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Protection of Human Rights under the European Convention on Human Rights in Central Europe: Bosnia and Herzegovina**

ABSTRACT: According to the Constitution of Bosnia and Herzegovina (BiH; Annex 4 to the General Framework Agreement for Peace in BiH), the state of BiH is defined as a democratic and legal state with free and democratic elections. By signing the Dayton Peace Agreement and accepting the Constitution, BiH undertook to ensure the highest level of internationally recognised human rights and fundamental freedoms. Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European Convention on Human Rights – ECHR) received a special status in the Constitution of BiH. Similar to other modern democratic and legal states, BiH has signed all the other international and regional instruments for the protection of human rights. Therefore, by insisting on the protection of human rights, it was necessary for all people in BiH, as well as in other democratic and legal states, to have an equal status towards the state and the government, which would ensure measures to overcome antagonisms created on the basis of religious, ethnic, racial, and national diversity in BiH.

Political participation in BiH needs to be viewed as a broader phenomenon that includes not only elections as the basis of democracy and a prerequisite for effective and legitimate decision-making, but also the participation of citizens in everyday political events and life. Furthermore, political participation in a state is limited by ethnicity and territorial origin. This means that only constituent peoples, as guaranteed by the Constitution and numerous laws, are allowed to run for the three-member Presidency of the State or the House of Peoples of BiH. National minorities are excluded from these branches of government, and their political participation is limited solely to local levels of legislative power. Although BiH, according to the Constitution, is considered a democratic state, it is unable to protect the rights of all its citizens and fulfil their basic human rights guaranteed by

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numerous internationally recognised conventions, but primarily by the ECHR.

Keywords: The Constitution of Bosnia and Herzegovina, The Convention for the Protection of Human Rights and Fundamental Freedoms, human rights, discrimination, constituency.

1. The Convention versus the Constitution of Bosnia and Herzegovina

On 14 December 1995, the General Framework Agreement for Peace in Bosnia and Herzegovina (BiH; the Dayton Agreement) was signed in Paris, with the intention of stopping the aggression against BiH and establishing frameworks that will lead to the stabilisation of conditions, both in BiH and the former Yugoslavia.¹ The Dayton Peace Agreement is the result of intensive negotiations conducted in November 1995 at the US Air Force base in the city of Dayton (state of Ohio). On 21 November 1995, the agreement was drawn up and initialled, while its signing ceremony took place on 14 December 1995 in Paris. The signatories to the Peace Agreement included representatives of BiH, Croatia, and the Federal Republic (FR) of Yugoslavia, as well as representatives of the Contact Group, that is, the "godfathers" (France, Germany, Russia, the USA, and Great Britain). The Dayton Agreement, BiH, which now consists of two entities, the Republika Srpska (the RS) and the Federation of BiH,² and the Brčko District (established by subsequent arbitration), guaranteed territorial integrity (within internationally recognised borders), state sovereignty, and international subjectivity. Along with it, the Constitution of BiH was also adopted,³ which, in fact, created the current constitutional and legal order.

Unlike all other European countries that incorporated the human rights and fundamental freedoms of the European Convention into their own constitutional and legal system through ratification by the national parliament, BiH accepted the rights and freedoms of the European Convention by signing the General Framework Agreement for Peace in

¹ The Dayton Agreement consists of the General Framework Agreement for Peace in BiH and 11 annexes to this agreement. [Online]. Available at: <https://www.ohr.int/dayton-peace-agreement/?lang=en> (Accessed: 02 July 2024).

² The name of one of the entities of BiH is: the Federation of BiH and not the "Bosniac-Croatian FBiH", as Nenad Kecmanović repeatedly points out. For more details see: Kecmanović, 2007, p. 63.

³ For more on the legal aspect of Annex 4, see: Begić, 2021, pp. 103-104.

BiH. Hence, BiH accepted the human rights and freedoms contained in the European Convention on Human Rights (ECHR) and its protocols not through ratification after becoming a member of the Council of Europe – as is the case with all European countries – but through an international treaty, the General Framework Agreement for Peace in BiH, in which the Constitution represents only one (Annex 4) out of a total of 11 annexes to that treaty. The legal basis for this exception is contained in the Recommendation of the Council of Ministers of the Parliamentary Assembly of the Council of Europe on the establishment of a mechanism for the protection of human rights in European countries that are not members of the Council of Europe.⁴ This is precisely why BiH is a country distinct not only because it accepted the ECHR through the Dayton Peace Agreement, but also because it gave the convention a supra-constitutional character.⁵

Considering that the versions of the Constitution of BiH in the official languages – Bosnian, Serbian, and Croatian – have never been published in the official gazettes, only the English version of the text must be accepted as authentic. In the English version, therefore the only authentic one, Article II/2 of the Constitution of BiH reads as follows:

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

Using a simple grammatical interpretation, it is very easy to conclude that the term "*over all other law*" entails that in the legal order of BiH, the ECHR is above the entire law in BiH, and consequently above the Constitution of BiH as one part of the totality of the legal order of a state.⁶

⁴ Haller, 2006, p. 105.

⁵ Begić, 2015.

⁶ A different opinion is given by the judge of the Constitutional Court of FBiH, Mirko Bošković, 'if Article II/2 of the Constitution of BiH regulates that the European Convention on the Protection of Human Rights and Fundamental Freedoms "has priority over any other law", then it could be concluded, starting from the aforementioned provision of the Constitution of BiH, that the European Convention on the Protection of Human Rights and Fundamental Freedoms has the priority only over the law but not over the Constitution. Or, if the Annex to the Constitution of FBiH contains "Instruments for the protection of human rights that have the legal force of constitutional provisions", among which the European

For example, this interpretation is supported by the fact that Article 3, item 3/b of the Constitution of BiH, states '*the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities*'. Article I/2 of the Constitution of BiH also states 'Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections'.

An additional argument is given by the text of Article X of the Constitution of BiH, which establishes the procedure for amending the Constitution of BiH; however, Article X/2 establishes that no amendment to the Constitution of BiH can eliminate or reduce any of the rights and freedoms from Article II of the Constitution of BiH or amend this provision.⁷ Thus, Article II of the Constitution of BiH became the only article of the Constitution of BiH by which the human rights it protects cannot in any way be changed or reduced. Furthermore, the position of the principle of protection of human rights is further strengthened in Art. II/6 and II/8 of the Constitution of BiH, which establishes the obligation of all courts, institutions, and authorities, be they state, entity, or intra-entity authorities, to apply human rights and fundamental freedoms from the European Convention.⁸ In addition, the obligation of local authorities to

Convention on the Protection of Human Rights and Fundamental Freedoms is listed, then it could be concluded that this Convention, according to the Constitution of FBiH, has only the force of constitutional provisions, that is, the force equal to that of the rank of the Constitution, but not the force above the Constitution of BiH'. Round table discussion on the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in Bosnia and Herzegovina, case-law of the Constitutional Court of BiH and the courts of the Entities and Brčko District, Sarajevo, 15 and 16 November 2001, p. 52.

⁷ Article X: Amendment

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.

