

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2) (b), Article 59 (1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Zlatko M. Knežević, President

Mato Tadić, Vice-President

Mirsad Ćeman, Vice-President

Margarita Tsatsa-Nikolovska, Vice-President

Tudor Pantiru,

Valerija Galić,

Miodrag Simović,

Seada Palavrić,

Giovanni Grasso,

Having deliberated on the request of the **Bosniac People Caucus in the Council of Peoples of the Republika Srpska** in case no. **U-7/19**, at its session held on 4 October 2019, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request of the **Bosniac People Caucus in the Council of Peoples of the Republika Srpska** for review of the constitutionality of Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11),

it is hereby established that Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) is not in conformity with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention for Protection of Human Rights and Fundamental Freedoms relating to abolition of the death penalty under all circumstances (*Official Gazette of Bosnia and Herzegovina - International Treaties*, 8/03).

Pursuant to Article 61(2) of the Constitution of Bosnia and Herzegovina, Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) reading as follows: “The death penalty may be pronounced exclusively for capital crimes,” shall be quashed.

Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96,

16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11), which has been quashed in accordance with Article 61(3) of the Rules of the Constitutional Court, shall be rendered ineffective the day following the date of the publication of the decision of the Constitutional Court in *the Official Gazette 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 Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 27 June 2019, the Bosniac Caucus in the Republika Srpska Council of Peoples (“the applicant”) filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for review of constitutionality of Article 11(2) of the Constitution of the Republika Srpska (“the Constitution of RS).

II. Procedure before the Constitutional Court t

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska (“the National Assembly”) was requested on 2 July 2019 to submit its reply to the request.
3. The National Assembly submitted its reply on 25 July 2019.

III. Request

a) Allegations from the Request

4. The applicant alleges that the Article 11(2) of the RS Constitution is not in conformity with the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) and its Protocols. In this respect, the applicant refers to the provisions of Articles II(1), II(2) and II (3)(a) of the Constitution of Bosnia and Herzegovina, and to the provisions of Articles 1 and 2 of Protocol No. 13 to the European Convention, Article 1 of Protocol No. 6 to the European Convention, and Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (“the International Covenant”).

5. In the exhaustive request, the applicant states, *inter alia*, that even 16 years after the entry into force of Protocol No. 13 to the European Convention, the RS National Assembly did not harmonize the RS Constitution with the Constitution of Bosnia and Herzegovina and the said Protocol. The applicant recalled that since the beginning of 1980 the Council of Europe have made efforts to abolish the death penalty across Europe, and as a result of these efforts is the fact that there has been no execution of death penalty in the member states of the Council of Europe since 1997. The first concrete steps in this direction include the adoption of Protocol No. 6 to the European Convention, which became the first legally binding instrument to abolish the death penalty in peace, and since 1989 the abolition of the death penalty has been a condition for all new members to access the European Union. In 2002, the Council of Europe took an important step in prohibiting the death penalty in all circumstances by adopting Protocol 13 to the European Convention, which requires the abolition of the death penalty even with regards to the acts committed during the war.

6. The applicant points out that all levels of government in Bosnia and Herzegovina, with the exception of the Republika Srpska Entity, have fully complied with the international obligation and the provisions of the Constitution of Bosnia and Herzegovina and abolished the death penalty. Unfortunately, as the applicant states, despite the fact that the provisions of Article 5 of the RS Constitution require that the constitutional organization of that Entity be based on the guarantee and protection of human rights and freedoms in accordance with international standards, the death penalty is still part of the RS Constitution. It was also pointed out that under criminal codes of Bosnia and Herzegovina the death penalty is not stipulated, but that the disputed Article 11(2) of the RS Constitution also stipulates that the death penalty can exceptionally be pronounced for the most serious forms of criminal acts.

7. The applicant then points out that the representatives of all peoples in the Republika Srpska agreed that the disputed provision of the RS Constitution should be deleted. However, that did not happen. To this end, the applicant explains why this has not happened yet, although in 2009 an initiative was launched and the RS National Assembly adopted an Act that included 29 Amendments to the RS Constitution, including an amendment that prescribed deletion of the disputed Article 11(2) of the Constitution of RS. In order for such arrangement to be fully adopted and put into effect, according to Article 135 of the RS Constitution, a majority of the members of the Council of Peoples from each constituent people and the Others should have voted for it, which did not happen because the amendments were adopted as a “package” along with other largely disputed amendments that could not be supported by the applicants. It is for this reason that the amendment relating to the deletion of Article 11(2) of the RS Constitution, which is not in dispute, could not be adopted because it was not made possible for individual amendments to the RS Constitution to be adopted.

