ethnic, linguistic or other criteria for the composition of constitutional courts is fundamentally different from the inclusion of such elements in the process of decision making. By likening the composition of the court to the composition of society, such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people.

4. However, the proposed voting rule will be shown to be alien to the very nature of judicial decision making and the principles that flow from this nature. The Constitutional Court of Bosnia and Herzegovina does have such a pluralistic composition but this cannot lead to a conclusion that 'pluralistic' decision making would be indicated. While rules on pluralistic composition are inclusive, a veto power for certain judges would act in an excluding manner as the principle of majority voting would be defeated.

5. Therefore, in this opinion, first the necessary hierarchical position of the proposed voting rule will be discussed. The rule will then be tested against the principles of the impartiality of the judge, the principle of collegiality, the principle of the necessity of the functioning of state organs, and the constitutional goal of a state of citizens. Finally practical considerations will be discussed.

1. Hierarchy of norms

6. The Constitutional Court is established by the Constitution, which also deals with the question of the necessary quorum to reach a decision within the Court (Article VI.2.a of the Constitution). There is no law on to the Constitutional Court but the Constitution entrusts the Court to adopt its own Rules of Procedure (Article VI.2.b).

7. The Rules of Procedure clearly could not provide for such a fundamental provision as specific voting rules according to the origin of judges. This is evident from the fact that the Constitution itself provides for the Court's quorum of presence (Article VI.2.a). While it is very doubtful whether a law on the Court could introduce such a rule, this is clearly not true for the Rules of Procedure. Such a rule would probably have to be part of the Constitution.

2. Nature of judicial decision making – judicial ethics / impartiality

8. The nature of judicial decision making does not result from the person of the judge but from objective criteria derived from legal texts and principles applicable to each case. While the judge has to interpret the law and will thus necessarily introduce some degree of subjectivity, he or she is nevertheless bound by the law. A judicial decision requires judicial ethics as a precondition: the judge has to accept to be bound by the law only and has to be impartial by excluding other influences.

9. According to the principle of impartiality, judges have to take decisions regardless of ethnicity. Section 24 of Opinion No. 3 of the Council of Europe's Consultative Council of European Judges provides:

“24. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.”

10. The introduction of the ethnic origin of the judge as an element of decision making, would amount to suggest that the judge does not respect judicial ethics by including into his or her considerations elements, which are outside of the scope of law, which has to be his or her sole guidance. A political element which is alien to the judiciary would thus be introduced into the process of judicial decision-making.

11. Another aspect of the nature of judicial decision making is that a *non liquet* situation is unacceptable. (Constitutional) courts have to remain functional in order to fulfil their task of providing solutions in cases of conflict in society. A veto of a minority in court could result in such situations (for the specific case of the Court's role in vital interest vetos in Parliament see section 4 below).

3. Principle of collegiality

12. The principle of collegiality would be disregarded by the proposal. A court acts as one body. Where they exist, separate opinions (dissenting or concurring) - like those provided for in Article 41 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - are possible but the dissenters nevertheless have to respect the majority decision as the final and binding decision of the Court.

13. While the composition of a constitutional court may and should reflect *inter alia* ethnic, geographic or linguistic aspects of the composition of society, once appointed, each judge is member of the court as a collegiate body with an equal vote, acting independently in a personal capacity and not as a representative of a particular group. For example in Belgium there is a balance between Dutch-speaking and French-speaking judges but no requirement for a specific number of judges voting in one or the other way.

14. Furthermore, the principle of collegiality implies the principle of majority voting. In case of a lack of unanimity between the judges, a decision of the majority prevails. If the proposed voting rule were introduced, a minority of judges could block the taking of a collegiate decision.

15. The principle of collegiality entails the equality between the judges. Giving national judges a right to 'veto' a decision would disrespect equality in relation to international judges.

4. The Constitutional Court as a guarantor of the functioning of the Parliamentary Assembly.

16. According to Article IV.3.e of the Constitution, a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of a constituent people by a majority of delegates from that people.

17. When a majority of the Bosniac, Croat, or of the Serb delegates objects to the invocation of such a vital interest, the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three delegates, one each selected by the Bosniac, by the Croat, and by the Serb delegates, to resolve the issue. According to Article IV.3.f of the Constitution, if this Joint Commission fails to resolve the problem within five days, the matter is referred to the Constitutional Court, which reviews it for procedural regularity. Notwithstanding the political context of such a case, this review is not a political but clearly a judicial function.

18. This procedure is designed to make the Constitutional Court a guarantor of the functioning of the National Assembly in cases of conflict arising out of vital interest vetos. In such situations of conflict, the Constitutional Court itself must be in a position to act and to deliver its decision based on the Constitution and independent from its composition.

19. The proposed rule of making decisions of the Constitutional Court dependent on their support of at least one judge from each constituent people would clearly defeat this purpose and could lead to a *non liquet* situation and leave the Court incapable of resolving a constitutional crisis.

5. Constitutional principle

20. The long-term aim in Bosnia and Herzegovina is to move from a State based on constituent peoples to a State based on citizens (in this respect refer to the Venice Commission's opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative - CDL-AD(2005)004). The proposal would be a step back in this respect.

6. Practical considerations

21. Under European standards a Court cannot refuse to give a decision. Requiring a specific majority for a decision would mean that, in the absence of such majority, the appeal is rejected.

22. In some cases this would be relatively clear:

- For appellate jurisdiction (Article VI.3.b of the Constitution) the decision of the lower court would continue to stand;
- If a law is referred for its constitutionality (Article VI.3.c of the Constitution) (including by RS considering a State law to be *ultra vires*) it would continue to stand.

23. In other cases it would be arbitrary or unclear:

- If one institution of the State introduces a claim against the other, the plaintiff would lose; this may be quite arbitrary and lead to manipulations;
- If a judge wants to reject a part of the claim only, the decision may be difficult to determine;

Conclusion

24. The Commission is of the opinion that a rule requiring that decisions of the Constitutional Court of Bosnia and Herzegovina would be valid only if at least one judge from each constituent people supported the decision would run counter to European standards. The specific situation in Bosnia and Herzegovina cannot justify such a solution, which would contradict a number of constitutional principles and might create serious practical problems.