⁸ Article II: Human Rights and Fundamental Freedoms

6. Implementation. Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.
8. Cooperation. All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring

cooperate with international mechanisms for the protection of human rights has been established. Regarding the formulation of the direct applicability of the ECHR in BiH, it is the provision that allows the immediate application of the rights contained in it, by the courts in BiH, without the adoption of subsequent acts for their implementation. At the same time, the essence of the concept of direct applicability lies in prohibiting state bodies from preventing the application of these rights in any way or transforming these rights into national law, thus concealing their true source and meaning. Such would be the case with the Constitution of BiH, as Article II/3 states the rights that are almost identical to the rights from the European Convention, but the constitution maker still, despite this fact, gave the European Convention a special place in the Constitution of BiH. As stated earlier, the Court of Justice defined the concept of direct applicability in relation to the law of the European Union and found that it represents a complete and uniform application of regulations (community law) in all member states from the moment of its entry into force until as long as they are in force. Such provisions represent a direct source of rights and obligations for all addressees – the subjects of community law, be they member states or individuals.⁹

The obligation to harmonise the Constitution of BiH with the ECHR, specified in the provision that the priority of the ECHR over every other right must be established, represents the only known case where the constitution itself mandates the obligation to be changed from the very moment of signing and declaration on 14 December 1995 in Paris. The obligation imposed on the state of BiH to protect human rights is also its obligation to be able to execute the function of human rights protection. In BiH, unlike all other countries in Europe, it is precisely the primary obligation to strengthen the state in a democratic way so that it can protect human rights, which is executed by emphasising the need to consistently establish itself on the principles of a representative system and the separation of powers.

mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

⁹ Vehabovic, 2006, p. 93.

The obligation to implement the ECHR is therefore a way to eliminate the obvious shortcomings of the state of BiH and build it as a modern democratic and legal state, capable of protecting human rights. Accordingly, the ECHR, which pursuant to the decision of the European Court of Human Rights is a "constitutional instrument of the European legal order", also became a constitutional instrument of the constitutional and legal order of BiH. The direct application of human rights contained in the ECHR and their priority in relation to any other right should, according to Annex 6 to the General Framework Agreement for Peace in BiH, be ensured by the Office of the Ombudsman and the Human Rights Chamber,¹⁰ which was not the best solution for post-war BiH. The situation regarding the protection of human rights changed after the admission of BiH to the Council of Europe and the ratification of the ECHR, when the protection mechanisms changed, such that the European Court of Human Rights in Strasbourg took over the protection of human rights instead of the House for Human Rights.¹¹

Insisting on the priority of the ECHR human rights over any other right is an obvious signal of the legislator's intention to, among other things, eliminate all forms of discrimination against individuals, including primarily those based on nationality, religion, and race. This is precisely why the state's obligation to protect the human rights of all individuals under its jurisdiction came into conflict with the "*vital national interests*" of Bosniacs, Serbs, and Croats as "*constituent peoples*", and why, under such circumstances, the state of BiH could not resolve this contradiction.¹² Namely, the decision-making process at the Parliamentary Assembly of BiH foresees the protection of "*vital national interest*", as the Constitution actually specifies the particular interests of individual national groups – such that the interest of society as a whole is actually the sum of the interests of individual national groups. The emphasised role of ethnic groups coincides with the discrimination of individuals who are outside these groups. Such an attitude is indicated by the very division of the peoples who lived in BiH according to the 1991 population census into a "constituent", which are Bosniacs, Croats, and Serbs, and "Others", which include

¹⁰ Articles 2(1) and 2(2) of Annex 6 to the General Framework Agreement for Peace in BiH.

¹¹ Article 19 of the ECHR.

¹² On the issues of constituent peoples, see more in Begić, 2021, pp. 115-134.

seventeen remaining peoples that make up the population of BiH.¹³ However, the term “Others” should not be understood as referring exclusively to national minorities. Rather, it encompasses all citizens of BiH who choose not to identify as members of the constituent peoples or as members of any specific national minority. This broader interpretation reflects the inclusive nature of the constitutional framework, which recognises the right of individuals to refrain from ethnic self-identification and affirms the principle of equality irrespective of ethnic affiliation. Such an understanding is essential for accurately conceptualising the category of “Others” within the legal and political discourse of BiH, particularly in light of the country’s commitment to pluralism, non-discrimination, and the protection of individual rights under both domestic and international legal standards.¹⁴

The legal nature of contemporary Bosnian-Herzegovinian multicultural society is defined by the existence of “constituent peoples” and their primacy over the individual. This framework results in the marginalisation of the primary decision-making subject the Bosnian-Herzegovinian citizen – and restricts the enjoyment of guaranteed human rights and freedoms.

Given the specificity of the term “constituent peoples”, its legal significance must be understood in light of the following considerations:¹⁵

- It constitutes a collective national right of the Peoples explicitly enumerated in the Constitution;
- It represents a right narrower than sovereignty yet broader than individual rights to national identity and equality. As such, it cannot be exercised in isolation or independently of the rights of other constituent peoples, nor can it serve as a basis for the territorialisation of constituent peoples;

¹³ In 2003, the Parliamentary Assembly of BiH adopted the *Law on the Protection of the Rights of National Minorities*. This legislative act affirms the commitment of BiH to safeguard the status, equality, and rights of seventeen national minorities officially recognised within its territory. These minorities include Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Rusyns, Slovaks, Slovenes, Turks, and Ukrainians.

¹⁴ Omerdić, 2021, pp. 323-350.

¹⁵ *Ibid.*

- It entails a system of institutional and procedural guarantees aimed at protecting the equality of all constituent peoples, regardless of their proportional representation within the population structure;
- It is a right significantly broader than that afforded to non-constituent peoples, and is therefore inherently discriminatory in relation to national minorities (and Others);
- Its application is justified only insofar as the economic, social, political, cultural, and other conditions necessary for the realisation of international standards of human rights and freedoms have not yet been established.

This jeopardises the principle of equality of individuals before the law and the obligation of the state to ensure human rights and freedoms specified in the ECHR and its protocol for all individuals under its jurisdiction, regardless of which people they belong to, which constitutes the violation of Article 14 of the ECHR, which specifically prohibits discrimination based on nationality, religion, and race.¹⁶

The incorporation of the ECHR into the constitutional system of BiH was supposed to be an incentive to build BiH as a modern state. In this sense, it was necessary to strengthen the principle of political representation as the foundation of a modern democratic state by introducing the right to free elections instead of the segregation and discrimination provisions of the Constitution.¹⁷ This right meant ensuring modern democratic elections, which in the process of electing legislative bodies, ensure the free expression of the opinion of the people – not only the three constituent peoples, as stated in the remaining part of the Constitution of BiH, but the people of BiH as a whole.¹⁸

The Constitution that prioritises the three “*constituent peoples*” instead of the people as a whole and “vital national interests” instead of general interests is certainly anachronistic and at odds not only with the principles of constitutional law but also with modern civilisation. This persistent insistence on the special interests of the three peoples is particularly expressed in the decision-making process at the Parliamentary Assembly of BiH¹⁹ and the Presidency of BiH.²⁰ The completely

¹⁶ Article 14 of the ECHR.

¹⁷ On the issues of constituent peoples see more in Trnka, 2000, pp. 86-91.

¹⁸ Article 3. Protocol 1 of the ECHR.

¹⁹ Article 4(3) of the Constitution of BiH.

²⁰ Article 5(2) of the Constitution of BiH.

unnecessary and inexplicable insistence on the protection of “*vital national interests*” necessarily leads to the slowing down and blocking of political decision-making, and often the absolute impossibility of making some decisions that are of vital importance for the state, people, and individuals in BiH, including those belonging to the so-called constituent peoples. The desire to protect the “*vital national interests*” of the three “*constituent peoples*” at all costs had to lead not only to the discrimination of individuals belonging to all the remaining peoples regarding their possibility to compete for membership in the Presidency of BiH and the House of Peoples of BiH of the Parliamentary Assembly of BiH, the president and two vice-presidents of each house of the Parliamentary Assembly of BiH, etc. This insistence also led to the paralysis of passing laws and other political decisions in the Parliamentary Assembly of BiH and the Presidency of BiH, returning like a boomerang to the “*constituent peoples*” themselves in the form of general economic, democratic, and other lags in relation to other European nations.