8. The applicant points out that the reports to the European Commission indicated that the provisions on the death penalty in the RS Constitution should be abolished, since such a provision constitutes a major obstacle to the harmonization of legal provisions with the EU acquis and, consequently, to the membership in the European Union. Protocol No. 13 to the European Convention was adopted on 3 May 2002, ratified by Bosnia and Herzegovina on 29 July 2003, and entered into force on 1 November 2003, and at that moment the obligation of Bosnia and Herzegovina was created to adhere to it and apply it in domestic law. Article 1 of the said Protocol abolished the death penalty in all circumstances, and Article 2 of the same Protocol provided that Article 15 of the European Convention could not derogate from the provisions of the Protocol. The applicant points out that Protocol No. 13 entered into force to strengthen the protection of the right to life guaranteed by Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention, and the right to life is one of the fundamental human rights, which constitutes a legal and a political precondition for exercise of all other rights and freedoms. The right to life is the highest value in the international hierarchy of rights and is protected by binding standards at the universal and regional level.

9. The applicant considers that the disputed provision of the RS Constitution stipulating the possibility of imposing the death penalty for the most serious crimes is unconstitutional because such provision violates the above provisions of the Constitution of Bosnia and Herzegovina and the European Convention and its Protocols.

b) Response to the Request

10. In response to the request, the RS National Assembly primarily challenged the applicant's authority to file the request, within the meaning of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina, since the RS Council of Peoples does not represent a separate house of the RS National Assembly, which arises from Article 69(2) of the RS Constitution. Therefore, it is clear that the Council of Peoples, which has restrictive jurisdiction, is one special body for protection of the vital national interest of any of the constituent peoples, and it is not another house of the RS National Assembly.

11. With respect to the applicant's allegations that Article 11(2) of the RS Constitution is not consistent with the provisions of the Constitution of Bosnia and Herzegovina, the RS National Assembly very extensively explained what activities it had undertaken in the period 2007-2009 with a view to erasing the disputed Article 11(2) of the RS Constitution. However, if the Bosniac People Caucus in the RS Council had not been against the Amendments to the RS Constitution, including the amendment to delete the disputed provision on the death penalty, the Amendments would have been adopted, thereby the Republika Srpska would have fully harmonized its Constitution with the European Convention and its Protocols, and, consequently, with the Constitution of Bosnia and Herzegovina. In this regard, they point out that the Bosniac delegates to the Council of Peoples are the only ones to be blamed for the fact that the RS Constitution has not been yet brought in line with the European Convention. It has been emphasized in the response that in a situation in which the same body, which is in charge of adopting an amendment, refused to adopt the relevant amendment that would make it possible for the disputed Article 11(2) of the RS Constitution to be rendered ineffective, now, after more than seven years, has decided to submit a request for review of the compatibility of the disputed provision with the Constitution of Bosnia and Herzegovina, and that constitutes a legal nonsense, direct abuse of their competencies and unsustainable legal situation.

12. Finally, it was pointed out in the response that the RS National Assembly adopted Amendment CXXV as a part of the proposal for Amendment CXXII-CL to the Constitution of the RS by a two-thirds majority, in accordance with Article 135(2) of the Constitution of the RS. At the public hearing the whole public, including the formally presented views of the representatives of the European Union and the Council of Europe, supported the proposed amendments to the RS Constitution, which gave them full legitimacy. On the other hand, without any support from the public and citizens, with almost no legitimacy, the delegates of the Bosniac People Caucus made it

impossible for the amendments to the RS Constitution to be adopted at its session held on 26 April 2012.

13. Given the fact that, because of all of the above, the RS National Assembly is unable to give other response to the request than the one stated above, it is proposed that the Constitutional Court seek a response from the applicant, in order to gain insight into the real reasons why this request was filed and because of which the mentioned provision of the RS Constitution is still in force, which is contrary to the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

14. The **Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96,16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) as relevant reads:

Article 11 (2)

(2) *The death penalty may be pronounced exclusively for capital crimes.*

15. The **Constitution of Bosnia and Herzegovina** as relevant reads:

Article II

Human Rights and Fundamental Freedoms

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a) The right to life.

16. The **Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty** (*Official Gazette of BiH, 6/99*) as relevant reads:

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

17. The **Second Optional Protocol to the International Covenant on Civil and Political Rights** (*Official Gazette of Bosnia and Herzegovina, 31/00*) as relevant reads:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death

penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

18. **The Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the Death Penalty in all Circumstances** (*Official Gazette of Bosnia and Herzegovina* - International Treaties, 8/03)

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

Prohibitions of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 5

Relationship to the Convention

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

V. Admissibility

19. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

20. 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.

21. The request for constitutional review was submitted by seven delegates of the Republika Srpska Council of Peoples, totalling 28 delegates, making $\frac{1}{4}$ members of any legislative body of the Entity, which means that, contrary to the allegations of the RS National Assembly, the request was submitted by an authorized person within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility, *U 7/10* of 26 November 2010, paragraph 21 available on the website of the Constitutional Court: www.ccbih.ba).

