The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 42 (5), Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on the requests of Messrs. **Željko Komšić, Member of the Presidency of Bosnia and Herzegovina and Šefik Džaferović, Member of the Presidency of Bosnia and Herzegovina, at the time of filing the request,** in the case no. **U-27/22**, at its session held on 23 March 2023, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

Deciding on the requests filed by Messrs. **Željko Komšić, Member of the Presidency of Bosnia and Herzegovina and Šefik Džaferović, Member of the Presidency of Bosnia and Herzegovina**, **at the time of filing the request**, for review of the constitutionality of the Amendments to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, 79/22 and 80/22) and the Law on Amendments to the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 67/22),

it is hereby established that the Amendments to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, 79/22 and 80/22) and the Law on Amendments to the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 67/22) are compatible with Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights.

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 11 October 2022, Mr. Željko Komišić, a Member of the Presidency of Bosnia and Herzegovina ("applicant Komšić"), lodged a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of the Amendments to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, 79/22 and 80/22, "the Amendments"), nos. CXI, CXII, CXX, CXXI, CXXVIII and Articles 1 to 5 of the Law on Amendments to the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 67/22, "the Amendments to the Election Law"), with the Constitution of BiH. The Amendments and the Amendments to the Election Law were imposed by Decisions nos. 06/22 and 07/22 of 2 October 2022, which were passed by the High Representative for Bosnia and Herzegovina ("the High Representative"). The aforementioned request was registered under number *U-27/22*.

2. Pursuant to Article 64 of the Rules of the Constitutional Court, the applicant also filed a request for an interim measure by which the Constitutional Court would a) suspend the implementation of the election results and b) suspend the execution of the challenged provisions pending a final decision of the Constitutional Court on the request.

3. On 26 October 2022, Mr. Šefik Džaferović, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing the request ("applicant Džaferović"), lodged a request with the Constitutional Court for review of the compatibility of the Amendments nos. CX to CXXX and the Amendments to the Election Law with the Constitution of BiH. The aforementioned request was registered under number *U-30/22*.

4. In addition, pursuant to Article 64 of the Rules of the Constitutional Court, applicant Džaferović also submitted a request for an interim measure by which the Constitutional Court

would "suspend the application of the challenged provisions pending a final decision of the Constitutional Court on the request."

II. Procedure before the Constitutional Court

5. In the Decision on interim measure no. *U-27/22* of 1 and 2 December 2022 (available at www.ustavnisud.ba), the Constitutional Court dismissed the requests for the adoption of interim measures.

6. The Constitutional Court, pursuant to Article 32(1) of the Rules of the Constitutional Court, took a decision on the joinder of the aforementioned requests in respect of which the Constitutional Court would conduct one set of proceedings and take a single decision on interim measure under number *U-27/22*.

7. Based on Article 23, paragraph 2 of the Rules of the Constitutional Court, on 13 October 2022, the Office of the High Representative was requested to submit a response to the request within 30 days from the date of receiving the letter.

8. In response, the Office of the High Representative has stated that due to its status in terms of Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina ("the General Framework Agreement"), it cannot be a participant in proceedings before the judicial institutions of Bosnia and Herzegovina, but if the Constitutional Court decides, it will submit its observations in a capacity of *amicus curiae*.

9. On 21 October and 9 November 2022, the Constitutional Court invited the Office of the High Representative as the author of the impugned acts, to submit its observations on the requests, if it deemed it necessary.

10. On 8 and 23 November 2022, the Office of the High Representative submitted its observations on the requests.

11. On 9 December 2022, the observations were forwarded to the applicants, as information.

Introductory notes

12. The Constitution of the Federation of Bosnia and Herzegovina was adopted by the Constituent Assembly of the Federation of Bosnia and Herzegovina, at the session held on 30 March 1994. The Constitution of the Federation of Bosnia and Herzegovina was published in the *Official Gazette of the Federation of Bosnia and Herzegovina*, 1/94. The relevant provisions that related to the election of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina ("the FBiH House of Peoples") and the President and Vice Presidents of the Federation of Bosnia and Herzegovina are set forth in the relevant regulations.

13. In the Third Partial Decision in Case no. *U-5/98* of 30 June and 1 July 2000 (*Official Gazette of Bosnia and Herzegovina*, 23/00, of 14 September 2000, Decision on the Constituent Status of Peoples), the Constitutional Court declared unconstitutional, *inter alia*, the provision of Article I.1 (1) as to the wording "Bosniacs and Croats as constituent peoples, along with Others, and" as well as "in the exercise of their sovereign rights", as modified by Amendment III. In terms of the mentioned decision, which established the necessity of implementing the principle of the constituent status of the Peoples throughout Bosnia and Herzegovina, it appeared necessary, *inter alia*, to regulate differently the composition and method of election of the House of Peoples of the FBiH Parliament, and the President and Vice-Presidents of the FBiH.

14. Through the mediation of the High Representative, on 27 March 2002, the political parties (apart from the Stranka Demokratske Akcije (*Party of Democratic Action*) and the Hrvatska Demokratska Zajednica (Croatian Democratic Union) reached an Agreement on various key elements necessary for the implementation of the third partial Decision of the Constitutional Court. The then High Representative determined that the time limit for the implementation of the third partial Decision of the Constitutional Court in accordance with the mentioned Agreement would be 18 April 2002. However, the necessary changes were not made within that time limit.

15. On 19 April 2002, the High Representative passed Decision no. 149/02 amending the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 16/02). In passing the decision, the need to hold democratic elections in Bosnia and Herzegovina, which were planned for 5 October 2002, was emphasized. The election of the President and Vice-Presidents of the FBiH, as well as the composition of the FBiH House of Peoples and the election of the members thereof was changed by Amendments no. XXXIII,

XXXIV, XLI, XLII and LI of the FBiH Constitution (see relevant regulations). The aforementioned amendments had remained in force until the contested amendments were passed.

16. With a view to harmonizing the Election Law of Bosnia and Herzegovina ("the Election Law") with the mentioned amendments to the FBiH Constitution, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on Amendments to the Election Law (*Official Gazette of Bosnia and Herzegovina*, 20/02, of 3 August 2002). In addition, it adopted the Correction to the Law on Amendments to the Election Law (*Official Gazette of Bosnia and Herzegovina,* 25/02, of 10 September 2002), which introduced new rules for the election of delegates to the FBiH House of Peoples.

17. After the general elections in Bosnia and Herzegovina that were held on 3 October 2010, the Cantonal Assemblies of Posavina Canton, West Herzegovina Canton and Canton 10 did not elect the delegates to the FBiH House of Peoples for more than five months. The delegates, who had been elected until then, constituted the FBiH House of Peoples, and elected the FBiH President and Vice-President. The decisions of the Central Election Commission of Bosnia and Herzegovina ("the CEC") of 24 March 2011 determined that the elections for the FBiH House of Peoples were not conducted in all ten cantons in accordance with the provisions of the Election Law, and that the conditions for the constitution thereof were not met. In addition, it was established that the election of the FBiH President and Vice-Presidents, which was carried out by the Decision of both Houses of the FBiH Parliament, was not carried out in accordance with the Election Law, and the election of the FBiH President and Vice-Presidents was annulled. The High Representative issued an Order, temporarily suspending the aforementioned decisions of the CEC of 24 March 2011, as well as any proceedings concerning the aforementioned decisions.

18. In Decision on Admissibility and Merits *U-14/12* of 26 March 2015 (*Official Gazette of Bosnia and Herzegovina*, 38/15, available at www.ustavnisud.ba), the Constitutional Court partially granted the request of applicant Komšić, who challenged the provisions on the election of the President and Vice-Presidents of the FBiH and the RS. In the mentioned decision, *inter alia*, it was established that the provisions of Article IV.B.1 Article 1, paragraph 2 (amended by Amendment XLI) and Article IV.B. 1 Article 2, paragraphs 1 and 2 (amended by Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina as well as Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law were 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 European Convention"). In the reasoning of that decision, the Constitutional Court noted that it unambiguously followed from the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. BiH* that the Constitution of BiH should be amended (judgment of 22 December 2009, Applications no. 27996/06 and 34836/06). In addition, it was pointed out that the European Court of Human Rights, in the case of *Zornić v. Bosnia and Herzegovina* (Judgment of 15 July 2014, Application no. 3681/06, paragraph 40), stated that the finding of a violation in that case was a direct consequence of the failure of the authorities of Bosnia and Herzegovina to introduce measures to ensure compliance with the judgment in the case of *Sejdić and Finci* (*idem*, paragraph 73). However, the Constitutional Court also pointed out that, at that moment, it was impossible to foresee the scope of those changes. Therefore, the Constitutional Court decided that it would not quash the mentioned provisions of the Constitutions of the Entities and the Election Law. It decided it would not order the Parliamentary Assembly of BiH, the National Assembly of the RS and the Parliament of FBiH to harmonize the mentioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the existing inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the aforementioned cases (*idem*, paragraph 74).

19. In Decision on Admissibility and Merits *U-23/14* of 1 December 2016 (*Official Gazette of Bosnia and Herzegovina*, 1/17, available at www.ustavnisud.ba), the Constitutional Court partly granted the request of Božo Ljubić, Chairman of the House of Representatives of the Parliamentary Assembly of BiH at the time of filing the request. In that decision, it was established that Article 10.12 of the Election Law (in the part stating that *each of the constituent peoples shall be allocated one seat in every canton*), and the provisions of Article 20.16A, paragraph 2, subparagraphs a-j of the Election Law (which prescribed that the number of delegates should be determined according to the 1991 census and that the number of delegates in the Cantons was determined), were not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina. The Constitutional Court reasoned as follows: *not only that the provisions ... are not based on the precisely clear criteria but they also imply that right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the*

House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates. The Constitutional Court finds that the mentioned is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina…(*idem*, paragraph 52).

20. In its Ruling *U-23/14* of 6 July 2017 (*Official Gazette of Bosnia and Herzegovina*, 54/17, available at www.ustavnisud.ba), the Constitutional Court established that the Parliamentary Assembly of Bosnia and Herzegovina failed to implement, within the given time limit, the Decision of the Constitutional Court *U-23/14* of 1 December 2016, and determined that the aforementioned provisions should cease to have effect on the date following the date of publication of the decision in the *Official Gazette*.

21. After that, on 7 October 2018, general elections were held in Bosnia and Herzegovina. After the elections, in December 2018, the CEC issued an Instruction Amending the Instruction on the Procedure for the Implementation of Indirect Elections for Authorities in Bosnia and Herzegovina under the BiH Election Law (*Official Gazette of Bosnia and Herzegovina,* 91/18 of 21 December 2018, "the 2018 Instruction"). In the 2018 Instruction, the preliminary number of delegates elected from cantonal assemblies to the House of Peoples of FBiH was determined. The CEC, taking into account the provisions of the FBiH Constitution, decided to elect at least one member of the constituent people from each canton. Although the 2018 Instruction did not state which population census was taken as the basis for determining the schedule of mandates in the cantons for filling the House of Peoples, it follows that the CEC was guided by the 2013 census.

22. The decision on the termination of proceedings *U-4/18* of 5 July 2019 (available at www.ustavnisud.ba), terminated the proceedings initiated by the request of Borjana Krišto, Chairman of the House of Representatives of the Parliamentary Assembly of BiH, for review of the constitutionality of the provisions of Article IV.A. 2.8, paragraph 3 of the FBiH Constitution as amended by Amendment XXXIV (*Official Gazette of the Federation of Bosnia and Herzegovina*, 1/94, 13/97, 16/02, 22/02, 52/02, 18/03, 63/03, 9 /04, 20/04, 33/04, 71/05, 72/05, 32/07 and 88/08), for the applicant withdrew her request.

23. In the Decisions on Admissibility *U-24/18* of 31 January 2019 and *U-3/19* of 28 March 2019 (available at www.ustavnisud.ba), the requests for review of the constitutionality of the 2018 Instruction were rejected as inadmissible, for the Constitutional Court of Bosnia and Herzegovina was not competent to take a decision.

24. After the general elections held on 7 October 2018, the legislative branch, *i.e.* the House of Representatives and the House of Peoples of the FBiH Parliament, was established in the Federation of BiH. However, a new executive branch was not established, i.e. the FBiH President and Vice-Presidents as well as the FBiH Government were not elected in the manner prescribed by the FBiH Constitution. In addition, the competent public authorities did not elect the judges of the FBiH Constitutional Court and, consequently, the Council for the Protection of Vital National Interest within that Court could not operate. Therefore, in the period between 2018 and 2022, the executive branch at the FBiH level was in charge in a caretaker function.

25. On several occasions, political parties conducted discussions about the establishment of government and amendments to the Constitution of BiH, with the aim of implementing the judgments of the European Court of Human Rights in the case of *Sejdić and Finci v. BiH* and other similar judgments. In addition, discussions were conducted in connection with the amendments to the FBiH Constitution and the Election Law, with a view to implementing the decisions of the Constitutional Court. However, those negotiations did not result in concrete constitutional and legislative changes.

26. On 27 July 2022, the High Representative imposed technical amendments to the Election Law, and gave political parties a time limit of six weeks to agree on amendments to the Election Law and the FBiH Constitution. The political parties did not reach such an agreement within the given time limit.

27. After the general elections held on 2 October 2022, immediately after the closing of the polling stations, the High Representative passed the Decision Enacting Amendments to the FBiH Constitution no. 06/22, and the Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina no. 07/22. As stated above, the aforementioned decisions were published in *Official Gazettes* and entered into force. The reasons for making the aforementioned decisions and their content are stated in the relevant regulations.

28. On 2 November 2022, the CEC passed the Decision on the confirmation and publication of the results of the 2022 general elections. After that, at the session of 4 November 2022, it issued the Instruction on the Procedure for the Implementation of Indirect Elections for Authorities in Bosnia and Herzegovina under the BiH Election Law (*Official Gazette of BiH*, 75/22, "the 2022 Instruction") and Criteria and procedure for filling the seats that cannot be filled in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (*Official Gazette of BiH*, 75/22).

III. Requests

1. Allegations in the request in case no. *U-27/22*

29. Applicant Komšić contends that Amendments CXI, CXII, CXX, CXXI, CXXVIII and Articles 1 to 5 of the Amendments to the Election Law, which were imposed by Decisions nos. 06/22 and 07/22 of 2 October 2022 of the High Representative, are inconsistent with the provisions of Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of Protocol No. 1 to the European Convention, Article 1 Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights.

a) Allegations as to the unconstitutionality of Amendments CXI and CXII and Articles 2, 3, 4, and 5 of the Amendments to the Election Law

30. The applicant challenges Amendments CXI and CXII and Articles 2, 3, 4, and 5 of the Amendments to the BiH Election Law, which relate to the increase in the number of delegates (80) in the FBiH House of Peoples, 23 from among each of the constituent peoples and 11 from among the Others, to be elected by the Cantonal Assemblies in proportion to the ethnic structure of the population. The applicant contends that the challenged provisions are inconsistent with Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

31. The applicant asserts that the challenged provisions put guarantees into practice that the "constituent" peoples are elected from the territories where they are the majority. In the

applicant's opinion, in this way, fully democratic processes are redirected from the struggle of political parties to win seats in the FBiH House of Representatives ("the FBiH House of Representatives"), to the election process in which the only thing that matters is securing a majority in the respective caucus in the FBiH House of Peoples. According to the applicant, this leads to the possibility that a political party does not have a single representative in the FBiH House of Representatives, but could win, within the cantonal assemblies, a sufficient number of mandates for the FBiH House of Peoples and manage political processes in the entire FBiH, and thus also at the state level. The applicant contends that, if the High Representative intended to protect possibly endangered members of the constituent peoples, then it would be logical that the majority of those representatives are elected from the areas where they are in a relatively "minority" position. Thus, through their position in the FBiH House of Peoples, they could protect their rights, which is actually the purpose of that body.