2. Conflict between the Constitution of BiH and the ECHR

The best illustration of the method of application of the ECHR and the de facto reshaping of the Constitution of BiH, in the event of a conflict between the Constitution of BiH and the ECHR, with regard to its material content, is expressed in the decision of the Constitutional Court in case number U 26/01, which decided on the constitutionality of the Law on the Court of BiH.²¹

The applicants²² believed that the Law on the Court of BiH grossly violates the provisions of Article III of the Constitution of BiH, which regulate the competences and relations between the institutions of BiH and the entities. They highlighted that point 3(a) 1 of the article does not foresee the judiciary to be under the authority of BiH and stated that it is apparent from point 3(a) of the same article that the organisation of the judicial system is under the authority of the entities, and that there is no constitutional basis for the adoption of the Law on the Court of BiH,

²¹ The decision by the Constitutional Court number U 26/01, dated 28 September 2001 was published in the “Official Gazette of BiH” number 4/02 dated 04 March 2002. [Online]. Available at: https://www.ustavisud.ba/uploads/odluke/_bs/U-26-01-51291.pdf (Accessed: 2 July 2024).

²² 25 representatives of the National Assembly of the RS.

because apart from the Constitutional Court, the Constitution does not specify any other judicial instance at the state level. They also stated that the implementation of the Law on the Court of BiH implies the adoption of a set of laws of a material and procedural character, which also has no basis in the Constitution of BiH. Thus, in this case, there was a conflict between the text of the Constitution of BiH and the ECHR. In explaining its decision, the Constitutional Court stated:²³

This issue needs to be considered, first of all, in the context of Article I/2. of the Constitution, which reads: ‘Bosnia and Herzegovina is a democratic state that functions in accordance with the law on the basis of free and democratic elections.’ Based on this fundamental principle of a democratic state as well as on its internal structure modified pursuant to point 3 of the same article, the Constitution assigns BiH responsibilities and competences that ensure: the preservation of its sovereignty, territorial integrity, political independence and international subjectivity (see, among others, Articles I/1, II/7, III/1.(a), III/5.(a), IV/3.(a)); the highest level of internationally recognized human rights and fundamental freedoms (see, among other things, Article II/1 of the Constitution, Annexes 5–8 of the General Framework Agreement for Peace in Bosnia and Herzegovina); and free and democratic elections (see Articles IV/2 and V/1 of the Constitution). In Article III/1., the Constitution establishes that the exclusive responsibilities of the institutions of BiH are: foreign policy, foreign trade policy, customs policy, monetary policy as provided for in Article VII, finances of the institutions and for the international obligations of BiH, immigration, refugee and asylum policy and regulation, international and inter-entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-entity transportation, and air traffic control. In addition, the jurisdiction of BiH includes the citizenship of BiH which, pursuant to Article I/7. of the Constitution, is regulated by the Parliamentary Assembly of BiH; ensurance of the highest level of internationally recognized human rights and fundamental

²³ Decision of the Constitutional Court in case number U 26/01.

freedoms, as provided for in Article II of the Constitution; and adoption of the election law, as provided for in Article IV/2. and Article V/1. of the Constitution. Pursuant to Article III/5.(a) of the Constitution, BiH 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 BiH, in accordance with the division of responsibilities between the institutions of BiH. Additional institutions may be established as necessary to exercise these powers.

The Constitutional Court especially points out that pursuant to Article II/1. of the Constitution, BiH and both entities shall ensure the highest level of human rights and fundamental freedoms and that, pursuant to Article II.2, the rights and freedoms set forth in the ECHR and its Protocols shall apply directly in BiH. These shall have priority over all other law. In the specific case, the Constitutional Court shall specifically consider the general principle of the rule of law inherent in the ECHR, and more specifically, the principles of fair trial and effective legal remedy, which are protected by Articles 6 and 13 of the ECHR.

The establishment of the Court of BiH is expected to be an important element in ensuring that the institutions of BiH act in accordance with the rule of law and meet the requirements of the ECHR regarding fair trials before courts and effective legal remedies. The Constitutional Court observes that, until the Court of BiH began to function, in the legal system of BiH there was no possibility of contesting the decisions of the institutions of BiH before a body that fulfills the prerequisites of an 'independent and impartial tribunal'.

In this regard, the Constitutional Court refers to Article IV/4.(a) of the Constitution, which stipulates that the Parliamentary Assembly of BiH passes the laws required to implement the decisions of the Presidency of BiH or to perform the functions of the Assembly under this Constitution. Although it is not the task of the Constitutional Court to determine the appropriateness of laws, the Court nevertheless notes that, in the context of BiH, the

establishment of the Court of BiH can be expected to contribute to strengthening the rule of law, which is one of the fundamental principles for the functioning of a democratic state. Such a clear position of the Constitutional Court leaves no room for speculation about the priority in the application of the ECHR in the event of a conflict between the Constitution of BiH and its provisions. Instead of the conclusion about the supremacy of the ECHR over the Constitution of BiH, which seems not to be questionable after this position of the Constitutional Court, the following position of the Constitutional Court from the aforementioned decision may be used:

... Apart from those stipulated by the Constitution, Bosnia and Herzegovina, functioning as a democratic state, is authorized to establish other mechanisms and additional institutions required for the execution of its competencies, including the establishment of a court to strengthen the legal protection of its citizens and ensure respecting the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. Constituency of the People Pursuant to the Provisions of the Constitution of BiH

Bearing in mind the explicit constitutional provisions and the concept of constitutional solutions, it can be concluded that the constituency of Bosniacs, Croats, and Serbs at the state level is manifested through the parity representation of the constituent peoples in the House of Peoples of the Parliamentary Assembly of BiH (House of Peoples) and the Presidency of BiH, and the specified decision-making procedures of these bodies.

Exercising the right to constitutivity through equal representation in government institutions is based, first of all, on Article IV paragraph 1, which prescribes the structure of the House of Peoples of the state parliament. Pursuant to the provisions of this article, the House of Peoples shall comprise 15 delegates, two thirds from the Federation of BiH (including five Croats and five Bosniacs) and one third from the RS (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 of BiH. Delegates from the RS shall be

selected by the National Assembly of the RS (Article IV paragraph 1. a)). Each of the Houses of the Parliamentary Assembly of BiH has a chairperson and two deputies, elected from the delegates belonging to constituent peoples, with the mandatory rotating chair.²⁴

The European Commission for Democracy through Law (the so-called Venice Commission) also commented on the method of elections and the structure of the House of Peoples of the Parliamentary Assembly of BiH. In its Opinion on the constitutional situation in BiH and the powers of the High Representative dated 11 March 2005,²⁵ point 79, the Commission states that, in accordance with constitutional solutions,

... No Serb from the Federation and no Croat or Bosniac from the RS may sit in the House of Peoples... A significant part of the population of BiH therefore does not have the right to stand for elections to the House of Peoples.

In this regard, the Commission concludes in point 80 of this Opinion that the structure and method of electing the delegates to the House of Peoples of the Parliamentary Assembly of BiH are not in accordance with the provisions of the ECHR from 1951 and its Protocols. Article 14 of the ECHR prohibits 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*'. In accordance with Article V of the Constitution of BiH, the Presidency of BiH is tripartite and only representatives of the three constituent peoples can be the members. However, it should be emphasised that exercising the right to constituency of Bosniacs, Croats, and Serbs, as well as Others, is significantly limited by the provisions of the electoral law, as Serbs from the Federation of BiH and Bosniacs and Croats from the RS cannot run for this office.

In connection with the structure and method of election of the members of the Presidency of BiH, the Venice Commission, in point 69 of the Opinion, took the following position:

²⁴ The Constitution of BiH, Article IV Paragraph 3.b.

