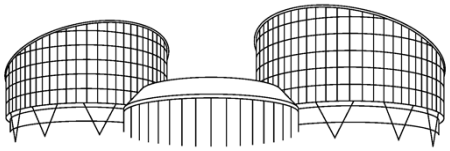

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOVAČEVIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 43651/22)

JUDGMENT

Art 1 P12 • Prohibition of discrimination • Inability of applicant due to combination of territorial and ethnic requirements, to vote for candidates of choice in legislative and presidential elections at State level • Applicant not affiliated with one of the constitutionally defined "constituent peoples" or with any other ethnic group • Discriminatory treatment on grounds of ethnicity and place of residence • Current arrangements excluding certain citizens from the House of Peoples on ethnicity grounds amplified ethnic divisions and undermined democratic character of elections • Reform of the domestic electoral system, based on the concept of the "constituent peoples", an outstanding post-accession obligation of joining the Council of Europe • "Constituent peoples" enjoying a privileged position in the current political system and not in the factual position of an endangered minority • Applicant not genuinely represented in the collective Presidency • No one should be forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint

STRASBOURG

29 August 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kovačević v. Bosnia and Herzegovina,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Ana Maria Guerra Martins,
Anne Louise Bormann*, judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 43651/22) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Bosnia and Herzegovina, Mr Slaven Kovačević ("the applicant"), on 30 August 2022;

the decision to give notice of the application to the Government of Bosnia and Herzegovina ("the Government");

the parties' observations;

Having deliberated in private on 30 May and 20 June 2023,

Delivers the following judgment, which was adopted on that last-mentioned date:

INTRODUCTION

1. The present case concerns the right to vote of citizens of Bosnia and Herzegovina who do not declare affiliation with any "constituent people" in legislative and presidential elections at the State level. It raises issues under Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. The applicant also relied on Articles 13 and 17 of the Convention.

THE FACTS

2. The applicant was born in 1972 and lives in Sarajevo. On 7 March 2023 he was granted leave to present his own case in the proceedings before the Court under Rule 36 § 2 *in fine* of the Rules of Court.

3. The Government were represented by one of their acting Agents, Ms H. Bačvić.

4. The Constitution of Bosnia and Herzegovina ("the Constitution") is an annex to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Agreement"), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. In accordance with the

Constitution, Bosnia and Herzegovina consists of two Entities – the Federation of Bosnia and Herzegovina ("the Federation") and the Republika Srpska (see Article I § 3 of the Constitution) – and the Brčko District in the joint ownership (condominium) of the two Entities (see Article VI § 4 of the Constitution, as amended in 2009).

5. The Constitution makes a distinction between "constituent peoples" (Bosniacs[1], Croats[2] and Serbs[3]) and "Others and citizens of Bosnia and Herzegovina" (members of ethnic minorities and those who do not declare affiliation with any particular ethnic group because of intermarriage, mixed parenthood, or other reasons). At the State level, power-sharing arrangements were introduced, such as a vital interest veto, an Entity veto, a bicameral system (with a House of Peoples – the second chamber of the State Parliament – composed of five Bosniacs and the same number of Croats from the Federation and five Serbs from the Republika Srpska) and a collective Head of State – the Presidency – comprising three members: a Bosniac and a Croat from the Federation and a Serb from the Republika Srpska (see Articles IV and V of the Constitution, quoted in paragraphs 12 and 13 below). Those arrangements make it impossible to adopt decisions against the will of the representatives of any "constituent people" (for more information, see paragraph 25 below).

6. Only persons declaring affiliation with a "constituent people" are thus entitled to run for the House of Peoples and the Presidency. Moreover, only the voters residing in the Republika Srpska may participate in the election of Serb members of the House of Peoples (through indirect elections) and the Presidency (through direct elections), whereas only the voters residing in the Federation may participate in the election of Bosniac and Croat members of those institutions. In contrast, no ethnic requirements apply in elections to the House of Representatives (the first chamber of the State Parliament).

7. The constitutional provisions pertaining to the ethnic privileges for the "constituent peoples" were not included in the Agreed Basic Principles which constituted the basic outline for what the future Dayton Agreement would contain (see paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of

[1] Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" should not be confused with the term "Bosnians", which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

[2] The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the Socialist Federal Republic of Yugoslavia ("the SFRY") including Bosnia and Herzegovina. The expression "Croat" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Croatian", which normally refers to nationals of Croatia.

[3] The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Serb" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Serbian", which normally refers to nationals of Serbia.

26 September 1995). Reportedly, the international mediators reluctantly accepted these arrangements at a later stage because of strong demands to this effect from some of the parties to the conflict (see Nystuen[4], *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, Martinus Nijhoff Publishers, 2005, pp. 192 and 240-41, and O'Brien[5], *The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation*, in Zartman and Kremenyuk (eds), *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes*, Rowman & Littlefield Publishers, 2005, p. 105). Fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out. Article II § 2 of the Constitution, providing that the rights and freedoms set forth in the Convention and its Protocols had "priority over all other law" (for the full text, see paragraph 10 below), was therefore inserted (see Nystuen, cited above, p. 100).

8. The applicant is a political scientist and a political adviser to a member of the Presidency of Bosnia and Herzegovina. It would appear that he does not declare affiliation with any "constituent people" or with any other ethnic group. Sarajevo, where he lives, is situated in the Federation. The latest legislative and presidential elections at the State level took place in 2022. The applicant complained that because of the combination of the territorial and ethnic requirements mentioned above he had been unable to vote for the candidates of his choice in those elections. He alleged that the candidates best representing his political views were not from the "right" Entity and/or of the "right" ethnic origin. The applicant did not indicate whether he had nevertheless voted for other candidates.

[4] Ms Nystuen participated in the Dayton negotiations and the preceding constitutional discussions as a legal adviser to the European Union Co-Chairman of the International Conference on the former Yugoslavia, Mr Bildt, who was heading the European Union delegation within the Contact Group. Thereafter, until 1997, she worked as a legal adviser to Mr Bildt in his capacity as High Representative for Bosnia and Herzegovina.

[5] Mr O'Brien participated in the Dayton negotiations as a Contact Group lawyer, as well as in most major negotiations concerning the former Yugoslavia from 1994 to 2001.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Constitution (Annex 4 to the Dayton Agreement)

1. Democratic principles

9. Article I § 2 of the Constitution provides that Bosnia and Herzegovina is a democratic State, which operates under the rule of law and with free and democratic elections.

2. International standards

10. Pursuant to Article II § 2 of the Constitution, the rights and freedoms set forth in the Convention and its Protocols apply directly and have priority over all other law.

3. Responsibilities of the Institutions of Bosnia and Herzegovina

11. The relevant part of Article III of the Constitution reads as follows:

> "1. **Responsibilities of the Institutions of Bosnia and Herzegovina**
>
> The following matters are the responsibility of the institutions of Bosnia and Herzegovina:
>
> (a) Foreign policy.
>
> (b) Foreign trade policy.
>
> (c) Customs policy.
>
> (d) Monetary policy as provided in Article VII.
>
> (e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.
>
> (f) Immigration, refugee, and asylum policy and regulation.
>
> (g) International and inter-Entity criminal law enforcement, including relations with Interpol.
>
> (h) Establishment and operation of common and international communications facilities.
>
> (i) Regulation of inter-Entity transportation.
>
> (j) Air traffic control.
>
> ...
>
> 5. **Additional Responsibilities**
>
> (a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and

Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

(b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects."

4. Parliamentary Assembly

12. Article IV of the Constitution reads as follows:

"The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

1. **House of Peoples**

The House of Peoples shall comprise 15 delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

(a) The designated Croat and Bosniac delegates from the Federation shall be selected respectively by the Croat and Bosniac delegates to the House of Peoples of the Federation[6]. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska[7].

(b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb delegates are present.

2. **House of Representatives**

The House of Representatives shall comprise 42 members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

(a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

(b) A majority of all members elected to the House of Representatives shall comprise a quorum.

3. **Procedures**

(a) Each chamber shall be convened in Sarajevo not more than 30 days after its selection or election.

(b) Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.

(c) All legislation shall require the approval of both chambers.

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[6] Bosniac and Croat delegates to the House of Peoples of the Federation are elected by the Bosniac and Croat caucuses of the cantonal assemblies (the Federation consists of ten cantons). Members of the cantonal assemblies are directly elected.

[7] Members of the National Assembly of the Republika Srpska are directly elected.

(d) All decisions in both chambers shall be by majority of those present and voting. The delegates and members shall make their best efforts to see that the majority includes at least one-third of the votes of delegates or members from the territory of each Entity. If a majority vote does not include one-third of the votes of delegates or members from the territory of each Entity, the chair and deputy chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the delegates or members elected from either Entity.

(e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb delegates selected in accordance with paragraph l (a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb delegates present and voting.

(f) When a majority of the Bosniac, of the Croat, or of the Serb delegates objects to the invocation of paragraph (e), 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. If the commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.

(g) The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.

(h) Decisions of the Parliamentary Assembly shall not take effect before publication.

(i) Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

(j) Delegates and members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. **Powers**

The Parliamentary Assembly shall have responsibility for:

(a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

(b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

(c) Approving a budget for the institutions of Bosnia and Herzegovina.

(d) Deciding whether to consent to the ratification of treaties.

(e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities."

5. Presidency

13. Article V of the Constitution provides:

"The Presidency of Bosnia and Herzegovina shall consist of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

1. **Election and Term**

(a) Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

(b) The term of the members of the Presidency elected in the first election shall be two years; the term of members subsequently elected shall be four years. Members shall be eligible to succeed themselves once and shall thereafter be ineligible for four years.

2. **Procedures**

(a) The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

(b) The members of the Presidency shall appoint from their members a chair. For the first term of the Presidency, the chair shall be the member who received the highest number of votes. Thereafter, the method of selecting the chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV § 3.

(c) The Presidency shall endeavour to adopt all Presidency decisions (i.e. those concerning matters arising under Article V § 3 (a)-(e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two members when all efforts to reach consensus have failed.

(d) A dissenting member of the Presidency may declare a Presidency decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the member from that territory; to the Bosniac delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac member; or to the Croat delegates of that body, if the declaration was made by the Croat member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency decision shall not take effect.

3. **Powers**

The Presidency shall have responsibility for:

(a) Conducting the foreign policy of Bosnia and Herzegovina.

(b) Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

(c) Representing Bosnia and Herzegovina in international and European organisations and institutions and seeking membership in such organisations and institutions of which Bosnia and Herzegovina is not a member.

(d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

(e) Executing decisions of the Parliamentary Assembly.

(f) Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

(g) Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

(h) Coordinating as necessary with international and non-governmental organisations in Bosnia and Herzegovina.

(i) Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities."

6. Amendments to the Constitution

14. Article X of the Constitution provides as follows:

"1. **Amendment Procedure**

This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

2. **Human Rights and Fundamental Freedoms**

No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph."

On 26 March 2009 the Parliamentary Assembly successfully amended the Constitution for the first time, in accordance with the above procedure. The amendment at issue concerned the status of the Brčko District.

7. Constitutional Court's case-law

(a) As to the issue of the "constituent peoples"

15. In its landmark case no. U 5/98, the Constitutional Court adopted four partial decisions declaring that certain provisions of the Entity Constitutions of the Republika Srpska and the Federation were not in accordance with the Constitution of Bosnia and Herzegovina. In particular, in the third partial decision of 1 July 2000 it held that in accordance with the Preamble to the Constitution of Bosnia and Herzegovina, all three constituent peoples were constituent and equal throughout the country and that it was not possible to divide the country into one Entity in which two of these peoples were constituent and another Entity in which the third people was constituent. Accordingly, it declared unconstitutional the description of the Republika Srpska as "the State of the Serb people and of all its citizens" in Article 1 of

the Constitution of that Entity and the wording "Bosniacs and Croats as constituent peoples, along with Others" in Article 1 of the Constitution of the Federation. The Constitutional Court distinguished the case before it from *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, Series A no. 113), on the following grounds:

> "119. In the case *Mathieu-Mohin and [Clerfayt] v. Belgium* the majority of the European Court of Human Rights ruled that Article 3 of the First Protocol to the [Convention] was not violated as the French-speaking electors in the Halle-Vilvoorde district were 'in no way deprived' of the right to vote and the right to stand for election on the same legal grounds as the Dutch-speaking electors 'by the sheer fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council'. ...
>
> 120. It could thus be argued that there is no violation of Article 3 of the First Protocol if a Croat voter has to cast his/her vote for a Bosniac or Serb candidate and vice versa. However, there is at least one striking difference in the electoral mechanisms of Belgium on the one hand and the Federation of Bosnia and Herzegovina on the other, particularly as far as the right to stand as a candidate is concerned. The Belgian system does not exclude *per se* the right to stand as a candidate *solely* on grounds of language. Every citizen can stand as a candidate, but must – upon his/her choice – decide whether he/she will take the oath in French or in Flemish. It is therefore the subjective choice of each individual candidate whether to take the oath in French or in Flemish and thereby to 'represent' a specific language group, whereas provisions of the Constitution of the Federation of Bosnia and Herzegovina provide for *a priori* ethnically defined Bosniac and Croat delegates, caucuses and veto powers for them."