32. In addition, the applicant states that it is unacceptable in the Election Law to have a system based on the use of odd figures 1, 3, 5, 7, 9... (which is actually Sainte-Laguë method) in relation to the ethnic population in each canton, which creates a certain quotient of the value of each constitutive people and Others in each canton and, based on that, the number of mandates of the constituent peoples that are delegated from the cantonal assemblies is calculated. The ultimate consequence of such a calculation, as asserted by the applicant, is an unequal value of citizens at the individual level, because each of them would be treated through the quotient of the constituent people or group. In this way, the formation of the government focuses exclusively on the FBiH House of Peoples and winning the majority in the caucuses of the constituent peoples, while completely neglecting the role of minorities and citizens who, essentially, do not have any possibility to influence the formation of the government. The applicant contends that this created a situation where only ethnically based and organized political parties have a control package of seats in the FBiH House of Peoples. Thereby, they have the complete and open-ended displacement of civic-oriented political parties, and their complete political and social marginalization. The applicant also emphasizes that the FBiH Houses of Peoples are the principal obstacle to the realization of the democratic will of the citizens, which is achieved through majority decision-making in the representative bodies of the legislative branch. Moreover, the applicant contends that the decisions imposed further reinforce the role of the House of Peoples by increasing the number of representatives who are predominantly elected from territories where one people (ethnic group) already has a majority, whereby "ethnic divisions are cemented."

33. Furthermore, the applicant contends that the enactment of the Amendments to the FBiH Constitution and the Amendments to the Election Law, in itself, represents a gross violation of democratic procedures. Namely, the circumstance that the High Representative changed the valid rules after the elections, according to the applicant's understanding, led to the fact that voters at the time of voting were not aware of the High Representative's decision and could not even know what they were actually voting for. If they had known, it is very likely that the voters' will would have been completely different, as well as the messages that the political parties, participating in the elections, would have sent to their voters. Given the aforementioned, the applicant contends that the High Representative "deceived the voters", for he passed the Amendments to the FBiH Constitution and the Amendments to the Election Law "on the night of the elections." In this regard, the request refers to *Purcell v. Gonzalez* Judgment of the US Supreme Court, which established the so-called *Purcell principle* and reversed changes to election rules made just prior to the elections. The applicant highlights that, although this principle in the US context is applied mainly where the courts change the election rules by their decisions, this principle is *mutatis mutandis* applicable to any change in election rules immediately prior to the elections. In addition, the applicant refers to the case law of the European Court of Human Rights in cases *Paschalidis, Koutmeridis and Zaharakis v. Greece* (Judgment of 10 April 2008, Applications nos. 27863/05, 28422/05 and 28028/05), and *Ekoglasnost v. Bulgaria* (Judgment of 6 November 2012, Application no. 30386/05). The European Court of Human Rights took the position that sudden and unpredictable changes to the rules relating to the calculation of the votes may lead to a violation of Article 3 of Protocol No. 1 to the European Convention. Furthermore, the applicant holds that such conduct is in contravention of the Code of Good Practice in Electoral Matters ("the Code"), which was adopted by the European Commission for Democracy through Law ("the Venice Commission") at the 51st Plenary Session in 2002. This Code sets the basic principle that election rules must be stable and that they should not be changed too often, *i.e.* that the elements of the election law, especially the voting system, the composition of the election commissions and the determination of the boundaries of the constituencies may be changed no later than one year before the elections.

b) Allegations as to the unconstitutionality of Amendments CXX and CXXI and Article 1 of the Amendments to the Election Law - Chapter 9A in relation to Articles 9.13, 9.14, 9.15, 9.17, 9.18 and 9.19

34. The applicant contends that the provisions of Amendments CXX and CXXI and Article 1 of the Amendments of the Election Law, Chapter 9A in relation to Articles 9.13, 9.14, 9.15, 9.17, 9.18 and 9.19, which relate to the process of appointing the FBiH President and Vice President, are in contravention of the provisions of Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights.

35. The applicant bases these allegations primarily on the claim that the process is entirely based on discrimination against minorities and citizens, *i.e.* Others. However, the High Representative imposed similar provisions of the FBiH Constitution in respect of which the Constitutional Court, in its Decision on Admissibility and Merits *U-14/12* (see paragraph 18 of this decision), had already found to be inconsistent with the FBiH Constitution and the European Convention (IV.B.1. Article 2, paragraphs 1 and 2), for they make it impossible for the Others to stand for election as candidates and to be possibly elected to the office of the FBiH President and Vice-Presidents. In that decision, the Constitutional Court did not quash the challenged provisions of the Constitutions of both Entities and the Election Law of BiH. It did not order the BiH Parliamentary Assembly to amend the BiH Election Law, nor the Entities to amend their constitutions in order to harmonize them with the Constitution of Bosnia and Herzegovina, until the adoption, in the national legal system, of constitutional and legislative measures removing the existing inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention and the Judgments of the European Court.

36. In addition, the applicant points out that the High Representative changed only the number of delegates who must support the candidates for the FBIH President and Vice-Presidents, while excluding the Others as possible candidates for those positions. In this part, the applicant states general considerations on democracy and pluralism (pp. 20-22). In addition, on pp. 22-24, the applicant extensively presents the provisions of the Constitution of BiH, the European Convention and Article 1 of Protocol No. 12 to the European Convention prohibiting discrimination and how discrimination is examined. Furthermore, the applicant states that, by the mentioned provisions, the Others are placed in the same situation as before the adoption of these decisions of the High Representative. Namely, the Others still do not

have the possibility to nominate their candidate either for the FBiH President or Vice Presidents, nor do they have any role in proposing candidates, which is done exclusively within the caucuses of the constituent peoples. Moreover, the applicant refers to the case law of the European Court of Human Rights in the cases of *Sejdić and Finci,* and *Zornić* (cited above), *Pilav* (judgment of 9 June 2016, Application no. 41939/07)*, Šlaku* (judgment of 26 May 2016, Application no. 56666/12) and *Pudarić* (judgment of 8 December 2020, Application no. 55799/18), *v. BiH.* He contends that the Others are discriminated against since they are treated differently, for they are denied the right to equal participation in the exercise of the functions of the FBiH President and Vice-Presidents.

c) Allegations as to the unconstitutionality of Amendment CXXVIII

37. The applicant also contends that Amendment CXXVIII, which establishes two completely different censuses as a basis for the formation of the FBiH House of Peoples as part of the legislative branch, on the one hand, and the executive branch, on the other, is in contravention of Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

38. In this part, the applicant highlights that the challenged amendment applies the "last census" to the formation of the FBiH House of Peoples, while retaining the 1991 census as "the basis for all calculations requiring demographic data." In other words, the 1991 census represents the basis for the formation of executive authorities and demographic calculations, and the High Representative uses the last census from 2013 exclusively for the formation of the FBiH House of Peoples. The purpose of using the 1991 census is to prevent the legalization of the outcome and results of ethnic cleansing in BiH, *i.e.* until the implementation of Annex 7 of the General Framework Agreement, which requires the return of all exiles to their pre-war homes and places of living. In this way, according to the applicant, the High Representative, by introducing the 2013 census, unconsciously legalizes the outcome of ethnic cleansing and informally declares Annex 7 completed, which is unacceptable and represents a "flagrant violation" of Annex 7 to the General Framework Agreement.

39. In addition, the request further points out that the formation of the House of Peoples, as a legislative body, cannot be separated from the administrative body and executive branch, while using different methods and bases for filling these bodies, because the structure of the

executive branch must reflect the structure of the legislative branch. According to the applicant's claim, these provisions are in violation of the principle of democracy, for they establish a composition of institutions that does not correspond to the structure of the population, and especially does not correspond to the structure of the population in 1991. For this reason, the applicant contends that it is obvious that the High Representative wanted, at all costs, to establish a new FBiH House of Peoples, which corresponds to the imaginary projection of the composition thereof, which, in the circumstances of the post-war society, in essence, ethnically homogenize the population in certain parts of Bosnia and Herzegovina and thus "further reinforce the division of the country under ethnically homogenized lines." Therefore, the obvious goal of the High Representative is to ensure that the HDZ BiH has exclusive control over the Croat Caucus in the FBiH House of Peoples and, by retaining the 1991 census as a basis for the formation of executive branch, to keep control over another ministry in the FBiH Government. In addition, the applicant emphasises that the High Representative's basic motive was to satisfy the requests coming from the Government of the Republic of Croatia (RC), which is ruled by the HDZ RC, which provided a key diplomatic support for strengthening the political position of HDZ BiH in Bosnia and Herzegovina.

2. Allegations in the request in case no. *U-30/22*

40. Applicant Džaferović contends that the Amendments and Amendments to the Election Law imposed by the High Representative in Decisions no. 06/22 and 07/22 of 2 October 2022 are inconsistent with the provisions of Articles I(2) and II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention.

a) Allegations as to the inconsistency of the challenged regulations with Article I(2) of the Constitution of Bosnia and Herzegovina

41. The applicant states that the procedure for the entry into force of the Decision of the High Representative of 2 October 2022 is in violation of the democratic principles under Article I(2) of the Constitution of Bosnia and Herzegovina, namely, the principle of the rule of law, the principle of legal certainty and the principle of the protection of legitimate expectations. In this regard, the applicant claims that, by imposing the decisions on "the night of the elections" and by their entry into force, the High Representative acted in violation of the principle of legal certainty by failing to adapt the procedure related to the entry into force

of the Amendments and Amendments to the Election Law to the intensity, scope and importance of the imposed acts on legal and political life in Bosnia and Herzegovina.

42. In addition, the applicant refers to the positions taken by the European Court of Human Rights in the following judgments: *The Sunday Times v. the United Kingdom* (Judgment of 6 November 1980, Application no. 6538/74, paragraph 49 *et seq*.) and *Lindon, Otchakovsky-Laurens and July v. France* (Judgment of 22 October 2007, Applications nos. 21279/02, 36448/02, paragraph 42 *et seq*.), *Ždanoka v. Latvia* (Judgment of 16 March 2006, Application no. 58278/00, paragraph 115 *et seq*.), and *Hirst v. the United Kingdom* (Judgment of 6 October 2005, Application no. 74025/ 01, paragraph 58). In connection with those judgments, the applicant cites the statement of 7 October 2022 given by Mr. Željko Bakalar, a Member of the CEC, which was published in the media under the title "The Central Election Commission still does not know how to implement Schmidt's decisions." In view of the above, the applicant concluded that even the CEC did not have a sufficiently clear, precise and predictable regulation that it could implement, which amounted to a violation of the principle of legal certainty.

43. Furthermore, the applicant contends that the challenged provisions are in violation of the principle of the protection of "legitimate expectations," for the challenged acts were imposed on the night of the elections, without deadline and adjustment period. In addition, according to the applicant, many actions related to the election process, such as the compilation of electoral lists and the nomination of candidates, could not be carried out in accordance with the new regulations. Moreover, the applicant refers to the case law of the Court of Justice of the European Union (CJEU) and points out that it can be concluded that, at the level of the EU or Member States, the adoption of an act or unpredictable changes in procedures that would disappoint the legitimate expectations of citizens that the law will be equally applied and that everyone is equal before the law, would be in contravention of both national constitutions and laws and the EU acquis.

44. In that context, the applicant points out that the CEC, at its session of 4 May 2022, adopted the act "Instructions on Deadlines and Order of Election Activities for the 2022 General Elections to be held on Sunday, 2 October 2022" ("the Instructions"). Article 2, paragraph 2 of the Instructions specifies the period from 22 June 2022 to 4 July 2022 at 4 p.m., by which time all political subjects had to submit candidate lists. Accordingly, the political subjects based their legitimate expectations on the provisions of the Election Law

and the FBiH Constitution, which were in force on 4 July 2022 and, based on these regulations, they compiled their electoral lists and planned indirect elections for delegates to the FBiH House of Peoples. In that regard, applicant Džaferović states that "the legitimate expectations of political parties were let down" when the High Representative imposed the challenged provisions. In the applicant's opinion, political subjects and citizens/individuals did not have the opportunity to express their opinion, to use legal means or the possibility in the newly created situation to base their "legitimate expectations on the new election rules." In addition, the applicant contends that putting the responsibility on the CEC would be a disproportionate and unfounded burden, for the CEC, too, "cannot protect the legitimate expectations, or legal certainty, or the principle of the rule of law."

b) Allegations as to the inconsistency of the challenged regulations with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention

45. As to the allegations about the inconsistency of the challenged regulations with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention, applicant Džaferović refers to the Code of the Venice Commission, and the decisions of the European Court of Human Rights in the cases of *Ekoglasnost* and *Hirst* (cited above). In addition, he points out that it is clear that Bosnia and Herzegovina "has fulfilled its duty and positive obligation to participate actively in the protection of rights in the election process." However, the decisions of the High Representative "changed the rules for conducting elections," thereby violating Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention.

3. Observations of the High Representative

a) As to request number *U-27/22*

46. The High Representative first states that he is not opposed to the Constitutional Court's review of the constitutionality of the challenged provisions of the Amendment to the FBiH Constitution and the Amendments to the Election Law. The High Representative then presents the events and decisions that preceded the enactment of the contested provisions, as shown in the introductory part of this decision, considering that it is important to point out that some of the issues relevant for the present case have been debated, in the Constitutional

Court and in other institutions of BiH, for a long period of time. The High Representative points out that the preamble of his decisions enacting the challenged provisions makes all this abundantly clear. In particular, he highlights the fact that these amendments are aimed at overcoming the current deadlock in the institutions of the Federation of BiH in order for Bosnia and Herzegovina to engage meaningfully in reforms needed for the country to advance its integration into European Union and to move away from the deadlock the Federation of BiH has been in for years. Namely, the adoption of a Ruling on failure to enforce the decision of the Constitutional Court in case *U-23/14* of July 6, 2017 (see paragraph 20 of this decision) led to a situation that the legal framework governing the election of delegates to the FBiH House of Peoples, as provided for by the FBiH Constitution and the Election Law, was inconsistent. The elections of delegates to the FBiH House of Peoples pursuant to the 2018 CEC Instruction ensure that the upper chambers of the FBiH and BiH Parliaments were able to function but did not bring the dispute concerning electoral reform to an end. This situation, as stated, exposed serious problems concerning the functionality of the FBiH institutions, as the process of election of executive authorities in the Federation of BiH has been blocked, leaving the FBiH Government elected in 2014 in charge in a caretaker function. This also affected the timely appointment of new judges to the Constitutional Court of the Federation of BiH.