²⁵ Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative. [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e) (Accessed: 2 July 2024).

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.²⁶

In point 70 of the aforementioned Opinion, the following is emphasised:

Furthermore, members of the three constituent peoples can be elected to the Presidency, but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. Moreover, the Election Law (based on the corresponding provisions of the Constitution) clearly excludes Others, i.e., citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and to stand for election under Article 25 of the ICCPR or with the equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention for the Protection of National Minorities to formally exclude members of minorities from a public office.

In this regard, in point 71 of the Opinion, the Venice Commission referred to Article 14 of the ECHR, stating, however, that a violation of this article can be assumed,

if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature.” The Commission warned about Protocol No. 12 of the ECHR and its entry into force on April 1, 2005, in BiH, which guarantees the enjoyment of any right set forth, not by the Convention, but by the laws of the member state. The

²⁶ *Ibid.*

commission pointed out that "... the prohibition of discrimination will thereby be extended to cover the right to elect a President or stand for election as President.

The right to constituency is also exercised through the prescribed decision-making procedures of the Presidency of BiH. Thus, Article V paragraph 2. c) of the Constitution of BiH prescribes that the Presidency whose members are the representatives of the constituent peoples '*...shall try to adopt all decisions... ...through consensus*'. Decisions of the Presidency, pursuant to the same article, '*... can... ... be adopted by two members if all attempts to reach a consensus fail*'. In such cases, as stipulated in paragraph 2.d of the same article, '*a member of the Presidency who does not agree with the decision, may declare the decision of the Presidency destructive to the vital interest of the entity from which he was elected, provided that they do so within three days of its adoption. Such a statement shall be sent immediately to the National Assembly of the RS, if the statement was made by a member from that entity; to Bosniac delegates in the House of Peoples of the Federation of BiH, if such a statement was made by a Bosniac member; or to the Croatian delegates in the same body, if that statement was made by a Croatian member*'. *The disputed decision of the Presidency, made by overvoting, shall have no effect 'if such a proclamation is confirmed by a two-thirds majority of votes within ten days after its sending...*' In this way, the decision-making procedures in the Presidency of BiH are fully "placed" in the function of protecting national interests. Regardless of the fact that the constitutional norm in this case introduces the term "*vital interest of the entity*", it is clear that in the Federation of BiH, the representatives of the constituent peoples Bosniacs and Croats decide on the merits, while the procedure itself is also initiated by the representatives of these constituent peoples. In the RS, the situation is significantly different. It is true that the entire procedure is initiated by the representative of the Serbs as the constituent people in the Presidency of BiH, but the final decision is made by the National Assembly of the RS, whose members are elected by all citizens of this entity, rather than the delegates to the House of Peoples as exclusive representatives of the interests of the Serbs as the constituent people in this entity. Thus, in the case of the RS, in this context, one can speak of the institute as the Constitution of BiH itself names it – "*vital interest of the entity*" – rather than in the case of the Federation of BiH where, with regard to decision-

making bodies, this institute is entirely in the function of protecting national interests.

From this, as well as from the entire Constitution of BiH, it follows that the constituency of the people is a collective right narrower than sovereignty, but broader than the individual right to national identity. Constituency does not entail the right to self-determination or the right to secede. No nation achieves its constituency independently of other nations that have the same rights.²⁷

This is the principle by which the citizens of BiH, as members of the constituent peoples, should achieve national equality within the state of BiH.²⁸

4. Conflict of the Constitution of BiH with the ECHR

One small but not the only example of the inconsistency between the Constitution of BiH and the ECHR concerns Articles IV/1 and V/1 of the Constitution of BiH, which determine the method of electing the members of the Presidency and delegates to the House of Peoples of the Parliamentary Assembly of BiH. The reasons are also given for their non-compliance based on the practice of the European Court of Human Rights.

4.1. The Presidency and the House of Peoples of BiH

Under the terms of Article V/1 of the Constitution, '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'.

This provision leads to the conclusion that to be elected member of the Presidency, a citizen has to belong to one of the constituent peoples; that the choice of the voters is limited to Bosniac and Croat candidates in the Federation of BiH and Serb candidates in the RS; and that Bosniacs and Croats can be elected only from the territory of the Federation of BiH and not from the RS, while Serbs can be elected only from the RS and not from the Federation of BiH. In principle, in a multi-ethnic state such as BiH, it

²⁷ Trnka, 2006, p. 178.

²⁸ Mirašćić and Begić, 2009.

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.²⁹

The Constitutional Court of BiH referred to this problem in the following terms in its decision number U 5/98,³⁰ concerning constituent peoples in the Entity constitutions:

A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph, 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 of BiH, and one Serb directly elected from the territory of RS. 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 the RS with or without a specific ethnic affiliation. He/She thus represents neither the RS as an entity nor the Serb people only, but all the citizens of the electoral unit of the RS. And the same is true for the Bosniac and Croat Members to be elected from the Federation of BiH.

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 of BiH. The identity of interests in this ethnically dominated manner impedes the development of a wider sense of nationhood.

²⁹ Begić and Delić, 2013, p. 455.

³⁰ The decision of the Constitutional Court U 5/98. – “Official Gazette of BiH” number 36/00.

Furthermore, members of the three constituent peoples can be elected to the presidency but they may be prevented from standing as candidates in the entity in which they reside if they live as Serbs in the Federation of BiH or as Bosniacs or Croats in the RS. Moreover, the Election Law (based on the corresponding provisions of the Constitution of BiH) clearly excludes Others, that is, citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the presidency. This seems clearly incompatible with the equal right to vote and stand for election under Article 25 of the ICCPR or with the equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention for the Protection of National Minorities as it formally excludes members of minorities from a public office.³¹

Article 14 of the ECHR provides that,

The enjoyment of the rights and freedoms set forth in this 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.

A violation of this article can therefore only be assumed if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature. However, it must also be taken into account that BiH has ratified Protocol No. 12 to the ECHR, which guarantees the enjoyment of any right set forth by law without discrimination. This Protocol entered into force on 1 April 2005, and the prohibition of discrimination has been thereby extended to cover the right to elect a President or stand for election as President.

However, one might still wonder whether such an apparent discrimination may be justified under the specific, fairly exceptional conditions of BiH. The European Court of Human Rights in its decisions *Mathieu-Mohin and Clerfayt v. Belgium* and *Melnychenko v. Ukraine*³²

³¹ Begić, 2024, p. 170.

³² Judgments of the European Court of Human Rights in the *Case of Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 02 March 1987; *Case of Melnychenko v. Ukraine*, App. No. 17707/02, 19 October 1994.

seemed willing to leave to states a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

In the present case, the distribution of posts in the state organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny the legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and avoid further loss of human lives. The inclusion of such rules in the text of the Constitution of BiH at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution of BiH aimed at preventing discrimination. This justification has to be considered, however, in the light of development in BiH since the Constitution of BiH entered into force. BiH 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 ratified the ECHR and its Protocol No. 12. However, circumstances remain that require a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups, as a transitional solution until a civil state principle is achieved.

This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such that raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of certain groups of citizens, be they constituent peoples or Others. The need for the amendments to the constitutional provisions on the presidency seems completely clear so as to make these provisions compatible with international standards for human rights protection.

5. Cases of the European Court of Human Rights

The following section of the article presents three very significant decisions made by the European Court of Human Rights that support discrimination set forth in the Constitution of BiH. The decisions refer to the election of a member of the Presidency of BiH as an active voting right as well as the possibility to elect the members of the Presidency of BiH in terms of a

passive voting right. The abbreviated versions of the cases are taken from the website of the European Court of Human Rights and include descriptions of the cases and the Court meritum with no additional changes made.

