

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

Ms. Valerija Galic, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Mr. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević,

Having deliberated on the request of **Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, in case no. *U 14/12*, at its session held on 26 March 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. **Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, is partly granted.

It is hereby established that Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The request for review of the constitutionality of Articles 9.15, 12.1 and 12.2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) lodged by Mr. **Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, is hereby dismissed as ill-founded.

It is hereby established that Articles 9.15, 12.1 and 12.2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

REASONING

I. Introduction

1. On 23 November 2012, Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request ("the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of the following provisions:

- *Article 80(2)(4), (Item 1(2) of the Amendment LXXXIII) and Article 83(4) of the Constitution of the Republika Srpska (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII),*

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- *Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and*
 - *Articles 9.13, 9.14, 9.15, 9.16, 12.1, 12.2 and 12.3 of the Election Law of Bosnia and Herzegovina (Official Gazette of BiH, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14 - “the Election Law”).*

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Parliamentary Assembly of BiH, the House of Representatives and the House of Peoples, the National Assembly of the Republika Srpska (“the National Assembly”), the Parliament of the Federation of Bosnia and Herzegovina, the House of Representatives and the House of Peoples, were requested on 14 January 2013 and on 6 December 2012 to submit their respective replies to the request.
3. Pursuant to Article 15(3) of the Rules of the Constitutional Court, the Office of the High Representative for Bosnia and Herzegovina (“the Office of the High Representative”) was requested on 21 February 2013 to submit its expert opinion in writing in relation to the respective request.
4. The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (“the Constitutional-Legal Committee”) submitted its reply to the request on 14 February 2013 and the National Assembly did so on 21 December 2012.
5. The Parliament of the Federation of Bosnia and Herzegovina failed to submit its reply to the request.
6. The Office of the High Representative submitted its opinion in relation to the respective request on 16 April 2013.
7. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were transmitted to the applicant on 8 May 2013.
8. At the Plenary session held on 5 July 2013 the Constitutional Court decided to hold a public hearing in this case. The public hearing was held on 29 November 2013.

III. Request

a) Allegations from the Request

9. The applicant holds that the challenged provisions of the Constitutions of the Entities and of the Election Law are not in conformity with Article 1 of Protocol No. 12 to the European Convention; Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26; Article 14 in conjunction with Article 3 of Protocol No. 1 to the European Convention.

10. The applicant noted that the Constitution of Bosnia and Herzegovina differentiates between “the constituent peoples” (persons who declare themselves as Bosniacs, Croats and Serbs) and the “Others” (members of ethnic minorities and persons who do not declare themselves as members of any group because of the mixed marriages, mixed marriages of their parents or for other reasons). However, only the persons who declare themselves as members of one of “the constituent peoples” may run for office of the President or Vice-Presidents of the Republika Srpska (the RS”) and of the Federation of Bosnia and Herzegovina (“the FBiH”).

11. The applicant holds that the challenged constitutional provisions of the Entities, according to which the Presidents and Vice-Presidents must come from among the constituent peoples (explicit provisions when considered in the light of the Election Law), constitute a violation of the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) in relation to the members of “Others”. Besides, the applicant holds that the challenged provisions are contrary to the Decision of the European Court of Human Rights in the case of *Sejdić and Finci* (see, the European Court, *Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06, Judgment of 22 December 2009*), since they make it impossible for “Others” to participate equally in the exercise of these public functions. In that respect, the applicant noted that the state of Bosnia and Herzegovina, in the process of preparations for becoming a member of the Council of Europe in 2002, and when signing the Stabilization and Association Agreement with the European Union in 2008, assumed an obligation to review the election legislation in the light of the norms of the Council of Europe and to make amendments where necessary (see the Opinion 234 2002, the Parliamentary Assembly of the Council of Europe, dated 22 January 2002, paragraph 15(iv)(b)), that is to say to “make amendments to the election legislation in respect of the number of the Members of the BiH Presidency and the number of Delegates in the House of Peoples in order to

secure full compatibility with the European Convention and the post-accession obligations towards the Council of Europe” (see Annex to the Decision of the Council 2008/211/EU, of 18 February 2008, on the principles, priorities and conditions contained in the European Partnership with BiH and the annulment of the Decision 2006/55/EU, *Official Gazette of the EU*, L80/21(2008)).

12. The applicant noted that the central objective of the General Framework Agreement for Peace and of the Constitution of Bosnia and Herzegovina is the prohibition of discrimination. In that respect he referred to Article II(4) of the Constitution of Bosnia and Herzegovina, which guarantees all persons the enjoyment of rights and freedoms without discrimination under Article II as well as under 15 international instruments enumerated in the Annex I to the Constitution of Bosnia and Herzegovina, which also make up a part of the Constitution of Bosnia and Herzegovina. The applicant holds that these constitutional provisions have priority over the law of the State and the Entities, which include all the laws as well as the Constitutions of the Entities.

13. The applicant holds that the existence of differential treatment and analogous situation in the challenged provisions of the Entities’ Constitutions and the Election Law is reflected in the fact that each person is guaranteed the right to run for office in the elections without discrimination, but that, in accordance with the challenged provisions of the Entities’ Constitutions and the Election Law, the persons not belonging to the constituent peoples cannot appear on the lists of candidates for the President and Vice-Presidents, that is to say such persons are prevented from running for any of the mentioned offices.

14. The applicant further mentions that such solutions do not have objective and reasonable justification. One cannot accept the argumentation that such solutions are acceptable given the specific quality of BiH and its ethnic composition, because it neglects the existence of the citizens who are not members of any of “the constituent” peoples. Such a situation in a multiethnic society with a high level of normative human rights protection is incompatible with the constitutional principles referred to in Article II of the Constitution of Bosnia and Herzegovina, the European Convention, Annex I to the Constitution of Bosnia and Herzegovina and the Judgment in the case of *Sejdić and Finci*. In this respect, the applicant cited extensively the positions of the European Court taken in the case of *Sejdić and Finci*, *inter alia*, the following: “In the present case, bearing in mind the applicants' active participation in the public life, it was totally justified for the applicants to consider running for office in the House of Peoples and the Presidency. The applicants may therefore claim to be the victims of the alleged discrimination. The fact that the respective case raises the issue of the compatibility of the national Constitution with the Convention is irrelevant in

this regard (see, by analogy, *Rekvény v. Hungary* [GC], no. 25390/94, ECHR 1999-III). Notwithstanding the fact that they are the citizens of Bosnia and Herzegovina, the applicants are denied all rights to stand for election to the House of Peoples and the Presidency on the grounds of their racial/ethnic background (the Court held the discrimination on ethnic ground to be a form of racial discrimination in the case of *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII)".