47. In addition, it is indicated that on 27 July 2022, the High Representative enacted amendments to the Election Law of Bosnia and Herzegovina, in order to bring it more in line with international standards and good democratic practices, leaving more time to political parties to come up with an agreement on how to address other reforms required. However, the High Representative states that although some political parties and citizens group constructively participated to that dialogue, applicant Komšić and his political party chose not to contribute to that process. In view of the failure of that dialogue process and given the high risk that the formation of institutions after the elections would once again be blocked, the High Representative states that he decided to use his mandate to resolve a situation in connection with civilian implementation that jeopardizes citizen participation in political processes and poses a serious threat to the implementation of the election results and the proper functioning of the Federation of BiH and possibly the State authorities. According to the High Representative, the Decision Enacting Amendments to the FBiH Constitution and the Decision Enacting the Law on Amendments to the BiH Election Law contain a set of measures that allow the rapid establishment and functioning of legislative, executive, and

judicial bodies after the elections. According to the High Representative, those Decisions have been designed to address one problem — and one problem only — *i.e.* the post-election establishment of indirectly elected bodies and their functionality. At the same time, the specific nature of Bosnia and Herzegovina as a federal and multi-national country had to be recognized, as must be the precarious balance between the different constituent groups and other segments of the electorate, which to some extent bars full proportional representation as established in other democratic countries.

48. Consequently, the High Representative states that the challenged acts have no bearing on direct elections, but only affect the "upcoming formation of indirectly elected bodies." He considers the extension of the number of delegates in the FBiH House of Peoples as an appropriate and balanced response to the Decision of the Constitutional Court in case *U-23/14*. The composition of the FBiH House of Peoples, as he further states, must reflect a number of principles inherent in the constitutional system of the Federation of BiH, which requires the establishment of a delicate balance. Namely, the cantonal assemblies elect delegates from among their own ranks and there must be parity between the cantons and the constituent peoples, and it is necessary to achieve a minimum representation of the constituent peoples in all cantons whenever it is possible. These principles constitute a mixture of proportionality and positive discrimination.

49. As to applicant Komšić's claims that the role of the **FBiH House of Peoples has been increased**, the High Representative states that even though the number of delegates in the FBiH House of Peoples has been increased, it is inaccurate to state that the role of that House was increased. Namely, Amendment CXVI removes the possibility to invoke vital national interest on all issues. In addition, Amendment CXVIII streamlines the procedure to invoke and decide on vital national interest issues, including by deleting the possibility for a proposed act to be blocked without proper review by the Council for the Protection of Vital National Interest established within the FBiH Constitutional Court. Furthermore, the extension of the number of delegates in each constituent peoples' caucus follows that logic of more credible representation and aims at increasing proportionality in the representation of cantons and constituent peoples by increasing the number of seats that are distributed to cantons and constituent peoples in proportion to their population. In so doing, it increases the chances of smaller parties or group of parties to accede to representation. It does so without affecting in any way the safeguards given to all constituent peoples and the group of Others

in all cantons. Besides, the High Representative contends that the criticism of the use of the Saite-Laguë (aka Webster) formula to allocate mandates is also unfounded. Applied in this context, the Saite-Laguë formula is usually seen as favouring smaller contenders (in this case cantons), so the use of that formula comes in support of the minimum representation rule (the so-called 1/1/1 rule) and operates in favour of the representation of constituent peoples in cantons where they are in numerical minority. All the aforementioned leads to the conclusion that the extension of the number of delegates, by addressing issues that the Court expressed in its Decision *U-23/14*, lifts the uncertainty that existed in respect to the implementation of that Decision.

50. As to the **choice of the census**, the High Representative states that the Constitutional Court, in its Ruling no. *U-23/14* of 6 July 2017, repealed the transitional provisions of Article 20.16A, (2), subparagraphs a-j of the Election Law. The mentioned repeal brought to an end the transitional regime and triggered the applicability of Article 10.12 of the Election Law. However, it has placed the FBiH Constitution at variance with the BiH Election Law and obliged the CEC to adopt the 2018 Instruction. Amendment CXXVIII removes the inconsistencies between the provisions of the Election Law (Article 10.12, paragraph 1) and the provision of Article IX.7. of the FBiH Constitution. In taking this step, the need for continuity has been taken into account, as the 2013 census was applied in the last election. In addition, as he further states, it does not in any way prejudge or pre-empt completion of return efforts undertaken under Annex 7 to the General Framework Agreement. All this, as he points out, was made clear in the Preamble to the Decision no. 6/22, which is challenged by the applicant. Therefore, the High Representative states that he does not consider that the applicant's criticism of the use of data from two different censuses during the transition period is well-founded. According to the High Representative, that fact should rather be considered as evidence that the Federation of BiH is gradually moving away from its past to look more into its future, opening itself for broader reforms. Exclusive use of 30-years old data could indeed prove problematic in a country that aspires to become a member of the European Union.

51. As to the allegations about **discrimination in the election of the FBiH President and Vice-Presidents**, the High Representative states that his intervention pursued an objective quite limited in scope. In the Preamble of the Decision Amending the FBiH Constitution of 2 October 2022, it is stated that the Decision of the Constitutional Court in

case no. *U 14/12* of 26 March 2015 is yet to be implemented. However, it also states that its implementation is linked to the prior adoption of constitutional and legislative measures in the implementation of the European Court of Human Rights Judgments taken in the cases of *Sejdić and Finci*, *Zornić* and other relevant cases. Consequently, the High Representative states that his Decision does not alter Article IV.B.1, paragraph 2 (amended by Amendment XLI) to the FBiH Constitution, which determines the composition of the FBiH President and Vice-Presidents. The High Representative points out that he should not fully displace the elected organs to which the constitutional framework assigns the competence and responsibility for amending the basic law of the Federation of BiH and BiH. According to the High Representative, all this explains why the recent constitutional and legislative amendments enacted by him cannot pre-empt all the reforms necessary to respond to issues identified by the ECtHR and the Constitutional Court. Therefore, in his view, it would be inappropriate for the High Representative to settle all pending issues of proper representation by his decisions rather than respecting the responsibility of the elected authorities and political parties of BiH. The High Representative's role under the General Framework Agreement, as he claims, includes neither the responsibility nor the power to change the terms of the legal regime itself in which his mandate is anchored.

52. As to the **allegations about a violation of the principle of stability of election law and legal certainty**, the High Representative states that he published his Decisions after the closure of the polling stations and before the announcement of the first preliminary election results. He did so in order to prevent any influence of the Decisions on the mind and the electoral preferences of the voters and not to disturb the election campaign of political actors. The Decisions were passed before the first results were known because he wanted to avoid any speculation that he reacted to a new political distribution. In addition, the High Representative contends that the Decisions do not affect the counting of the votes and that they do not interfere with the fundamental elements of electoral law — like the composition of election commissions, the electoral system and the drawing of constituency boundaries. His intervention aims at making elections and appointments to indirectly elected bodies possible by removing the procedural obstacles that would have made this unlikely. In this connection, he notes that all the judicial decisions mentioned in the request relate to changes that were made to the regulations applicable to direct elections.

53. As to the allegations of applicant Komšić that the Decisions confused the voters, the High Representative states that the new rules do not change the method of indirect elections in the cantonal assemblies nor the method of allocation of seats that was provided for in the election law. They do not take away from any canton representation in any caucus of constituent people and they merely ensure that more delegates will be elected by certain cantonal assemblies from each constituent people and from the group of Others. The ethnic declaration of the candidates annexed to the candidacy lists certified for the elections to the cantonal legislatures is not mentioned on the printed ballots and is therefore not formally known to the voters. When the voters cast their vote, they are doing so with a view to have their candidate elected to the cantonal assembly. It is only when the elections to the cantonal assemblies are certified that caucuses of constituent peoples are formed on the basis of those declarations and that parties establish their lists to compete in the vote that takes place in each caucus of each assembly. When casting their votes for a candidate for a cantonal assembly, the voter is unaware of the way the caucus will be composed, how parties will seek alliances or how other members of the constituent people caucus will vote. In fact, the candidates that fare best in the direct vote could very well be set aside by a political party and not be candidates for election to the FBiH House of Peoples. In view of the above, the High Representative contends that it is difficult to see how his Decisions could have confused the voters as to the predictability of these election.

54. In the opinion of the High Representative, the same argument can be made for the change of rules regulating the nomination and election of the FBiH President and Vice-President. He points out that besides the fact that it is generally accepted that deciding on the manner of election of the President is a matter for the Constitution of an individual state and is not subject to the same guarantees as election to the legislature, he submits that his Decisions do not change the manner of election of the President and Vice-Presidents as to deprive their election of democratic legitimacy.

55. In view of all the above, the High Representative submits that the amendments subject to the applicant's request do not interfere with the principle of stability of the election law nor with the predictability of the election system. Rather, a situation where elections would remain dead letter and not translate in the formation of indirectly elected bodies would have directly eroded *the confidence in the elections* together with the principle of *legitimate expectations* and/or *legal certainty*. The Decisions of 2 October 2022 in a remedial way

respond to this risk, striking a fair balance between the legitimate interests of the voters and various sector of the electorate on one hand and the need to promote good governance on the other.

b) As to request number *U-30/22*

56. The High Representative states that his observations should be seen as supplementing those he provided in relation to the request in case number *U-27/22*. He submits that it is necessary to observe that the theory of functional duality elaborated by the Constitutional Court in case *U-9/00* (of 3 November 2000, published in the *Official Gazette of BiH*, 1/01) is not called into question. Namely, the High Representative contends that accepting the arguments put forward by the applicant in respect to the timing of the enactment of his Decisions could seriously hamper the discretion of the High Representative to use his powers. The powers of the High Representative, such as those exercised on 2 October 2022, are by essence “last resort” crisis management powers, which purport to solve serious problems arising in the implementation of the civilian aspects of the peace agreement. It is stated that it is their nature as last resort tools and, accordingly, it must belong to the High Representative’s discretion to determine whether the conditions for the use of these powers, including the exhaustion of the possibility of settlement by authorities, are met. Therefore, pointing to the decision of the European Court of Human Rights in the case of *Dušan Berić and Others v. Bosnia and Herzegovina* (Decision of 18 July 2013, Application no. 36357/04 *et al.*), the High Representative highlights that the Constitutional Court cannot examine whether the High Representative properly or timely exercised his discretion in enacting “remedial” legislation on 2 October 2022 after closure of polling stations in place of domestic authorities. He did so trying to strike an appropriate balance between the need not to disturb the electoral campaign and the need to use his powers as a last resort tool to solve difficulties arising under the General Framework Agreement. It is also stated that he sought to adjust his intervention and make it proportionate to the aim pursued, *i.e.* enabling the establishment of newly indirectly elected authorities, including the election of delegates to the FBiH House of Peoples, in order to promote democracy and advance the reform agenda needed for EU integration. All this was done with the aim of promoting democracy and advancing the reform agenda that is needed for integration into the European Union, taking into account ongoing discussions on BiH candidacy status.

57. As to the allegations of applicant Džaferović, the High Representative states that the challenged acts do not affect the principles regulating the election of delegates to the FBiH House of Peoples, nor the election of the President and Vice-Presidents of the Federation of Bosnia and Herzegovina. This was done with the aim of ensuring that the election procedures cannot be blocked and can therefore serve the orderly functioning of constitutional bodies. According to the High Representative, these principles have not been affected by his Decisions, which adopt corrective measures that respond to demands formulated in the Decision of the Constitutional Court in case no. *U-17/16* of 19 January 2017 (available at www.ustavnisud.ba), according to which it was necessary to ensure that all seats in all caucuses can be filled. In addition, it was necessary to implement the Decision of the Constitutional Court no. *U-23/14* with the aim of ensuring greater proportionality in the assignment of seats to cantons and constituent peoples.

58. Furthermore, the High Representative states that the request incorrectly claims that the composition of the candidacy lists certified for the elections to the cantonal legislatures would change the outcome of elections for the FBiH House of Peoples. In that regard, the High Representative points out that the rules in the FBiH Constitution and in the Election Law distinguish between elections for cantonal legislatures and elections for the FBiH House of Peoples, as he already explained in his observations on request no. *U-27/22*. When the voters cast their vote, they do so with a view to have their candidate elected to the cantonal assembly, and subsequently, indirectly, the elections of delegates to the FBiH House of Peoples are held. The outcome of such a process cannot be predicted as the political parties present in the constituent people's caucuses of the cantonal assemblies adapt their strategy to the alliances/coalitions they can conclude and to their relative strength in these caucuses, and political parties can even decide to split their votes between different lists if they see an advantage in that strategy. All the mentioned options are inherent in the system of indirect election and reflect a practice that has been observed in the process of implementation of elections ever since 1996.

59. As to the applicant's claims about the unpredictability of the challenged acts, and that the rules enacted were vague and imprecise, the High Representative states that the CEC adopted the 2022 Instruction, whereby the allocation of mandates was carried out by applying the same method as the one applied in 2018, with a difference in the number of mandates. Therefore, the High Representative contends that his enactments fully respect the principle of

stability of the law or the principle of legitimate expectation, for they do not alter the system underlying the indirect election of the delegates to the FBiH House of Peoples and of the FBiH President and Vice-Presidents.

60. In addition, the High Representative points out other adjustments to the rules concerning the indirect elections, which are more substantial and far-reaching, have been made by different bodies, national and international. Such adjustments were made shortly before or after the announcement of the results, but always after the certification of candidates lists by the CEC. This past practice, in the opinion of the High Representative, inevitably corroborates the view that indirect elections, even if they are the extension of direct election, must be considered as a different process regulated by its own specific principles and rules. In that regard, the High Representative indicates that after the general elections in October 2018, the CEC adopted the 2018 Instruction in December 2018. It is also pointed out that in 2002, the BiH Parliamentary Assembly passed the Law on Amendments to the Election Law in order to implement the provisions of the FBiH Constitution, which were amended by Amendments XXXIII and XXXIV. Such amendments were published in the *Official Gazette of BiH*, 20/02, of 3 August 2002, *i.e.* after the list of candidates were certified by the CEC. Moreover, the High Representative points to the practice of the Provisional Electoral Commission, which organized elections under the auspices of the OSCE BiH, which in 2000, a month before the general elections in November, adopted new rules on the election of delegates to the FBiH House of Peoples, which were unsuccessfully challenged before by the Constitutional Court in case *U-40/00* (see Constitutional Court, Decision no. *U-40/00* of 2 and 3 February 2001, available at www.ustavnisud.ba).

61. In view of all the above, the High Representative contends that the Amendments and Amendments to the Election Law do not interfere with the principle of stability of the election law nor with the predictability of the election system. Rather, a situation where elections would remain a “dead letter” and not translate in the formation of indirectly elected bodies would have directly eroded the confidence in the elections together with the principle of legitimate expectations and/or legal certainty. The Decisions to amend the FBiH Constitution and the BiH Election Law in a remedial way respond to such a risk, striking a fair balance between the legitimate interests of the voters and various sector of the electorate on one hand and the need to promote good governance on the other. In the High Representative’s opinion, contrary to the arguments submitted by applicant Džaferović in

favour of the *status quo ante*, stability of an electoral regime, properly understood, cannot signify stalemate, institutional blockade and dysfunctionality and, in the end, defeat the voters' confidence in democratic processes.

IV. Relevant laws

a) Relevant laws relating to the Constitution of Bosnia and Herzegovina

62. In the **Constitution of Bosnia and Herzegovina, as relevant reads:**

Article I (2)

2. Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

Article II(2) and (4)

2. International Standards

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

4. Non-Discrimination

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.

Article III(3)(b)

3. Law and Responsibilities of the Entities and the Institutions

b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general

principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities

b) Regulations relating to the competence of the High Representative

63. **Annex 10 – Agreement on Civilian Implementation, General Framework Peace Agreement in Bosnia and Herzegovina**, as relevant reads:

Article II(1) items (a) and (d)

The High Representative shall :

a) Monitor the implementation of the peace settlement;

b) Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation;

Article V:

The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

c) Relevant laws relating to the Constitution of the Federation of Bosnia and Herzegovina

64. The **Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of Federation of BiH*, 1/94) as adopted by the Constitutional Assembly of the Federation of BiH, as relevant reads,:

IV. STRUCTURE OF THE FEDERATION GOVERNMENT

A. The Federation Legislature

Federation Parliament

2. The House of Peoples

Article 6

There shall be a House of Peoples, comprising 30 Bosniac and 30 Croat Delegates as well as Other Delegates, whose number shall be in the same

ratio to 60 as the number of Cantonal legislators not identified as Bosniac or Croat is in relation to the number of legislators who are so identified.

Article 8

The number of Delegates to be allocated to each Canton shall be proportional to the population of the Canton. Within that number, the percentage of Bosniac, Croat, and Other Delegates of a Canton shall be as close as possible to the percentage of the Bosniac, Croat, and Other legislators in the Canton. However, there shall be at least one Bosniac, one Croat, and one Other Delegate from each Canton that has at least one such member in its Legislature, and the total number of Bosniac, Croat, and Other Delegates shall be in accordance with Article 6.

Bosniac, Croat, and Other Delegates from each Canton shall be elected by the respective legislators in that Canton's Legislature.

B. The Federation Executive

1. The President and the Vice-President

Article 1

The President of the Federation shall represent the Federation and shall be the head of the Federal executive power,

Article 2

In electing the President and Vice-President, a caucus of the Bosniac Delegates and a caucus of the Croat Delegates to the House of Peoples shall each nominate one person. Election as President and Vice-President shall require approval of the two nominees jointly by a majority vote in the House of Representatives, then by a majority vote in the House of Peoples, including a majority of the Bosniac Delegates and a majority of the Croat Delegates. Should either House reject the joint slate, the caucuses shall reconsider their nominations. The persons elected shall serve alternative one-year terms as President and Vice-President during a four-year period. Successive Presidents may not be from the same constituent people.

IX. APPROVAL AND ENTRY INTO FORCE OF THE CONSTITUTION AND TRANSITIONAL ARRANGEMENTS

Article 7

The published results of the 1991 census shall be used as appropriate m making any calculations requiring population data.

65. The **Decision of the High Representative Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina, 149/02** (*Official Gazette of the Federation of BiH,* 16/02) as relevant, reads:

AMENDMENT XXXIII

Composition of the House of Peoples and Selection of Members

(1) The House of Peoples of the Federation of Bosnia and Herzegovina shall be composed on a parity basis so that each constituent people shall have the same number of representatives.

(2) The House of Peoples shall be composed of 58 delegates; 17 delegates from among each of the constituent peoples and 7 delegates from among the Others.

(3) Others have the right to participate equally in the majority voting procedure. .

This Amendment shall amend Article IV.A.2.6 of the Constitution of the Federation of BiH.

AMENDMENT XXXIV

(1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population.

(2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law.

(3) In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.

(4) Bosniac delegates, Croat delegates and Serb delegates from each Canton shall be elected by their respective representatives, in accordance with the election results in the legislative body of the Canton, and the election of delegates from among the Others shall be regulated by law.

(5) No delegate of the House of Representatives or councillor of the Municipal Council may serve as a member of the House of Peoples.

This Amendment shall replace Article IV.A.2.8 of the Constitution of the Federation of BiH.

AMENDMENT XLI

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.

This Amendment shall amend Article IV.B.1 as amended by Amendment XI to the Constitution of the Federation of Bosnia and Herzegovina.

AMENDMENT XLII

(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.

(3) If no list of the nominees receives the required majority in both Houses the procedure shall be repeated.

(4) If one of the Houses rejects the joint nominees' list in the repeated procedure as well, it shall be considered that the nominated persons have been elected by approval of the list in only one house.

(5) The President and two Vice-presidents of the Federation shall be elected for a four-year term of office.

This Amendment shall replace Article IV.B.2 of the Constitution of the Federation of BiH.

AMENDMENT LI

Published results of the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented.

This Amendment shall replace Article IX.7 of the Constitution of the Federation of BiH.

66. The **High Representative Decision Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina, 06/22 of 2 October 2022** (*Official Gazette of F BiH*, 79/22) as relevant reads:

Underscoring that the Peace Implementation Council Steering Board has on several occasions condemned "the stagnation and dysfunctionality in the FBiH, including the failure to appoint Federation-level (...) governments for three and a half years since the 2018 General Elections,

which is a constitutional, and therefore a General Framework Agreement for Peace in Bosnia and Herzegovina obligation, and the fact that the Federation President has failed in his constitutional duty to nominate judges to the Federation Constitutional Court, leaving the Court barely able to function and its Vital National Interest Panel completely unable to function";

***Deploring** that the authorities in Bosnia and Herzegovina also failed to implement the Decision of the Constitutional Court of Bosnia and Herzegovina of 1st December 2016 in Case No. U-23/14 (hereinafter: Ljubić Case)*

[..]

Regretting that the absence of implementation of the Decision taken in the Ljubic case has led to a situation where the legal framework regulating the election of delegates to the House of Peoples of the Federation was insufficiently harmonized;

[…]

Recalling also the Decision of the BiH Constitutional Court in case no. U 14/12 of 26 March 2015 is yet to be implemented but that its implementation is linked to the prior adoption of constitutional and legislative measures in the implementation of the European Court of Human Rights Judgments taken in the Sejdic and Finci, Zornic and other relevant cases and that the requirement under Article IV.B.1. Paragraph (2) of the Constitution of the Federation remains problematic and shall need to be adjusted, along with the provisions of Article IV.B.2. provided hereinafter;

Recalling further that implementing those Judgments is overdue and calling for discussions on this to resume as soon as possible; […]

Persuaded that further reform of the Constitution of the Federation will be necessary and that the rules governing the composition, election, role and functions of the House of Peoples, including the role of caucuses of three constituent peoples, will need to be examined in the shortest possible time frame with a particular emphasis on the rights of Others;[…]

Further noting that Bosnia and Herzegovina and the wider region is at a crossroad and must be given the tools to decisively ensure that the country can move further in its integration in the European Union;

Having considered and borne in mind all the matters aforesaid, the High Representative hereby issues the following

DECISION

Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina

This Decision and the amendments attached hereto which form an integral part of this decision, shall be published without delay in the Official Gazette of the Federation of Bosnia and Herzegovina and on the Official website of the Office of the High Representative and shall enter into force forthwith.

Such amendments shall have precedence over any inconsistent provisions of laws, regulations and acts. No further normative act is required to ensure the legal effect of such amendments. Nevertheless, authorities in the Federation of BiH remain under the obligation to harmonize such laws, regulations and acts with the Constitution of the Federation of Bosnia and Herzegovina.

[....]

AMENDMENTS TO THE CONSTITUTION

OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, nos. 1/94, 1/94, 13/97, 13/97, 16/02, 22/02, 52/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 32/07 and 88/08) shall be amended as follows:

Amendment CXI

Article IV.A.6, Paragraph (2) shall be amended to read:

"(2) The House of Peoples shall be composed of 80 delegates: 23 from among each of the constituent peoples and 11 from among the Others."

Amendment CXII

In Article IV.A.8, Paragraph (1) shall be amended to read:

"(1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies in proportion to the ethnic structure of the population. They shall be elected from among their representatives except if otherwise provided by law."

Paragraph (3) shall be amended to read:

"(3) In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb and one delegate of the group of Others from each Canton which has at least one such delegate in its legislative body."

Amendment CXIII

Article IV.A.10 shall be amended to read:

"Cantonal Assemblies shall elect their delegates to the House of Peoples within thirty (30) days of the certification of the results of the elections. The law shall specify the manner of re-allocating the seats allocated to one or more constituent peoples and/or to the group of Others in a Canton if its Cantonal Assembly fails to elect delegates from that or those constituent peoples or from the group of Others to the House of Peoples within the deadline stipulated in this Article."

Amendment CXX

Article IV.B.2 shall be amended and read:

"(1) Any group of eleven delegates in each caucus of constituent peoples of the House of Peoples may nominate a candidate from the corresponding constituent people, provided that each delegate may only support one candidate. All candidates may be elected pursuant to this Article as either President or Vice-President of the Federation.

(2) If the requisite number of delegates in one or more constituent people's caucus(es) fails to nominate a candidate for the positions of President and two Vice-Presidents of the Federation pursuant to Paragraph (1) of this Article within 30 days of the verification of the results for the election of delegates to the House of Peoples, then any group of seven delegates from the constituent people caucus(es) of the House of Peoples that failed to nominate shall do so.

(3) If the requisite number of delegates in one or more constituent people's caucus(es) fails to nominate a candidate for the positions of President and two Vice-Presidents of the Federation pursuant to Paragraphs (1) and (2) of this Article within 50 days of the verification of the results for the election of delegates to the House of Peoples, then any group of four delegates from the relevant constituent people caucus(es) of the House of Peoples that failed to nominate shall do so.

(4)The election for the President and two Vice-Presidents of the Federation shall require the approval of a list composed of three candidates including one candidate from among each constituent peoples, each nominated in the relevant constituent people caucus, in the House of Representatives, and then in the House of Peoples.

(5) The candidates nominated pursuant to Paragraphs (1) through (3) of this Article shall be submitted to the House of Representatives which shall vote on one or more list(s) within 30 days of the submission of the last candidate(s) pursuant to Paragraph (1) through (3) of this Article. A list shall be approved by the House of Representatives if it is supported by a majority of the members present and voting and shall be forwarded to the House of Peoples for approval.

(6) Should the number of candidates nominated pursuant to Paragraph (1) through (3) of this Article enable the formation of two lists, a single vote will be organized within the House of Representatives and each member of the House will be able to cast his/her vote for one of the two lists. The list that obtains the highest number of votes in the House of Representatives shall be forwarded to the House of Peoples for approval.

(7) In the event that the number of candidates nominated pursuant to Paragraph (1) through (3) of this Article enables the formation of more than two lists, a single vote will be organized within the House of Representatives and each member of the House will be able to cast his/her vote for one of the lists. If none of the lists obtains a majority of votes of the members present and voting in the first round of voting, a second round of voting shall be organised within a week where the members of the House of Representative will vote for one of the two most voted lists in the first round of voting. The list that obtains the highest number of votes in the House of Representatives shall be forwarded to the House of Peoples for approval.

(8) The House of Peoples shall decide by a majority of the delegates present and voting within 30 days of the receipt of the list approved by the House of Representatives.

(9) Notwithstanding Paragraph (4) of this Article, if the House of Representatives fails to approve a list of candidates in the deadline provided for in Paragraph (5) of this Article, the list composed of the candidates that received the most support in the respective caucuses of the House of Peoples when nominated pursuant to Paragraph (1) through (3) of this Article shall be forwarded to the House of Peoples and such list shall be considered elected if approved in the House of Peoples only.

(10) Notwithstanding Paragraph (4) of this Article, if the House of Peoples fails to vote on the list of candidates submitted by the House of Representatives in the deadline provided for in Paragraph (8) of this Article, the list approved in the House of Representatives only shall be considered elected.

(11) If the list of candidates is not approved pursuant to Paragraphs (4) through (10) of this Article, the procedure shall be repeated. In the repeated procedure, the House of Representatives shall vote for a new list in accordance with Paragraph (5) through (7) of this Article within 15 days of the vote by which the list of candidates was rejected. If the House of Representatives has exhausted all possible lists of candidates nominated pursuant to Paragraphs (1) through (3) of this Article, the procedure

provided for in Paragraphs (1) through (7) of this Article shall be repeated provided that the deadlines for the relevant caucus to nominate candidate(s) provided for in Paragraphs (1) to (3) of this Article shall be halved and shall start on the day of the vote of House by which it rejected the last list.

(12) Notwithstanding Paragraph (4) of this Article, in the repeated procedure, the list approved by the House of Representatives shall be considered elected.

(13) The three candidates elected pursuant to this Article shall decide among themselves who shall occupy the post of President. If no agreement is reached, the House of Representatives shall decide.

(14) The President and two Vice-Presidents of the Federation shall be elected for a four- year term of office. The same person may not be elected to one of the positions of either President or Vice-President more than twice consecutively."

Amendment CXXI

In Article IV.B.3, Paragraph (2) shall be amended to read:

"(2) If either the President or a Vice-President of the Federation dies, is removed from office, or, in the opinion of the Cabinet acting by consensus, is permanently unable to fulfill the duties of the office, the procedure provided in Article IV.B.2 shall be followed, provided that the deadlines for the relevant caucus to nominate candidate(s) for the vacant position will start on the day the position(s) to fill became vacant. The vacancy shall be filled for the remainder of the original term."

Amendment CXXVIII

In Article IX.7, the existing provision shall become paragraph (1) after which a new paragraph (2) shall be added to read:

"(2) Notwithstanding Paragraph (1) of this Article, published results of the latest census in Bosnia and Herzegovina shall be used for the calculations

requiring demographic data made for the election of delegates to the House of Peoples."

d) Relevant laws relating to the Election Law of Bosnia and Herzegovina

67. 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, 48/11 – Decision of the CC BiH, 63/11 – Decision of the CC BiH, 15/12 – Ruling of the CC BiH, 11/13 – Ruling of the CC BiH, 18/13, 7/14, 31/16, 1/17 – Decision of the CC BiH, 54/17 – Ruling of the CC BiH, 41/20, 38/22, 51/22 and 67/22).

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, 48/11 – Decision of the CC BiH, 63/11 – Decision of the CC BiH, 15/12 – Ruling of the CC BiH, 11/13 – Ruling of the CC BiH, 18/13, 7/14, 31/16, 1/17 – Decision of the CC BiH, 54/17 – Ruling of the CC BiH, 41/20, 38/22 and 51/22) that was effective prior to adoption of disputed laws, as relevant reads:

CHAPTER 9A

PRESIDENT AND VICE- PRESIDENT OF THE FEDERATION OF BIH

Article 9.13

In election of the President and Vice- Presidents of the Federation of BiH, 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 BiH 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 BiH shall vote on one or several joint slates composed of three candidates

including one candidate from among each constituent peoples. The slate which receives the majority of votes in the House of Representatives of the Parliament of the Federation of BiH shall be elected if it gets majority of votes cast in the House of Peoples of the Parliament of the Federation of BiH including majority of votes of each constituent peoples' caucuses.

Article 9.15

If the joint slate presented by the House of Representatives does not receive the necessary majority in the House of Peoples, this procedure will be repeated. If in the repeated procedure the joint slate which receives majority of votes in the House of Representatives is rejected again in the House of Peoples 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 BiH from the rank of Others may participate in the election of candidates for the President and Vice- President. 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.

Article 9.17

The mandate of the President and Vice- President shall be for four (4) years provided that the mandate does not expire earlier.

Subchapter B

HOUSE OF PEOPLES OF THE PARLIAMENT OF THE FEDERATION OF BIH

Article 10.10

The Cantonal Legislature shall elect fifty eight (58) delegates to the House of Peoples, seventeen (17) from among Bosniacs, seventeen (17) from among Serbs, seventeen (17) from among Croats and seven (7) delegates from the rank of Others.

Article 10.11

The representatives from among Bosniacs, Croats, Serbs and Others in each Canton's Assembly shall elect delegates of their respective constituent peoples in that Canton.

Each party represented in the respective caucuses of the constituent peoples and Others or each member of one of these caucuses shall be entitled to nominate one or more candidates on a list for election of delegates of that particular caucus from that Canton.

Each list can include a larger number of candidates than is the number of delegates to be elected on the condition that the legislature of the Canton has a larger number of delegates from among Bosniacs, Croats, Serbs and Others than is the number of delegates from amongst Bosniacs, Croats, Serbs and Others that ought to be elected to the House of Peoples of the BiH Federation Parliament.

Article 10.12

(1) The number of delegates from each constituent people and group of Others to be elected to the House of Peoples of the BiH Federation Parliament from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census. The Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.

(2) For each canton, the population figures for each constituent people and for the group of Others shall be divided by the numbers 1,3,5,7 etc. as long as necessary for the allocation. The numbers resulting from these divisions shall represent the quotient of each constituent people and of the group of Others in each canton. All the constituent peoples' quotients shall be ordered by size separately, the largest quotient of each constituent people and of the Others being placed first in order. Each constituent people shall be allocated one seat in every canton. The highest quotient for each constituent people in each canton shall be deleted from that constituent

peoples' list of quotients. The remaining seats shall be allocated to constituent peoples and to the Others one by one in descending order according to the remaining quotients on their respective list.

Article 10.13

The election of delegates to the House of Peoples of the Federation of BiH Parliament shall take place as soon as a Cantonal Assembly convenes after the elections for the Cantonal Assemblies and no later than one month after validation of the results in accordance with Article 5.32 of this Law.

Article 10.14

(1) Each delegate in the Cantonal Assembly shall cast one vote for a list within his/her appropriate caucus.

(2) The vote shall be cast as a secret ballot.

Article 10.15

The results of vote shall be communicated to the Central Election Commission of BiH for the final allocation of seats. Mandates shall be distributed, one by one, to the lists or candidate with the highest quotients resulting from the proportional allocation formula referred to in Article 9.6 of this Law. When a list wins a mandate, the mandate shall be allocated from the top of the list.

Article 10.16

(1) If the required number of delegates to the House of Peoples from among each constituent people or from the group of Others in a given cantonal legislature are not elected then the remaining number of Bosniac, Croat, Serb or Other delegates shall be elected from the other canton until the required number of delegates from among each constituent people is elected.

(2) The Central Election Commission of BiH shall re-allocate, immediately after completion of the first round of election of the delegates to the House of Peoples in all cantons, the seats that cannot be filled from one canton. The Central Election Commission of BiH shall reallocate that seat to the

non-elected candidate who has the highest quotient on all lists running for the appropriate constituent people or for the Others in all cantons.

Article 20.16A

(1) Until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, Subchapter B of this law shall be done in accordance with this Article.

(2) Until a new census is organized, the 1991 census shall serve as a basis so that each Canton will elect the following number of delegates:

1) from the Legislature of Canton number 1, Una-Sana Canton, five (5) delegates, including two (2) Bosniacs, one (1) Croat and two (2) Serbs shall be elected.

2) from the Legislature of Canton number 2, Posavina Canton, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.

3) from the Legislature of Canton number 3, Tuzla Canton, eight (8) delegates, including three (3) Bosniacs, one (1) Croat, two (2) Serbs and two (2) Others shall be elected.

4) from the Legislature of Canton number 4, Zenica-Doboj Canton, eight (8) delegates, including three (3) Bosniacs, two (2) Croats, two (2) Serbs and one (1) Other shall be elected.

5) from the Legislature of Canton number 5, Bosnian-podrnije Canton – Gorazde, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.

6) from the Legislature of Canton number 6, Central Bosnia Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.

7) from the Legislature of Canton number 7, Herzegovina-Neretva Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.

8) from the Legislature of Canton number 8, West Herzegovina Canton, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.

9) from the Legislature of Canton number 9, Canton Sarajevo, eleven (11) delegates, including three (3) Bosniacs, one (1) Croat, five (5) Serbs and two (2) Others shall be elected.

10) from the Legislature of Canton number 10, Canton 10, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.

**Ruling of the CC BiH U-23/14: It is established that the provision of Sub-chapter B, Article 10.12 (2), in the part stating that „each of the constituent peoples shall be allocated one seat in every canton" and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), items a-j of the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) are rendered ineffective the next day from the date of publishing this Ruling in the „Official Gazette of Bosnia and Herzegovina"*

68. The **Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina, 07/22 of 2 October 2022** (*Official Gazette of BiH*, 67/22) as relevant reads:

The Law which follows and which forms an integral part of this Decision shall enter into force as provided for in Article 7 thereof, on an interim basis until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendment and with no conditions attached.

2. This Decision shall come into effect immediately and shall be published on the official website of the Office of the High Representative, and in the "Official Gazette of Bosnia and Herzegovina" without delay.

LAW ON AMENDMENTS TO THE

ELECTION LAW OF BOSNIA AND HERZEGOVINA

Article 1

In the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14, 31/16, 41/20, 38/22 and 51/22; hereinafter: the Law), Chapter 9A shall be amended to read:

"Chapter 9A

President and Vice-Presidents of the Federation of BiH

Article 9.13

(1) Any group of eleven delegates in each caucus of constituent peoples of the House of Peoples may nominate a candidate from the corresponding constituent people, provided that each delegate may only support one candidate. All candidates may be elected pursuant to Article 9.15 through 9.19 of this Law as either President or Vice-President of the Federation.

(2) If the requisite number of delegates in one or more constituent people's caucus(es) fails to nominate a candidate for the positions of President and two Vice-Presidents of the Federation pursuant to Paragraph (1) of this Article within 30 days of the verification of the results for the election of delegates to the House of Peoples, then any group of seven delegates from the constituent people caucus(es) of the House of Peoples that failed to nominate shall do so.

(3) If the requisite number of delegates in one or more constituent people's caucus(es) fails to nominate a candidate for the positions of President and two Vice-Presidents of the Federation pursuant to Paragraphs (1) and (2) of this Article within 50 days of the verification of the results for the election of delegates to the House of Peoples, then any group of four delegates from the relevant constituent people caucus(es) of the House of Peoples that failed to nominate shall do so.

Article 9.14

The election for the President and two Vice-Presidents of the Federation shall require the approval of a list composed of three candidates including one candidate from among each constituent peoples, each nominated in the relevant constituent people caucus, in the House of Representatives and then in the House of Peoples. The election for the President and two Vice-Presidents of the Federation shall be done by public voting except if otherwise decided by the House.

Article 9.15

(1) The candidates nominated pursuant to Article 9.13 of this Law shall be submitted to the House of Representatives which shall vote on one or more list(s) within 30 days of the submission of the last candidate(s) pursuant to Article 9.13 of this Law. A list shall be approved by the House of Representatives if it is supported by a majority of the members present and voting and shall be forwarded to the House of Peoples for approval.

(2) Should the number of candidates nominated pursuant to Article 9.13 of this Law enable the formation of two lists, a single vote will be organized within the House of Representatives and each member of the House will be able to cast his/her vote for one of the two lists. The list that obtains the highest number of votes in the House of Representatives shall be forwarded to the House of Peoples for approval. If two lists obtain the same number of votes, the list that is composed of the candidates that received cumulatively the most support in the caucuses of the House of Peoples when nominated pursuant to Article 9.13 of this Law shall be forwarded to the House of Peoples. If two lists have obtained the same support in the caucuses of the House of Peoples when nominated pursuant to Article 9.13, the list that is forwarded to the House of Peoples shall be determined by drawing of a lot.

(3) In the event that the number of candidates nominated pursuant to Article 9.13 of this Law enables the formation of more than two lists, a single vote will be organized within the House of Representatives and each member of the House will be able to cast his/her vote for one of the lists. If

none of the lists obtains a majority of votes of the members present and voting in the first round of voting, a second round of voting shall be organised within a week where the members of the House of Representative will vote for one of the two most voted lists in the first round of voting. If two lists obtain the same number of votes, the list that is composed of the candidates that received cumulatively the most support in the caucuses of the House of Peoples when nominated pursuant to Article 9.13 of this Law shall be forwarded to the House of Peoples. If two lists have obtained the same support in the caucuses of the House of Peoples when nominated pursuant to Article 9.13, the list that is forwarded to the House of Peoples shall be determined by drawing of a lot.

Article 9.16

(1) The House of Peoples shall decide by a majority of the delegates present and voting within 30 days of the receipt of the list approved by the House of Representatives.

(2) For the avoidance of any doubt, the delegates to the House of Peoples of the Parliament of the Federation of BiH from the rank of Others shall participate in the procedure prescribed in Paragraph (1) of this Article.

Article 9.17

(1) Notwithstanding Article 9.14 of this Law, if the House of Representatives fails to approve a list of candidates in the deadline provided for in Article 9.15 Paragraph (1) of this Law, the list composed of the candidates that received the most support in the respective caucuses of the House of Peoples when nominated pursuant to Article 9.13 of this Law shall be forwarded to the House of Peoples. If more than one such candidate received identical support in one or more caucuses of the House of Peoples when nominated pursuant to Article 9.13 of this Law, the candidate that is included on the list forwarded to the House of Peoples shall be determined by drawing of a lot. The list forwarded to the House of Peoples shall be considered elected if approved in the House of Peoples in accordance with Article 9.16 of this Law.

(2) Notwithstanding Article 9.14 of this Law, if the House of Peoples fails to vote on the list of candidates submitted by the House of Representatives in the deadline provided for in Article 9.16 Paragraph (1) of this Law, the list approved in the House of Representatives only shall be considered elected.

Article 9.18

(1) If the list of candidates is not approved pursuant to Articles 9.15 to 9.17 of this Law, the procedure shall be repeated. In the repeated procedure, the House of Representatives shall vote for a new list within 15 days of the vote by which the list of candidates was rejected. If the House of Representatives has exhausted all possible lists of candidates nominated pursuant to Article 9.13 of this Law, the procedure provided for in Articles 9.13 through 9.15 of this Law shall be repeated provided that the deadlines for the relevant caucus to nominate candidate(s) stipulated in Article 9.13 of this Law shall be halved and shall start on the day of the vote of House by which it rejected the last list.

(2) In the repeated procedure the list which obtains a majority of votes of the members present and voting in the House of Representatives pursuant to Article 9.15 of this Law shall be considered elected.

Article 9.19

(1) The three candidates approved pursuant to Article 9.13 through 9.18 of this Law shall decide among themselves who shall occupy the position of President. If no agreement is reached, the House of Representatives shall decide.

(2) The mandate of the President and Vice-President shall be for four (4) years provided that the mandate does not expire earlier. The same person may not be elected to one of the positions of either President or Vice-President more than twice consecutively."

Article 2

Article 10.10 shall be amended to read:

"The cantonal legislatures shall elect eighty (80) delegates to the House of Peoples, twenty-three (23) from among the Bosniacs, twenty-three (23) from among the Croats, twenty-three (23) from among the Serbs and eleven (11) from among the group of Others."

Article 3

In Article 10.12 of the Law, Paragraph (2) shall be amended to read:

"(2) For each canton, the population figures for each constituent people and for the group of Others shall be divided by the numbers 1,3,5,7 etc. as long as necessary for the allocation. The numbers resulting from these divisions shall represent the quotient of each constituent people and of the group of Others in each canton. All the constituent peoples'quotients and quotients of the group of Others shall be ordered by size separately, the largest quotient of each constituent people and of the Others being placed first in order. Each constituent people and the group of Others shall be allocated one seat in every canton which has at least one such delegate in its legislative body provided that, if a canton does not have one such delegate in its legislative body, Article 10.16 of this Law shall apply. The highest quotient for each constituent people and for the group of Others in each canton shall be deleted from that constituent peoples' list of quotients or from the list of the group of Others. The remaining seats shall be allocated to constituent peoples and to the Others one by one in descending order according to the remaining quotients on their respective list."

Article 4

In Article 10.13 of the Law, a new Paragraph (2) shall be added to read:

"(2) If a Cantonal Assembly fails to elect delegates from one or more constituent peoples or from the group of Others to the House of Peoples of the Federation of BiH within the deadline stipulated in Paragraph (1) of this Article, the seats allocated to the relevant constituent people(s) and/or to the group of Others from that Canton shall be re-allocated in accordance with Article 10.16 of this Law."

Article 5

In Article 10.16 of the Law, after the existing Paragraph (2), a new Paragraph (3) shall be added to read:

"(3) Exceptionally, the Central Election Commission of BiH shall adopt a special act in order to prescribe the method of filling the seats assigned to one of the constituent peoples or to the group of Others that remain vacant after the procedure provided in Paragraph (1) and (2) of this Article and shall fill the missing number of delegates from among the constituent people or from among the group of Others."

Article 6

Article 20.16A of the Law shall be deleted.

Article 7

This Law shall enter into force on the eighth day after its publication on the official website of the Office of the High Representative or the day following its publication in the "Official Gazette of Bosnia and Herzegovina", whichever comes first.

V. Admissibility

69. 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 neighbouring 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.

70. The requests for review of constitutionality were submitted by Željko Komšić, Member of the Presidency of Bosnia and Herzegovina, and Šefik Džaferović, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing of the request, which means that the requests were filed by the authorized persons, within the meaning of Article VI(3)(a) of the Constitution of BiH.

71. In addition, the Constitutional Court notes that the applicants seek the review of the constitutionality of the Amendments and Amendments to the Election Law imposed by the High Representative's Decisions no. 06/22 and 07/22 of 2 October 2022.

72. Regarding the competence of the High Representative to enact laws, and the competence of the Constitutional Court to decide on the conformity of such laws with the Constitution of Bosnia and Herzegovina, the Constitutional Court has already expressed its position that the High Representative's powers follow from Annex 10 of the General Framework Agreement, the relevant resolutions of the Security Council of the United Nations and the Bonn Declaration and that these powers, and the exercise of these powers, are not subject to review by the Constitutional Court. However, where the High Representative intervenes in the legal system of Bosnia and Herzegovina, substituting himself for the domestic authorities, he acts as an authority of Bosnia and Herzegovina. In addition, the laws enacted by him are in nature domestic laws and must be regarded as the laws of Bosnia and Herzegovina, the conformity of which with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court (see 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).

73. Namely, the Constitutional Court recalls that in accordance with the theory of functional duality developed by the Constitutional Court in decision *U-9/00*, it follows that the enactments of the High Representative, when he acts as a substitute for domestic authorities, can be subject to review by the Constitutional Court only if these enactments

would otherwise be subject to review under domestic law. However, the powers exercised by the High Representative exclusively under Annex 10 ("the international mandate of the High Representative") cannot be subject to such a review. In this regard, the Constitutional Court stated:

> *5. (...) Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.*
>
> *6. Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 (O.G. No. 2/2000) - or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed. (...)*

74. In the present case, the Constitutional Court notes that the High Representative intervened in the legal system of Bosnia and Herzegovina and, instead of the Parliamentary Assembly of Bosnia and Herzegovina and the Parliament of the Federation of Bosnia and Herzegovina, enacted the challenged Amendments and Amendments to the Election Law. In this regard, he therefore acted as the legislature of Bosnia and Herzegovina, and the Amendments, *i.e.* Amendments to the Election Law, which he passed, indisputably have the

legal nature of domestic regulations whose compliance with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court. In such a situation, the Constitutional Court holds that it is competent to examine the compatibility of the Amendments and Amendments to the Election Law with the provisions of the Constitution of Bosnia and Herzegovina.

75. Therefore, in view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court concludes that the requests are admissible for they have been filed by the authorized persons and relate to the issues falling within the competence of the Constitutional Court of Bosnia and Herzegovina. In addition, there is not any formal reason under Article 19(1) of the Rules of the Constitutional Court that would render the requests inadmissible.

VI. Merits

76. The applicants contend that the challenged Amendments and Amendments to the Election Law do not comply with the provisions of Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina, Article 3 of Protocol No. 1 to the European Convention, Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights.

77. Since the scope of the examination is limited to the issues related to the review of constitutionality, the Constitutional Court notes that in this case it will deal only with issues and arguments that raise the issue of the constitutionality of the challenged Amendments and Amendments to the Election Law. In addition, the Constitutional Court highlights that it is the master of the characterization to be given in law to the facts of the case, and that it is not bound by the characterization given by the applicants (see Constitutional Court, Decision on Admissibility and Merits no. *U-6/06* of 29 March 2006, paragraph 21, published in the *Official Gazette of BiH*, 40/08), as well as that the constitutional Court is the final authority on the interpretation and application of the BiH Constitution (see Constitutional Court, Decision on Admissibility and Merits no. *U-9/09* of 26 November 2010, paragraph 70, published in the *Official Gazette of BiH*, 48/11).

78. In view with the above, the Constitutional Court holds that the requests raise the issues relating to the following a) the stability of the electoral system, b) the election and role

of the House of Peoples of the FBiH Parliament; c) election of the President and Vice-Presidents of the Federation of Bosnia and Herzegovina, and d) respect for the principle of legal certainty.

a) As to the stability of the electoral system

79. In the present case, a review of the constitutionality of the challenged provisions of the Amendments and Amendments to the Election Law is requested with regard to the date of their entry into force. In this context, the Constitutional Court holds that the allegations of applicants Komšić and Džaferović, who challenge the time of enactment and entry into force of the challenged Amendments and Amendments to the Election Law, cannot be considered outside the scope of the powers of the High Representative under Article V of Annex 10 to the General Framework Agreement. In this respect, given the position of the Constitutional Court that the powers of the High Representative and the manner in which they are exercised are not subject to review by the Constitutional Court, the Constitutional Court holds that the issue of the time of enactment and entry into force of the Amendments to the FBiH Constitution and the Amendments to the Election Law can not be decided without interfering with the manner in which the High Representative exercises these powers. Namely, the issue of the enactment and entry into force of the High Representative's decisions whereby he intervenes in the legal system, acting as an authority of Bosnia and Herzegovina, first depends on his assessment of the necessity of using the powers resulting from the conclusions of the Bonn Peace Implementation Conference ("the Bonn Powers"). Pursuant to the Bonn Powers, the High Representative may make binding decisions, as he deems necessary in order to facilitate the resolution of disputed situations. A possible decision on that issue would mean that the Constitutional Court would have jurisdiction to establish time limits for the High Representative to make binding decisions, which is directly related to the issue of the manner in which he exercises his powers under Annex 10 of the General Framework Agreement. Therefore, the Constitutional Court holds that deciding on the time of enactment and entry into force of the Amendments and Amendments to the Election Law would go beyond the framework of the aforementioned theory of functional duality, *i.e.* the competence of the Constitutional Court (see paragraph 73 of the present decision) and, consequently, the Constitutional Court will not deal with that issue.

80. However, the Constitutional Court notes that, in the case at hand, the applicants contend that the challenged provisions were enacted immediately after the closing of the polling stations (voting) and that it, in itself, is a problem in terms of respecting the right to

free elections. According to the applicants, "the voters' will was influenced in this way," for the voters "could not even know that their vote in the elections could have a completely different outcome than the one they expected." In support of the above, the applicants refer to a number of decisions of the European Court of Human Rights. Taking into account the aforementioned, the Constitutional Court holds that the allegations in the request essentially question compliance with the principle of stability of the electoral system, thereby raising the issue of compliance with the right to free elections under Article 3 of Protocol No. 1 to the European Convention.

81. Article 3 of Protocol No.1 to the European Convention reads:

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.

As to the applicability of Article 3 of Protocol No. 1 to the European Convention to the present case

82. The European Court has emphasized that democracy constitutes a fundamental element of the "European public order." The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see ECtHR, among other authorities, *op cit. Ždanoka v. Latvia* judgment, paragraphs 98 and 103, and *Yumak and Sadak v. Turkey*, judgment of 8 July 2008, application no. 10226/03, paragraph 105). Unlike all the other substantive clauses in the Convention and in Protocols, Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections, which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, the Court has established that this provision also implies individual rights, including the right to vote (the active aspect) and the right to stand for election (the passive aspect) (see ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, no. 9267/81, paragraphs 48-51 and *op. cit. Ždanoka v. Latvia*, paragraph 102). In this regard, the notion of the right of individuals to stand for election relates both to physical persons and political parties (see ECtHR, *Russian Conservative Party of Entrepreneurs and Others v. Russia,* judgment of 11 January 2007, nos. 55066/00 and 55638/00, paragraphs 53-67).

83. The Constitutional Court observes that Article 3 of Protocol No. 1 to the European Convention applies only to the election of the "legislature," or at least of one of its chambers if it has two or more. The word "legislature" has to be interpreted in the light of the constitutional structure of the State in question (see ECtHR, *Matthews v. the United Kingdom* [GC], judgment of 18 February 1999, no. 24833/94, paragraph 40) and, notably, the constitutional tradition of the State and scope of legislative responsibilities of the chamber concerned. Furthermore, the *travaux préparatoires* show (vol. VIII, pp. 46, 50 and 52) that the Contracting States took into account a particular position of some parliaments composed of non-elected chambers. Article 3 of Protocol No. 1 is therefore carefully conceived to avoid any expressions, which could be interpreted as creating an absolute obligation to hold elections in both chambers of legislature where the Member State follows a bicameral system (*ibid. Mathieu-Mohin and Clerfayt v. Belgium*, paragraph 53). However, as the European Court stated*, it is clear that Article 3 of Protocol No.1 applies to any of a parliament's chambers to be filled through direct elections* (op.cit., *Sejdić and Finci,* paragraph 40.

84. In the case of *Sejdić and Finci v. Bosnia and Herzegovina* (*op.cit.*, paragraphs 40 and 41), the European Court, in considering the issue of application of Article 3 of Protocol No. 1 to the European Convention, noted that "*its composition [of the House of Peoples] is the result of indirect elections, its members being appointed by the Entities' legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of Bosnia and Herzegovina and approves a budget of the State institutions (see Article IV § 4 (b)-(c) of the Constitution). Lastly, its consent is necessary before a treaty can be ratified (see Articles IV § 4 (d) and V § 3 (d) of the Constitution). Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1.*"

85. Bringing the above in relation to the position and role of the FBiH House of Peoples, the Constitutional Court emphasizes first that the FBiH Constitution determined the elections to the cantonal legislatures and to the House of Peoples as two different types of elections (see Constitutional Court, decision no. *AP-35/03* of 28 January 2005, paragraph 38, published

in the *Official Gazette of BiH*, 30/05). The elections to the cantonal legislatures have been set forth in the original text of the FBiH Constitution, from which it is evident that these are direct elections that are held in such a way that voters, by secret ballot, choose representatives for the legislature of the respective canton. The Constitutional Court notes that that before the entry into force of the Amendments and Amendments to the Election Law, the elections to the FBiH House of Peoples were regulated by Amendment XXXIV and Articles 10.10 to 10.18 of the Election Law, and following the contested Amendments, by Amendments CXI, CXII and CXIII to the FBiH Constitution and Articles 2-5 of the Amendments to the Election Law. It follows from a comparison between the previously valid provisions of the FBiH Constitution and Election Law and the provisions of the Amendments and Amendments to the Election Law that the method and procedure for electing delegates to the FBiH House of Peoples essentially remain unchanged.

86. Given the fact that the European Court has noted in the judgment of *Sejdić and Finci v. Bosnia and Herzegovina*, with regard to the elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, that they fall within the ambit of Article 3 of Protocol No.1 to the European Convention, the Constitutional Court notes that the mentioned Article is applicable to the present case as the FBiH House of Peoples has a role similar to that of the House of Peoples of the Parliamentary Assembly of BiH.

As to the relevant standards

87. The European Court has noted that the rights enshrined in the mentioned Article are not absolute. There is room for “implied limitations,” where the Contracting States have a wide margin of appreciation in this sphere. (*op. cit. Mathieu-Mohin and Clerfayt v. Belgium*, paragraph 63 and *Labita v. Italy* [GC], judgment of 26 April 2000, no. 26772/95, paragraph 201). The concept of “implied limitations” means, *inter alia*, that the application of Article 3 of Protocol No. 1 to the European Convention is not confined to a list of “legitimate aims” and that the European Court does not apply usual tests of “necessity” and “pressing social need,” which are used in the context of Articles 8-11 of the European Convention.” When examining the compatibility with Article 3 of Protocol No. 1, the European Court is mainly focused on two criteria: whether there has been arbitrariness or disproportionality and whether the limitation has affected the free expression of the opinion of the people.

88. The European Court has noted that it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 to the European Convention have been complied with. It has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (*op. cit. Mathieu-Mohin and Clerfayt*, paragraph 52). The European Court has emphasized the need to assess each election system in the light of political evolution of the country concerned, meaning that the features unacceptable in the context of one system may be justified in the context of another (*op.cit*. *Ždanoka v. Latvia*, paragraphs 103-104 and 115), at least as long as the system concerned provides for the conditions securing "the free expression of the people in the choice of the legislature" (*idem*. paragraph 104). In particular, any conditions imposed must not thwart the free expression of the people in the choice of integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (*op.cit*., *Hirst v. the UK* (No.2), paragraph 62).

89. When it comes to the modification of the election rules immediately before or after the elections, the Constitutional Court observes that it follows from the case law of the European Court that amending the election rules immediately before or after the elections is not contrary *per se* to Article 3 of Protocol No. 1 to the European Convention. What is important is that once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order (see ECtHR, *Lykourezos v. Greece,* judgment of 15 June 2006, no. 33554/03, paragraph 52). In the mentioned case, the European Court found a violation of the right to free elections under Article 3 of Protocol No. 1 to the European Convention as the constitution was amended after the applicant had been elected, thereby ending his term in accordance with the decisions of the courts. The European Court also noted that the Government had not advanced any ground of pressing significance to the democratic order that could have justified the immediate application of the absolute disqualification. The European Court concluded that the situation was therefore in breach of the very substance of the rights guaranteed by Article 3 of Protocol No. 1 as the courts had deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years

in Parliament, in breach of the principle of legitimate expectation (*ibid., Lykourezos v. Greece*, paragraph 57).

90. On the other hand, the Constitutional Court recalls that the European Court also considered the argument of a political party that a sudden change in the registration system, which had taken place a month before the repeat elections, was unexpected for voters (the *Georgian Labour Party v. Georgia*, judgment of 8 July 2008, no. 9103/04, paragraphs 88-89). In this connection, the European Court, referring to the Code of the Venice Commission, noted that, as a matter of policy, „it would indeed be preferable to maintain the stability of electoral law" and that fundamental electoral rules, such as those concerning voter registration, should not normally be amended too often and especially on the eve of an election. Otherwise, the State risks undermining respect for and confidence in the existence of the guarantees of a free election. However, the European Court noted that, for the purposes of applying Article 3 of Protocol No. 1, any electoral legislation had to be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system could be justified in the context of another. As noted further by the European Court, the electoral authorities had the challenge of remedying manifest shortcomings in the electoral rolls within very tight deadlines, in a "post-revolutionary" political situation. Consequently, the Court concluded that the unexpected change in the rules on voter registration one month before the repeat parliamentary election was, in the very specific circumstances of the situation, a solution devoid of criticism under Article 3 of Protocol No. 1. Consequently, in that case the European Court gave greater importance to the fact that the authorities had acted in a way to have more fair new ballots. The European Court rendered similar decisions in the cases of *Cernea v. Romania* (see ECtHR, judgment of 27 February 2018, no. 43609/10, paragraph 40) and *Dupre v. France* (judgment of 3 May 2016, no. 77032/12).

As to the application of the standards under Article 3 of Protocol No. 1 to the European Convention to this case

91. The Constitutional Court recalls that it considers the review of constitutionality, i.e. compatibility, of a law or legal provision with the Constitution of Bosnia and Herzegovina in a general or wider sense (*erga omnes*) and not in regard to this specific case (*inter partes*) (see Constitutional Court decision no. *U-15/11* of 30 March 2012, paragraph 63). The Constitutional Court reminds that in deciding the cases falling within the abstract review, it is

hard to examine whether individual rights have been violated, as the compliance or failure to comply with the provisions the European Convention, which prescribe in detail a number of procedural guarantees, may be effectively examined only upon the conduct of the proceedings as a whole before the competent courts. Within the scope of abstract review, the Constitutional Court may only examine whether the challenged provision explicitly violates any of the principles under the European Convention (see, *mutatis mutandis*, Decision on Admissibility and Merits *no. U-16/18* of 28 March 2019, paragraph 65, available at www.ustavnisud.ba).

92. Therefore, considering the standard laid out in Article 3 of Protocol No. 1 to the European Convention, in the instant case, the Constitutional Court should primarily consider *in abstracto* whether the Amendments and the Amendments to the Election Law, which were adopted immediately after the voting was completed at the polling stations, could call into question "the free expression of the people in the choice of the legislature". If the answer to this question is positive, it is necessary to consider whether, in the light of a political evolution of Bosnia and Herzegovina, convincing reasons of relevance for the protection of the democratic order existed for the entry into force of those legal acts. In addition, the Constitutional Court considers it necessary to answer the question whether the way in which the Constitution and the Election Law were amended was compatible with the very essence of the right of candidates to be elected and to exercise their mandate, as well as the voters' rights to vote.

93. When it comes to the rules related to the election process, the Constitutional Court observes that the difference created by the new Amendments and the Amendments to the Election Law relates to the increase in the number of candidates elected from the cantonal assemblies and the procedure in the event that there are no delegates in the cantonal legislatures or no delegates are elected from among one or more constituent peoples or from among Others. In this regard, according to the provisions of Article 10.11 of the previously valid Election Law, the essence of which has not been changed by the entry into force of the Amendments and the Amendments to the Election Law, delegates to the FBiH House of Peoples are indirectly elected by the cantonal legislatures following the general elections. According to the provision of Article 10.13 of the Election Law, the cantonal assemblies are convened only after the general elections have been completed and the results for the cantonal legislatures have been confirmed. After that, the procedure for the election of delegates to the FBiH House of Peoples is initiated so that each political party or each

member in the respective caucus of the constituent peoples and Others in the cantonal legislature has the right to nominate one or more candidates on the list for the election of delegates of that particular caucus from that canton (Article 10.14 of the Election Law). After the CEC confirms the lists, the representatives of each constituent people and Others, by secret ballot, elect delegates from their constituent people/Others in that canton. That election must be completed no later than one month after the certification of the election (Article 10.13 and 10.15 of the Election Law). If the required number of delegates from the constituent peoples/Others is not elected in the above manner, the remaining number of delegates is elected based on Article 10.16 of the Election Law. It is evident therefore from the aforementioned constitutional and legal provisions that these are indirect elections organized in two rounds and that they are held after the direct elections for the cantonal legislatures.

94. Turning to the present case, the Constitutional Court notes that the general elections were held on 2 October 2022 and that the CEC confirmed the results of the direct elections in a decision dated 2 November 2022 (available at izbori.ba). Based on the voting results in the cantonal legislatures, the CEC made decisions to confirm the results of the indirect elections and allocate the mandates to delegates in the FBiH House of Peoples for individual cantons, the last of which was made on 9 December 2022 in relation to the Bosnian-Podrinje Canton (available at izbori.ba). In addition, based on Article 10.16 of the Election Law, the CEC made decisions to re-allocate the mandates for non-filled seats from among the constituent peoples/Others. The last decision in this regard was made on 13 December 2022 (available at izbori.ba).

95. Applicant Komšić contends that the enactment of the contested provisions has amounted to the fact that voters were not aware of the High Representative’s decision at the time of voting and could not even know what they were actually voting for. If they had known, “it is very likely that the voters’ will would have been completely different, as well as the messages that the political parties, participating in the elections, would have sent to their voters.” These allegations essentially indicate that the contested acts essentially compromised “the free expression of the opinion of the people.”

96. The Constitutional Court observes that the European Court has noted that the terms “the free expression of the opinion of people” mean that the elections cannot be held under any form of pressure in the choice of one or more candidates, and that in this choice the

elector should not be unduly induced to vote for one party or another (see ECtHR*, X. v the United Kingdom*, no. 7140/75 of 8 October 1976, DR 7, page 96). Thus, no pressure can be exerted on the voters in their choice of a candidate or political party. Furthermore, the word "choice" signifies that the different political parties must be ensured a reasonable opportunity to present their candidates at elections (idem. *X v. Island*, no. 8941/80, Decision of the Commission, of 8 December 1981, DR 27, page 156).

97. When the aforementioned views are brought into connection with applicant Komšić's views that the voters "could not even know what they were actually voting for" and that an influence was exerted on the voters' will, the Constitutional Court first notes that the applicant mistakenly conflates direct elections with indirect elections. At the same time, applicant Komšić disregards the fact that the results of the elections to the FBiH House of Peoples can only be calculated based on the results of the indirect elections held in accordance with the aforementioned constitutional and law provisions and that the same was applicable before the adoption of the disputed acts.

98. As to the legal nature of the elections to the House of Peoples, the Constitutional Court recalls and applies, *mutatis mutandis,* its views in case no. *AP-35/03* (cited above), wherein it decided an appeal of the Social Democratic Party of Bosnia and Herzegovina (SDP), which claimed that a certain number of seats within the House of Peoples should have been allocated to that party, proportionate to the voting results achieved at the direct general elections for cantonal legislatures. That party considered as erroneous the approach whereby the number of seats in the House of Peoples was determined based on the results of the indirect elections held in the respective Cantonal Assemblies after the general direct elections. In this connection, the Constitutional Court noted as follows:

> *49. […] Therefore, the Constitutional Court finds no reason as grounds to apply the results of direct elections for Cantonal Legislatures on the elections of delegates to the House of Peoples of the Parliament of the Federation since there are two different types of elections at issue. The election results for the House of Peoples of the Parliament of the Federation can only be calculated on the basis of results of indirect elections held in accordance with the quoted constitutional and legal provisions. If the composition of the House of Peoples of the Parliament of the Federation were to be proportionate to the election results accomplished by parties in the direct elections for Cantonal Legislatures, the questions "what is the point of holding indirect*

elections", "why Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina was adopted in the first place" and "why amendments to the Election Law in part relating to the election of delegates to the House of Peoples of the Parliament of the Federation were adopted" could rightfully be posed [...].

99. Given the aforementioned, one cannot reasonably claim that based on the Amendments and the Amendments to the Election Law an influence was exerted on the already expressed wishes of the voters. Considering in this context, applicant Komšić's allegations that "it is very likely that the voters' will would have been completely different, as well as the messages that the political parties, participating in the elections, would have sent to their voters," the Constitutional Court considers that applicant Komšić, beyond the abstract level, did not provide a concrete argument on how the adoption and entry into force of the Amendments and the Amendments to the Election Law, in the context of the presented method of electing delegates to the FBiH House of Peoples, affected or could affect the free expression of the voters' opinion that had already been expressed. At the same time, the Constitutional Court notes that it is not the task of the Constitutional Court to presume what the outcome of direct elections would have been if the contested provisions of the Amendments and the Amendments to the Election Law that relate to the subsequent indirect elections had been valid at an earlier point. Therefore, the Constitutional Court cannot determine that there is a sufficiently close causal connection between the right of voters to directly elect representatives to the cantonal legislatures and changes in the number of delegates to the FBiH House of Peoples, who are elected at the indirect elections. This cannot be established solely based on the claim that "it is very likely that the voters' will would have been completely different."

100. Furthermore, the Constitutional Court recalls that in the general elections, the voters were clearly aware of who they could vote for in the direct elections by inspecting the open lists of candidates. However, before the impugned provisions were passed, and equally, even if the impugned provisions had been passed earlier, the voters could not have objectively known the ethnicity of the candidates who would be elected in direct elections, nor could they have forecasted the "outcome of the elections" to the cantonal assemblies for which they voted directly. Thus, when voting for the cantonal legislatures, the voters could not predict the composition of any caucus of people, how the parties would eventually form coalitions or how the other members of the caucus of the constituent peoples or Others would vote. The impossibility of exerting an influence by voters or parties on the final composition of the

House of Peoples is evidenced by the content of the decision of the Constitutional Court in case *no. U-17/16.* From the decision, it follows that it was not possible to fully fill the Serb caucus in the F BiH House of Peoples due to the insufficient number of elected candidates of a certain ethnicity (see, Constitutional Court, Decision on Admissibility and Merits *no. U-17/16* of 19 January 2017, paragraph 48, available at www.ustavnisud.ba). Thus, the Constitutional Court finds unconvincing the arguments of applicants Komšić and Džaferović that any of the voters could predict which of the political parties, for which she/he voted in the direct elections, would have best results in the elections for the cantonal legislatures and that in that manner they could influence the subsequent election of the candidates to the FBiH House of Peoples. For the stated reasons, the Constitutional Court notes that the views expressed in the case of the US Supreme Court *Purcell v. Gonzalez*, meaning that the electoral rules should not be changed too close to the elections, due to the risk of causing confusion among voters, cannot apply in this context.

101. Hence, bringing the applicants' claims into the context of the aforementioned case law of the European Court and the Constitutional Court, the Constitutional Court notes that nothing discloses the likelihood that the direct elections were conducted under any pressure in the choice of candidates or that the voters were unduly induced to vote for one political party or another or that the wishes expressed by the voters in the direct elections were changed. Thus, the Constitutional Court holds that there is nothing that would indicate that the entry into force of the Amendments and the Amendments to the Election Law had an influence on the voters so as to change their wishes thereby compromising the election process in contravention of the right under Article 3 of Protocol No. 1 to the European Convention.

102. When it comes to the applicants' claims that political parties were "deprived of a reasonable opportunity to present their candidates in the elections," the Constitutional Court recalls the case law the European Court. It was noted that the court has to satisfy itself that the conditions do not curtail the rights to vote and stand for election to such an extent as to impair their very essence and deprive them of their effectiveness and that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (*op.cit.*, *Mathieu-Mohin and Clerfayt v. Belgium*, paragraph 52). As to the issue of who is authorized to claim a violation of the "passive" aspect of the right to free elections, the European Court has noted that when electoral legislation or the measures taken by national authorities restrict

individual candidates' right to stand for election through a party list, the relevant party could claim to be a victim of such violation independently of its candidates (*op.cit.,* the *Georgian Labour Party v. Georgia*, paragraphs 72-74).

103. In this regard, the Constitutional Court observes that it does not follow from the allegations of the applicants, nor from the relevant provisions, how the adoption and entry into force of the disputed Amendments and the Amendments to the Election Law, in the part related to the election process, could affect or limit the right to stand for elections or present candidates for general elections. In this context, the Constitutional Court reiterates that the elections for the FBiH House of Peoples are held after the general election. In this connection, the Constitutional Court refers to its view expressed in decision *AP-35/03* (*op.cit.,* paragraph 98 of this decision), wherein it noted that the election results for the FBiH House of Peoples can only be calculated on the basis of results of indirect elections held in accordance with the quoted constitutional and legal provisions. At the time when the Amendments and the Amendments to the Election Law came into force, none of the candidates who participated in the direct elections had a final confirmation that she/he was elected, i.e., that she/he received a mandate in the cantonal legislature. Therefore, the Constitutional Court considers that there is nothing to indicate that any of the elected members of the cantonal assembly could have his/her mandate annulled or that he/she was deprived of the mandate received in direct elections after the entry into force of the Amendments and the Amendments to the Election Law.

104. Considering, in this context, the claims of applicant Džaferović regarding the violation of the principle of "legitimate expectations," the Constitutional Court notes that his allegations, apart from presenting a theoretical understanding of that principle, do not result in more detailed arguments about the way in which that principle was possibly violated in the context of holding elections. Furthermore, the applicant does not even claim that, as a result of the amendments at issue, there was a reduction in the number of delegates for some of the cantons compared to the number of delegates that would have been elected based on the earlier election, having thus a bearing on the "legitimate expectations" of candidates that, if elected in direct elections, would then be able to stand for the election of delegates to the FBiH House of Peoples, or on their prospects of being elected. On the contrary, one can conclude that the increase in the total number of delegates was in the interest of all political entities in the cantonal legislatures, since they can nominate larger number of persons to

stand for the election to the FBiH House of Peoples. This is so in light of the possibility, in a case where the required number of delegates is not elected in one canton, to elect the remaining number based on Article 10.16 until the required number of delegates is elected from among each constituent people.

105. The applicants Komšić and Džaferović claim that political parties could nominate a greater number of persons belonging to one ethnic group, had they been aware of the contested provisions earlier. However, the Constitutional Court notes that the subject matter of the amendments were not the provisions of the Election Law that enable political parties and lists of independent candidates to nominate an unlimited number of persons to stand for general elections, where members of the cantonal legislatures are elected, regardless of their ethnic affiliation. The Constitutional Court notes that it follows from the data of the CEC regarding the 2022 general elections that political parties nominated dozens of candidates on the lists for cantonal legislatures, which was certainly their right (source: 2022 General Elections Candidate Lists). In addition, the Constitutional Court notes that the candidates' declaration of ethnicity, which is attached to the candidate lists when certifying the elections to the cantonal legislatures, is not stated on the ballots, and thus is not formally known to the voters. Therefore, the "legitimate expectations" surrounding who will be indirectly elected to the FBiH House of Peoples cannot be based on the candidacy for direct elections alone. Bearing all this in mind, the Constitutional Court cannot conclude that the adoption of the Amendments and Amendments to the Election Law amounted to an interference with the "passive aspect" of the right to free elections under Article 3 of Protocol No. 1 to the European Convention in the context of the election of delegates to the FBiH House of Peoples.

106. Furthermore, the Constitutional Court notes that the case law referred to by the applicants cannot be applied to the present case. In particular, as it follows from the reasons for the aforementioned decisions, in each of the aforementioned cases there was a direct interference with a segment of the right to free elections of the candidates who were already elected or were directly prevented from standing. In those cases, the reasons given by the public authorities were not sufficient to establish the existence of convincing reasons of relevance for the protection of the democratic order. In this regard, the Constitutional Court notes that a violation of the right to free elections under Article 3(1) of the Protocol No. 1 to the European Convention was found in the case of *Paschalidis, Koutmeridis and Zaharakis*

v. Greece (*op.cit.,* paragraph 33 of the decision) as the mandates allocated to the applicants at the elections were annulled on the basis of the subsequently adopted decision of the Supreme Court. In the *Ekoglasnost v. Bulgaria* (*idem.)* judgment, the European Court found a violation of the right to free elections under Article 3(1) of the of the Protocol No. 1 to European Court as the national law, which entered into force a month before the deadline for registration of candidates, introduced new rules related to, *inter alia*, the system of electoral deposits and the signatures of at least 5,000 voters supporting the party's participation in the elections. That party could not therefore stand for elections. Furthermore, in the case of *Ždanoka v. Latvia*, a candidate of the Communist Party from the Soviet era, who attempted a coup d'état, was disqualified as a parliamentary candidate (*op.cit.,* paragraph 42 of the decision). However, as previously stated, in the specific case, it was not possible to ascertain that the right to free elections of the voters or candidates or their „legitimate expectations“ was affected in any way.

107. Although it was not possible to establish that the right to free elections of voters or candidates was affected, the Constitutional Court deems it necessary to consider the whether the challenged provisions affect the integrity of the election process by virtue of the timing of their adoption and entry into force. Specifically, the Constitutional Court accepts the applicants' claims that the timing of entry into force of the challenged provisions was not ideal. The change of certain provisions relating to the electoral process, after the direct elections had been held on 2 October 2022, right after the polling stations had been closed at 19.00 hrs that day, departs from the usual ways of entry into force of regulations relating to the implementation of elections in the democratic states. However, in the present case, the Constitutional Court deems that the timing of the adoption of the challenged provisions is irrelevant to the free expression of the will of voters who voted in direct elections, for the reason that the challenged provisions amended the rules relating to indirect elections. As already explained, the voters who voted in direct elections do not participate in indirect elections. Therefore, the Constitutional Court deems that the timing of entry into force of the challenged provisions could not affect the will of the voters, or the authenticity and integrity of the election process, as the applicants are trying to portray it.

108. The Constitutional Court finds it particularly difficult to accept the claims of the applicants that the time of adoption and entry into force of the Amendments and the Amendments to the Election Law *per se* could result in unconstitutionality of the entire

contents thereof. Indeed, the Constitutional Court finds that, as a last resort, one could raise only a question as to the time from which the provisions of the Amendments and the Amendments to the Election Law pertaining to the elections became applicable. Assuming that there was indeed an interference with the right to free elections, a violation of that right depends on whether or not there exist convincing reasons of relevance for the protection of the democratic order, which justify the challenged acts. In that regard, the Constitutional Court recalls that the Code of the Venice Commission, the Explanatory Report for Point II.2 of the Guidelines (see, the Code, page 27 available here), reads as follows:

> *[…] 65. It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.*
>
> *66. One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that. […]*

109. In this context, the Constitutional Court finds that it is important to reiterate that the European Court has stressed the need to assess any electoral system in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another. Therefore, as stated, it is necessary to leave sufficient latitude to both legislative and judicial authorities to assess the needs of their society in building confidence in the new democratic institutions (op. cit, *Ždanoka v. Latvia*, paragraphs 133 and 134). The Constitutional Court further stresses that the position of the High Representative is unique and it is impossible to disregard his authority to "resolve any difficulties arising in connection with civilian implementation of the General Framework Peace Agreement in Bosnia and Herzegovina". Therefore, it is necessary in the present case, when considering the justifiability the challenged acts, i.e. the existence of convincing reasons of relevance for the protection of the democratic order, to take into

account "special constitutional context of the country". In particular, it is necessary to take into account, the historical and political evolution of the Federation of Bosnia and Herzegovina in this area, which led to the adoption of the challenged legal acts (see, paragraphs 12-28 of this decision).