5.1. Case of *Sejdić and Finci v. Bosnia and Herzegovina*³³

The case originated in two applications against Bosnia and Herzegovina lodged with the Court under Article 34 of the ECHR (“the Convention”) by two citizens of BiH, Mr. Dervo Sejdić and Mr. Jakob Finci (“the applicants”), on 3 July and 18 August 2006, respectively.

The applicants were born in 1956 and 1943, respectively. They have held and still hold prominent public positions. Mr. Sejdić is now the Roma Monitor of the Organisation on Security and Cooperation in Europe (OSCE) Mission to BiH, having previously served as a member of the Roma Council of BiH (the highest representative body of the local Roma community) and a member of the Advisory Committee for Roma (a joint body comprising representatives of the local Roma community and of the relevant ministries). Mr. Finci is now serving as the Ambassador of BiH to Switzerland, having previously held positions such as the President of the Inter-Religious Council of BiH and the Head of the State Civil Service Agency.

The applicants describe themselves to be of Roma and Jewish origin, respectively. As they do not declare affiliation with any of the “constituent peoples”, they are ineligible to stand for election to the House of Peoples of BiH (the second chamber of the State Parliament) and the Presidency (the collective Head of State). Mr. Finci obtained official confirmation in this regard on 3 January 2007.

The Constitution of BiH (hereinafter referred to as “the Constitution” or “the State Constitution” when it is necessary to distinguish it from the Entity Constitutions) is an annex to the 1995 General Framework Agreement for Peace in BiH (“the Dayton Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. As it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures that could have provided democratic legitimacy. It constitutes the unique case of a constitution that was never officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. The Constitution confirmed

³³ *Case of Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06 and 34836/06, 22 December 2009.

the continuation of the legal existence of BiH as a State, while modifying its internal structure. In accordance with the Constitution, BiH consists of two Entities: the Federation of BiH and the RS. The Dayton Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard (Article V of Annex 2 to the Dayton Agreement). Pursuant to an arbitral award of 5 March 1999, the Brčko District has been created under the exclusive sovereignty of the State.

In the Preamble to the Constitution, Bosniacs, Croats, and Serbs are described as “constituent peoples”. At the State level, power-sharing arrangements were introduced, making it impossible to adopt decisions against the will of the representatives of any “constituent people”, including a vital interest veto, an Entity veto, a bicameral system (with a House of Peoples composed of five Bosniacs and the same number of Croats from the Federation of BiH and five Serbs from the RS), as well as a collective Presidency of three members with a Bosniac and a Croat from the Federation of BiH and a Serb from the RS.

The applicants took issue with their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. They relied on Article 14 of the Convention, Article 3 of Protocol No. 1, and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

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 to the Convention provides:

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.

he Court's assessment

(a) As Regards the House of Peoples of BiH

The applicants relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court considers that this complaint should first be examined under the first-mentioned provisions.

(i) The applicability of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

It is noted that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence as it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall “within the ambit” of one or more of the latter.³⁴ The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms that the Convention and the Protocols require each State to guarantee. It applies also to those additional rights falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court’s case-law.³⁵

³⁴ See, among many other authorities: *Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, App. Nos. 9214/80; 9473/81; 9474/81, 28 May 1985, § 71; *Case of Petrovic v. Austria*, App. No. 20458/92, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II; *Case of Sahin v. Germany*, App. No. 30943/96, 8 July 2003, § 85.

³⁵ See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (merits)*, 23 July 1968, § 9, Series A no. 6; *Case of Stec and Others v.*

The Court must decide, therefore, whether elections to the House of Peoples of BiH fall within the “ambit” or “scope” of Article 3 of Protocol No. 1. In this connection, it is reiterated that this provision applies only to elections of a “legislature”, or at least of one of its chambers if it has two or more. However, the word “legislature” has to be interpreted in the light of each State’s constitutional structure and, in particular, its constitutional traditions and the scope of the legislative powers of the chamber in question. Furthermore, the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50, and 52) that the Contracting Parties took into account the particular position of certain parliaments that included non-elective chambers. Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms that could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system.³⁶ At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament’s chambers to be filled through direct elections.

As regards the House of Peoples of BiH, the Court notes that its composition is the result of indirect elections, its members being appointed by the Entities’ legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of BiH and approves a budget of the State institutions.³⁷ Lastly, its consent is necessary before a treaty can be ratified.³⁸ Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1. Accordingly, Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

the United Kingdom, App. Nos. 65731/01 and 65900/01, § 40, *Case of E.B. v. France*. App. No. 43546/02, 22 January 2008.

³⁶ *Case of Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2 March 1987, § 53.

³⁷ See Article IV § 4 (b)-(c) of the Constitution.

³⁸ See Articles IV § 4 (d) and V § 3 (d) of the Constitution.

(ii) Compliance with Article 14 taken in conjunction with Article 3 of Protocol No. 1

The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.³⁹ 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 (*ibid.*, § 82).

Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person’s ethnic origin is a form of racial discrimination (see the definition adopted by the International Convention on the Elimination of All Forms of Racial Discrimination in paragraph 19 above and that adopted by the European Commission against Racism and Intolerance in paragraph 23 above). 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.

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. The Court has also held that no difference in treatment that 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 said, Article 14 does not prohibit Contracting Parties from treating groups differently to correct “factual inequalities” between them. Indeed, in certain circumstances, a failure to

³⁹ *Case of Andrejeva v. Latvia*, App. No. 55707/00, 18 February 2009.

attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article.⁴⁰

Turning to the present case, the Court observes that to be eligible to stand for election to the House of Peoples of BiH, one has to declare affiliation with a “constituent people”. The applicants, who describe themselves to be of Roma and Jewish origin respectively and who do not wish to declare affiliation with a “constituent people”, are, consequently, excluded (see paragraph 11 above). The Court notes that this exclusion rule pursued at least one aim that is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place, a very fragile ceasefire was in effect on the ground. The provisions 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” (namely, the Bosniacs, Croats, and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants’ preoccupation with effective equality between the “constituent peoples” in the post-conflict society.

It is nevertheless the case that the Court is only competent *ratione temporis* to examine the period after the ratification of the Convention and Protocol No. 1 thereto by BiH. The Court does not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a “legitimate aim”, as for the reasons set out below, the maintenance of the system in any event does not satisfy the requirement of proportionality.

To begin with, the Court observes significant positive developments in BiH since the Dayton Agreement. It is true that progress might not always have been consistent and challenges remain.⁴¹ It is nevertheless the case that in 2005, the former parties to the conflict surrendered their control over the armed forces and transformed them into a small, professional force; in 2006,

⁴⁰ See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, cited above, § 10; *Case of Thlimmenos v. Greece*, App. No. 34369/97, 6 April 2000, § 44; *Case of D.H. and Others*, cited above, § 175;

⁴¹ E.g. see the latest progress report on BiH as a potential candidate for European Union membership prepared by the European Commission and published on 14 October 2009, SEC (2009)1338.

BiH joined the North Atlantic Treaty Organization's Partnership for Peace; in 2008, it signed and ratified a Stabilisation and Association Agreement with the European Union; in March 2009, it successfully amended the State Constitution for the first time; and it has recently been elected a member of the United Nations Security Council for a two-year term beginning on 1 January 2010. Furthermore, whereas the maintenance of an international administration as an enforcement measure under Chapter VII of the United Nations Charter implies that the situation in the region still constitutes a "threat to international peace and security", it appears that preparations for the closure of that administration are under way.⁴²

In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to BiH and that the time may still not be ripe for a political system that would be a simple reflection of majority rule, the Opinions of the Venice Commission⁴³ clearly demonstrate that there exist mechanisms of power-sharing that 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.⁴⁴

Lastly, by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto without reservations, the respondent State has voluntarily agreed to meet the relevant standards. It has specifically undertaken 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'. Likewise, by ratifying a Stabilisation and Association Agreement with the European Union in 2008, the respondent State committed itself to 'amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention

⁴² See a joint report by Mr. Javier Solana, the European Union's High Representative for Common Foreign and Security Policy, and Mr. Olli Rehn, European Union Commissioner for Enlargement, on "EU's Policy in Bosnia and Herzegovina: The Way Ahead" of 10 November 2008, and a report by the International Crisis Group on "Bosnia's Incomplete Transition: Between Dayton and Europe" of 9 March 2009.

⁴³ See paragraph 22 above.

⁴⁴ *Case of Glor v. Switzerland*, App. No. 13444/04, 30 April 2009, § 94.

on Human Rights and the Council of Europe post-accession commitments' within one to two years.⁴⁵

Thus, the Court concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of BiH lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.

(iii) The complaints under Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12

Having regard to its finding in the preceding paragraph, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12 as regards the House of Peoples.

(b) As Regards the Presidency of BiH

The applicants relied on Article 1 of Protocol No. 12 only.

(i) The applicability of Article 1 of Protocol No. 12

The Court notes 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 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination.

The applicants contested constitutional provisions rendering them ineligible to stand for election to the Presidency of BiH. Therefore, whether or not elections to the Presidency fall within the scope of Article 3 of Protocol No. 1,⁴⁶ this complaint concerns a "right set forth by law"⁴⁷, which makes Article 1 of Protocol No. 12 applicable. This has not been contested before the Court.

(ii) Compliance with Article 1 of Protocol No. 12

The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that "discrimination" means treating differently, without an objective and reasonable justification, persons in

⁴⁵ See paragraph 25 above.

⁴⁶ *Case of Boškoski v. the former Yugoslav Republic of Macedonia*, App. No. 11676/04, 2 September 2004.

⁴⁷ See sections 1.4 and 4.19 of the Election Act 2001 – see paragraph 18 above.

similar situations. The authors used the same term, “discrimination”, in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14.⁴⁸ The Court does not therefore see any reason to depart from the settled interpretation of “discrimination”, noted above, in applying the same term under Article 1 of Protocol No. 12.⁴⁹

The lack of a declaration of affiliation by the present applicants with a “constituent people” also rendered them ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples; moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner. It follows that the constitutional provisions that render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol No. 12, the Court not considering that there is any pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of BiH.

Accordingly, and for the detailed reasons outlined in paragraphs 47-49 above in the context of Article 14, the Court finds that the impugned precondition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12.

5.2. Case of Zornić v. Bosnia and Herzegovina⁵⁰

The case originated in an application against BiH lodged with the Court under Article 34 of the ECHR (the Convention) by a citizen of BiH, Ms. Azra Zornić (the applicant), on 19 December 2005.

The applicant was born in 1957 and lives in Sarajevo. She actively participates in the political life of the country. Among other things, in 2002, she stood as a candidate of the Social Democratic Party of BiH for election to the parliament of one of the Entities. As the applicant does not declare

⁴⁸ See paragraph 18 of the Explanatory Report to Protocol No. 12.

⁴⁹ As regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see. *Case of N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634.

⁵⁰ *Case of Zornić v. Bosnia and Herzegovina*, App. No. 3681/06, 15 December 2014.

affiliation with any of the “constituent people” (namely, Bosniacs, Croats, and Serbs), but simply as a citizen of BiH, she is ineligible to stand for election to the second chamber of the State parliament (the House of Peoples) and to the collective Head of State (the Presidency).⁵¹

(a) As Regards the House of Peoples of BiH

The applicant relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court will first examine this complaint under the first-mentioned provisions. Furthermore, the test for Article 14 and Article 1 of Protocol No. 12 being the same⁵², the Court finds it appropriate to look at this complaint under Article 1 of Protocol No. 12 at the same time.

The Court has already held in *Sejdić and Finci* that elections to the House of Peoples of BiH fall within the scope of Article 3 of Protocol No. 1.⁵³ Accordingly, Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.

The Court observes that in accordance with the Constitution, only persons declaring affiliation with a “constituent people” (Bosniacs, Croats, and Serbs) are entitled to run for the House of Peoples of BiH. The applicant, who does not declare affiliation with a “constituent people”, but declares herself as a citizen of BiH, is, consequently, excluded.⁵⁴ The Court considers, therefore, that the present case is identical to *Sejdić and Finci*. Although, unlike the applicants in that case, who were of Roma and Jewish origin, respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.

As regards the Government’s argument that the applicant could at any time choose to affiliate with one of the “constituent people”, the Court observes that the same could be said for members of minority groups, such as the applicants in *Sejdić and Finci*, or citizens without any ethnic affiliation. As noted above, there are no objective criteria for one’s ethnic affiliation (see paragraph 8 above). It depends solely on one’s own self-classification. There may be different reasons for not declaring affiliation

⁵¹ Ribičič, Begić and Pavlović, 2016.

⁵² See paragraph 27 above.

⁵³ *Ibid.*, §§ 40 and 41.

⁵⁴ See, *mutatis mutandis*, *Sejdić and Finci*, cited above, § 45.

with any particular group, such as, for example, intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of BiH. While it is unclear what the present applicant's reasons are, the Court considers them in any case irrelevant. The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification.

The Court reiterates that identical constitutional provisions have already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 in *Sejdić and Finci*.⁵⁵ Accordingly, and for the detailed reasons elaborated in *Sejdić and Finci*⁵⁶, the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and a violation of Article 1 of Protocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of BiH.

Having regard to its finding in the preceding paragraphs, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone as regards the House of Peoples.

(b) As Regards the Presidency of BiH

The applicant relied on Article 1 of Protocol No. 12 only. The Court has already found this Article to be applicable to elections to the Presidency of BiH in *Sejdić and Finci*⁵⁷.

The lack of a declaration of affiliation by the present applicant with a "constituent people" also renders her ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 as regards the House of Peoples (see paragraph 32 above); moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 27 above). In *Sejdić and Finci* (ibid., § 56), the Court has already found that the constitutional provisions that rendered the applicants ineligible for election to the Presidency were discriminatory and in breach

⁵⁵ *Ibid.*, § 50.

⁵⁶ §§ 47-49.

⁵⁷ *Ibid.* § 54.

of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jurisprudence in the present case.

There has accordingly been a violation of Article 1 of Protocol No. 12 as regards the present applicant's ineligibility to stand for election to the Presidency.

(i) Application of article 46 of the Convention

The Court finds it appropriate to consider the present case under Article 46 of the Convention, which provides, in so far as relevant:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant that the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings.⁵⁸

The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions that rendered the applicant's ineligible to stand for elections to the House of Peoples and to the Presidency of BiH amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. 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

⁵⁸ See: *Case of Scozzari and Giunta v. Italy*, App. Nos. 39221/98 and 41963/98, 13 July 2000, § 249; *Case of Karanović v. Bosnia and Herzegovina*, App. No. 39462/03, 20 November 2007; *Case of Čolić and Others v. Bosnia and Herzegovina*, App. No. 1218/07, 10 November 2009; *Case of Burdov v. Russia*, App. No. 33509/04, § 125; *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010, § 106.

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.⁵⁹

Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that several amendments to the Constitution of BiH and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions urging the authorities of BiH to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of BiH and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further.⁶⁰ In its third resolution in particular, the Committee of Ministers called upon the respondent State, to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the 'constituent peoples'.⁶¹

In light of the lengthy delay that has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner that complies with the Convention's guarantees.⁶²

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". The nature of the conflict was such that the approval of the "constituent peoples" was

⁵⁹ *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010.

⁶⁰ See paragraph 12 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation No. 2025(2013) of the Parliamentary Assembly of the Council of Europe.

⁶¹ See paragraph 12 above.

⁶² *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010, § 112.

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 that will provide every citizen of BiH with the right to stand for elections to the Presidency and the House of Peoples of BiH without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of BiH.

5.3. Case of *Pilav v. Bosnia and Herzegovina*⁶³

The applicant, Ilijaz Pilav, is a citizen of BiH who was born in 1964 and lives in Srebrenica, in the RS (one of the two constituent entities of BiH). Mr. Pilav declares himself as Bosniac, one of the country's "constituent peoples". He is a member of the Party for BiH and has held several elected and appointed political positions in the RS. In 2006, Mr. Pilav submitted his candidacy for the elections to the Presidency of BiH. The Central Election Commission rejected it on the grounds that he declared his affiliation with Bosniacs, whereas, pursuant to the Constitution and the Election Act, the presidential candidate from the RS had to be a Serb. Mr. Pilav's appeal against that decision was rejected and, in September 2006, the Constitutional Court of BiH rejected his constitutional appeal. In 2010, Mr. Pilav again submitted his candidacy, which was again rejected.

The Court observed that in accordance with the Constitution of BiH, only persons declaring affiliation with a "constituent people" were entitled to stand for election to the Presidency, which consisted of three members: one Bosniac and one Croat, each directly elected from the Federation of BiH, and one Serb directly elected from the RS. Mr. Pilav, a Bosniac living in the RS was as a result excluded. The Court had already found a similar constitutional precondition to amount to a discriminatory difference in treatment, in breach of Article 1 of Protocol No. 12, in the case of *Sejdić and Finci*, which concerned the inability of the applicants, of Roma and Jewish origin, respectively, to stand for election to the Presidency. While Mr. Pilav, as being affiliated with one of the "constituent people", had a constitutional right – unlike the applicants in *Sejdić and Finci* – to participate in elections to the Presidency, he would be required to leave his

⁶³ *Case of Pilav v. Bosnia and Herzegovina*, App. No. 41939/07, 9 September 2016.

home and move to the Federation of BiH to effectively exercise this right. In other cases, the Court had found that a residence requirement was not disproportionate or irreconcilable with the underlying purpose of the right to free elections under Article 3 of Protocol No. 1 to the Convention. However, unlike the applicants in those cases, who did not have permanent residence in the State where they wished to stand for elections and therefore did not satisfy the residence requirement, Mr. Pilav lived in BiH. The Court noted that the Presidency of BiH was a political body of the State and not of one of the two constituent entities. Its policy and decisions affected all citizens of BiH, whether they lived in the Federation, the RS, or Brčko District. Therefore, although Mr. Pilav was involved in political life in the RS, he was also clearly concerned with the political activity of the collective Head of State. The Court took account of an objection of the Government of BiH to the effect that Mr. Pilav could not claim to be a victim of discrimination as the residence requirement concerned in his case applied equally to all the “constituent peoples”. However, Mr. Pilav complained that he was treated differently from Serbs living in the RS. As regards the Government’s argument that that difference in treatment was justified by the need to maintain peace and facilitate a dialogue between different ethnic groups, the Court recalled that it had already addressed that justification in the case of *Sejdić and Finci*. It had held in particular that, while it was not necessary to abandon the power-sharing mechanisms peculiar to BiH, there existed power-sharing mechanisms that did not automatically lead to the total exclusion of representatives of the other communities. Notwithstanding the differences with the case of *Sejdić and Finci*, the Court considered that Mr. Pilav’s exclusion from election to the Presidency as a result of the residence requirement in question was based on a combination of ethnic origin and place of residence, both grounds of distinction falling within the scope of Article 1 of Protocol No. 12. That exclusion as such amounted to a discriminatory treatment in breach of Article 1 of Protocol No. 12. In view of that conclusion, the Court considered that it was not necessary to examine separately whether there had also been a violation of Article 1 of Protocol No. 12 as regards Mr. Pilav’s complaint that he was unable to vote for a member of his own ethnic community to the Presidency.

5.4. Case of *Kovačević v. Bosnia and Herzegovina*⁶⁴

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. The Constitution of BiH (“the Constitution”) is an annex to the 1995 General Framework Agreement for Peace in BiH (“the Dayton Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. In accordance with the Constitution, BiH consists of two Entities – the Federation of BiH (“the Federation”) and the RS (see Article I § 3 of the Constitution) – and the Brčko District in the joint ownership (condominium) of the two Entities.⁶⁵ The Constitution makes a distinction between “constituent peoples” (Bosniacs, Croats, and Serbs) and “Others and citizens of BiH” (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 RS) and a collective Head of State – the Presidency – comprising three members: a Bosniac and a Croat from the Federation and a Serb from the RS.⁶⁶ Those arrangements make it impossible to adopt decisions against the will of the representatives of any “constituent people”.⁶⁷

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 RS 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. By contrast, no ethnic requirements apply in elections to the House of Representatives (the first chamber of the State Parliament).

The constitutional provisions pertaining to the ethnic privileges for the “constituent peoples” were not included in the Agreed Basic Principles that constituted the basic outline for what the future Dayton Agreement would

⁶⁴ *Case of Kovačević v. Bosnia and Herzegovina*, App. No. 43651/22, 29 August 2023.

⁶⁵ See Article VI § 4 of the Constitution, as amended in 2009.

⁶⁶ See Articles IV and V of the Constitution, quoted in paragraphs 12 and 13 below.

⁶⁷ For more information, see paragraph 25 below.

contain.⁶⁸ 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.⁶⁹ 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.⁷⁰

The applicant is a political scientist and a political adviser to a member of the Presidency of BiH. 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.

5.4.2. The Court’s assessment

(a) General Principles

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.⁷¹ 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.

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

⁶⁸ See paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of 26 September 1995.

⁶⁹ See: Nystuen, 2005, p. 192 and pp. 240-41; O’Brien, 2005, p. 105.

⁷⁰ Nystuen, 2005, p. 100.

⁷¹ Sejdić and Finci, cited above, § 55.

similar, situations.⁷² 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,⁷³ and their interpretation has not been limited to characteristics that are personal in the sense that they are innate or.⁷⁴ The Court has previously recognised that the “place of residence constitutes an aspect of personal status for the purposes of Article 14” and can trigger the protection of that Article.⁷⁵

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”⁷⁶. 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.

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 authority’s 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.⁷⁷

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.⁷⁸ The Court has also held that no difference in treatment that is based exclusively or to a decisive extent on a

⁷² See, for instance, *Case of Molla Sali v. Greece*, App. No. 20452/14, 19 December 2018, § 133.

⁷³ See *Case of Khamtokhu and Aksenchik v. Russia*, App. Nos. 60367/08 and 961/11, 24 January 2017; *Case of Carson and Others v. the United Kingdom*, App. No. 42184/05, 4 November 2008, § 70.

⁷⁴ See *Case of Clift v. the United Kingdom*, App. No. 7205/07, 13 July 2010, §§ 56-59.

⁷⁵ See *Case of Carson and Others*, cited above, §§ 70-71.

⁷⁶ See, among many authorities, *Molla Sali*, cited above, § 135.

⁷⁷ See *Case of Sejdić and Finci*, cited above, § 43, with further references.

⁷⁸ See *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007, § 196.

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.⁷⁹ That said, Article 14 does not prohibit Contracting Parties from treating groups differently 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.⁸⁰

(b) Application of the Above Principles in the Present Case

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 RS.⁸¹

First, to indirectly participate in the election of Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of BiH, 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 BiH.⁸² Second, 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 BiH. 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.⁸³ Moreover, social benefits are strictly linked to place of residence and are not the same in different parts of the country.⁸⁴ Accordingly, the applicant is treated differently than persons from

⁷⁹ *Ibid.* § 176.

⁸⁰ 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; *Case of Thlimmenos v. Greece*, App. No. 34369/97, 6 April 2000, § 44; *Case of D.H. and Others*, cited above, § 175; and *Case of Sejdić and Finci*, cited above, § 44.

⁸¹ See Article IV § 1 of the Constitution, quoted in paragraph 12 above.

⁸² See Article IV § 1 (a) of the Constitution, quoted in paragraph 12 above.

⁸³ See paragraph 20 above.

⁸⁴ See, *mutatis mutandis*, *Case of Pilav v. Bosnia and Herzegovina*, App. No. 41939/07, 9 June 2016, §§ 34, 43, 45, in which the Court rejected a similar argument, and, for

the Federation who declare affiliation with Bosniacs and Croats and persons from the RS who declare affiliation with Serbs.

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 BiH, 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”.⁸⁵ 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. That being the case, it is of utmost importance that all segments of society should be represented in the House of Peoples.

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.⁸⁶

The Government asserted that the time was still not ripe for a political system that would be a simple reflection of majority rule.⁸⁷ The Court has already examined and dismissed that argument in, *inter alia*, *Sejdić and Finci*,⁸⁸ in which it held in particular:⁸⁹

illustrative purposes; *Case of Pudarić v. Bosnia and Herzegovina*, App. No. 55799/18, 8 December 2020, § 26.

⁸⁵ See, for instance, the Venice Commission’s analysis and proposals in paragraphs 25 and 27 above.

⁸⁶ See, *mutatis mutandis*, *Case of Bakirdzi and E.C. v. Hungary*, App. Nos. 49636/14 and 65678/14, 10 November 2022 § 63 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 that 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.

⁸⁷ See paragraph 46 above.

⁸⁸ Cited above, §§ 47-49.

⁸⁹ *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.⁹⁰

Moreover, in *Zornić*, 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'. The nature of the conflict was such that the approval of the 'constituent peoples' was necessary to ensure peace. 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.

⁹⁰ See *Case of Glor v. Switzerland*, App. No. 13444/04, 06 November 2009, § 94.

The Court sees no reason to depart from that case-law.⁹¹ Indeed, a reform of the electoral system is an outstanding post-accession obligation of BiH.

The Court notes that the Government referred to *Mathieu-Mohin and Clerfayt v. Belgium*, 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”.⁹² The Court sees no reason to disagree with the finding of that court.

Lastly, although the Convention does not prohibit Contracting Parties from treating groups differently to correct “factual inequalities” between them⁹³, none of the “constituent peoples” is in the factual position of an endangered minority that must preserve its existence. On the contrary, the “constituent peoples” clearly enjoy a privileged position in the current political system.

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.

At the time of writing the paper, the judgment of the Grand Chamber had not been made publicly available. On 25 June 2025, the European Court of Human Rights delivered the operative provisions (conclusions) of its judgment in the case *Kovačević v. Bosnia and Herzegovina*.⁹⁴ The case concerned the applicant's allegation that the requirements applicable to elections for the House of Peoples of the Parliamentary Assembly and for the Presidency of BiH are discriminatory against him and prevented him from voting for candidates of his choice in those elections in 2022. The Court upheld the Government's objection to the admissibility of the application on the grounds that the applicant had abused the right of application within the meaning of Article 35 § 3 (a) of the ECHR, and that he lacked victim status under Article 14 of the Convention, in conjunction

⁹¹ 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.

⁹² See paragraph 15 above.

⁹³ See the case-law quoted in paragraph 52 above.

⁹⁴ *Case of Kovačević v. Bosnia and Herzegovina*, App. No. 43651/22, 29 August 2023.

with Article 3 of Protocol No. 1 to the Convention, and Article 1 of Protocol No. 12.

6. Conclusion

By introducing the principle of the ECHR having priority over every right, Annex 4 – the Constitution of BiH – should have been fundamentally transformed, such that instead of the three “constituent peoples” and their “vital national interests”, an individual – a citizen, is introduced as the basis and goal of the state in accordance with the old maxim that every right is created for the benefit of human beings (*Hominum causa omne ius constitutum est*).

The Constitution of BiH, or Annex 4 of the Dayton Agreement, if viewed beyond the provision on the mandatory application of the ECHR, cannot in any way belong to the positive democratic constitutional tradition of Europe. Rather, it would fall into the category of extremely undemocratic, possibly totalitarian systems, such as those Europe has known throughout its history, precisely because the three “constituent peoples” rather than a human being are the purpose of the constitution and the state founded by that constitution. If the three constituent peoples are everything, and the citizen and the democratic state are nothing, then in a certain sense, it is still a constitution that does not follow the tradition of the democratic countries of Europe, which is given in the ECHR Preamble.

Harmonisation of the Constitution of BiH with the ECHR certainly implies the need for the urgent addressal of several discriminatory constitutional provisions, which has already been discussed. However, the Constitution of BiH includes numerous other inconsistencies, gaps, and contradictions in the text of the Constitution itself, which also need to be overcome in the process of harmonising the Constitution of BiH with the ECHR. It is especially important to respond to the numerous positive obligations the state of BiH accepted by ratifying the ECHR with the aim of ensuring the protection of human rights and fundamental freedoms of individuals under its jurisdiction. The realisation of this type of obligation requires more than the abrogation action of the state, as is the case with discrimination provisions. It requires a certain creative engagement so as to equip the state for the consistent and full application of the ECHR, as well as all the obligations arising from it. In this regard, it would be particularly important to structure the organisation of judicial bodies in a modern way to

ensure the individual's right to an effective legal remedy. This would also mean completing the principle of separation of powers that serve as the basis for the functioning of the modern state. What is particularly striking here is the need to integrate the judiciary in a modern way and re-introduce a supreme court that will ensure the equal position of all individuals according to the law, justice, and the state.

However, the fact that the rights of constituent peoples lead to discrimination against citizens of BiH who do not belong to this category cannot be ignored. In addition, it should be emphasised that the exercise of the right to constituency at the state level is significantly limited. Thus, Serbs from the federation of BiH and Bosniacs and Croats from the RS cannot be elected or vote for their national representative in the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH. Thus, according to some estimates, almost one third of the citizens of BiH are excluded from the electoral process for the aforementioned state authorities, which directly violates international democratic standards on the active and passive voting rights of citizens, which also, in accordance with the General Framework Agreement for Peace in BiH, represent an integral part of the constitutional system of BiH. The key issue is to find a constitutional model in which the civil concept shall not be threatened by collective national rights and vice versa. In this regard, the realisation of the sovereignty of the citizens of BiH, as well as the constituency of Bosniacs, Serbs, and Croats, must be ensured by the consistent realisation of their political rights, primarily through active and passive voting rights. The negation of the importance of the citizen of BiH, regardless of their "collective belonging", cannot lead to the construction and preservation of a stable and prosperous BiH society.

In conclusion, it can be stated that the actual application of the ECHR as a document with a supra-constitutional character in BiH would be a big step forward in the creation of a democratic state of BiH, capable of fulfilling all the functions of a modern state. At the same time, it would also mark considerable progress towards the increased security of BiH, which is a necessary condition for fulfilling its role in the protection of human rights as well as all other obligations in the creation of a modern economy and promotion of technology, democracy, and human rights.

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