15. The applicant holds that the challenged provisions of the Entities' Constitutions and the Election Law essentially establish a situation identical to that considered in the case of *Sejdić and Finci*, which exists at the BiH level. Namely, both cases concern the exercise of the right to stand for election to the executive authority bodies, which right is denied to each and every person not declaring themselves as members of one of the constituent peoples. Therefore, in his opinion, the reasoning of the judgment in the case of *Sejdić and Finci* can be applied also to the particular situation, as practical effects are identical for the persons not belonging to the constituent peoples. Through this conduct, in the applicant's opinion, BiH and both of its Entities engage in discrimination against their citizens who have the right to stand for election under Article 3 of Protocol No. 1 to the European Convention, which is contrary to Article 1 of Protocol No. 12 to the European Convention, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26 and Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention.

b) Replies to request

1. National Assembly

16. The National Assembly noted that the particular case did not concern the review of constitutionality of the articles of the RS Constitution and the Election Law, but the review of compatibility of those articles with Article 3 of Protocol No. 1, Article 14 of the European Convention and Article 1 of Protocol No. 12, so that it would provide the reply to request with regards to the applicability and admissibility of the mentioned articles of the European Convention and Protocols thereto.

17. The National Assembly noted that Article 3 of Protocol No. 1 to the European Convention may be applied only in cases concerning the election of legislature, and the positions of the

President and Vice-Presidents of the RS fall, neither by their function nor by their powers, within the scope of legislature. Bearing in mind that Article 14 of the European Convention is not independent, rather it may be applied solely in connection with the enjoyment of rights and freedoms ensured by the European Convention, Article 14 is not applicable in the present case.

18. Further, according to the National Assembly, the respective request is inadmissible, because the issue of national affiliation of an individual as a condition for running for public office, which was raised precisely in the respective request, is the subject of deliberation in another five cases pending before the European Court. Besides, the judgment in the case of *Sejdić and Finci* has not been implemented even three years after its adoption and it is uncertain when and how it will be implemented. Due to the mentioned circumstances, the National Assembly holds that entering into the merits of the request by the Constitutional Court would constitute the prejudging of the manner of implementation of the judgment in the case of *Sejdić and Finci*. The National Assembly also holds that the challenged provisions of the Entities' Constitutions and of the Election Law are in conformity with the Constitution of BiH which is still in force, so that granting the request would open the issue of compatibility of the Entities' Constitutions with the Constitution of BiH, whereby the legal system of BiH, as well as its state and legal organization, would be called into question in their entirety. For all the aforementioned reasons, the National Assembly points out that the request is inadmissible for being premature.

Further, in support of the inadmissibility of the request, the National Assembly stated that the Constitutional Court had already decided in the case no. AP-2678/06 (see, the Constitutional Court, Decision on Admissibility and Merits no. AP-2678/06 of 29 September 2006, available at www.ccbh.ba), on the issue of ethnicity as a condition for running for public office, thus by entering into the merits of the respective request the Constitutional Court would act contrary to the legal principle of deciding the same matter again. It was noted that this could result in the revision of the positions already taken and in the conduct contrary to the case-law of the Constitutional Court. Besides, the National Assembly stated that the challenged provisions of the RS Constitution were the result of the implementation of the Third Partial Decision of the Constitutional Court no. U-5/98 ("the Decision on Constitutionality"), so by entering into the review thereof, as the applicant requested, the Constitutional Court would enter into the review of the mentioned decision. Besides, the National Assembly noted that the challenged constitutional solutions were imposed by the decision of the High Representative, and as the applicant insisted on the review of the challenged provisions in conjunction with the international documents, the Constitutional Court would enter

into the review of compatibility of the decisions of the High Representative with the international documents.

19. Next, the National Assembly stated that, if the Constitutional Court, despite the objection to inadmissibility, entered nevertheless into the decision-making on the merits of the request, it was appropriate to give a reply only in relation to Article 1 of Protocol No. 12 in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina. The challenged constitutional and legal provisions are the direct consequence of the implementation of the Decision on Constitutionality, and of amendments imposed by the High Representative. Before the adoption of the Decision on Constitutionality the provisions of the RS Constitution did not contain an ethnic determinant, however the Decision on Constitutionality rated such a situation as a “systematic, long-term, intentional discriminatory practice of the public authorities of the RS”. In accordance with that decision, and according to the Decision of the High Representative, the RS Constitution was amended, which made the declaration of belonging to one of the constituent peoples a condition for one to run for one of these offices. Prior to the amendments, the provisions of the RS Constitution did not have any discriminatory feature and were replaced by the challenged provisions introduced indirectly by the Constitutional Court, which the applicant considers discriminatory. The respective request creates an absurd situation, especially when one bears in mind that these provisions ought to be considered again by the Constitutional Court.

20. In addition, the National Assembly recalls the position of the European Court that in the period of political turmoil the public authorities need time to reassess the measures necessary for the preservation of the achieved stability and the assessment of the needs of their society (see, the European Court, *Zdanoka v. Latvia* [GC], no. 58278/00, paragraph 131, ECHR 2006-IV), and that it is up to the Member State to set the course of its democratic development, whereby they must be considerate of the differences in historical development, cultural diversity and differences in political thought (see, the European Court, *Hirst v. the United Kingdom (no. 2)*, no. 74025/01, paragraph 61, ECHR 2005-IX). The National Assembly refers to the position of the Constitutional Court stating that a differential treatment does not constitute *a priori* discrimination, but one can talk about the existence of discrimination only in cases where the differential treatment lacks objective and reasonable justification. In this respect it was noted that the Decision on Admissibility and Merits no. *AP-2678/06* analyzed the justification of constitutional restrictions, according to which the appellant, on account of his ethnicity/nationality, was unable to run for office of a Member of the Presidency, and that the Constitutional Court concluded that such a restriction was

reasonable, justified and proportionate, that is to say that the restriction was proportionate to the objective of the social community at large, in terms of the preservation of the established peace and the continuation of a dialogue.

21. According to the National Assembly there is no basis for one to take a different position in the particular case, all the more so that all the alleged restrictions were the result of the Decision on Constitutionality and the Decision of the High Representative on Amendments to the RS Constitution of 25 April 2002, and not of the arbitrariness on the part of the domestic authorities. Besides, ethnic minorities have been represented in the work of the legislature bodies (the number of their representatives exceeds their percentage in the population figures), and that within those bodies, as the legislative ones, they can affect the amendments to the regulations which the applicant challenges, which indeed is the essence and the goal of the democratic process of decision-making. In this respect, there was a reference to the position of the European Court that the state was entitled to apply the measures ensuring the stability of the order in the country even when they constitute restriction or total exclusion from the participation in the exercise of public affairs for a certain category defined by ethnic/national affiliation (see, the European Court, *Sadak and Yumak v. Turkey*, Case no. 10226/03 of 8 July 2008).

22. The National Assembly proposed that the Constitutional Court adopt a decision granting the preliminary objections, and declaring inapplicable Article 3 of Protocol No. 1 in conjunction with Article 14 of the European Convention, and declaring the rest of the respective request inadmissible. Should the Constitutional Court decide to enter into the merits, the National Assembly proposed that the request be dismissed, *i.e.* that it be established that there is no discrimination in relation to the provisions of the Constitution of the RS and of the Election Law.

2. Constitutional-Legal Committee

23. The Constitutional-Legal Committee stated that, following the discussion, it supported the request by four votes “in favor”, three votes “against” and none abstained.

c) Opinion given in the capacity of *amicus curiae*

24. The Opinion indicated that certain provisions, which the applicant challenges, were issued by the High Representative without ever getting adopted thereafter by the relevant legislative bodies, however according to the case-law of the Constitutional Court in the Decision no. 9/00 of

3 November 2000, the High Representative is not against the review of amendments to the Entities' Constitutions to be done by the Constitutional Court.

25. Further, the chronology of events was indicated and so was the procedure of the implementation of the Decision of the Constitutional Court no. U 5/98, as well as the Agreement on various elements necessary for the implementation of the Third Partial Decision no. U 5/98 of 27 March 2002. The said Agreement contained the provision concerning the distribution of the positions of the President and Vice-Presidents of the Entities among the constituent peoples, as follows: *the President of the Entity shall have two Vice-Presidents coming from among different constituent peoples. They shall be elected according to the Entities' Constitutions.* The emphasis was more on ensuring the equitable distribution of these positions among the constituent peoples with the aim of achieving viable power-sharing arrangements, rather than on ensuring a system that would give equal chances to all candidates regardless of their ethnic background. The said provision was therefore seen as a prohibition to the representatives of the constituent peoples to hold more than one of the three positions, rather than a prohibition for the representatives of Others to hold any of those positions. However, it was noted that a strictly literal interpretation of the said provision referred to in the Agreement leaves no room for a conclusion that the representatives of Others may hold those positions.

26. Furthermore, it is indicated in the Opinion that the differential treatment between the persons belonging to the group of Others and the persons belonging to the constituent peoples is evident in the legal provisions that are challenged. Therefore, in the specific and fairly exceptional conditions prevailing in BiH, not only at the time of the enactment of amendments, but most importantly in the present, a question arises as to whether such differential treatment may be justified. The distribution of posts in the Entities' Presidencies among the constituent peoples was the central element of the implementation of the Decision of the Constitutional Court no. 5/98, which required the Entities to amend their Constitutions in order to ensure the full equality of the constituent peoples. Also, this Agreement on the power-sharing was a central tenet of the General Framework Agreement for Peace which made peace in Bosnia and Herzegovina possible. In that respect, it was noted that the Venice Commission, in its opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, stated the following: *"(...) In such a context it is difficult to deny the legitimacy to norms which may be problematic from the point of view of non-discrimination, but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time,*

therefore, does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination (...)” However, it was noted that the Venice Commission also pointed out the following: “(...) *This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. 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 now ratified the European Convention on Human Rights and its Protocol No. 12. As set forth above, the situation in BiH has evolved in a positive sense, but there remain circumstances requiring a political system that is not a simple reflection of majority rule, but one which guarantees the distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups (...)*”.

27. Also, the Opinion pointed out that the enactment of amendments relied on the assumption that a certain degree of interference with the rights to stand for elections could have been justified in the light of the margin of appreciation given to states. In that regard references were made to the positions of the European Court, according to which the states were left a particularly wide margin of appreciation in the area of electoral legislation (see, the European Court, *Mathieu-Mohin and Clerfazat v. Belgium* of 2 March 1987 and *Melnychenko v. Ukraine* of 19 October 2004). The aim being pursued, in particular the implementation of a decision of the Constitutional Court recognizing “the constitutional principle of collective equality of the constituent peoples arising from the designation of Bosniacs, Croats and Serbs as constituent peoples”, which “prohibits any special privileges for one or two of these peoples, any domination in the governmental structures and any ethnic homogenization through segregation based on territorial separation” (Decision of the Constitutional Court no. 5/98), supports that conclusion.

28. Moreover, it is pointed out that the Office of the High Representative has no intention to determine whether such an interference is also justified in 2013 nor is it its obligation to do so. In that regard a reference was made to the position of the Constitutional Court in the Decision no. U 9/09 reading that it is on the Constitutional Court to decide whether there exists an objective and reasonable justification in each individual case within the meaning of Article II(4) of the Constitution of Bosnia and Herzegovina. Finally, it is pointed out that the legal situation in respect of the issue raised before the Constitutional Court has changed, particularly so in the light of the entry into force of Protocol No. 12, which expands the scope of protection to “all the rights set forth by law”, which introduces a general prohibition of discrimination.

IV. Public Hearing

29. Pursuant to Article 46 of the Rules of the Constitutional Court, at the plenary session held on 5 July 2014 the Constitutional Court decided to hold a public hearing to discuss the relevant request. Pursuant to Article 47(3) of the Rules of the Constitutional Court, at the plenary session held on 27 September 2013 the Constitutional Court decided to summon the following representatives to the public hearing: the representative of the applicant, the Parliamentary Assembly of BiH, the National Assembly, the Council of Peoples of the Republic Srpska (“the Council of Peoples”), the Parliament of F BiH, the Office of the High Representative, the Helsinki Committee for Human Rights in BiH, the Faculty of Law of the University in Sarajevo, the Faculty of Law of the University in Mostar, the Faculty of Law of the University “Dzermal Bijedic” Mostar and the Faculty of Law of the University in Banjaluka. On 29 November 2013 the Constitutional Court held the public hearing attended by the representatives of the National Assembly (the members of the commission for constitutional issues), the representative of the Council of Peoples (the employee of the Legal Office), the representatives of the Bosniac Caucus in the Council of Peoples, the representative of the Helsinki Committee for Human Rights in BiH, the representative of the Faculty of Law in Sarajevo and the Faculty of Law of the University in Mostar.

30. The representatives of the National Assembly presented their arguments which were mainly within the frame of the response to the request. The representative of the Council of Peoples presented the objection relating to the applicability of Article 3 of Protocol No. 1 and prematurity of the request in question as the decision of the European Court of Human Rights in the case of *Sejdić and Finci* had not been implemented yet. According to the standpoint of the Council of Peoples, by considering the merits of the request the Constitutional Court would review the decision U - 5/98, *i.e.* it would engage in reviewing the decision of the High Representative, whereby it would engage in reviewing the compatibility of the decisions of the High Representative with the relevant provisions of the European Convention and its Protocols.

31. The representatives of the Bosniac Caucus in the Council of Peoples analyzed the provisions of the Constitution of Bosnia and Herzegovina and challenged provisions of the Entity laws and pointed out that those provisions were restrictive as they provide only for the members of the constituent people to stand as candidates for the mentioned positions. They concluded that the request was well-founded and that the challenged provisions should be declared unconstitutional.

32. The representative of the Helsinki Committee supported the request pointing out that the request served the purpose of building the principle of equality of all peoples in BiH and expressed his expectations that the Constitutional Court, when deciding the request in question, would be in “line” with introduction of this principle.

33. The representative of the Faculty of Law of the University in Sarajevo pointed out that the request raised essentially the same issue as the one raised in the case of the European Court of Human Rights *Sejdić and Finci v. Bosnia and Herzegovina*. Therefore, the challenged provisions are in contravention of the European Convention and international documents applicable in BiH.

V. Relevant Law

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

Article 80(2)(4)

The President shall have two Vice-Presidents from among different constituent peoples

(Item 1(2) of the Amendment LXXXIII).

Article 83(4)

The President of the Republic and Vice-presidents of the Republic shall be directly elected from the list of the candidates for the President of the Republika Srpska so that a candidate who wins the highest number of votes shall be elected President while the Vice-presidents shall be elected candidates from the other two constituent peoples who win the highest number of votes after the elected President of the Republic.

(Item 5 of the Amendment XL as supplemented with Item 4 of Amendment LXXXIII)

35. The **Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 1/94, 13/97, 16/02, 22/02, 52/02, 60/02, correction, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 32/07 and 88/08), in its relevant part, reads:

Article IV.B(1) Article 1(2)

(2) The President of the Federation shall have two Vice-Presidents who shall come from different constituent peoples. They shall be elected in accordance with this Constitution.

(amended by Amendment XLI)

Article IV.B(1) Article 2(1) and (2)

(1) In electing the President and two Vice-presidents of the Federation, at least one third of the delegates of the respective Bosniac, Croat or Serb caucuses in the House of Peoples may nominate the President and two Vice-presidents of the Federation.

(2) The election for the President and two Vice-presidents of the Federation shall require the joint approval of the list of three nominees, by a majority vote in the House of Representatives, and then by a majority vote in the House of Peoples, including the majority of each constituent people's caucus.

(amended by Amendment XLII)

36. The **Election Law of BiH** (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32 /10 and 18/13 and 7/14), in its relevant part, reads:

CHAPTER 9A

PRESIDENT AND VICE- PRESIDENT

OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article 9.13

In election of the President and Vice-Presidents of the Federation of Bosnia and Herzegovina, at least one third of the delegates of the constituent peoples' caucuses to the House of Peoples of the Federation shall nominate delegates for the office of the President and Vice-Presidents.

Article 9.14

(1) The joint slates for the office of President and Vice-Presidents of the Federation of Bosnia and Herzegovina shall be formed from among the candidates referred to in Article 9.13.

(2) The House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina shall vote on one or several joint slates composed of three candidates including one candidate from among each constituent people. The slate which receives the majority of votes in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina shall be elected if it gets majority of votes cast in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina including majority of votes of each constituent peoples' caucuses.

Article 9.15

If the joint slate presented by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina does not receive the necessary majority in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, this procedure will be repeated. If in the repeated procedure the joint slate which receives majority of votes in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina is rejected again in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina that joint slate shall be considered to be elected.

Article 9.16

The delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina from the rank of Others may participate in the election of candidates for the President and Vice-President of the Federation of Bosnia and Herzegovina. However, on this occasion, no caucus of Others shall be formed and their vote shall not be counted in calculating the specific majority in the caucuses of the constituent peoples.

CHAPTER 12

PRESIDENT AND VICE- PRESIDENT OF REPUBLIKA SRPSKA

Article 12.1

The President and two Vice-Presidents of Republika Srpska shall be directly elected from the territory of Republika Srpska by voters registered in the Central Voting Register to vote for Republika Srpska.

Article 12.2

A voter registered in the Central Voting Register to vote in the elections for the President of the Republika Srpska may vote for one candidate only.

Article 12.3

The candidate from each constituent people receiving the highest number of votes shall be elected. Among these three (3) candidates, one from each constituent people, the candidate receiving the highest number of votes shall be elected President, and the two candidates receiving the second and third highest number of votes shall be elected Vice Presidents.

VI. Admissibility

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

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

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

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

Whether any provision of an Entity's Constitution or law is consistent with this Constitution.

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

38. In the particular case the request was filed by Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court notes that the respective request is admissible, as it was filed by an authorized entity, and that there is not a single reason whatsoever under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VII. Merits

39. The applicant holds that the challenged provisions of the Constitutions of the Entities and of the Election Law are not in conformity with: Article 1 of Protocol No. 12 to the European Convention; Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, and the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26; as well as the international instruments referred to in Annex I to the Constitution of BiH and Article 14 in conjunction with Article 3 of Protocol No. 1 to the European Convention.

40. In the first part the Constitutional Court will provide the answers to the objections raised by the National Assembly in connection with the respective request.

41. The National Assembly holds that the respective request primarily raises the issue of compatibility of the challenged provisions with the European Convention, and that the European Court has five cases pending, which raise the issue of the national/ethnic affiliation of an individual as a condition for running for public office. In that respect the decision-making on the merits would imply the overlapping of the jurisdiction between the European Court and the Constitutional Court in the cases having the same legal grounds. The Constitutional Court does not accept the mentioned objection. Namely, the respective request raises the issue of compatibility of the challenged provisions with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12. Further, in accordance with Article VI(3)(a) of the Constitution of BiH, the Constitutional Court shall have exclusive jurisdiction to review the compatibility of the Entities' Constitutions and laws with the

Constitution of BiH. On the other hand, the European Convention has emerged as an expression of the concurrence of the states to secure in their respective territory rights and freedoms provided therein for all who come under their jurisdiction. Therefore, the system of human rights protection refers, first and foremost, to the protection of human rights at the national level. The protection exercised through the Convention mechanisms has a subsidiary character. Therefore, the fact that an issue, which falls within the jurisdiction of the Constitutional Court in accordance with the constitutional competencies, or within the jurisdiction of the European Court in accordance with the European Convention, may be raised simultaneously before both courts does not restrict and exclude the competencies of the Constitutional Court referred to in the mentioned provision of the Constitution of BiH, given that the protection of human rights must be primarily secured at the national level.

42. The National Assembly notes that the respective request should be rejected as premature given that the decision-making on it would prejudge the implementation of the decision of the European Court in the case of *Sejdić and Finci* and the outcome of the constitutional and legal reform of the Constitution of BiH which is in progress. The Constitutional Court does not accept this objection. Namely, the Constitutional Court indicates that the subject of “the dispute” before the European Court were the provisions of the Constitution of BiH on the election of the Members of the Presidency of BiH and the Delegates to the House of Peoples of the Parliamentary Assembly of BiH. The respective request raises the issue of compatibility of the provisions of the Entities’ Constitutions and of the Election Law on the election of the President and Vice-Presidents of the Entities with the Constitution of BiH and the international documents applicable in BiH. The Constitution of BiH does not contain a single provision whatsoever regulating the election to the mentioned offices. As the applicant has referred to Article II(4) which, according to Article X(2) of the Constitution of BiH, may not be amended in any case, the Constitutional Court holds that there is no obstacle for considering the compatibility of the challenged provisions with the Constitution of BiH, that is Article II(4) of the Constitution of BiH.

43. In that respect, the possible amendments to the Constitution of BiH in the wake of the implementation of the decision in the case of *Sejdić and Finci* in no way limit or prevent the Constitutional Court from considering the respective request and the compatibility of the challenged provisions with the Constitution of BiH, in particular with Article II(4), which, according to Article X(2) of the Constitution of BiH, may not be amended in any case.

44. Furthermore, the National Assembly holds that the respective request raises the identical issue on which the Constitutional Court has already decided in the decision no. *AP-2678/06* cited above. The Constitutional Court does not accept this objection. In the mentioned case the Constitutional Court examined the *restriction* imposed in relation to the standing for election of *the constituent peoples to the office of the Members of the Presidency of BiH*, considering their national/ethnic affiliation and the Entity they come from, which was established by the Election Law consistent with the solutions set forth in Article V of the Constitution of BiH. However, the respective request raises the issue of *the exclusion of "Others" from the running for office of the President and Vice-Presidents of the Entities*, as established by the challenged provisions of the Entities' Constitutions and, as such, in line with the Election Law.

45. The National Assembly points out that the challenged provisions of the Constitutions of the Entities are the result of the implementation of the Third Partial Decision no. *U-5/98* (see, the Constitutional Court, Partial Decision no. *U-5/98 III* of 1 July 2000, published in the *Official Gazette of BiH*, 23/00), so by reviewing it the Constitutional Court would enter into the review of its own decision. The Constitutional Court does not accept this objection. Namely, it is indisputable that the challenged provisions of the Entities' Constitutions and the Election Law arose from the implementation of the Third Partial Decision no. *U-5/98*, which promoted the constitutional principle of equality of the three constituent peoples throughout BiH, and, in that respect, the distribution of public offices among the constituent peoples. However, the Third Partial Decision no. *U-5/98* did not address the rights of "Others", and the respective request raises precisely the issue of participation of "Others" in the distribution of the public offices thereby ensuring the guarantees under Article II(4) of the Constitution of BiH. Besides, the respective request must be considered also in connection with the changes that have followed after the adoption of the Decision no. *U-5/98*, first and foremost, that BiH has become a full-fledged member of the Council of Europe, that it has ratified the European Convention and Protocols thereto, and that it has ratified Protocol No. 12 which introduces the general prohibition of discrimination.

46. Furthermore, the National Assembly holds that the challenged provisions were imposed as constitutional solutions by the decision of the High Representative, and that by reviewing them the Constitutional Court would, considering the allegations made in the request for review of the compatibility with the European Convention and the International Convention on the Elimination of All Forms of Racial Discrimination, enter into reviewing the compatibility of the decisions of the High Representative with the international documents. The Constitutional Court does not accept the

mentioned objection. Namely, as already stated in this decision, the respective request raises the issue of compatibility of the challenged provisions with Article II(4) of the Constitution of BiH. The Constitutional Court recalls that where the High Representative intervenes in the legal system of Bosnia and Herzegovina, substituting the domestic authorities, they act as an authority of Bosnia and Herzegovina, and the laws they enact have the nature of domestic laws, and must, therefore, be considered the laws of Bosnia and Herzegovina, which conformity with the Constitution of Bosnia and Herzegovina is subject to the control by the Constitutional Court (see the Constitutional Court, Decision no. *U 9/00* of 3 November 2000, published in the *Official Gazette of BiH*, 1/01, Decision no. *U 16/00* of 2 February 2001, published in the *Official Gazette of BiH*, 13/01 and Decision no. *U 25/00* of 23 March 2001, published in the *Official Gazette of BiH*, 17/01).

47. The National Assembly points out that the challenged provisions of the Entities' Constitutions and the Election Law are in conformity with the Constitution of BiH, which is in force and, if the request were granted, an issue of compatibility of the Entities' Constitutions with the Constitution of BiH would be raised, whereby the legal system of BiH as well as its state and legal organization in their entirety would be called into question. The Constitutional Court does not accept the mentioned objection. Namely, it is indisputable that the challenged provisions of the Entities' Constitutions and the Election Law reflect the identical principle as the provisions of the Constitution of BiH (*Article V of the Presidency of BiH*), which, just as the challenged provisions, exclude the possibility for "others" to stand for election to one of the mentioned offices. In addition, it is indisputable that the Constitutional Court, in its case-law, decided the request relating to the issue of compatibility of the provisions of the Constitution of BiH with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention (*U-5/04*). The Constitutional Court concluded that that did not concern "the dispute arising under this Constitution" within the meaning of Article VI(3) of the Constitution of BiH, but a possible conflict between the national and the international law, that is to say that the rights referred to in the European Convention cannot have a superior status in relation to the Constitution of BiH, given the fact that the European Convention entered into force on the basis of the Constitution of BiH. Also it is indisputable that the Constitutional Court decided the request raising the issue of compatibility of the provisions of the Election Law (the exclusion of the possibility for "Others" to run for office of the Members of the Presidency of BiH) on the standing for election as Members of the Presidency of BiH with Article 3 of Protocol No. 1 to the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 2(1)(c) and Article 5(1)(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (*U-13/04*). As the challenged provision of

the Election Law is based on Article V of the Constitution of Bosnia and Herzegovina, the Constitutional Court took a stance that, by entering into the merits of the request, it would engage in reviewing the compatibility of the provisions of the Constitution of Bosnia and Herzegovina with the provisions of the European Convention and the International Convention on the Elimination of All Forms of Racial Discrimination.

48. However, the respective request challenged the provisions of the Entities' Constitutions, and not of the Constitution of BiH, as was the case in the case no. *U-5/04*, that is to say the challenged provisions are not identical to any provision of the Constitution of BiH, as was the case in the case no. *U-13/05*. The Constitutional Court recalls that in accordance with Article VI(3)(a) of the Constitution of BiH it has exclusive jurisdiction to decide whether any provision of an Entity's Constitution or law is consistent with *this Constitution*. Thereby, in interpreting the term *this Constitution and the obligation of the Constitutional Court to uphold this Constitution*, one must take into account 15 international human rights agreements referred to in Annex I to the Constitution of BiH, which are directly applied in BiH, and the position that the rights referred to in the European Convention and the Protocols thereto occupy in the constitutional order of the state. Namely, the rights set forth in the European Convention and the Protocols thereto not only are directly applied in BiH, but, in accordance with Article II(2) of the Constitution of BiH, have priority over all other law. Finally, in accordance with Article II(4) of the Constitution of BiH, the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The significance of Article II of the Constitution of BiH regulating human rights and freedoms is determined by Article X(2) of the Constitution of BiH according to which *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*. To that end the terms *this Constitution and the obligation of the Constitutional Court to uphold this Constitution* in the area of the exercise and protection of human rights and freedoms guaranteed by the Constitution imply first and foremost Article II of the Constitution of BiH in its true meaning, in the interpretation of which the Constitutional Court may not eliminate or diminish rights and freedoms guaranteed by this article. Also, the fact that this concerns not only rights and freedoms specifically enumerated in the mentioned provision of the Constitution of BiH, but also the rights and freedoms contained in the international documents, does not diminish the character of Article II as the provision of the

Constitution of BiH, which includes *this Constitution and the obligation of the Constitutional Court to uphold this Constitution*. Besides, the Constitutional Court recalls that it took the following position in the Third Partial Decision no. U-5/98 “(...) it cannot be concluded that the Constitution of BiH provides for a general institutional model, which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level, that need not meet the overall binding standard of non-discrimination in accordance with Article II(4) of the Constitution of BiH (...)”. Accordingly, the fact that the challenged provisions of the Entities’ Constitutions and the Election Law reflect the principle identical to that contained in Article V of the Constitution of BiH does not prevent the Constitutional Court from reviewing the challenged provisions in relation to *the overall binding standard of non-discrimination of the Constitution of BiH under Article II(4) of the Constitution of BiH*.

49. The Constitutional Court will consider the alleged violation of Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention, since, according to the allegations of the applicant, “Others” are denied the right to run for office of the President and Vice-Presidents of the Entities solely on the ground that they are not members of one of the constituent peoples.

50. Article 14 of the European Convention reads as follows:

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.

51. Article 3 of Protocol No. 1 to the European Convention reads as follows:

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.

52. The Constitutional Court recalls that Article 14 of the European Convention is applicable to the cases in which there is a differential treatment based on prohibited grounds of a person or group of persons in a similar situation in respect of a right under the European Convention and its Protocols, where there is not an objective or reasonable justification for such treatment. Therefore, in order for Article 14 to be applicable, a rule, act or omission must fall within the ambit of a

substantive right under the European Convention. The applicant holds that the challenged provisions fall under the scope of Article 3 of Protocol No. 1 to the European Convention.

53. The Constitutional Court notes that the European Court, in case of *Boskoski v. the former Yugoslav Republic of Macedonia* (see, ECtHR, *Boskoski v. the former Yugoslav Republic of Macedonia*, Application no. 11676/04 of 2 September 2004) noted as follows: “The Court reiterates that Article 3 of Protocol No. 1 guarantees the “choice of the legislature” and that the word “legislature” does not necessarily mean the national parliament. That word has to be interpreted in the light of the constitutional structure of the State in question (see, *mutatis mutandis*, *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 23, § 53; and *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, § 40). In two earlier cases the Commission held that the powers of the Head of the State could not as such be construed as a “legislature” within the meaning of Article 3 of Protocol No. 1 (see *Baskauskaitė v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998; and *Habsburg-Lothringen v. Austria*, no. 15344/89, Commission decision of 14 December 1989, Decisions and Reports 64, p. 211). The Court does not exclude, however, the possibility of applying Article 3 of Protocol No. 1 to presidential elections. It reiterates that this provision enshrines a characteristic of an “effective political democracy”, for the ensuring of which regard must not solely be had to the strictly legislative powers which a body has, but also to that body's role in the overall legislative process (see the *Matthews v. the United Kingdom* judgment cited above, §§ 42 and 49). Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a “legislature” within the meaning of Article 3 of Protocol No 1.”

54. Turning to the instant case, the Constitutional Court notes that according to the relevant provisions of the Constitution of the Republika Srpska, the President of the Republika Srpska may refuse the promulgation of the law adopted by the National Assembly as a basic body passing laws, and may request the National Assembly to vote again on the law. However, the President of the Republic is bound to promulgate the law passed for the second time by the National Assembly. Moreover, in a state of war or emergency declared by the institutions of Bosnia and Herzegovina, and if the National Assembly is unable to convene, the President of the Republic, upon the proposal of the Government or on his/her own initiative, having consulted the President of the National Assembly, will issue decrees with the force of law regarding matters in the jurisdiction of the National Assembly, and will appoint and recall those officials who are normally appointed and

recalled by the National Assembly. The President of the Republic will submit these decrees with the force of law, and the decisions of appointments and recalls, to be voted by the National Assembly as soon as it is able to convene. Furthermore, in a state of war or in a state of emergency, the President of the Republic, if the National Assembly is unable to convene, may pass extraordinary legal acts, which will be valid only for the duration of such a state and will suspend certain provisions of the Constitution related to the passing of laws, except for those relating to certain freedoms and rights. Therefore, the aforementioned applies exclusively in special circumstances (the state of war and emergency). Furthermore, the President of the Government of the Republika Srpska and its members are appointed by the majority of votes of delegates in the National Assembly. If the President of the Republic assesses that a crisis has arisen in the functioning of the Government, he may request, upon the initiative of at least 20 deputies and upon hearing the opinion of the President of the National Assembly and the President of the Government, the resignation of the President of the Government. Should the President of the Government refuse to resign, the President of the Republic may dismiss him.

55. Furthermore, the Constitutional Court notes that according to the relevant provisions of the Constitution of the Federation of Bosnia and Herzegovina, when the President of the Federation of BiH determines that the houses as basic legislatures are unable to enact necessary legislation, he may with the concurrence of the Vice-President of the Federation of BiH dissolve either of each house, provided that a house may not be dissolved within of one year of being first convened. The President of the Federation of BiH will have the exclusive authorization to dissolve both houses when they fail to adopt the budget of the Federation of BiH before the start of the budgetary period. Furthermore, the President of the Federation of BiH in agreement with both Vice-Presidents of the Federation will appoint the Government of the Federation, as a basic legislature, upon consultation with the Prime Minister or a nominee for that function. The Government will be elected after its appointment has been confirmed by a majority vote of the House of Representatives of the Federation. If it does not confirm the appointment of the Government, the entire procedure must be repeated. Furthermore, the President of the Federation with the concurrence of the Vice-President may remove the Government of the Federation of BiH or by a vote of no confidence adopted by a majority in each house of the Parliament of the Federation of BiH.

56. The Constitutional Court holds that the aforementioned analysis does not indicate that the President of the Republika Srpska and President of the Federation of BiH have powers to initiate or adopt laws or that they have more extensive powers to control the adoption of laws or powers to

control basic legislative bodies in order to hold that there is a “legislature” within the meaning of Article 3 of Protocol No. 1. Taking into account the aforesaid, the request in question does not raise an issue under Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention. In this respect, the Constitutional Court dismisses this part of the request as ill-founded.

57. Furthermore, it follows from the applicant’s allegations that the challenged provisions of the Entities’ Constitutions and the Election Law introduced discrimination against “Others” with respect to their exercising the right to stand for election and to be possibly elected, being the right guaranteed by law. “Others” are denied the right to run for office of the President and Vice-Presidents of the Entities solely on the ground that they are not members of one of the constituent peoples. The aforesaid, according to the applicant’s allegations, runs counter to Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

58. **Article II(4) of the Constitution of BiH**, as relevant, reads:

Article II(4)

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

59. **Article 1 of Protocol No. 12** to the European Convention reads:

Article 1

General prohibition of discrimination

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.

60. **The Election Law of Bosnia and Herzegovina**, as relevant, reads:

Article 1.4

(1) Each citizen of Bosnia and Herzegovina (hereinafter: the citizen of BiH) who has reached the age of eighteen (18) shall have the right to vote and stand for election (hereinafter: the voting right) pursuant to this Law.

61. The Constitutional Court recalls that the right to vote and to stand for election makes up the basis of an effective political democracy. The states enjoy a broad margin of appreciation in establishing and regulating the election system to be applied. There are numerous and various ways of organizing and carrying out elections. This difference is conditioned upon the historical development, cultural diversity and the development of political thought in the state. Therefore, the legislation regulating the elections must be considered in the light of the political evolution of the country concerned, as the features which are unacceptable in the context of one system may be acceptable at a given time within the context of another. In that context, the states are free to choose the purpose on account of which they will impose restrictions on the rights to vote and to stand for election. However, this freedom is restricted by an obligation that the purpose of the restriction must be in keeping with the principle of the rule of law and justified by specific circumstances (see, the European Court, *Sitaropoulos and Giakoumopoulos v. Greece*, Judgment of 15 March 2012 (paragraphs 63 through 68). Finally, one of the factors in assessing a broad margin of appreciation which the states enjoy in this area is whether or not other ways and means exist for one to achieve the same goal (see, the European Court, *Glor v. Switzerland*, Application no. 13444/04, Judgment of 30 April 2009, paragraph 94).

62. The Constitutional Court points out that the Election Law in Article 1.4 guarantees to all the citizens of BiH who have reached the age of 18 the right to vote and to stand for election. In that respect this concerns the right guaranteed by law within the meaning of Article 1 of Protocol No. 12 which enjoyment must be secured without discrimination on any ground and regarding which the public authorities must not discriminate against anyone.

63. Furthermore, the Constitutional Court points out that regarding the interpretation of the notion of discrimination, in terms of Article 1 of Protocol No. 12, in the Decision of *Sejdić and Finci* (paragraph 55) the European Court stated: “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 similar situations (see paragraphs 42-44 above and the authorities cited therein). 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 (see the Explanatory Report to Protocol No. 12, § 18). 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 (as regards the case-law of the UN 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 Nowak, CCPR Commentary, N.P. Engel Publishers, 2005, pp. 597-634)".

64. In view of the aforementioned, the Constitutional Court must answer the question whether the challenged provisions, which make it impossible for "Others" to exercise their right to stand for election as candidates and to be possibly elected to the office of the President and Vice-Presidents, because they do not come from among the constituent peoples, establish the differential treatment without objective and reasonable justification against the persons who are in a similar position.

65. The Constitutional Court observes that Article 1.4 of the Election Law guarantees the right to vote and to stand for election to all the citizens of BiH. Article 3 of the Law on Citizenship stipulates that all citizens of BiH enjoy the same human rights and fundamental freedoms as laid down in the Constitution of BiH and enjoy the protection of these rights throughout BiH, under the same conditions. On the basis of the mentioned provisions it follows indisputably that the notion of the citizens of BiH, which guarantees the rights to vote and to stand for election in terms of Article 1.4 of the Election Law, implies constituent peoples and "Others". In that respect, the challenged provisions of the Entities' Constitutions and the Election Law, which exclude the possibility for "Others" as citizens of BiH to run for office of the President and Vice-Presidents of the Entities, guaranteeing that possibility exclusively to the constituent peoples as the citizens of BiH, establish the differential treatment "between the persons who are in a similar (or the same) position", based on ethnic origin.

66. The next question to be answered is whether the differential treatment was established without objective and reasonable justification. In that respect, the Constitutional Court points out that the European Court in the case of *Sejdić and Finci* (paragraphs 43 and 44) took a position which may be summarized as follows: "discrimination on account of a person's ethnic origin is a form of racial discrimination, which is a particularly egregious kind of discrimination and, in view

of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII, and *Timishev*, cited above, § 56). In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *D.H. and Others*, cited above, § 196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*ibid.*, § 176)". Finally, the Constitutional Court indicates that the European Court of Human Rights was guided by the same principles contained in the judgment *Azra Zornić v. Bosnia and Herzegovina*, where it examined the case of inability of the person concerned to stand as candidate for the office of the member of the Presidency of BiH or delegate in the House of Peoples as she has not declared her affiliation with any constituent people or any ethnic group (Application no. 3681/06, judgment of 15 July 2014).

67. The Constitutional Court recalls that the distribution of positions in the state bodies among the constituent peoples was the central element of the Dayton Agreement in order to secure peace in BiH. In that context it is hard to deny the legitimacy of norms that may be problematic from the point of view of non-discrimination, but which were necessary in order to secure peace and stability and to avoid further loss of human lives. The challenged provisions of the Entities' Constitutions and the Election Law on the distribution of the offices of the President and Vice-Presidents of the Entities among the constituent peoples, although built into the Entities' Constitutions in the process of the implementation of the Third Partial Decision no. U 5/98 serve the same goal. In that respect, the Constitutional Court observes that the legitimacy of the goal, which was reflected in securing the peace, was not called into question by the European Court in the light of the European Convention (see, *Sejdić and Finci*, paragraph 46).

68. However, this justification must be considered in connection with the development of events in Bosnia and Herzegovina following the Dayton Agreement. In that regard, the Constitutional Court points out that the European Court pointed out the following in the case of *Sejdić and Finci* (see, paragraph 47): "(...) the Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement. It is true that progress might not always have been consistent and challenges remain (see, for example, the latest progress report on Bosnia and

Herzegovina as a potential candidate for EU membership prepared by the European Commission and published on 14 October 2009, SEC/2009/1338). 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 Bosnia and Herzegovina joined NATO's Partnership for Peace; in 2008 it signed and ratified a Stabilization 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 (see a report by Mr Javier Solana, EU High Representative for the Community and Common Foreign and Security Policy, and Mr Olli Rehn, EU 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)". Also, the European Court pointed out the following as well (see, paragraph 49): "(...) 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" (see paragraph 21 above). Likewise, by ratifying a Stabilization 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 on Human Rights and the Council of Europe post-accession commitments" within one to two years (see paragraph 25 above)".

69. The Constitutional Court points out that it is undisputed that a positive progress has been made in the development of BiH as a democratic state and in the democratic institutions achieved on the basis of the functioning of the system of power-sharing, which excluded the members of "Others" in accessing a number of public offices, as regulated by the challenged provisions. It is indisputable that such a system has a justification in the legitimate goal reflected in the preservation of peace, which is a value in the service of the society as a whole. It is in the service of the establishment and preservation of security and stability, as a precondition for the preservation of the

progress achieved and of the further development and the building of the society and the building of trust between the former conflicting parties. In this respect, the Constitutional Court indicates that the European Court, while noting the progress made following the signing of the Dayton Agreement, pointed out the following (see, paragraph 48): “(...) *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 stance of the Venice Commission supports the aforementioned, which was imparted in the Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, which stated as follows: “*Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the [European Convention on Human Rights] and Protocol No. 12 [thereto]. As set forth above, the situation in Bosnia and Herzegovina has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups (...)*”.

70. In view of the aforementioned, the next question to be answered is whether the only way to achieve the legitimate goal determined in such a way is by imposing restrictions as in the challenged provisions with respect to a certain group regarding the exercise of the right established under the law, which is guaranteed to everyone without discrimination.

71. The Constitutional Court recalls that, in accordance with Article I(2) of the Constitution of BiH, Bosnia and Herzegovina is defined as a democratic state operating under the rule of law and with free and democratic elections. In accordance with Article II(1) of the Constitution of BiH, Bosnia and Herzegovina and both Entities will ensure the highest level of internationally recognized human rights and fundamental freedoms. Besides, in accordance with Article II(4) of the Constitution of BiH, rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. These provisions suggest the establishment of the principle of a democratic state, the rule of law and free elections, which will have that same specific significance as in the developed democratic countries with a long-standing practice of the establishment thereof. The legitimate goal which is reflected in the preservation of peace for a country after the war represents the permanent value which the society as a whole must be

dedicated to, which significance cannot be diminished by the lapse of time and the progress made in the democratic development. In that respect the Constitutional Court cannot accept that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples, as regulated by the challenged provisions, and which serves the legitimate goal of the preservation of peace, can be abandoned and replaced by a political system reflecting the rule of majority. However, the question that arises is whether the only way to achieve the legitimate goal and preserve peace is still the exclusion of “Others” from standing for election as candidates for, particularly, the office of the President and Vice-Presidents of the Entities. When one considers, on the one hand, the principles of the rule of law, the standards of human rights and the obligation of non-discrimination in their enjoyment and protection, the positive development made by BiH ever since the signing of the Dayton Agreement, the international obligations it assumed also in the area of exercising and protecting human rights, and the clear commitment to the further democratic development, the exclusion of “Others” from exercising one of the human rights which constitutes the foundation of a democratic society can no longer represent the only way in which to achieve the legitimate goal reflected in the preservation of peace. Particularly so when one bears in mind that such an exclusion was established expressly on ethnic affiliation, which cannot be objectively justified in the contemporary democratic societies built on the principles of pluralism and respect for different cultures, which BiH society is and which it aspires to. The Preamble of the Constitution of BiH, according to which the Constitution of BiH is based on respect for human dignity, liberty, and equality, and it indicates that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society, is also suggestive of this conclusion.

72. In view of the positions presented in the foregoing text of the decision, the Constitutional Court concludes that the provisions of Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law are in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention. In this respect, the Constitutional Court emphasizes that the exclusion of the possibility for the members of “Others” who are, as well as the constituent peoples, citizens of BiH who are guaranteed by law the right to stand for election without discrimination and restrictions in running for office of the President and Vice-Presidents of the

Entities, no longer represents the only way to achieve the legitimate goal, which is the reason why it cannot have a reasonable and objective justification. Namely, in exercising the right guaranteed by law, the mentioned provisions of the Entities' Constitutions and the Election Law establish the differential treatment of "Others" which is based on ethnic affiliation and result in the discrimination in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

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

74. However, it is impossible to foresee the scope of those changes in this moment. The Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases.

75. The Constitutional Court concludes that the challenged provisions of Articles 9.15, 12.1 and 12.2 of the Election Law are in conformity with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention. Namely, the Constitutional Court observes that these provisions, although in the service of the regulation of the election process of the President and Vice-Presidents of the Entities, do not *per se* restrict and exclude the members of "Others" from exercising their right to stand for election, being the right guaranteed by law, which would result in

the discrimination contrary to Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

Other allegations

76. Given the conclusion in respect of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention, the Court holds that there is no need to examine separately the applicant's allegations about the violation of Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26.

VIII. Conclusion

77. The Constitutional Court concludes that the provisions of Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (item 5 of the Amendment XL as amended by item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law are in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

78. The Constitutional Court concludes that the challenged provisions of Articles 9.15, 12.1 and 12.2 of the Election Law are in conformity with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

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

80. Pursuant to Article 43 of the Rules of the Constitutional Court, a Joint Partly Dissenting Opinion of President Valerija Galić, Vice-President Miodrag Simović, and Judges Mato Tadić and Zlatko M. Knežević has been annexed to the present decision (concerning the part of the decision granting the request).

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

JOINT PARTLY DISSENTING OPINION OF PRESIDENT VALERIJA GALIĆ, VICE-PRESIDENT MIODRAG SIMOVIĆ AND JUDGES MATO TADIĆ AND ZLATKO M. KNEŽEVIĆ

We are unable to agree with the decision granting the request, for the following reasons:

1. The request for review of the constitutionality of the challenged provisions of the Constitution of the Federation of BiH and of the Constitution of the Republika Srpska and of the challenged provisions of the Election Law of Bosnia and Herzegovina is essentially based on the Decision of the European Court of Human Rights in the case of *Sejdić and Finci*.
2. Without contesting the Decision of the European Court of Human Rights, we are of the opinion that, in assessing the constitutionality of the challenged provisions of the Entities' Constitutions and the Election Law of BiH, the starting point should be that the Constitutional Court of BiH is a national court and that its primary task is *to uphold this Constitution*, as stipulated by Article VI(3) of the Constitution of BiH, unlike the European Court of Human Rights, which has the task to monitor whether the Member States of the Council of Europe meet their obligations under the European Convention. The Constitution of BiH contains neither provisions nor principles relating to the election of a president or vice-president of an Entity, but it contains the provisions relating to the election of Members of the Presidency of BiH and the provisions governing the composition of the Presidency of BiH in an identical manner as regulated by the Entities' Constitutions. In such a situation, we are certain that this request will be premature as long as the Decision of the European Court of Human Rights in the case of *Sejdić and Finci* is not implemented. It is undisputed that it unambiguously ensues from the *Sejdić and Finci* Decision that the Constitution of BiH ought to be amended. Only after amending the Constitution of BiH in accordance with the said Decision, can the constitutionality of the challenged provisions be assessed. Accordingly, we are of the opinion that in order for the Constitutional Court not to turn into a framer of the constitution, *i.e.* a legislator, substituting it in the true sense of the word, the Constitutional Court cannot intervene in a case where the framer of the constitution, *i.e.* the legislator failed to regulate a social relationship that is, in the present case, where it failed to implement the *Sejdić and Finci* Decision.
3. In addition, in a number of its decisions the Constitutional Court has taken the position that it is not a constitution maker and that its role is to *uphold this Constitution* and that it may not amend the Constitution regardless of certain contradictions in the constitutional arrangements and of contradictions between the Constitution of BiH and the European Convention.
4. Furthermore, the European Convention is not above the Constitution of BiH, since the European Convention has a constitutional status based on the Constitution of BiH, as already stated in a number of the decisions of the Constitutional Court.
5. The present constitutional structure and challenged arrangements contained in the Entities' Constitutions fit well into the general institutional system of the Entities, which is actually a consequence of the implementation of the Decision of the Constitutional Court no. U 5/98 (Decision on Constitutionality) and of amendments imposed to the Entities' Constitutions by the High Representative for BiH and now, given that no provision of the Constitution of

BiH has been amended, the Constitutional Court of BiH is actually changing its Decision on Constitutionality.

6. In view of the above, we hold that the present request should have been declared premature and, in case that the Entities' Constitutions, after the implementation of the *Sejdić and Finci* Decision, remain not harmonised in this part, the Constitutional Court ought to reserve the right *ex officio* to continue the proceedings for review of the constitutionality.