VI. Merits

22. The applicant considers that the provision of Article 11(2) of the RS Constitution is not in conformity with the provisions of the Constitution of Bosnia and Herzegovina, namely Articles II(1), II(2) and II(3)(a) and international protocols which limit or completely abolish the death penalty, and it is about Protocols Nos. 6 and 13 to the European Convention and the Second Optional Protocol to the International Covenant (see relevant regulations).

23. On the other hand, the RS National Assembly does not refute that Article 11(2) of the RS Constitution is incompatible with the Constitution of Bosnia and Herzegovina and international

protocols abolishing the death penalty in all circumstances. However, as regards the fact that the disputed provision still exists in the RS Constitution, the RS National Assembly places the burden of responsibility on the applicant for that and, according to the RS National Assembly, that makes the filed request contradictory.

24. Taking the allegations stated in the request as a starting point, the Constitution of Bosnia and Herzegovina, in its Article II(1), obliges Bosnia and Herzegovina and its Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms, while in Article II(2), it states that the rights and freedoms provided for in the European Convention and its Protocols are directly applicable in Bosnia and Herzegovina.

25. The right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina, as a fundamental human right, constitutes a fundamental value in a democratic society. Considering the importance of the right to life, the Constitutional Court recalls that while wishing to strengthen the protection of that right, the member states of the Council of Europe have made efforts to secure the right to abolish the death penalty through international instruments. In this regard, the Constitutional Court recalls that in 2003, in the *Öcalan v. Turkey* case, the European Court of Human Rights stated that the areas covered by the member states of the Council of Europe became a “zone without death penalty” and that capital punishment in peacetime had come to be regarded as an unacceptable, if not inhuman, form of punishment which was no longer permissible under Article 2 of the European Convention (see, the European Court of Human Rights, Judgment (First Section), 12 March 2003, no. 46221/99) .

26. Taking into account the changes that have taken place in several member states of the Council of Europe, which have expressed a general tendency to abolish the death penalty, on 28 April 1983 the member states of the Council of Europe adopted the Protocol in Strasbourg on the abolition of the death penalty (see relevant regulations). The Constitutional Court recalls that the prohibition of death penalty laid down in Protocol No. 6 created a non-derogatory Convention right, but did not provide absolute protection for that right. The prohibition of the imposition of the death penalty under this Protocol shall not apply to acts committed in time of war or imminent threat of war, if so provided by the law of the relevant State.

27. The Constitutional Court recalls that a step further on the abolition of the death penalty was taken by adoption of the Second Optional Protocol to the International Covenant, which also prohibits the execution of the death penalty in peace, but during the war the death penalty is allowed

only if executed on the basis of a judgment because of a particularly grave offense of a military nature committed during the war and if such an exception was made by an international legal declaration on reserve at the time of ratification or accession to the covenant.

28. With the aim of complete abolition of the death penalty, on 3 May 2002, the members of the Council of Europe adopted in Vilnius Protocol No. 13 on the abolition of the death penalty in all circumstances (see relevant regulations), which entered into force on 1 July 2003. The immediate consequence of its entry into force was the indirect repeal of Article 2 of Protocol No. 6, which provided that the prohibition of the imposition of the death penalty does not apply to acts committed during the war or imminent threat of war if so provided by the law of the relevant State. The foregoing indicates that Article 2 of Protocol No. 6 and Protocol No. 13 are mutually exclusive by the fact that Protocol No. 13 indirectly derogates from Article 2 of Protocol No. 6, while it also derogates from the second sentence of Article 2(1) of the European Convention. Although it is not apparent from the very text of the European Convention, these Protocols amended, for the first time and thus far it was the only time, a substantive Convention provision governing a protected human right. It is about the second sentence of Article 2(1) of the European Convention, which reads as follows: “.... No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

29. Thus, with the entry into force of Protocol No. 13 to the European Convention, the death penalty was abolished in all circumstances. Therefore, since its entry into force, the Protocol No. 13 to the European Convention, which abolishes the death penalty, constitutes a legally binding act for all levels of government in Bosnia and Herzegovina, including its Entities, it is obvious, consequently, that the unconstitutional provision of the 11(2) which exceptionally allows for pronouncing of the death penalty for the most serious criminal offences, should not have place in the RS Constitution.

30. Therefore, in view of the above, the Constitutional Court concludes without any dilemma that the provision of Article 11(2) of the RS Constitution is not compatible with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention, which prohibits the death penalty in all circumstances.

VII. Conclusion

31. The Constitutional Court concludes that the challenged provision of Article 11(2) of the RS Constitution, which exceptionally prescribes pronouncing of the death penalty for the most serious crimes is not in compliance with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention relating to the prohibition of the death penalty in all circumstances, which was ratified by Bosnia and Herzegovina and which is a legally binding act for all levels of government in Bosnia and Herzegovina, including the Entity of Republika Srpska.

32. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina