

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges: Ms. Valerija Galić, as President, Mr. Miodrag Simović, Mr. Tudor Pantiru and Ms. Seada Palavrić as Vice-Presidents and judges, Ms. Constance Grewe, Mr. Mato Tadić, Mr. Mirsad Ćeman, Ms. Margarita Tsatsa Nikolovska and Mr. Zlatko M. Knežević, having deliberated on the request of **Mr. Milorad Živković, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. U 7/13, at its session held on 27 September July 2013, adopted the following

DECISION ON ADMISSIBILITY

The request filed by Mr. **Milorad Živković, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina** for review of the constitutionality of Article 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), is hereby rejected as inadmissible due to the lack of jurisdiction of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brcko District of Bosnia and Herzegovina*.

REASONING

1. On 1 April 2013, Milorad Živković, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of the constitutionality of Article 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09) (“the Rules of the Constitutional Court”).
2. The applicant holds that the contested Article of the Rules of the Constitutional Court is in direct contravention with Article VI(1)(d) of the Constitution of Bosnia and Herzegovina which regulates that the Parliamentary Assembly of Bosnia and Herzegovina (“the Parliamentary Assembly”) may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights. Having regard to this constitutional provision, the applicant holds that the challenged provision of the Rules of the Constitutional Court prevents the Parliamentary Assembly to “regulate a different method of selection of the three judges”.
3. Furthermore, the applicant considers that it is “illogical” that the Rules of the Constitutional Court “prohibit any body in Bosnia and Herzegovina to enact laws concerning the activities of the Constitutional Court, and the Parliamentary Assembly adopts each year the Law on Budget for the Institutions of Bosnia and Herzegovina and International Obligations of Bosnia and Herzegovina by which, *inter alia*, the funds for the Constitutional Court of Bosnia and Herzegovina were allocated” and he asks himself if that would be contrary to the Rules of the Constitutional Court. The applicant also alleges that Article 3 of the same Rules regulates that the Constitutional Court “shall be independent in allocating approved funds from the Budget of the institutions of Bosnia and Herzegovina pursuant to its annual budget and Law on Execution of the Budget”. In this respect the applicant asks whether it is possible “that the law adopted by the Parliamentary Assembly can be applied if no body may enact laws that concern the activities of the Constitutional Court”.
4. The applicant alleges that he does not bring to doubt that the Constitutional Court, in the manner provided for by the Constitution of Bosnia and Herzegovina, enacts its Rules of Procedure but he holds that “it is unacceptable that the Rules, as a lower legal act, derogate from the highest legal act – the Constitution, particularly given the context of the role of the Constitutional Court ‘to

uphold this Constitution”. Furthermore, the applicant states that the Constitution of Bosnia and Herzegovina provides for the manner in which the amendments to that Constitution are passed and that the Parliamentary Assembly may, in the procedure prescribed by the Constitution, enact the laws from its competence and, “thus, it may also amend the Constitution and the role of the Constitutional Court therein”. Therefore, as the applicant further alleges, if the Parliamentary Assembly may amend the Constitution of Bosnia and Herzegovina, the issue arises as to “whether it is possible to forbid it, under the Rules of the Constitutional Court, from enacting the laws relating to the Constitutional Court in the clearly defined manner set out in the Constitution itself”. In this respect, the applicant also states that the Ministry of Justice of Bosnia and Herzegovina, in its opinion no. 08-02-4-11914/09 of 23 October 2009, pointed out that under the provision of Article VI(1)(d) of the Constitution of Bosnia and Herzegovina, “the issue relating to the method of selection of the three judges selected by the President of the European Court of Human Rights could be differently regulated by law”.

5. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court.

Article VI(2)(b) of the Constitution of Bosnia and Herzegovina reads:

The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- *Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*
- *Whether any provision of an Entity's constitution or law is consistent with this Constitution.*

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly; by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1)(1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases:

1. the Constitutional Court is not competent to take a decision;

6. The request for review of constitutionality of the Rules of the Constitutional Court was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, which means that that the request was filed by an authorized person in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

7. The next question to which the Constitutional Court must reply when evaluating the admissibility of the request is whether the Constitutional Court is competent to review the constitutionality of the Rules of the Constitutional Court of Bosnia and Herzegovina, i.e., as to whether it concerns a “dispute” relating to a “law” within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In its jurisprudence the Constitutional Court indicated that, taking into account the linguistic meaning of the first sentence of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it clearly follows that the existence of a “dispute” is an admissibility requirement for such proceedings. However, such a “dispute” cannot arise from ordinary and positive legal regulations but it must relate to certain issues regulated by the Constitution of Bosnia and Herzegovina itself (see the Constitutional Court, Decision on Admissibility no. *U 12/08* of 30 January 2009, published in the *Official Gazette of Bosnia and Herzegovina* no. 62/09, para. 7).

8. Further, as to the issue of whether the particular request relates to a “law” in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it is necessary to firstly examine the issue of legal nature of the Rules of the Constitutional Court. In this respect the Constitutional Court recalls its previous position that the Constitution of Bosnia and Herzegovina confers to the Constitutional Court the general task to “uphold the Constitution” (Art. VI(3)) as well as the wide competencies of control of the constitutionality. These functions which are exercised vis-à-vis the other constitutional bodies, particularly vis-à-vis the legislator, and which are reflected in the final

and binding decisions with regard to all public authorities, clearly imply solid guarantees of independence and autonomy of Constitutional Court (see, *mutatis mutandis*, the Constitutional Court, Decision on Admissibility and Merits no. U 6/06 of 29 March 2008, para. 29, published in the *Official Gazette of Bosnia and Herzegovina* no. 40/08). In this respect, the Constitutional Court recalls again that the provision of Article VI(2)(b) of the Constitution of Bosnia and Herzegovina stipulates that the Court shall adopt its own *rules of court* by a majority of all members. Such constitutional solution indicates to the intent of the Constitution's author to secure the independence of the Constitutional Court and thereby to prevent any interference with the exercise of its responsibilities assigned to it by the Constitution of Bosnia and Herzegovina. This also indicates that the Constitutional Court has a special position according to the Constitution of Bosnia and Herzegovina (*idem*, para. 24). In the same decision, the Constitutional Court stressed that “[in] the absence of constitutional laws, the Constitutional Court must be able to decide independently on its internal organization and functioning” (*idem*, para. 30).

9. Accordingly, the competence of the Constitutional Court to independently regulate the *rules of court* ensues directly from the Constitution of Bosnia and Herzegovina with a clear goal to preserve the autonomy and independence of the Constitutional Court to the full extent. Precisely for that reason, the Rules of the Constitutional Court have the specific constitutional position and special constitutional nature. This also means that there is no manner in which that jurisdiction might be performed by any other Institution, including the Parliamentary Assembly of Bosnia and Herzegovina, since the Constitution of Bosnia and Herzegovina does not provide for something like that. In this manner, a clear distinction between the position of the Constitutional Court which draws its competencies directly from the Constitution of Bosnia and Herzegovina and the ordinary courts in relation to which the legislative authorities on the appropriate instances have the competence to pass adequate laws both those regulating organization and operations of these courts and the procedural laws under which these courts conduct their proceedings is established by the Constitution of Bosnia and Herzegovina. Such a distinction, *inter alia*, is the result of fact that the task of the Constitutional Court, as already stated, is to uphold the Constitution of Bosnia and Herzegovina through the exercise of jurisdictions which are given exclusively to the Constitutional Court by the Constitution of Bosnia and Herzegovina in particular.

10. Certainly, the Constitutional Court points out that the Constitution of Bosnia and Herzegovina stipulates the competence of the Parliamentary Assembly under which it could regulate a different method “of selection of the three judges selected by the President of the European Court of Human

Rights” by law as prescribed by Article VI(1)(d) of the Constitution of Bosnia and Herzegovina. However, it clearly follows from the text of the above Article that the authority to adopt such law enables the Parliamentary Assembly to differently regulate exclusively the manner of appointment of judges of the Constitutional Court and solely in a restrictive manner – only in relation to the three judges selected by the President of the European Court of Human Rights. However, this, by no means, could be interpreted in a broader manner, as the applicant does, because the respective provision does not in any way bring to doubt the exclusive jurisdiction of the Constitutional Court under Article VI(2)(b) to completely independently issue the *rules of court*.

11. Having regard to the aforesaid, the Constitutional Court holds that the Rules of the Constitutional Court which are provided for by the Constitution of Bosnia and Herzegovina as an act the issuance of which is in the exclusive competence of the Constitutional Court, have a specific constitutional nature which is the result of need and intention to fully preserve and protect the autonomy and independence of the Constitutional Court. Having regard to such constitutional nature of this act, and the fact that that act has its source directly in the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that the *rules of court* could be considered a *sui generis* law in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. However, having regard to the clearly prescribed exclusive competence of the Constitutional Court to pass the *rules of court*, the Constitutional Court holds that in respect to that issue no “dispute” could arise between the two Entities or Bosnia and Herzegovina and one or both of its entities and between the Institutions of Bosnia and Herzegovina the constitutionality of which the Constitutional Court would have the jurisdiction to evaluate in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

12. In view of the provision of Article 17(1)(1) of the Rules of the Constitutional Court, according to which a request shall be rejected if established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as set out in the enacting clause of this decision.

13. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Valerija Galić

President
Constitutional Court of Bosnia and Herzegovina