(b) As to the legal provisions excluding persons who do not declare affiliation with "constituent peoples" from public functions

16. When provisions excluding persons who do not declare affiliation with "constituent peoples" from public functions are included in the State Constitution (such as Articles IV §§ 1 and 3 (b) and V of the Constitution, quoted in paragraphs 12-13 above), the approach of the Constitutional Court has not always been consistent. In decisions nos. U 5/04 of 31 March 2006 and U 13/05 of 26 May 2006 it held that the Convention did not have priority over the State Constitution and that it lacked jurisdiction to rule whether the State Constitution was in conformity with the Convention, although a request to that effect had been submitted by a person authorised to seek an abstract review of constitutionality (a member of the Presidency). The relevant parts of decision no. U 5/04 read as follows (**bold** added):

> "**The request lodged by Mr. Sulejman Tihić, the Chair of Presidency of Bosnia and Herzegovina at the time of filing the request, for a review of conformity of Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of Bosnia and Herzegovina with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and**

Fundamental Freedoms is rejected as inadmissible because the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

...

In view of the applicant's allegations, it appears that he requests examination of conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention and its Protocols. Therefore, the Constitutional Court must establish whether it is competent to examine constitutional provisions to establish their compatibility with the European Convention. Admissibility of the present request depends primarily upon the relation between the Constitution of Bosnia and Herzegovina and the European Convention. The status of the European Convention stems from Article II(2) of the Constitution of Bosnia and Herzegovina which clearly states that the rights and obligations provided for by the European Convention are directly applicable in Bosnia and Herzegovina. This provision points to the general phenomenon of the internalisation of the domestic legal system in Bosnia and Herzegovina. It follows from the case-law of the European Court of Human Rights that the domestic law must meet the requirements stipulated by the European Convention. According to Article VI(3) of the Constitution of Bosnia and Herzegovina, the Constitutional Court 'shall uphold this Constitution'. In order for the Constitutional Court to uphold the Constitution of Bosnia and Herzegovina, it may refer to the text of that Constitution and to the European Convention which derives also from Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

In order to establish jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it is necessary to establish that there is 'a dispute' within the meaning of this constitutional provision. The present case does not involve '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' but a possible conflict between international and domestic law. In addition, where as in the present case an examination of conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention is requested, the Constitutional Court notes that the rights under the European Convention cannot have a superior status to the Constitution of Bosnia and Herzegovina. The European Convention, as an international document, entered into force by virtue of the Constitution of Bosnia and Herzegovina, and therefore the constitutional authority derives from the Constitution of Bosnia and Herzegovina and not from the European Convention itself.

Although the Constitution of Bosnia and Herzegovina does not expressly provide for the Constitutional Court's jurisdiction as to the interpretation of the Constitution, it is clear that the Constitutional Court cannot exercise its jurisdiction unless it has first interpreted the relevant constitutional provisions and the provisions of the law subject to abstract review by the Constitutional Court on a request lodged with the Constitutional Court, as well as the provisions relating to its own jurisdiction. The Constitutional Court must always adhere to the text of the Constitution of Bosnia and Herzegovina, which in the present case does not allow for wider interpretation of its jurisdiction, in view of the obligation of the Constitutional Court to 'uphold this Constitution'.

In light of the aforesaid, the Constitutional Court concludes that it falls out of the scope of its competence to decide in the present case on the conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention and its Protocols."

The relevant part of decision no. U 13/05 reads as follows (**bold** added):

"**Consequently, although the subject matter of the case at hand is not a review of conformity of the provisions of the Constitution of Bosnia and Herzegovina but of the Election Act, it cannot be ignored that the challenged provision of the Election Act, *de facto*, derives fully from the provisions of Article V of the Constitution of Bosnia and Herzegovina, which remove any doubts as to its unconstitutionality. For these reasons, the Constitutional Court has no competence to decide because this would otherwise imply a review of conformity of the constitutional provision with the provisions of the international documents relating to the human rights, and it has already taken the position that these, i.e. the European Convention, could not have a superior status in relation to the Constitution of Bosnia and Herzegovina (Decision in case No. U 5/04 of 27 January 2006)**."

17. Following the judgments of this Court in *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, ECHR 2009), *Zornić v. Bosnia and Herzegovina* (no. 3681/06, 15 July 2014) and *Pilav v. Bosnia and Herzegovina* (no. 41939/07, 9 June 2016), the Constitutional Court has started declaring complaints about the ethnic composition of the House of Peoples and the Presidency of Bosnia and Herzegovina inadmissible because the matter has already been examined. The relevant part of decision no. AP 3464/18 of 17 July 2018 reads as follows:

"[T]he Constitutional Court notes that the appellant is a Serb who lives on the territory of the Federation of Bosnia and Herzegovina, and it is for this reason that his request to be a candidate for the elections to the Presidency of Bosnia and Herzegovina was rejected. Thus, this is essentially the same situation as the one in the case of *Pilav*, in which, after the decision of the Constitutional Court, the European Court gave a final and binding judgment. The Constitutional Court considers that in such a situation, when the European Court has in three judgments in relation to Bosnia and Herzegovina – of which the judgment in *Pilav* relates to the same situation as that of the appellant – unambiguously ruled that it is necessary to amend the Constitution of Bosnia and Herzegovina, there is no basis to decide again on the same issue.

In this regard, the Constitutional Court notes that the decisions being challenged and the appellant's inability as a Serb residing in the Federation of Bosnia and Herzegovina to be a candidate for the elections to the Presidency of Bosnia and Herzegovina are also a result of the omission by the competent authorities to take the necessary measures for the purpose of enforcement of the judgments in the cases of *Pilav*, *Sejdić and Finci* and *Zornić*, which would end the incompatibility of the Constitution and the Election Act with the requirements of Article 1 of Protocol No. 12, as determined by those judgments. Thus, Bosnia and Herzegovina, namely its competent authorities, has the obligation to harmonise the Constitution of Bosnia and Herzegovina and the Election Act pursuant to three judgments of the European Court, and the Constitutional Court, in line with its conclusion in Decision no. U-14/12, still cannot foresee the scope of those changes. The Constitutional Court particularly emphasises that it does not have either constitution-making or legislative competence, and thus cannot act in place of other institutions, most notably the Parliamentary Assembly of Bosnia and Herzegovina, which has the competence, by means of a prescribed procedure, to amend the Constitution of Bosnia and Herzegovina, or to take the place of those institutions that have the obligation to take the relevant measures for the purpose of the enforcement of the judgments of the European Court in the cited cases.

Thus, for the courts and other competent bodies to apply the European Convention directly to this matter, as the appellant requests, it is necessary to end the current

incompatibility of the Constitution of Bosnia and Herzegovina with the European Convention as found by the European Court in the judgments of *Sejdić and Finci*, *Zornić* and *Pilav*. As already noted, that can only be done by the competent institutions and the prescribed procedure, which is the basic requirement of the rule of law as set out in Article I § 2 of the Constitution of Bosnia and Herzegovina, but also the principle on which the European Convention itself is based. Otherwise, the Constitutional Court, but also the Court of Bosnia and Herzegovina and the Central Election Commission of Bosnia and Herzegovina, would be acting outside their prescribed competences, namely they would assume the role of constitution-makers and legislators despite the fact that this is within the exclusive competence of other institutions of government."

18. Furthermore, when provisions excluding persons who do not declare affiliation with "constituent peoples" from public functions are included in the Entity Constitutions (concerning, for instance, Presidents/Vice-Presidents of the Entities), there is no doubt that the Constitutional Court has jurisdiction to examine whether they are in accordance with the State Constitution and/or the Convention (see paragraph 15 above). However, even if the Constitutional Court finds that such a provision is contrary to the State Constitution and the Convention, it maintains it in place without ordering any remedial measures, for the reasons set out in decision no. U 14/12 of 26 March 2015, the relevant parts of which read as follows (**bold** added):

"71. The Constitutional Court recalls that, in accordance with Article I(2) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina is defined as a democratic state operating under the rule of law and with free and democratic elections. In accordance with Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities will ensure the highest level of internationally recognised human rights and fundamental freedoms. Besides, in accordance with Article II(4) of the Constitution of Bosnia and Herzegovina, rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. These provisions suggest the establishment of the principle of a democratic state, the rule of law and free elections, which will have that same specific significance as in the developed democratic countries with a long-standing practice of the establishment thereof. The legitimate goal which is reflected in the preservation of peace for a country after the war represents the permanent value which the society as a whole must be dedicated to, which significance cannot be diminished by the lapse of time and the progress made in the democratic development. In that respect the Constitutional Court cannot accept that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples, as regulated by the challenged provisions, and which serves the legitimate goal of the preservation of peace, can be abandoned and replaced by a political system reflecting the rule of majority. However, the question that arises is whether the only way to achieve the legitimate goal and preserve peace is still the exclusion of 'Others' from standing for election as candidates for, particularly, the office of the President and Vice-Presidents of the Entities. When one considers, on the one hand, the principles of the rule of law, the standards of human rights and the obligation of non-discrimination in their enjoyment and protection, the positive development made by Bosnia and Herzegovina ever since the signing of the Dayton Agreement, the international obligations it assumed also in the area of exercising and protecting human rights, and the clear commitment to the further democratic development, the exclusion of 'Others' from exercising one of the human rights which

constitutes the foundation of a democratic society can no longer represent the only way in which to achieve the legitimate goal reflected in the preservation of peace. Particularly so when one bears in mind that such an exclusion was established expressly on ethnic affiliation, which cannot be objectively justified in the contemporary democratic societies built on the principles of pluralism and respect for different cultures, which Bosnia and Herzegovina society is and which it aspires to. The Preamble of the Constitution of Bosnia and Herzegovina, according to which the Constitution of Bosnia and Herzegovina is based on respect for human dignity, liberty, and equality, and it indicates that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society, is also suggestive of this conclusion.

72. In view of the positions presented in the foregoing text of the decision, the Constitutional Court concludes that the provisions of Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Act are in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention. In this respect, the Constitutional Court emphasises that the exclusion of the possibility for the members of 'Others' who are, as well as the constituent peoples, citizens of Bosnia and Herzegovina who are guaranteed by law the right to stand for election without discrimination and restrictions in running for office of the President and Vice-Presidents of the Entities, no longer represents the only way to achieve the legitimate goal, which is the reason why it cannot have a reasonable and objective justification. Namely, in exercising the right guaranteed by law, the mentioned provisions of the Entities' Constitutions and the Election Act establish the differential treatment of 'Others' which is based on ethnic affiliation and result in the discrimination in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

73. Finally, the Constitutional Court notes that it unambiguously follows from the *Sejdić and Finci* judgment of the European Court that the Constitution of Bosnia and Herzegovina should be amended. In this connection, the Constitutional Court outlines that the European Court noted in the case of *Zornić v. Bosnia and Herzegovina* (see para 40): '... It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111)'.

74. **However, it is impossible to foresee the scope of those changes in this moment. The Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Act, it will not order the Parliamentary Assembly of Bosnia and Herzegovina, National Assembly of the Republika Srpska and the Parliament of the Federation to harmonise the aforementioned provisions until the adoption, in the national legal system, of**

constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Act with the European Convention, which was found by the European Court in the quoted cases."

B. Election Act 2001

19. The Election Act 2001 (*Izborni zakon*, Official Gazette of Bosnia and Herzegovina nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14, 31/16, 41/20, 38/22, 51/22 and 67/22) entered into force on 27 September 2001. The relevant provisions of this Act provide:

Section 1.1a

"...

Compensatory mandates are the mandates that are allocated to the lists of political parties or coalitions according to the number of valid votes received. They serve to compensate for inadequate proportional representation at the Entity level arrived at by summing up the results for the particular multi-member constituency in the Entity.

..."

Section 1.4(1)

"Each citizen of Bosnia and Herzegovina who has attained eighteen years of age shall have the right to vote and to be elected pursuant to this Act."

Section 1.5(1)

"All citizens of Bosnia and Herzegovina who have the right to vote pursuant to this Act shall have the right to vote in person in the municipality of their permanent residence.

..."

Section 4.19

"(1) The certified political party or coalition shall submit a separate list of candidates for each constituency.

...

(4) The list of candidates shall contain the name and surname of every candidate on the list, their personal identification number (JMBG number), their permanent residence, their declared affiliation with a particular 'constituent people' or the group of 'Others', and the signature of the president of the political party or the authorised representative of the coalition. Each candidate's declaration of acceptance of candidacy and a statement confirming the absence of impediments referred to in sections 1.8(1) and 1.10(1)(5) of this Act shall be attached to the list. The declaration and statement must be duly certified.

(5) The declaration of affiliation with a particular 'constituent people' or the group of 'Others' referred to in the preceding paragraph shall be used for the purposes of the

exercise of the right to hold an elected or appointed position for which such a declaration is required in the election cycle for which the list has been submitted.

(6) A candidate shall be entitled not to declare his or her affiliation to a 'constituent people' or the group of 'Others'. However, any such failure to declare affiliation shall be treated as a waiver of the right to hold an elected or appointed position for which such a declaration is required.

..."

Section 4.24

"(1) Each political party and coalition certified to submit candidates for the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina, or the National Assembly of the Republika Srpska shall submit a list of candidates for compensatory mandates to the Election Commission of Bosnia and Herzegovina. Such a list shall be submitted for each of the bodies listed above for which the political party or coalition is certified, within five days of the date of certification of the lists of candidates, as per section 4.21 of this Act.

(2) The list of candidates for compensatory mandates shall include only the names of candidates already included on the regular lists of candidates submitted by the political party or coalition for one or more multi-member constituencies. Candidates on a list of candidates for compensatory mandates may be from the list of any multi-member constituency within the same Entity and at the same electoral level. ...

(4) Lists of candidates for compensatory mandates shall not be published on the ballot and shall only be used for the purposes of awarding compensatory mandates pursuant to sections 9.8, 10.6 and 11.6 of this Act. The lists shall be published by the Election Commission of Bosnia and Herzegovina in the Official Gazette of Bosnia and Herzegovina and in the broadcast media."

Section 8.1

"(1) The members of the Presidency of Bosnia and Herzegovina who are directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat – shall be elected by voters registered to vote in the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation of Bosnia and Herzegovina may vote for either the Bosniac or the Croat member of the Presidency, but not for both. The Bosniac and the Croat candidate who receive the highest number of votes among candidates from the same 'constituent people' shall be elected.

(2) The member of the Presidency of Bosnia and Herzegovina who is directly elected from the territory of the Republika Srpska – a Serb – shall be elected by voters registered to vote in the Republika Srpska. The candidate who receives the highest number of votes shall be elected.

(3) The mandate for the members of the Presidency of Bosnia and Herzegovina shall be four years."

Section 9.1

"(1) The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina shall consist of forty-two members, twenty-eight of whom shall be directly elected by voters registered to vote in the territory of the Federation of Bosnia and Herzegovina, and fourteen of whom shall be directly elected by voters registered to vote

in the territory of the Republika Srpska. The mandate of members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina shall be four years.

(2) Of the twenty-eight members who shall be directly elected by voters registered to vote in the territory of the Federation of Bosnia and Herzegovina, twenty-one shall be elected from multi-member constituencies under the proportional representation formula set forth in section 9.6 of this Act, and seven shall be elected from the [list of candidates for] compensatory mandates from the territory of the Federation of Bosnia and Herzegovina as a whole pursuant to section 9.7 of this Act.

(3) Of the fourteen members who shall be directly elected by voters registered to vote in the territory of the Republika Srpska, nine shall be elected from multi-member constituencies under the proportional representation formula set forth in section 9.6 of this Act, and five shall be elected from the [list of candidates for] compensatory mandates from the territory of the Republika Srpska as a whole pursuant to section 9.7 of this Act.

(4) A voter shall have one ballot for the proportional representation mandates in the multi-member constituency for which the voter is registered."

Section 9.12

"The House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina shall consist of fifteen delegates, of whom two-thirds shall be from the Federation of Bosnia and Herzegovina (five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs)."

Section 9.12a

"(1) Croat and Bosniac delegates from the Federation of Bosnia and Herzegovina to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina shall be elected by the Croat and Bosniac caucus, as appropriate, in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina.

(2) Croat and Bosniac delegates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina shall elect delegates from their respective 'constituent people'.

(3) Serb delegates and delegates of the 'Others' in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina shall not participate in the process of electing Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina from the Federation of Bosnia and Herzegovina.

(4) Delegates from the Republika Srpska (five Serbs) to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina shall be elected by the National Assembly of the Republika Srpska.

(5) Bosniac and Croat delegates and delegates of the 'Others' in the National Assembly of the Republika Srpska shall participate in the process of electing delegates from the Republika Srpska to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina."

Section 18.2

"A citizen of Bosnia and Herzegovina who is registered to vote for the Brčko District shall have the right to vote:

1. for the members of the Presidency of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina by casting the appropriate ballot in the Entity of which the voter has citizenship[8];

..."

C. Residence Act 2001

20. The Residence Act 2001 (*Zakon o prebivalištu i boravištu državljana Bosne i Hercegovine*, Official Gazette of Bosnia and Herzegovina nos. 32/01, 56/08 and 58/15) entered into force on 27 January 2002. Section 31 of the Act provides that a false declaration of permanent residence is an offence, subject to a fine of up to 300 convertible marks[9].

II. INTERNATIONAL LAW AND PRACTICE

A. The Parliamentary Assembly of the Council of Europe

21. On becoming a member of the Council of Europe in 2002, Bosnia and Herzegovina undertook to "review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary" (see Opinion 234(2002) of the Parliamentary Assembly of the Council of Europe of 22 January 2002, paragraph 15(iv)(b)). Thereafter, the Parliamentary Assembly of the Council of Europe has periodically reminded Bosnia and Herzegovina of this post-accession obligation and urged it to adopt a new Constitution before October 2010 with a view to replacing "the mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against 'Others'" (see Resolution 1383 (2004) of 23 June 2004, paragraph 3; Resolution 1513 (2006) of 29 June 2006, paragraph 20; and Resolution 1626 (2008) of 30 September 2008, paragraph 8).

[8] All citizens of Bosnia and Herzegovina also have the citizenship of the Entity in which they have declared their permanent residence. Since the Brčko District is in the joint ownership (condominium) of the two Entities, its residents are entitled to choose their Entity citizenship.
[9] The convertible mark uses the same fixed exchange rate to the euro that the German mark has (1 convertible mark = 0.51129 euros).

B. The Committee of Ministers of the Council of Europe

22. On 7 June 2023, at its 1468th meeting, the Committee of Ministers of the Council of Europe, in its supervisory function under the terms of Article 46 § 2 of the Convention, examined the state of implementation of the *Sejdić and Finci* group of judgments and adopted the following decision (document no. CM/Del/Dec(2023)1468/H46-4):

"The Deputies

1. recalled that in these judgments, the Court found discrimination against persons not affiliated with the constituent peoples in Bosnia and Herzegovina, or those failing to meet a combination of the requirements of ethnic origin and place of residence as regards their right to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina;

2. reaffirmed once more the crucial importance of the respondent State's obligation, assumed under Article 46 of the Convention, to abide by the Court's judgments promptly, fully and effectively to ensure the maximum possible reparation for the violations found; recalled Interim Resolutions CM/ResDH(2011)291, CM/ResDH(2012)233, CM/ResDH(2013)259 and CM/ResDH(2021)427 by which the Committee strongly urged the authorities and political leaders of Bosnia and Herzegovina to amend the Constitution and the electoral legislation;

3. noted the communication submitted by the Council of Europe Commissioner for Human Rights expressing her great concern that, fourteen years since the delivery of the leading judgment by the Grand Chamber, the impugned discriminatory provisions remain in the country's Constitution and electoral legislation, amplifying ethnic divisions in the country;

4. recalled again with utmost concern that, as a direct result of the absence of measures taken by the respondent State to execute the present group of judgments, to date four general elections were held in under the same regulatory framework which the European Court found to be discriminatory;

5. recalled however the coalition agreement of 29 November 2022 signed by leaders of several political parties following the elections of October 2022, by which they, *inter alia*, agreed to adopt, within six months following the formation of governments at all levels at the latest, limited amendments to the Constitution and to the electoral legislation in order to implement the present judgments; regretted the lack of information on the measures taken to implement the above political decision;

6. insisted firmly on the utmost importance of instantly relaunching the electoral reform work and exhorted the political leaders and all relevant authorities to ensure that the above written commitment leads to concrete results, while pursuing all consultations necessary, and to take all actions required to ensure the adoption of the constitutional and legislative amendments aimed at eliminating discrimination based on ethnic affiliation in elections for the Presidency and the House of Peoples of Bosnia and Herzegovina;

7. reiterated once again the willingness of the Council of Europe, notably the Venice Commission, to assist by all available means the authorities of Bosnia and Herzegovina during the above process in meeting their obligations under Article 46 of the Convention;

8. urged the authorities to submit information in writing on the measures taken to implement the present group of judgments; decided to resume its examination at their 1483rd meeting (December 2023) (DH) and should no tangible progress be achieved by then, instructed the Secretariat to prepare a draft interim resolution for their consideration at that meeting."

C. Commissioner for Human Rights

23. The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by the Council of Europe to promote awareness of and respect for human rights in the member States. The relevant part of her submission to which the Committee of Ministers referred in its decision quoted in paragraph 22 above reads as follows:

"...

13. In the Commissioner's view, time has always been of the essence in the execution of these judgments, and the negative impact of the delay on social cohesion and inter-ethnic relations has been significant. The deeply embedded 'ethnic keys' in the country's constitutional system, at state and entity levels, have amplified divisions along ethnic lines over the years, which has adversely impacted on the human rights situation in the country, as confirmed by reports of the Commissioner's predecessors and the Council of Europe monitoring bodies, such as ECRI and the Advisory Committee on the Framework Convention for the Protection of National Minorities. The Venice Commission warned of these risks already in 2006. In its opinion about the constitutional reform from that year, the Venice Commission noted that the notions of 'constituent peoples' and of 'Others' leads to a stratification of society which, instead of appeasing ethnic tensions, exacerbates them, given that part of the civic prerogatives depends on whether or not one belongs to a constituent people. The Commissioner shares the view of the Venice Commission expressed in this opinion that those who have decided to 'opt out' of one of the constituent peoples appear to have replaced their 'ethnic identity' with an 'identity through citizenship' and that 'this attitude should be encouraged, *inter alia* through the enhancement of the position of the "Others" at the constitutional level.'

14. The Commissioner considers it positive that the implementation of these judgments is one of the commitments of the newly-formed coalition in Bosnia and Herzegovina; however, reference to the implementation of '*limited* changes to the Constitution' raises her concern. While there is, at present, no clarity as to what this entails, the Commissioner underlines the importance of ensuring that any constitutional or legislative changes that the authorities undertake fully comply with these Court judgments and that they lead to the full elimination of ethnic discrimination from both the Constitution and the electoral legislation. The Commissioner thus considers it important that in its latest decision on the execution of these judgments from March 2023, the Committee of Ministers strongly urged the political leaders and all relevant authorities to take all actions required to ensure the adoption of the constitutional and legislative amendments aimed at eliminating discrimination based on ethnic affiliation in elections for the Presidency and the House of Peoples of Bosnia and Herzegovina, and that it continues to do so.

15. In the same vein, the Commissioner is concerned about calls for so-called 'legitimate representation of constituent peoples' in discussions about reform of the Constitution and the electoral legislation. This concept has been upheld by the

Constitutional Court of Bosnia and Herzegovina in respect of the House of Peoples of the Federation of Bosnia. The Commissioner understands this concept to imply the inclusion of additional mechanisms in the Constitution and the electoral legislation, which would ensure the election of candidates from constituent peoples in the Presidency and in the House of Peoples of Bosnia and Herzegovina who are considered as 'legitimate' representatives of their ethnic group. For the Commissioner, this would mean granting special rights for constituent peoples, to the exclusion of minorities or citizens of Bosnia and Herzegovina who do not affiliate with any of the constituent peoples, and which could contravene the Court's findings in these judgments. Even if this only means preserving the existing situation, this implies that being just a citizen is considered to be of a lower status, as opposed to being a member of one constituent people, which would be contrary to the principle of non-discrimination.

...

16. The longstanding non-execution of these judgments is a reminder that the legacy of the violent past still lingers in Bosnia and Herzegovina 30 years after the war, and is impeding social cohesion, reconciliation, and progress. As she has done in her above-mentioned statement from December 2020, the Commissioner wishes to once more draw attention to the negative impact on human rights of an ingrained vision of politics that for decades has been capitalising on lingering ethnic resentment to maintain power and a discriminatory status quo, without even a minimal effort or any political will to ensure equality and prosperity for all living in Bosnia and Herzegovina, regardless of their ethnic or any other affiliation.

17. The Commissioner considers that the non-execution of these judgments is the expression of a persisting approach which does not place human rights at its centre, and which also manifests itself in rising ethnic tensions and polarisation, as well as lingering divisions along ethnic lines in education.

18. In this sense, the Commissioner shares concerns expressed by other international human rights actors, including those of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr Fabian Salvioli. In the report on his visit to Bosnia and Herzegovina from July 2022, the Special Rapporteur noted that 'in recent years, relentless political bargaining by political elites and the exacerbation of nationalist agendas for political purposes has led to a virtual standstill in governance. This, combined with an exponential rise in anti-ethnic minority rhetoric and the glorification of convicted war criminals, has led to worrying levels of polarization and tangible risks to peace sustainability, which require an immediate national and international response.'

...

21. In the Commissioner's view, the failure of the authorities to execute these judgments has contributed to the further deterioration of the situation in Bosnia and Herzegovina and has amplified ethnic divisions. Increased threats to peace and stability, the rise of hate speech, glorification of war criminals and unsanctioned genocide denial, as well as longstanding divisions in education along ethnic lines, are just some of the negative consequences of the preservation of a system based on ethnic discrimination. It is imperative that the authorities place focus on building a state based on the equality of citizens, rather than on further embedding ethnic discrimination in the Constitution and the electoral legislation.

..."

D. The European Commission for Democracy through Law (Venice Commission)

24. The Venice Commission, the Council of Europe's advisory body on constitutional matters, has adopted a number of Opinions in this connection.

1. Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, 11 March 2005 (CDL-AD(2005)004)

25. This opinion reads, in so far as relevant, as follows (**bold** added):

"1. On 23 June 2004 the Parliamentary Assembly of the Council of Europe adopted Resolution 1384 on 'Strengthening of democratic institutions in Bosnia and Herzegovina'. Paragraph 13 of the Resolution asks the Venice Commission to examine several constitutional issues in Bosnia and Herzegovina.

...

b) The functioning of the institutions

29. Bosnia and Herzegovina is a country in transition facing severe economic problems and desiring to take part in European integration. The country will only be able to cope with the numerous challenges resulting from this situation if there is a strong and effective government. The constitutional rules on the functioning of the State organs are however not designed to produce strong government but to prevent the majority from taking decisions adversely affecting other groups. It is understandable that in a post-conflict situation there was (and is) insufficient trust between ethnic groups to allow government on the basis of the majoritarian principle alone. In such a situation specific safeguards have to be found which ensure that all major groups, in Bosnia and Herzegovina the constituent peoples, can accept the constitutional rules and feel protected by them. As a consequence the Bosnia and Herzegovina Constitution ensures the protection of the interests of the constituent peoples not only through territorial arrangements reflecting their interests but also through the composition of the State organs and the rules on their functioning. In such a situation, a balance has indeed to be struck between the need to protect the interests of all constituent peoples on the one hand and the need for effective government on the other. However, in the Bosnia and Herzegovina Constitution, there are many provisions ensuring the protection of the interests of the constituent peoples, *inter alia*: the vital interest veto in the Parliamentary Assembly, the two-chamber system and the collective Presidency on an ethnic basis. The combined effect of these provisions makes effective government extremely difficult, if not impossible. Hitherto the system has more or less functioned due to the paramount role of the High Representative. This role is however not sustainable.

<u>The vital interest veto</u>

30. The most important mechanism ensuring that no decisions are taken against the interest of any constituent people is the vital interest veto. If the majority of the Bosniac, Croat or Serb delegates in the House of Peoples declare that a proposed decision of the Parliamentary Assembly is destructive to a vital interest of their people, the majority of Bosniac, Serb and Croat delegates have to vote for the decision for it to be adopted. The majority of delegates from another people may object to the invocation of the clause. In this case a conciliation procedure is foreseen and ultimately a decision is taken by the Constitutional Court as to the procedural regularity of the invocation. It is

noteworthy that the Constitution does not define the notion of vital interest veto, contrary to the Entity Constitutions which provide a (excessively broad) definition.

31. It is obvious, and was confirmed by many interlocutors, that this procedure entails a serious risk of blocking decision-making. Others argued that this risk should not be overestimated since the procedure has rarely been used and the Constitutional Court in a decision of 25 June 2004 started to interpret the notion [see decision U-8/04 on the vital interest veto against the Framework Law on Higher Education]. The decision indeed indicates that the Court does not consider that the vital interest is a purely subjective notion within the discretion of each member of parliament and which would not be subject to review by the Court. On the contrary, the Court examined the arguments put forward to justify the use of the vital interest veto, upheld one argument and rejected another.

32. The Commission is nevertheless of the opinion that a precise and strict definition of vital interest in the Constitution is necessary. The main problem with veto powers is not their use but their preventive effect. Since all politicians involved are fully conscious of the existence of the possibility of a veto, an issue with respect to which a veto can be expected will not even be put to the vote. Due to the existence of the veto, a delegation taking a particularly intransigent position and refusing to compromise is in a strong position. It is true that further case-law from the Constitutional Court may provide a definition of the vital interest and reduce the risks inherent in the mechanism. This may however take a long time and it also seems inappropriate to leave such a task with major political implications to the Court alone without providing it with guidance in the text of the Constitution.

33. Under present conditions within Bosnia and Herzegovina, it seems unrealistic to ask for a complete abolition of the vital interest veto. The Commission nevertheless considers that it would be important and urgent to provide a clear definition of the vital interest in the text of the Constitution. This definition will have to be agreed by the representatives of the three constituent peoples but should not correspond to the present definition in the Entity Constitutions which allows practically anything being defined as vital interest. It should not be excessively broad but focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture.

Entity veto

34. In addition to the vital interest veto, Article IV § 3 (d) of the Constitution provides for a veto by two-thirds of the delegation from either Entity. This veto, which in practice seems potentially relevant only for the Republika Srpska, appears redundant having regard to the existence of the vital interest veto.

Bicameral system

35. Article IV of the Constitution provides for a bicameral system with a House of Representatives and a House of Peoples both having the same powers. Bicameral systems are typical for federal States and it is therefore not surprising that the Bosnia and Herzegovina Constitution opts for two chambers. However, the usual purpose of the second chamber in federal States is to ensure a stronger representation of the smaller entities. One chamber is composed on the basis of population figures while in the other either all entities have the same number of seats (Switzerland, USA) or at least smaller entities are overrepresented (Germany). In Bosnia and Herzegovina this is quite different: in both chambers two-thirds of the members come from the Federation of Bosnia and Herzegovina, the difference being that in the House of Peoples only the Bosniacs and Croats from the Federation and the Serbs from the Republika Srpska are

represented. The House of Peoples is therefore not a reflection of the federal character of the State but an additional mechanism favouring the interests of the constituent peoples. The main function of the House of Peoples under the Constitution is indeed as the chamber where the vital interest veto is exercised.

36. The drawback of this arrangement is that the House of Representatives becomes the chamber where legislative work is done and necessary compromises are made in order to achieve a majority. The role of the House of Peoples is only negative as a veto chamber, where members see as their task to exclusively defend the interests of their people without having a stake in the success of the legislative process. **It would therefore seem preferable to move the exercise of the vital interest veto to the House of Representatives and abolish the House of Peoples.** This would streamline procedures and facilitate the adoption of legislation without endangering the legitimate interests of any people. It would also solve the problem of the discriminatory composition of the House of Peoples.

The collective Presidency

37. Article V of the Constitution provides for a collective Presidency with one Bosniac, one Serb and one Croat member and a rotating chair. The Presidency endeavours to take its decisions by consensus (Article V § 2 (c)). In case of a decision by a majority, a vital interest veto can be exercised by the member in the minority.

38. A collective Presidency is a highly unusual arrangement. As regards the representational functions of Head of State, these are more easily carried out by one person. At the top of the executive there is already one collegiate body, the Council of Ministers, and adding a second collegiate body does not seem conducive to effective decision-making. This creates a risk of duplication of decision-making processes and it becomes difficult to distinguish the powers of the Council of Ministers and of the Presidency. Moreover, the Presidency will either not have the required technical knowledge available within ministries or need substantial staff, creating an additional layer of bureaucracy.

39. A collective Presidency therefore does not appear functional or efficient. Within the context of Bosnia and Herzegovina, its existence seems again motivated by the need to ensure participation by representatives from all constituent peoples in all important decisions. A single President with important powers seems indeed difficult to envisage for Bosnia and Herzegovina.

40. **The best solution therefore would be to concentrate executive power within the Council of Ministers as a collegiate body in which all constituent peoples are represented.** Then a single President as Head of State should be acceptable. Having regard to the multi-ethnic character of the country, an indirect election of the President by the Parliamentary Assembly with a majority ensuring that the President enjoys wide confidence within all peoples would seem preferable to direct elections. Rules on rotation providing that a newly elected President may not belong to the same constituent people as his predecessor may be added.

...

c) Citizens or peoples as the basis of the State

43. The Constitution of Bosnia and Herzegovina incorporates a large number of international human rights instruments, grants priority to the European Convention on Human Rights over all other law, underlines the democratic character of the state and puts strong emphasis on the prohibition of discrimination. On the other hand, the state institutions are structured not to represent citizens directly but to ensure representation

of the constituent peoples. Some legal problems resulting from this approach will be examined below in Part V of this Opinion. However, beyond specific legal problems this approach raises more general concerns. First of all, the interests of persons not belonging to the three constituent peoples risk being neglected or people are forced to artificially identify with one of the three peoples although they may for example be of mixed origin or belong to a different category. Moreover, there is a strong risk that all issues will be regarded in the light of whether a proposal favours the specific interests of the respective peoples and not of whether it contributes to the common weal. Finally, elections cannot fully play their role of allowing political alternance between majority and opposition. Each individual is free to change his political party affiliation. By contrast, ethnic identity is far more permanent and individuals will not be willing to vote for parties perceived as representing the interest of a different ethnic group even if these parties provide better and more efficient government. **A system favouring and enshrining a party system based on ethnicity therefore seems flawed.**

44. It would certainly not be realistic to expect that Bosnia and Herzegovina move quickly from a system based on ethnic representation to a system based on representation of citizens. This will certainly be a long-term process. Nevertheless, **the Commission wishes to encourage people and politicians in Bosnia and Herzegovina to start examining the extent to which the mechanisms of ethnic representation are really required and to replace them progressively by representation based on the civic principle**.

...

2. Composition and Election of the Presidency

...

68. In a federal State special arrangements ensuring an appropriate representation of the Entities within the federal institutions are unobjectionable. In principle, in a multi-ethnic State such as Bosnia it appears also legitimate to ensure that a State organ reflects the multi-ethnic character of society. **The problem is however the way in which the territorial and the ethnic principle are combined.** The Constitutional Court of Bosnia and Herzegovina referred to this problem in the following terms in its decision concerning constituent peoples in the Entity constitutions:

> *'65. ... One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation. He thus represents neither Republika Srpska as an entity nor the Serb people only, but all the citizens of the electoral unit Republika Srpska. And the same is true for the Bosniac and Croat Members to be elected from the Federation.'*

69. If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the Entity from which they were elected. **It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation.** The identity of interests in this ethnically-dominated manner impedes the development of a wider sense of nationhood.

...

75. ... Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the [European Convention on Human Rights] and Protocol No. 12 [thereto]. As set forth above, the situation in Bosnia and Herzegovina has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

76. This can, however, be achieved without entering into conflict with international standards. **It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable.** It seems possible to redesign the rules on the Presidency to make them compatible with international standards while maintaining the political balance in the country.

77. A multi-ethnic composition can be ensured in a non-discriminatory way, for example by providing that not more than one member of the Presidency may belong to the same people or the Others and combining this with an electoral system ensuring representation of both Entities. Or, as suggested above, as a more radical solution which would be preferable in the view of the Commission, the collective Presidency could be abolished and replaced by an indirectly elected President with very limited powers.

3. Composition and election of the House of Peoples

78. ... These rules raise particular problems with respect to the Federation. As regards the right to vote, this right applies also to indirect elections. In the Federation not all members of the Federation House of Peoples may vote but only the Croat and Bosniac members. There is therefore no equality between the parliamentarians. In the RS the situation is somewhat different since all members of the National Assembly may take part in the election although their choice is limited to Serb candidates. Although these rules reflect the same difficulties of mixing ethnic and territorial concepts as expressed in relation to the Bosnia and Herzegovina Presidency, it is difficult to find a legal rationale for this different treatment of the same election in the two Entities, especially since this question is regulated by the Constitution of the State and not individually by the Constitutions of the Entities.

...

80. The House of Peoples is a chamber with full legislative powers. Article 3 of Protocol No. 1 to the [Convention] is thereby applicable and any discrimination on ethnic grounds is thereby prohibited by Article 14 of the [Convention]. As to a possible justification, the same considerations as with respect to the Presidency apply. While it is a legitimate aim to try to ensure an ethnic balance within Parliament in the interest of peace and stability, this can justify ethnic discrimination only if there are no other means to achieve this goal and if the rights of minorities are adequately respected. For the House of Peoples it would for example be possible to fix a maximum number of seats to be occupied by representatives from each constituent people. Or, as argued above, a more radical solution which would have the preference of the Commission, could be chosen and the House of Peoples simply be abolished and the vital national interest mechanism be exercised within the House of Representatives.

...

5. Conclusions

83. **In conclusion, the rules on the composition and election of the Presidency and the House of Peoples raise concerns as to their compatibility with the European Convention on Human Rights. The rules on the composition and election of the House of Peoples seem incompatible with Article 14 [of the Convention], the rules on the composition and election of the Presidency seem incompatible with Protocol No. 12, which enters into force for Bosnia and Herzegovina on 1 April 2005.**

..."

2. *Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina, 20 March 2006 (CDL-AD(2006)004)*

26. The relevant parts of this Opinion read as follows:

"1. By letter dated 2 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to provide an Opinion on three different proposals for the election of the Presidency of this country. This request was made in the framework of negotiations on constitutional reform between the main political parties in Bosnia and Herzegovina. The issue of the election of the Presidency remains to be resolved in order to reach agreement on a comprehensive reform package.

...

Comments on Proposal I

8. Proposal I would consist of maintaining the present rules on the election and composition of the Presidency, with one Bosniac and one Croat elected from the territory of the Federation and one Serb elected from the territory of Republika Srpska. In its [Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] the Commission raised serious concerns as to the compatibility with Protocol No. 12 to the European Convention [on] Human Rights of such a rule, which formally excludes Others as well as Bosniacs and Croats from Republika Srpska and Serbs from the Federation from being elected to the Presidency. Maintaining this rule as it stands should therefore be excluded and Proposal I be rejected.

Comments on Proposal II

9. Proposal II, which is not drafted as text to be included in the Constitution but as a summary of possible constitutional content, maintains the system of directly electing two members of the Presidency from the Federation and one from Republika Srpska, however without mentioning any ethnic criteria for the candidates. The *de jure* discrimination pointed out in the Venice Commission Opinion would therefore be removed and adoption of this proposal would constitute a step forward. The Proposal also includes a rotation of the President of the Presidency every 16 months. Within the logic of a collective Presidency, this appears as a rational solution.

10. By contrast, the Proposal lacks clarity as to the pluri-ethnic composition of the Presidency. The collective Presidency was introduced, and supposedly will now be maintained, in order to ensure that no single State organ is dominated by a representative of a single constituent people. As it stands, under the proposal it would be possible to, for example, elect two Bosniacs from the Federation to the Presidency. Legally, this drawback could be remedied in the framework of the Proposal by providing that not more than one member of the Presidency may belong at the same

time to the same constituent people or the group of Others. It is the understanding of the Commission that the intention is indeed to include such a provision in the Constitution in case this proposal is adopted.

11. However, the problem would result of having to possibly exclude from the Presidency candidates who have received a higher number of votes. In the Federation it is quite possible that two Bosniacs would attain the highest number of votes. In this case, a candidate who obtained more votes would have to be barred from the Presidency in favour of a candidate who obtained fewer votes. These issues should be regulated clearly at the level of the Constitution and not be left to ordinary law.

12. As a further drawback, *de facto* Bosniacs and Croats from the Republika Srpska and Serbs from the Federation would also continue to have no realistic possibility to elect a candidate of their preference.

13. Furthermore, the election of the Head of State would continue to take place on an Entity basis while it would be desirable to move it to the State level as part of the overall approach of strengthening the State.

14. As a minor issue, the proposal would also allow members of the Presidency to hold a leadership position in a political party. This does not seem in line with the overall aim of constitutional reform of transforming the Presidency from an executive body into a (collective) Head of State.

15. To sum up, Proposal II is a clear improvement with respect to the present constitutional situation. However, it has a number of drawbacks, including the risk that candidates with less votes than others are elected and it does not contribute to the overall aims of the constitutional reform of moving power to the Council of Ministers and strengthening the State level.

Proposal III

16. Proposal III differs more markedly from the present constitutional situation by introducing a complicated procedure of indirect elections for the Presidency. As set forth above, the main preference of the Commission is for the indirect election of a single President with reduced powers. But also in the case of a collective Presidency, the Commission maintains its preference for indirect elections.

17. The reason is, first of all, that one of the main aims of the constitutional reform would be to reduce the powers of the Presidency and to concentrate executive power in the Council of Ministers. This change will be more difficult to bring about if the Presidency does have the legitimacy of a direct popular vote.

18. Moreover, in an indirect election it is easier to devise mechanisms ensuring the desired pluri-ethnic composition of the Presidency. It offers more possibilities for inter-ethnic cooperation and compromise while direct elections for *de facto* separate ethnic slots provide an incentive to vote for the person considered as the strongest advocate of the respective constituent people and not for the candidate best suited to defend the interests of the country as a whole.

19. Finally, the Proposal moves the election to the State Parliament. It is indeed desirable and in line with the overall aim of strengthening the State to have the election of the Head of State at this level.

20. From the point of view of the overall approach, Proposal III therefore seems preferable. There are nevertheless some drawbacks.

21. First of all, the proposal seems complicated with too many steps and possibilities for stalemate. Nominations can be put forward by members of the House of

Representatives or the House of Peoples, the selection of the candidates takes place by the three separate ethnic caucuses in the House of Peoples and thereafter the slate of candidates has to be confirmed both by the three caucuses in the House of Peoples and by the House of Representatives.

22. Within the parameters of the proposal, it would seem preferable to have a simpler procedure with more focus on the House of Representatives as the body having direct democratic legitimacy derived from the people as a whole. The possibility to nominate candidates should be reserved to members of the House of Representatives, selection among these candidates could take place in the three separate ethnic caucuses of the House of Peoples to ensure that the interests of all three constituent peoples are respected and the slate of candidates would have to be confirmed by the majority of the composition of the House of Representatives, ensuring that all three members have legitimacy as representatives of the people of Bosnia and Herzegovina as a whole.

23. In addition, it should be clarified how the positions of the President and Vice-Presidents are to be distributed. As it stands, Proposal III leaves this important decision implicitly to backroom dealing between the three ethnic caucuses since a slate identifying President and Vice-Presidents has to be submitted to the House of Representatives, while no indication is provided on how this choice has to be made. This seems the worst possible solution and likely to lead to stalemate. The rotation envisaged by Proposal II seems more feasible.

24. There are also other aspects of Proposal III which are not in accordance with the preferences of the Venice Commission. In its above-mentioned Opinion, the Commission argued in favour of abolishing the House of Peoples. Giving it a strong role in the selection of the Presidency cannot therefore be considered a positive step. The role of ethnic caucuses makes the election of candidates not belonging to a constituent people extremely unlikely. This is however not peculiar to this Proposal but reflects the political situation. The proposal at least ensures that the representatives of the Others in the House of Representatives will take part in the vote and that Serbs from the Federation and Bosniacs and Croats from Republika Srpska are no longer disadvantaged since their representatives in the State Parliament will be able to vote for the candidates of their choice.

25. Even in the framework of a collective Presidency, solutions for indirect elections could be devised, which would appear preferable. For example, within the House of Representatives, slates of three candidates not coming from the same constituent people or the group of Others could be nominated and the vote could take place between such slates. This would nevertheless be a different proposal and not an amendment to Proposal III.

26. To sum up, Proposal III is also a clear improvement with respect to the present situation. If it were to be adjusted as suggested in paragraphs 22 and 23, it would appear suitable as a solution (although not an ideal one) for the first stage of constitutional reform.

Conclusions

27. In conclusion, the Commission strongly welcomes that the political parties in Bosnia and Herzegovina have found the courage to try adopting a comprehensive constitutional reform before the forthcoming elections in October 2006. It acknowledges that a reform adopted at this stage can have an interim character only, as a step towards the comprehensive reform the country clearly needs.

28. With respect to the three proposals submitted to the Commission, adoption of the first proposal could only be regarded as a failure of constitutional reform on this issue

and should be excluded. By contrast, both Proposal II and Proposal III deserve, subject to some additions and amendments, to be considered at the present stage as important steps forward, but by no means as ideal solutions.

29. Between Proposal II and Proposal III, the Commission would – though not without hesitation – give preference to Proposal III, subject to some adjustments as indicated above. An indirect election in line with the aim of the constitutional reform of reducing the powers of the Presidency makes it easier to ensure a balanced composition of the Presidency and thereby corresponds better to the *raison d'être* of this – unusual – institution. The Proposal also moves the election to the State level, in accordance with the overall aim to strengthen the State of Bosnia and Herzegovina. However, sight should not be lost of the ultimate aim of constitutional reform in this area: having in future a single President elected in a manner ensuring that he or she enjoys trust beyond the ethnic group to which he or she belongs."

3. *Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina, 12 June 2006 (CDL-AD(2006)019)*

27. The relevant parts of this Opinion read as follows:

"1. By letter dated 21 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to give an Opinion on the text of the agreement on the modalities of the first phase of constitutional reform reached by the leaders of political parties in Bosnia and Herzegovina on 18 March 2006. Since the constitutional reform has to be adopted urgently in order to make it possible to take it into account at the parliamentary elections scheduled for October 2006, he expressed the wish to receive the Opinion of the Venice Commission 'shortly'.

...

Amendment II to Article IV of the Constitution on the Parliamentary Assembly

...

22. The main aim of the Amendment is to move from a bicameralism with two equal chambers to a new system where the House of Peoples ... would have only limited powers with a focus on the vital national interests veto. The new structure of the Article, systematically putting the House of Representatives ... first, reflects this aim. The reform would be a step in the direction of the Venice Commission recommendation to abolish the [House of Peoples] and to streamline decision-making within the State institutions.

...

24. Sub-section (d) would increase the number of members of the [House of Peoples] from 15 to 21. The justification of the increase in the membership of this House is less apparent since its powers are greatly reduced. Nevertheless, this is an issue entirely within the discretion of the national authorities. If they feel that this increase is required to ensure that the House adequately represents the political spectrum, this step seems justifiable.

25. More problematic is the circumstance that membership in this House remains limited under sub-section (d) to people belonging to one of the three constituent peoples. In its Opinion [on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] the Venice Commission noted that the previous composition of this House along similar lines seemed to contradict Article 14 of the [Convention] in conjunction with Article 3 of [Protocol No. 1].

26. Following the reform the House of Peoples would however no longer be a full legislative chamber but a body dealing mainly with the vital national interests veto. It seems therefore questionable whether Article 3 of [Protocol No. 1] and thereby Article 14 of the [Convention] would still be applicable. The problem of the compatibility of this provision with Protocol No. 12 [to the Convention] remains however. In the absence of any case-law on this Protocol, it can be interpreted only with prudence. ...

27. In the present case the legitimate aim could be seen in the main role of the House as a body in which the vital national interests veto is exercised. The Bosnia and Herzegovina Constitution reserves the right to exercise this veto to the three constituent peoples and does not give it to the Others. From that perspective it would not seem required to include 'Others' in the composition of this House. The other responsibilities of the House, to participate in the election of the Presidency and to approve constitutional amendments – though not beyond criticism –, do not lead to a different result. They show that the function of the [House of Peoples] is to be a corrective mechanism, ensuring that the application of the democratic principle reflected in the composition of the [House of Representatives] does not disturb the balance among the three constituent peoples. The need for such a mechanism seems still to be felt in Bosnia and Herzegovina. In that case it seems possible to regard this need as a legitimate aim justifying an unequal treatment of Others in respect to representation in the [House of Peoples].

...

Amendment III amending Article V of the Constitution on the Presidency

43. The main aim of the Amendments is to strengthen the powers of the Council of Ministers and increase its efficiency and reduce the role of the Presidency. This is entirely in line with the Opinion [on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] of the Venice Commission. In addition, the Commission would have preferred having a single President instead of a collective Presidency. This does however not seem politically possible at the moment. Nevertheless Amendment III takes a first step in this direction.

...

46. The Venice Commission adopted an Opinion on the three alternative proposals for electing the Presidency at its last session (CDL-AD(2006)004). It would serve no purpose to re-open this discussion at the present moment. The absence of a dead-lock breaking mechanism if the [House of Representatives] refuses to confirm the proposal of the [House of Peoples] is however a concern.

..."

THE LAW

I. COMPLAINT CONCERNING THE COMPOSITION OF THE HOUSE OF PEOPLES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

28. The applicant complained under Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 and under Article 1 of Protocol No. 12 that because of a combination of the territorial and ethnic requirements

applicable to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, he had been unable to vote for the candidates of his choice in the latest legislative elections, which had taken place in 2022. He alleged that the candidates best representing his political views were not from the "right" Entity and/or of the "right" ethnic origin.

Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 3 of Protocol No. 1 provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Article 1 of Protocol No. 12 reads:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

1. Exhaustion of domestic remedies

29. The Government maintained that the applicant had failed to use available domestic remedies in respect of this complaint. In particular, he failed to lodge an objection with the Central Election Commission of Bosnia and Herzegovina, an appeal with the Court of Bosnia and Herzegovina and, eventually, a constitutional appeal.

30. The applicant argued that those remedies would not have been effective.

31. The general principles concerning the rule of exhaustion of domestic remedies were summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

32. Turning to the present case, the Court notes that the applicant indeed failed to use any domestic remedy before lodging his application. However, in view of the Constitutional Court's approach to complaints about the legal provisions excluding persons who do not declare affiliation with "constituent peoples" from public functions (see paragraphs 16-18 above), the Court agrees with the applicant that the remedies to which the Government referred were bound to fail in respect of this complaint (see *Zornić v. Bosnia and Herzegovina*, no. 3681/06, § 21, 15 July 2014). In this connection, the Court

notes that the legal provisions contested in the cases cited in paragraphs 1618 above impose restrictions on both the right to stand for election and the right to vote (for example, by excluding members of the House of Peoples of the Parliament of the Federation who do not declare affiliation with Bosniacs or Croats from participating in elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina).

33. Accordingly, this objection of the Government cannot be upheld.

2. *The Court's jurisdiction* ratione materiae

34. Although the Government did not raise any objection as to the applicability of Article 1 of Protocol No. 12 to this complaint, the Court considers that it has to address this issue of its own motion (see *Pinkas and Others v. Bosnia and Herzegovina*, no. 8701/21, § 51, 4 October 2022).

35. At the outset, the Court reiterates that as the question of applicability is an issue of its jurisdiction *ratione materiae*, the general rule for dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018). No such particular reason exists in the present case and the issue of the applicability of Article 1 of Protocol No. 12 falls to be examined at the admissibility stage.

36. The Court reiterates that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 introduces a general prohibition of discrimination (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009, and *Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 45, 29 October 2019).

37. It is important to note that Article 1 of Protocol No. 12 extends the scope of protection not only to "any right set forth by law", as the text of paragraph 1 might suggest, but beyond that. This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority (see *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010). According to the Explanatory Report on Article 1 of Protocol No. 12, the scope of protection of that Article concerns four categories of cases, in particular where a person is discriminated against:

> "i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
>
> iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."

The Explanatory Report further clarifies the following:

"... it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category."

38. Therefore, in order to determine whether Article 1 of Protocol No. 12 is applicable, the Court must establish whether the applicant's complaint falls within one of the four categories mentioned in the Explanatory Report (see *Savez crkava "Riječ života" and Others*, cited above, § 105).

39. In the present case, given that the applicant is a citizen of Bosnia and Herzegovina who has attained eighteen years of age (see section 1.4(1) of the Election Act 2001, quoted in paragraph 19 above) and is a resident of Sarajevo (see paragraph 2 above), he was clearly entitled to vote in the latest elections to the Assembly of the Sarajevo Canton and, indirectly, in elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (see Article IV § 1 (a) of the Constitution, quoted in paragraph 12 above). The applicant complains that he has been discriminated against in the enjoyment of that right. This complaint thus concerns a "right set forth by law". Moreover, in view of the powers of the House of Peoples (see Article III §§ 1 and 5 and Article IV §§ 3 (c)-(d) and 4 of the Constitution, quoted in paragraphs 11 and 12 above), the functions it fulfils on behalf of the citizens, including the applicant, involve both legal obligations and discretionary powers (see categories (ii) and (iii) mentioned in the Explanatory Report). The ability of the applicant to influence decisions made in respect of himself and those like him is reduced by the fact that he was and still is unable to participate in the exercise of any of those powers (even if they directly affect him). Article 1 of Protocol No. 12 is therefore applicable (compare *Zornić*, cited above, § 28, in which the Court applied Article 1 of Protocol No. 12 to a complaint concerning the right to stand for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina). In those circumstances, the Court considers that it is not necessary to examine whether Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 is also applicable to this complaint.

3. Victim status

40. Although the respondent State did not raise any objection as to the applicant's victim status, this issue also calls for consideration by the Court of its own motion (see *Sejdić and Finci*, cited above, § 27).

41. The Court reiterates that in order to be able to lodge an application by virtue of Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the disputed measure. The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. It is, however, open to applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted (see *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33-34, ECHR 2008, and the authorities cited therein).

42. The present applicant is a political scientist and a political adviser to a member of the Presidency of Bosnia and Herzegovina (see paragraph 8 above). That said, since he complains about legal restrictions on his right to vote, he does not need to show that he is politically active (contrast *Sejdić and Finci*, cited above, § 29, and *Zornić*, cited above, § 17, which concerned the right to stand for election). It is sufficient to establish that he is eligible to vote in elections to a cantonal assembly and thus, indirectly, in elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. Since this is clearly the case (see paragraph 39 above), the applicant may claim to be a victim of the alleged breach of Article 1 of Protocol No. 12.

In those circumstances, the Court considers that it is not necessary to examine whether the applicant is also a victim of the alleged violation of his rights under Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

4. Conclusion

43. The Court notes that the complaint under Article 1 of Protocol No. 12 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

44. The essence of the applicant's case was that because of the power-sharing arrangements mentioned in paragraph 5 above, Bosnia and Herzegovina was not a genuine democracy but an "ethnocracy" in which ethnicity – and not citizenship – was the key to securing power and resources.

According to the applicant, the three dominant ethnic groups (the "constituent peoples") controlled the State institutions to further their interests, whereas all the others, like himself, were second-class citizens with no real influence on the political life and future of the country.

45. In particular, the applicant complained that he, as a person who did not declare affiliation with any of the "constituent peoples", was not represented in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina although that chamber had very wide legislative powers. As a result, he was discriminated against on the grounds of his place of residence and on ethnic grounds, contrary to Article 1 of Protocol No. 12 and Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

46. The Government referred to the case of *Ždanoka v. Latvia* ([GC], no. 58278/00, ECHR 2006-IV), in which the Court had reaffirmed that the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State. The current constitutional structure in Bosnia and Herzegovina had been established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups – the "constituent peoples". The Government maintained that the contested constitutional provisions, by which persons who did not declare affiliation with a "constituent people" were excluded from the House of Peoples and the Presidency, should be assessed against that background. They argued that the time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina.

47. The Government stated that, in any event, the applicant had the right to vote in presidential and legislative elections at the State level in accordance with domestic law. Notably, since the citizens of Bosnia and Herzegovina enjoy the right to choose their residence, if the applicant wished to vote for Serb candidates, he could have established his permanent residence in the Republika Srpska. Therefore, his right to vote was not curtailed to such an extent as to impair its very essence and deprive it of its effectiveness. In that regard, they relied on *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113. The Government added that the applicant was in exactly the same situation as all other citizens of Bosnia and Herzegovina and that he was therefore not discriminated against on any of the prohibited grounds.

2. The Court's assessment

(a) General principles

48. The Court reiterates that despite the difference in scope between those provisions, the meaning of "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 of the Convention (see *Sejdić and Finci*, cited above, § 55). It therefore sees no reason to depart from the settled interpretation of "discrimination", as developed in the case-law concerning Article 14, in applying the same term under Article 1 of Protocol No. 12.

49. In order for an issue to arise under Article 14 of the Convention, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, for instance, *Molla Sali v. Greece* [GC], no. 20452/14, § 133, 19 December 2018). However, only differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other are capable of triggering the application of this provision. The words "other status" in the text of Article 14 have generally been given a wide meaning (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 61, 24 January 2017, and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 70, ECHR 2010), and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-59, 13 July 2010). The Court has previously recognised that the "place of residence constitutes an aspect of personal status for the purposes of Article 14" (see *Carson and Others*, cited above, §§ 70-71) and can trigger the protection of that Article.

50. A difference in the treatment of persons in analogous or relevantly similar situations will be deemed discriminatory only if it has no objective and reasonable justification – in other words, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among many authorities, *Molla Sali*, cited above, § 135, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (see *Andrejeva*, cited above, § 82).

51. Discrimination on account of a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Sejdić and Finci*, cited above, § 43, with further references).

52. In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 196, ECHR 2007-IV). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (ibid., § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 10, Series A no. 6; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *D.H. and Others*, cited above, § 175; and *Sejdić and Finci*, cited above, § 44).

(b) Application of the above principles in the present case

53. The Court notes that the House of Peoples (the second chamber of the State Parliament) comprises fifteen delegates: five Bosniacs and five Croats from the Federation and five Serbs from the Republika Srpska (see Article IV § 1 of the Constitution, quoted in paragraph 12 above).

54. Firstly, in order to indirectly participate in the election of Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, the applicant must vote for persons who declare affiliation with Bosniacs and Croats in elections for his cantonal assembly (the Assembly of the Sarajevo Canton) because only the Bosniac and Croat caucuses of that Assembly elect Bosniac and Croat delegates to the House of Peoples of the Parliament of the Federation, who, in turn, elect Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (see Article IV § 1 (a) of the Constitution, quoted in paragraph 12 above). Secondly, it follows from the combination of the relevant territorial and ethnic requirements that the applicant, as a resident of the Federation, cannot participate in the election of Serb delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. The Government's argument that the applicant could always change his permanent residence is not convincing because a false declaration of permanent residence is an offence, subject to a fine of up to 300 convertible marks (see paragraph 20 above). Moreover, social benefits are strictly linked to place of residence and are not the same in different parts of the country (see, *mutatis mutandis*, *Pilav v. Bosnia and Herzegovina*, no. 41939/07, §§ 34, 43, 45 and 48, 9 June 2016, in which the Court rejected a similar argument, and, for illustrative purposes, *Pudarić v. Bosnia and Herzegovina* [Committee], no. 55799/18, § 26, 8 December 2020). Accordingly, the

applicant is treated differently than persons from the Federation who declare affiliation with Bosniacs and Croats and persons from the Republika Srpska who declare affiliation with Serbs.

55. The Court is aware of the historical context, notably that the above-mentioned arrangements were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace. It is therefore conceivable that the existence of a second chamber, composed of representatives of the "constituent peoples" only, would have been acceptable in the special case of Bosnia and Herzegovina, had the powers of the House of Peoples been limited to the precisely, narrowly and strictly defined vital national interests veto of the "constituent peoples" (see, for instance, the Venice Commission's analysis and proposals in paragraphs 25 and 27 above). However, the House of Peoples is currently a chamber with full legislative powers. Article IV § 3 (c) of the Constitution specifically provides that all legislation requires the approval of both chambers (see paragraph 12 above). That being the case, it is of the utmost importance that all segments of society should be represented in the House of Peoples.

56. It must be emphasised in this connection that in addition to excluding certain citizens from the House of Peoples on the grounds of their ethnicity, the current arrangements render ethnic considerations and/or representation more relevant than political, economic, social, philosophical and other considerations and/or representation and thus amplify ethnic divisions in the country and undermine the democratic character of elections (see, *mutatis mutandis*, *Bakirdzi and E.C. v. Hungary*, nos. 49636/14 and 65678/14, § 63, 10 November 2022, in which the Court held under Article 3 of Protocol No. 1 taken in conjunction with Article 14 of the Convention that the right to vote encompassed the opportunity for voters to choose candidates or party lists which best reflected their political views, and that election regulations should not require voters to espouse political positions that they did not support; see also the submission of the Commissioner for Human Rights, quoted in paragraph 23 above).

57. The Government asserted that the time was still not ripe for a political system which would be a simple reflection of majority rule (see paragraph 46 above). The Court has already examined and dismissed that argument in, *inter alia*, *Sejdić and Finci* (cited above, §§ 47-49), in which it held in particular (ibid., § 48):

> " ... while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission ... clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same

end is an important factor in this sphere (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009)."

58. Moreover, in *Zornić* (cited above, § 43) the Court noted:

"In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing' (... ibid., § 45). The nature of the conflict was such that the approval of the 'constituent peoples' was necessary to ensure peace (ibid.). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina."

59. The Court sees no reason to depart from that case-law (see also the decision of the Committee of Ministers of the Council of Europe, quoted in paragraph 22 above, and the submission of the Commissioner for Human Rights, quoted in paragraph 23 above, according to which the current system, based on ethnic discrimination, impedes social cohesion, reconciliation and progress). Indeed, a reform of the electoral system is an outstanding post-accession obligation of Bosnia and Herzegovina (see paragraph 21 above).

60. The Court notes that the Government referred to *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, Series A no. 113), in which the Court found no breach of Article 3 of Protocol No. 1 taken either alone or in conjunction with Article 14 of the Convention. However, the Constitutional Court held that the situation examined in that case was significantly different from the domestic electoral system based on the concept of the "constituent peoples" (see paragraph 15 above). The Court sees no reason to disagree with the finding of that court.

61. Lastly, although the Convention does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them (see the case-law quoted in paragraph 52 above), none of the "constituent peoples" is in the factual position of an endangered minority which must preserve its existence. On the contrary, the "constituent peoples" clearly enjoy a privileged position in the current political system.

62. There has accordingly been a breach of Article 1 of Protocol No. 12. In view of this conclusion, it is not necessary to examine separately either the admissibility or the merits of this same complaint under Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

II. COMPLAINT CONCERNING RESTRICTIONS ON THE RIGHT TO VOTE STEMMING FROM THE COMPOSITION OF THE PRESIDENCY OF BOSNIA AND HERZEGOVINA

63. The applicant also complained that because of the combination of the relevant territorial and ethnic requirements, he had been unable to vote for the candidates of his choice in the most recent presidential elections at the State level in 2022. He alleged that the candidates best representing his political views were not from the "right" Entity and/or of the "right" ethnic origin. In that regard, he relied on Article 1 of Protocol No. 12.

A. Admissibility

64. The Government maintained that the applicant should have lodged an objection with the Central Election Commission of Bosnia and Herzegovina, an appeal with the Court of Bosnia and Herzegovina and, eventually, a constitutional appeal in respect of this complaint as well.

65. As mentioned in paragraph 30 above, the applicant disagreed.

66. A reference to the general principles about exhaustion of domestic remedies is contained in paragraph 31 above.

67. For the reasons set out in paragraph 32 above, the Court agrees with the applicant that the remedies to which the Government referred were bound to fail in respect of this complaint. Accordingly, the Court dismisses this objection.

68. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. The complaint must therefore be declared admissible.

B. Merits

69. The applicant complained that in elections to the Presidency of Bosnia and Herzegovina, his choice was limited to those candidates who declared affiliation with Bosniacs and Croats. Only the residents of the Republika Srpska were entitled to vote for those candidates who declared affiliation with Serbs. Lastly, those who did not declare affiliation with any "constituent people" were not entitled to stand for election to the Presidency of Bosnia and Herzegovina. He argued that because of that combination of territorial and ethnic requirements, his statutory right to vote was limited in a discriminatory fashion on the grounds of his place of residence and on ethnic grounds.

70. The Government's arguments outlined in paragraphs 46-47 above were also applicable to this complaint.

71. The general principles on prohibited discriminations under Article 1 of Protocol No. 12 are summarised in paragraphs 48-52 above.

72. The Court observes that the Presidency of Bosnia and Herzegovina is made up of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb, directly elected from the territory of the Republika Srpska (see Article V of the Constitution, quoted in paragraph 13 above).

73. The Court has found that this combination of territorial and ethnic requirements amounts to discriminatory treatment in breach of Article 1 of Protocol No. 12 in the context of the right to participate in elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (see paragraphs 53-62 above). It considers that the same is true in respect of the right to vote in elections to the Presidency of Bosnia and Herzegovina. Firstly, the applicant did not have the option of voting for candidates who did not declare affiliation with any of the "constituent peoples" (since such candidates were not even entitled to stand for election). Furthermore, being a resident of the Federation, the applicant was not entitled to vote for the candidates who declared affiliation with Serbs. Therefore, unlike persons from the Federation who declare affiliation with Bosniacs and Croats and persons from the Republika Srpska who declare affiliation with Serbs, the applicant is not genuinely represented in the collective Presidency. He is thus treated differently on the grounds of his place of residence and ethnicity. In this connection, the Court observes that the Presidency is a political body of the State and not of the Entities. Its policy and decisions affect all citizens of Bosnia and Herzegovina, whether they live in the Federation, the Republika Srpska or the Brčko District. Therefore, the political activity of the collective Head of State is a matter that clearly concerns the applicant (see *Pilav*, cited above, § 45, and contrast the cases cited therein).

74. As regards the Government's justification for the current system (that is, the need to maintain peace and to facilitate dialogue between different ethnic groups), the Court refers to its finding in paragraphs 57-61 above. In addition, it considers that peace and dialogue are best maintained by an effective political democracy (see, in particular, the Preamble to the Convention), of which the ability to freely exercise one's right to vote is a pillar. Therefore, no one should be forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint (see, *mutatis mutandis*, *Bakirdzi and E.C.*, cited above, § 64). Even if a system of ethnic representation is maintained in some form, it should be secondary to political representation, should not discriminate against "Others and citizens of Bosnia and Herzegovina" and should include ethnic representation from the entire territory of the State.

75. There has accordingly been a breach of Article 1 of Protocol No. 12.

III. THE APPLICANT'S REMAINING COMPLAINTS

A. Article 3 of Protocol No. 1 taken alone and/or in conjunction with Article 14 of the Convention

76. As regards the House of Representatives (the first chamber of the State Parliament), the applicant took issue with the fact that the territory of Bosnia and Herzegovina was divided into constituencies and that some members of that chamber were elected from compensatory lists. In respect of the House of Peoples (the second chamber of the State Parliament), he complained that the delegates to that chamber were not directly elected. He relied on Article 3 of Protocol No. 1 taken alone and/or in conjunction with Article 14 of the Convention.

77. The Government maintained that the applicant had failed to use the available domestic remedies in respect of this complaint, in particular a constitutional appeal.

78. The applicant argued that a constitutional appeal would not have been effective.

79. A reference to the general principles about exhaustion of domestic remedies is contained in paragraph 31 above.

80. The Court notes that none of these complaints concern the issue of exclusion of those who do not declare affiliation with "constituent peoples" from public functions (contrast paragraph 32 above). Notably, anyone with a permanent residence in any given constituency is entitled to vote and stand for election to the House of Representatives in that particular constituency, without any requirement of ethnic affiliation (see Article IV § 2 of the Constitution, quoted in paragraph 12 above). Accordingly, the Court agrees with the Government that a constitutional appeal was not bound to fail and that the applicant should therefore have used it. Indeed, in the case of legal systems which provide constitutional protection for fundamental rights, such as that of Bosnia and Herzegovina, the Court reiterates that it is incumbent on the aggrieved individual to test the extent of such protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, and the authorities cited therein). The Court thus considers that the Government's objection is well-founded and that these complaints must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Article 13 of the Convention

81. The applicant further complained under Article 13 that he had not had an effective domestic remedy in respect of his discrimination complaints. Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

82. The Court reiterates that Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention (see, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 135, ECHR 2009, and *Sejdić and Finci*, cited above, § 60). Since the applicant's discrimination complaints concern the content of constitutional and statutory provisions, as opposed to an individual measure of implementation, the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected under Article 35 § 4.

C. Article 17 of the Convention

83. Lastly, the applicant complained under Article 17 of the Convention, which reads as follows:

> "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

84. The Court considers that the applicant's complaint under Article 17 does not go beyond his aforementioned allegations of breaches of other provisions of the Convention and the Protocols thereto. Since no issue arises under Article 17 proper, this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected under Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

86. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the applicant's complaints under Article 1 of Protocol No. 12 about the composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina admissible;

2. *Holds*, by six votes to one, that there is no need to examine either the admissibility or the merits of the applicant's complaint about the composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina under Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1;

3. *Declares*, unanimously, the remainder of the application inadmissible;

4. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 12 in respect of the complaint about the composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina;

5. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 12 in respect of the complaint about elections to the Presidency of Bosnia and Herzegovina.

Done in English, and notified in writing on 29 August 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kucsko-Stadlmayer is annexed to this judgment.

G.K.S.
A.N.T.

DISSENTING OPINION OF JUDGE KUCSKO-STADLMAYER

I. GENERAL REMARKS

1. I regret that I was not able to vote with the majority in favour of the admissibility of the applicant's complaints under Article 1 of Protocol No. 12.

2. Under this Protocol, the applicant, a citizen of Bosnia and Herzegovina, challenged the electoral legislation as enshrined in the Constitution and the Election Act of this State. He did not contest that he had the right to vote. However, he complained about "the composition of the House of Peoples ... and the Presidency of Bosnia and Herzegovina" (see the titles above paragraphs 28 and 63 and point 1 of the operative part of the judgment). He alleged that the composition of those bodies restricted his "right to vote" for them (see paragraphs 1 and 42 of the judgment), as it reflected constitutional privileges for candidates who declared affiliation with one of the three "constituent peoples" (namely Bosniacs, Croats and Serbs). He did not declare affiliation with any of these peoples and called Bosnia and Herzegovina an "ethnocracy" (as opposed to a "genuine democracy") which allowed the "three dominant ethnic groups" to control the State institutions, whereas "all the others, like himself, were second-class citizens with no real influence on the political life and future of the country" (see paragraph 44 of the judgment).

3. For the first time before this Court, an individual voter has claimed that his (active) right to vote is automatically restricted by the constitutional provisions which regulate the (passive) right to stand for election in Bosnia and Herzegovina. These complaints are different from those raised by the applicants in *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (nos. 27996/06 and 34836/06, 22 December 2009), *Zornić v. Bosnia and Herzegovina* (no. 3681/06, 15 July 2014), *Šlaku v. Bosnia and Herzegovina* (no. 56666/12, 26 May 2016), *Pilav v. Bosnia and Herzegovina* (no. 41939/07, 9 June 2016) and *Pudarić v. Bosnia and Herzegovina* (no. 55799/18, 8 December 2020), where the applicants had been potential candidates and successfully complained about restrictions on their right to stand for election.

4. The deep structural differences between the right to vote and the right to stand for election, as well as the respective regulatory framework, are not only enshrined in many of the member States' constitutions. They also follow from the Court's rich case-law on Article 3 of Protocol No. 1 to the Convention (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 51-52, Series A no. 113; *Melnychenko v. Ukraine*, no. 17707/02, §§ 54 and 57, ECHR 2004-X; *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV; *Etxeberria and Others v. Spain*, nos. 35579/03 and 3 others, § 50, 30 June 2009; and *Davydov and Others v. Russia*, no. 75947/11, § 286,

30 May 2017). Nevertheless, in the context of Protocol No. 12 the majority equate both rights by presuming that the Court's findings in its past judgments about the right to stand for election can automatically, without further explanation, be applied to the present case. The problems of this equation already become visible in the examination of two essential admissibility requirements: exhaustion of domestic remedies and victim status (Article 34 and Article 35 § 1 of the Convention).

II. EXHAUSTION OF DOMESTIC REMEDIES

5. A basic requirement for any application before the Court is that all domestic remedies have been exhausted (Article 35 § 1 of the Convention). In the present case, the Government argued that the applicant should have complained to the Central Electoral Commission, and could then have lodged an appeal with the Court of Bosnia and Herzegovina and finally applied to the Constitutional Court (see paragraph 29 of the judgment). However, the applicant has not pursued any of these remedies, without explaining this omission. He has therefore not offered the Constitutional Court the opportunity to decide his case.

6. As the Court has held in previous judgments concerning Bosnia and Herzegovina, the Constitutional Court of this country has broad jurisdiction in constitutional matters. It can deal with practically any allegation of a breach of the European Convention on Human Rights (Article VI of the Constitution; see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 36, 27 May 2008, and also *Čović v. Bosnia and Herzegovina*, no. 61287/12, §§ 16 and 18-20, 3 October 2017). It can declare any law of the State unconstitutional and order the Parliamentary Assembly to harmonise constitutional provisions with the Convention. The Convention "shall apply directly" and has explicit "priority over all other law" (Article II.2 of the Constitution). The same priority is also given to the Protocols to the Convention in so far as they have been ratified by Bosnia and Herzegovina, including Protocol No. 12. The Constitutional Court's decisions are final and binding on every legal and physical person (see *Bobić v. Bosnia and Herzegovina*, no. 26529/10, § 15, 3 May 2012). In one of its most recent decisions, the Constitutional Court examined on the merits a complaint of a violation of Article 1 of Protocol No. 12 on account of legal and constitutional provisions in electoral matters (see *Komšić and Džaferović*, U-27/22, 23 March 2023), thereby accepting its jurisdiction to review even constitutional provisions against the standard of Protocol No. 12 and the relevant Strasbourg case-law. The case-law of the Constitutional Court concerning Convention complaints is dynamic and developing quickly.

7. The Strasbourg principles on the requirement to apply to constitutional courts are strict. In a legal system which provides for constitutional protection of human rights, it is in principle incumbent on the individual to test the extent

of that protection and allow the domestic courts to develop those rights by way of interpretation (see *Independent News and Media plc and Independent Newspapers (Ireland) Limited v. Ireland* (dec.), no. 55120/00, 19 June 2003; *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006; *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010; *Vučković and Others v. Serbia* [GC], nos. 17153/11 and others, § 84, 25 March 2014; and *Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 37, 29 October 2019). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress.

8. The majority rejected the Government's preliminary objection regarding the complaints in question. However, they failed to examine whether a constitutional appeal would have been "obviously futile": they simply held that it was "not effective" in this case. In that regard, paragraph 32 of the judgment refers to "the Constitutional Court's approach to complaints about the legal provisions excluding persons who do not declare affiliation with 'constituent peoples' from public functions" and notes that "the legal provisions contested in the cases cited in paragraphs 16-18 above impose restrictions on both the right to stand for election and the right to vote". By this conclusion, the majority simply transpose the Constitutional Court's case-law on "public functions" automatically to a case about something different: the right to vote. The additional reference to *Zornić* (cited above, § 21) does not help: that case was also only about the right to stand for election. The unconvincing nature of the finding that the constitutional appeal is ineffective in the present case concerning this new issue becomes even clearer when one takes a closer look at the decisions of the Constitutional Court cited in paragraphs 16-18 of the judgment.

9. Paragraph 16 refers to two old decisions from March 2006 (U-5/04) and May 2006 (U-13/05) in which the Constitutional Court held in general that it lacked jurisdiction to assess the compliance of the State Constitution with the Convention. As the contested electoral system is enshrined in the Constitution, this could in principle be an argument supporting the ineffectiveness of a constitutional appeal in the present case. However, that position had already been superseded in the same year, by a decision from 29 September 2006 (AP-2678/06), where the Constitutional Court came to a different conclusion: it examined on the merits a discrimination complaint concerning the appellant's ineligibility to stand for election for the Presidency, thereby accepting its jurisdiction to conduct such a review. More than three years before *Sejdić and Finci*, it found no violation of Article 1 of Protocol No. 12 (see *Pilav*, cited above, § 14). Consequently, the decisions from 2006 cannot be used for the assumption that the Constitutional Court would find that it lacked jurisdiction in the present case.

10. The two other decisions of the Constitutional Court, referred to in paragraphs 17 and 18 of the judgment, are from 26 March 2015 (U-14/12)

and 17 July 2018 (AP-3464/18). However, they are not any more conclusive for the majority's position either. Both decisions concerned the right to stand for election (not the right to vote) and referred in that connection to the Court's findings in *Sejdić and Finci* and *Zornić* (both cited above). In the aftermath of those judgments, the Constitutional Court consequently and reasonably held that the matter had already been examined and referred to the ongoing implementation process, without ordering any amendments of the relevant constitutional and legal framework. The majority read this as a declaration of general lack of jurisdiction, unwillingness or inability to accept complaints concerning violations of the Convention on account of the contested constitutional provisions about "both the right to stand for election and the right to vote" (see paragraph 32 of the judgment). However, in those two decisions the Constitutional Court did not and could not even refer to the right to vote, as invoked in the present case, because it had not been the subject of the proceedings. The fact that in 2015 and 2018 the Constitutional Court had found that *Sejdić and Finci* had already decided the questions relating to the right to stand for election and that – as a Constitutional Court – it could not adopt the required legislative changes itself does not allow the conclusion that it would not enter into an examination of the applicant's new complaint about the right to vote either, which has never been decided by the Strasbourg Court. The constitutionally and politically sensitive question as to whether and, if so, to what extent discriminatory provisions about the right to stand for election do also discriminate against individual voters raises novel issues of constitutional substance which could (and should) have been decided by the Constitutional Court.

11. In this context, it is telling that not even the applicant attempted such a restrictive interpretation of the Constitutional Court's case-law as the majority performed in the present case. On the contrary, he did not submit a single argument for his general claim that a constitutional appeal "would not have been effective" (see paragraph 30 of the judgment). While one can accept that the applicant had doubts in that regard, the majority neglect to consider that according to the Court's established case-law, the existence of "mere doubts" as to the prospects of success of a particular avenue of redress is not a valid reason for failing to pursue it. The European Court of Human Rights is not a first-instance court (see *Vučković and Others*, cited above, § 70, and *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 115, ECHR 2015).

12. There is an additional aspect that makes the firm, generalised statement as to the ineffectiveness of a constitutional appeal in this case even more problematic. Article VI of the Constitution envisages the Constitutional Court of Bosnia and Herzegovina as a very specific institution, distinct from all other Constitutional Courts in Europe. Its legal foundation, constitutional position and organisation were particularly tailored by the Dayton Agreement to ensure progress towards a democratic political system. Beside its broad

powers as a guardian of the Constitution and the Convention (see paragraph 6 above), its composition and procedure are uniquely designed to ensure its functionality. It has nine members; six judges are selected by the respective assemblies or parliaments of the Entities, and three judges are appointed by the President of the European Court of Human Rights. Those judges cannot be citizens of Bosnia and Herzegovina or of any neighbouring State. Under Articles 9-12 of the Rules of the Constitutional Court, which were adopted by the Constitutional Court itself, it decides in Chambers (President and two Vice-Presidents), a Grand Chamber (the six judges elected by the entities) or the Plenary Court, which also includes the judges appointed by the President of the European Court of Human Rights. These "international judges" take action if the Grand Chamber cannot adopt a decision by a majority of votes and the case must be referred to the Plenary. This concept is obviously designed to overcome conflicts between the "constituent peoples" and to promote the implementation of the Convention in the legal system of Bosnia and Herzegovina.

13. Finally, the majority's rejection of the Government's non-exhaustion objection is difficult to understand as they upheld, by contrast, the same objection regarding the applicant's parallel complaint about the election of the House of Representatives and his complaint about the fact that the delegates to the House of Peoples are "not directly elected" (see paragraph 76 of the judgment). While some reasoning concerning the first of these complaints is given, any arguments in favour of rejecting the second of them are missing (see paragraph 80 of the judgment). This asymmetry is striking.

14. Unfortunately, the majority's finding that the Constitutional Court of Bosnia and Herzegovina is ineffective for a review of the applicant's complaints concerning the composition of the House of Peoples and his right to vote for the Presidency is not only difficult to reconcile with the Court's existing case-law concerning the constitutional appeal in general. In Bosnia and Herzegovina, it has the potential to destabilise the Constitutional Court, and to demotivate its judges and all those institutions who ensure its functioning.

III. VICTIM STATUS

15. Given that the applicant's complaints under Protocol No. 12 challenge the electoral legislation of Bosnia and Herzegovina in a rather abstract manner, another admissibility problem arises in his case. This problem goes far beyond the situation in Bosnia and Herzegovina, and it raises general questions about individual access to the Strasbourg Court. In order to claim to be a "victim" under Article 34 of the Convention, an applicant must be "directly affected" by the disputed measure (see paragraph 41 of the judgment).

16. In the present case, the majority had obvious difficulties in finding the right description of the applicant's complaints under Protocol No. 12 (see paragraph 2 above). They call them "complaint concerning the composition of the House of Peoples" (see the title above paragraph 28) and "complaint concerning restrictions on the right to vote stemming from the composition of the Presidency" (see the title above paragraph 63). The corresponding points 1 and 5 of the operative part use, surprisingly, a slightly different wording. By contrast, the introduction (see paragraph 1 of the judgment) and the assessment of these complaints speak almost exclusively of the applicant's "right to vote" (see paragraphs 32, 39, 42, 56, 63, 69, 73 and 74 of the judgment); this seems justified by the fact that he formulated the same concerns under Article 3 of Protocol No. 1. While this diversity reflects the applicant's own lack of clarity, it also shows that his complaints actually contest the electoral system as such in a rather abstract, fundamental way.

17. Implicitly referring to the applicant's right to vote, the majority see the substance of the applicant's complaints as being that the legislative framework forced him to vote for someone who "does not represent him", that he was "unable to vote for the candidates of his choice" and that he therefore could not "influence" the decisions of the respective body (see paragraphs 8, 28, 39, 45, 63 and 69 of the judgment). Regarding the House of Peoples, this complaint is twofold: it concerns "the fact" that the delegates "were not directly elected" and that the "composition" (of the body the applicant could not directly elect) was based on a combination of "territorial and ethnic requirements" (see paragraphs 8, 28, 54 and 76 of the judgment). While the complaint about the fact of indirect elections was declared inadmissible (see paragraph 13 above), the majority found the complaint "concerning the composition" of the House of Peoples admissible under Article 1 of Protocol No. 12. In doing so, they not only rejected the effectiveness of a constitutional appeal, but also accepted the applicability of Article 1 of Protocol No. 12 and the applicant's victim status (Article 34 of the Convention). In that regard, the majority simply relied on the applicant's position as a potential voter (see paragraph 42 of the judgment).

18. This explanation cannot, however, remove the doubt about the applicant's victim status. It must be pointed out that he cannot directly elect the delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. Under the Constitution, he can only elect candidates for his cantonal assembly (a right about which he does not complain), the latter's caucuses elect delegates to the House of Peoples of the Parliament of the Federation, and the House of Peoples of the Parliament of the Federation appoints the delegates to the House of Peoples of the Parliamentary Assembly of the State (see footnote 6 and paragraph 54 of the judgment). The applicant therefore has only a "double indirect" right to vote for the House of Peoples of the Parliamentary Assembly of the State. However, the fact that this election is only an indirect one is as such not in breach of the Convention (see

paragraph 13 above). Indirectly, the applicant can indeed influence the choice of candidates: he has the undisputed right to vote in the legislative elections. However, he derives the alleged limitations on this right directly from the restrictions for candidates, whose right to stand for elections depends on their affiliation with a "constituent people". Other candidates – whom the applicant may prefer because of their non-affiliation with such a people – are excluded.

19. This kind of complaint raises general questions concerning the concept of parliamentary democracy. Has every single voter with an active voting right also a right "to be represented" in a parliamentary body, even more so if this body is not directly elected? Does every voter in a democracy have a right to a party or a candidate "of his choice"? Must constitutional provisions governing the right to stand for election – and State funding for political parties – ensure that every single voter and/or every group of voters is "represented" in a democratic body? Do minimum age requirements for candidates directly affect the voting rights of young people? Do constitutions which do not provide for minority lists directly affect the voting rights of members of minorities? To sum up: can the right to vote of an individual voter really be considered to be "directly affected" by provisions on the right of candidates to stand for (indirect) election?

20. Although these questions are new, important and sensitive, the majority did not address them. In consequence, the acceptance of the applicant's victim status concerning his complaint about "the composition of the House of Peoples" insinuates an unprecedented concept in which every voter has an individual right to candidates by whom he or she is "represented". Such an interpretation finds support in paragraph 55 of the judgment (which holds that "all segments of society should be represented in the House of Peoples") and paragraph 73 of the judgment (which sees the crux of the violation in the fact that the applicant "is not genuinely represented in the collective Presidency"). Such a concept implies, however, on a general level, that all constitutional criteria which regulate the right to stand for election automatically also restrict the right to vote. This also allows the conclusion that member States must take positive measures to ensure the "representation" of all social, religious, economic, or other groups. This would not only contradict all constitutional concepts which clearly distinguish between the active right to vote and the passive right to stand for election. It would also change the concept of parliamentary, representative democracy as such: this concept can never – and does not intend to – guarantee that every voter finds a candidate "of his or her choice" who "represents him or her". Can such a far-reaching conclusion really be based on the prohibition of discrimination?

21. A further question arises in connection with the applicant's victim status regarding his complaint concerning "restrictions on the right to vote stemming from the composition of the Presidency of Bosnia and Herzegovina". He alleged that the candidates best representing his political

views in the presidential elections in 2022 were not from the "right" Entity and/or of the "right" ethnic origin (see paragraph 63 of the judgment). At the same time, it is known that the applicant is a political adviser to one of the three members of the current Presidency (see paragraph 8 of the judgment). Why could this person not be a candidate of the applicant's choice? The question remains open (see paragraphs 64-68 of the judgment).

IV. ARTICLE 13

22. The majority are conscious of the almost obvious consequence that these newly defined voting rights, which are assumed to be directly affected by the composition of State bodies and entail the admissibility of the complaints under Protocol No. 12, call for an effective remedy before domestic courts under Article 13 of the Convention. They evade this conclusion by referring to the Court's case-law to the effect that "Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority" (see paragraph 82 of the judgment). This reference, however, is particularly unsatisfactory in a judgment which has firmly stated (differently from *Sejdić and Finci* and all other judgments of the Court) that no effective domestic remedy for this specific category of complaints exists (see paragraph 32 of the judgment). It is also difficult to reconcile with the recent judgment in *Toplak and Mrak v. Slovenia* (nos. 34591/19, 42545/19, §§ 78-91, 26 October 2021), where the Court found a violation of Article 13 taken together with Article 1 of Protocol No. 12 because Slovenia did not provide an effective remedy for the enforcement of the right of disabled people to vote. That judgment is based on the principle that Article 13 guarantees the availability at the national level of a remedy to deal with the substance of all "arguable complaints" under the Convention, including complaints under Protocol No. 12. Does the opposite conclusion by the majority now mean that all potential voters of States which have ratified Protocol No. 12 who complain of discrimination on account of the election system and have no proper access to a domestic court can directly apply to the European Court of Human Rights?

V. CONCLUSION

23. For the above reasons I was unable to vote in favour of the admissibility of the applicant's complaints under Article 1 of Protocol No. 12 "concerning the composition" of the House of Peoples and the Presidency. I was therefore also unable to agree that there was a violation of this Article, and that it was not necessary to examine the same complaints under Article 3 of Protocol No. 1 taken together with Article 14. Those complaints were in my view premature.

24. Unfortunately, the problems underlined in the Court's judgment in *Sejdić and Finci* have still not been resolved, almost fourteen years after its publication and despite several later judgments concerning the right to stand for election in Bosnia and Herzegovina (see paragraph 3 above). This was recently criticised by the Committee of Ministers (see paragraph 22 of the judgment). The majority's language goes beyond this, by repeating the Commissioner for Human Rights' finding that the current system is "based on ethnic discrimination [and] impedes social cohesion, reconciliation and progress" (see paragraph 59 of the judgment).

25. Such a highly political message must concern us all: Europeans and European judges, from whatever court. However, a solution for any political dysfunctionality in Bosnia and Herzegovina must happen within the country. A constitutional court with such broad jurisdiction as the Bosnian one, which can apply the guarantees of the Convention and the Protocols thereto directly as superior to all national law, which is constantly developing its case-law and whose composition enjoys strong support from the European Court of Human Rights, should not lightly be declared "ineffective". This must give us food for thought, especially in a case which obviously raises new conceptual issues of representative democracy rooted in the relationship between the right to stand for election and the right to vote. For exactly this reason the majority should have been more careful with the application of the exhaustion rule. This is not least required by the principle of subsidiarity, prominently enshrined in the Preamble to the Convention since 1 August 2021.