110. Keeping that in mind, the Constitutional Court cannot help but notice that, following the adoption of a decision on non-enforcement in the case no. *U-23/14*, there was significant inconsistency between the previously applicable provisions of the FBiH Constitution and the Election Law, which pertained to the way of filling in the seats in the House of Peoples of FBiH. In addition, the Constitutional Court observes that, following the 2018 General Elections, the Central Election Commission adopted the 2018 Instruction more than two months later. The said Instruction, due to the cessation of the applicability of the relevant provisions of the Election Law, subsequently established the preliminary number of delegates to be elected from the cantonal assemblies. Hence, at the time of announcing and holding the 2018 General Elections, the number of delegates to be elected from certain cantonal assemblies was not known at all (see, paragraph 21 of this decision). In addition, the Constitutional Court recalls that such a way of determining preliminary number of mandates was of temporary character (see, *op. cit.*, *U-24/18*, paragraph 36). Therefore, if the challenged provisions were not adopted, it would be necessary for the Central Election Commission, following the 2022 General Elections, to adopt a decision (of temporary character) again on the number of delegates to the House of Peoples of FBiH who should be delegated from the cantonal legislative bodies. Hence, keeping such *modus operandi* would equally call into question the application of the principle of the right to free elections, particularly the standard according to which the electoral legislation must be at the level of a law. In such circumstances, the Constitutional Court deems that it would be irrational to expect for Article 3 of Protocol No. 1 to the European Convention and the provisions of the Code of the Venice Commission, relating to the stability of the election system, to be interpreted in such a way that it is necessary to maintain the legal force of the provisions resulting in a situation of legal uncertainty, disregarding the effect that they did have and could have on the democratic order.

111. The Constitutional Court further observes that such legal and factual situation primarily resulted from the failure of the public authorities to implement the decision of the Constitutional Court no. *U-23/14*. The public authorities, as shown in the facts of the case of this decision, used the process described above, as well as the procedure of the election of

delegates to the House of Peoples of FBiH, or the procedure for the election of President and Vice-Presidents of the Federation of Bosnia and Herzegovina, to further compound the then existing state of unconstitutionality of election laws and the general situation of legal uncertainty. This can be exemplified by recalling the fact that over the past period of 2018-2022, no executive authority has been established and that the previous executive authority operated in a technical mandate (see, paragraphs 10, 24 and 25 of this decision), and that clear indications existed showing that such situation would continue. For resolving this situation, consultations were held in the presence of the High Representative with the interested political parties. However, those participants, despite the given deadline (see, paragraph 26 of this decision), failed to reach a final solution that would make it possible to adopt clear electoral rules. In that way the participants in that process disregarded the fact that "[…] democratic authorities and fair procedures best create peaceful relationships within a pluralist society […]", as noted in line 3 of the Preamble to the Constitution of Bosnia and Herzegovina. Bearing in mind the existence of all the mentioned circumstances, the Constitutional Court observes that the High Representative intervened precisely in the areas where already significant political setbacks occurred that disrupted democratic procedures concerning the establishment and functioning of the government. Therefore, the Constitutional Court deems that the reasons provided for the adoption of the challenged regulations arising from the preambles of the decisions of the High Representative, and which were mentioned in the submitted observations to requests, constitute convincing reasons of relevance for the protection of the democratic order, which justify the entry into force of the challenged Amendments and the Amendments to the Election Law.

112. In this regard, the Constitutional Court took into account the applicants' arguments whereby they refer to the Code of the Venice Commission. In that connection, the Constitutional Court observes that the Code is conceived in the form of Guidelines and Explanatory Reports and that it follows from the case law of the European Court that any conduct in contravention of the mentioned Code does not *per se* constitute a violation of the right to free elections (op. cit., *Georgian Labour Party v. Georgia*, paragraph 90 of this decision). Namely, the Guidelines on Elections, Chapter I thereof "Principles of Europe's electoral heritage" provide for five principles underlying Europe's electoral heritage: universal, equal, free, secret and direct suffrage, and that elections must be held at regular intervals. Article 56 of the Code, reads: *Direct election of one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. Subject to*

such special rules as are applicable to the second chamber, where there is one, other legislative bodies, like the Parliaments of Federate States should be directly elected, in accordance with Article 3 of the Additional Protocol to the European Convention on Human Rights. Thus, it follows from the content of the Code that its provisions exclusively relate to the direct, but not to the indirect elections. This is understandable as there is no uniform manner of organising the indirect elections to the second chamber of parliaments in the Member States of the Council of Europe with bicameral parliaments. The feature of that system is that the "lower house" is constituted based on general and direct elections, and the "upper house" is constituted in different ways, while the Member States enjoy a wide margin of appreciation in this regard. Hence, the Constitutional Court stresses that the provisions of the Code should be necessarily considered in the specific context of every state (see, Compilation of Venice Commission Opinions and Reports Concerning the Stability of Electoral Law of, no. CDL-PI(2020)020 of 14 December 2020, page 3, paragraphs 4 and 6, available here).

113. In that regard, the Constitutional Court observes that Point II.2 of the Guidelines reads: "…a) rules of electoral law must have at least the rank of a statute, b) the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law" (see, the Code, op. cit., page 10). However, the Constitutional Court deems that there is nothing in the present case indicating that the challenged Amendments and the Amendments to the Election Law change the fundamental elements of the electoral system relating to the direct elections, which, as mentioned, are the subject matter of the Guidelines in the Code of the Venice Commission. Furthermore, even if one could hold that the Amendments and the Amendments to the Election Law pertain to any of the fundamental elements of the Election Law and to the indirect elections, the Constitutional Court observes that Article II.2.b) of the Code contains an alternative. From this alternative, a conclusion may be drawn that if amendments are carried out in a period less than one year before an election, they "should be written in the constitution or at a level higher than ordinary law". In this case the mentioned alternative condition has been met, as amendments have been established under the Amendments to the Constitution of the Federation of BiH, which guarantees them the necessary stability and protection against arbitrariness (see, *mutatis mutandis*, *Cernea v. Romania*, judgment of 27 February 2018, Application no.

43609/10, paragraph 40), which is the basic purpose of the recommendation not to amend the electoral rules right before the elections.

114. Therefore, the Constitutional Court holds that nothing indicates that the Amendments and the Amendments to the Election Law, which entered into force immediately after the voting was completed at the polling stations, could in any way whatsoever affect the rights of voters or candidates within the meaning of Article 3 of Protocol No. 1 to the European Convention to such an extent as to impair their very essence and deprive them of their effectiveness. In addition, the Constitutional Court holds that given the general circumstances (see the "Introductory Remarks" in this decision), there were grounds of pressing significance to the democratic order that justify their entry into force. Further, although the timing of entry into force of the challenged Amendments and the Amendments to the Election Law is unusual, it is not possible to claim that the free will of voters they expressed in the direct elections has been infringed upon, or that the integrity of the electoral process, in general, has been jeopardised.

115. Therefore, the Constitutional Court could not conclude that the Amendments and the Amendments to the Election Law are in contravention of Article 3 of Protocol No. 1 to the European Convention.

b) As to the allegations related to the FBiH House of Peoples

116. The Constitutional Court observes that applicant Komšić contests the constitutionality of the provisions of the Amendments and the Amendments to the Election Law relating to the election of delegates to the FBiH House of Peoples by referring essentially to Article I(2) of the Constitution of Bosnia and Herzegovina.

117. The Constitutional Court emphasizes that the task of the Constitutional Court under Article VI(3) of the Constitution of Bosnia and Herzegovina is primarily to uphold this Constitution and that Article VI(3)(a) line 2 specifies that the Constitutional Court has jurisdiction to examine whether any provision of an Entity's constitution or law is consistent with this Constitution. According to the provision of Article I(2) Bosnia and Herzegovina is defined as a democratic state, which shall operate under the rule of law and with free and democratic elections. The Constitutional Court has jurisdiction and the obligation to act as the guardian of the Constitution of Bosnia and Herzegovina (Article VI(3)), which includes one of its fundamental principles - the rule of law, referred to in the mentioned constitutional

provision. Therefore, taking into account the stated principle of the rule of law, all constitutions, laws and other regulations that are adopted must be harmonized with constitutional principles. Therefore, the Constitutional Court considers that it has jurisdiction to examine whether the Amendments and the Amendments to the Election Law are compatible with the constitutional principles within which the regulations must be enacted, i.e. whether the mutual relation between the Amendments and Amendments to the Election Law has jeopardized the principles of the Constitution of Bosnia and Herzegovina, i.e. its relevant provisions referred to by the applicant. The Constitutional Court recalls the text of Article I(2) of the Constitution of Bosnia and Herzegovina, which reads: "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections," stipulating, thus, the principle of the rule of law, under which all constitutions, laws and other regulations that are adopted must be harmonized with constitutional principles.

As to the allegations concerning the undemocratic nature of the House of Peoples of FBiH

118. Applicant Komšić claims that the disputed provisions "have additionally strengthened the role of the House of Peoples" through an increase in the number of delegates of each constituent people, who are elected based on the proportional ethnic structure of each canton. The applicant believes that the House of Peoples is "the main obstacle to the realization of the democratic wishes of the citizens, which is achieved through majority decision-making in the houses of representatives of the legislative power." He alleges that the contested acts "cement the existing ethnic divisions" in BiH, that priority is given to the ethnic parties that have a controlling package of seats in the House of Peoples and are an unavoidable factor in the formation of the government. In this way, he alleges, "democracy in the Federation of Bosnia and Herzegovina is being destroyed, which until now has been expressed through the election of representative bodies based on democratic principles."

119. The Constitutional Court recalls that more than 17 European countries, including Bosnia and Herzegovina, have bicameral legislatures. The method of elections to the second house depends on the context, where the purpose of the second house and the historical tradition of the country concerned are the key contextual determinants. When it comes to the existence of the second house, it is very difficult to identify any pattern, as there is a heterogeneity in the models for the election of the members of the second house and their

responsibilities. In its *amicus curiae* brief to the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the FBiH House of Peoples, the Venice Commission noted that *"(...) second chambers seem to be intended generally to ensure some representation of sub-national entities, in particular in federal states. This seemingly permanent feature was present at the time of the drafting of the ECHR and of the ICCPR and still is present today. It is therefore very unlikely that these treaties could be interpreted as requiring a radical change of the constitutional order of most countries with a bicameral system. At least, systems ensuring no equal representation of the population in second chambers, but aiming to ensure other aspects of the principle of equality, should be considered in conformity with these treaties. 51. Thus, where the purpose of a second chamber is to represent sub-national authorities, the assumption is that equality operates between those authorities, not between the populations of those authorities*." (*Amicus Curiae* Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, number CDL-AD(2016)032 of 14 and 15 October 2016), paragraphs 50-51, available here).

120. The Constitutional Court recalls that the existence of the House of Peoples at the level of the State of Bosnia and Herzegovina arises from the Constitution of BiH. Namely, Article IV of the Constitution of Bosnia and Herzegovina prescribes that "[t]he Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives." In addition, the Constitutional Court observes that the existence of a bicameral legislative body was prescribed under the Constitution at the level of the Federation of BiH and that the House of Peoples of FBiH has existed since the founding of the Federation of BiH. Initially, the caucuses of constituent peoples at the FBiH Parliament had 30 members each, and the number was reduced afterwards to 17 members per caucus of constituent peoples and 6 for the caucus of Others. The challenged provisions increased that number to 23 delegates in each caucus of constituent peoples and 11 in the caucus of Others. However, the Constitutional Court observes that the number of delegates itself does not change the role of the House of Peoples of FBiH in the decision-making process, neither does the increase of candidates in itself favours any group of political parties, as the applicant is trying to portray it.

121. Applicant Komšić asserts that Houses of Peoples are "the main hindrance to exercising democratic will of citizens, which is exercised through majority decision-making

at Houses of Representatives of the legislative authority." In regards to that, the Constitutional Court indicates that the question as to whether Bosnia and Herzegovina, or the Federation of BiH for that matter, should at all have a bicameral system and whether it should be organised in such a way that houses of peoples should not be equal in their legislative role, is not an argument that may result in referral of an issue under Article I (2) of the Constitution of Bosnia and Herzegovina. This Article designates Bosnia and Herzegovina as "a democratic state, which shall operate under the rule of law and with free and democratic elections." In particular, the Constitutional Court deems that these allegations of applicant Komšić do not raise the issue of constitutionality of Amendments to the Election Law, as the mentioned acts alter neither the role nor the method of operation of the House of Peoples of FBiH.

Allegations about unconstitutionality of Amendments CXI and CXII and Articles 2, 3, 4 and 5 of Amendments to the Election Law – increase in the number of delegates in the House of Peoples

122. Applicant Komšić further deems that Amendments CXI and CXII and Articles 2, 3, 4 and 5 of Amendments to the Election Law relating to the increase in the number of delegates (80) to the House of Peoples of FBiH from every constituent people (23 from each) and Others (11), who are elected by cantonal assemblies, proportionate to the ethnic structure of population, are contrary to Articles I (2), II (2), II (4) and III (3) (b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

123. Considering these allegations, the Constitutional Court recalls that it has already decided about the constitutionality of the provisions of Articles 10.10 and 10.12 of the previously applicable Election Law, relating to the number of delegates in the House of Peoples and prescribed identically the method of the calculation thereof, in the decision in the case *U-23/14*. In that decision the Constitutional Court stated:

> *"54. As to the provisions of Article 10.10 of the Election Law, the Constitutional Court holds that the total number of delegates to the House of Peoples from a constituent people may raise the issue whether each constituent people is represented with more or less credibility in that body following the elections. However, in the present case, such an arrangement is not contrary to the Constitution as the relevant provisions of the Constitution of the Federation of BiH and the Election Law determine the*

same number of delegates from all the three constituent peoples in the House of Peoples so that it is obvious that it enables equal representation of all constituent peoples in the House of Peoples. The Constitutional Court reiterates that, with a view to implementing the Decision of the Constitutional Court no. U 5/98, amendments to the Constitution of the Federation of Bosnia and Herzegovina were passed to harmonise the Constitution of the Federation with the Constitution of Bosnia and Herzegovina. As a result, the number of delegates was reduced and Serb delegates were included to the House of Peoples, so that each constituent people has an equal number of delegates to the House of Peoples (seventeen delegates each). Whether a greater number of delegates would enable better, i.e. more credible representation of constituent peoples and Others is the issue falling within the scope of competence of certain legislative authorities who enjoy a "wide margin of appreciation", and, thus, is not the issue of constitutionality so that it does not fall within the scope of jurisdiction of the Constitutional Court […].

55. As to the provisions of the remainder of Article 10.12 of the Election Law, the Constitutional Court has noted above that the legislator has determined that the number of delegates from each constituent people and from Others is proportional to the number of inhabitants according to the last census. Furthermore, the legislator provided a mathematical formula for allocation of seats in respect of each canton, which is based on the number of inhabitants from among each constituent people in all cantons. The Constitutional Court recalls that the proportional representation system is one of the standard models of the electoral system. Namely, the majority of the states of the European Union accepts the proportional representation system selecting different mathematical methods for calculating the results of the vote in determining the mandates. In this connection, the Constitutional Court reiterates that the election rules are subject to normative regulation by the legislator which enjoys a wide margin of appreciation when regulating it. Furthermore, such an arrangement is not indicative of a departure from the principles set forth in the Constitution of the Federation of BiH, i.e. it does not make it possible

> *in itself for the right to democratic decision-making exclusively through legitimate political representation not to be based on the democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina from amongst the constituent people being represented and whose interests are represented by those delegates. […]*
>
> *58. Taking into account all the aforesaid, the Constitutional Court holds that the provisions of Subsection B Article 10.10, the remaining part of 10.12 […] of the Election Law are not contrary to Article I (2) of the Constitution of Bosnia and Herzegovina."*

124. Considering the mentioned positions of the Constitutional Court, wherefrom it follows that the provision determining the total number of delegates falls within the State's "wide margin of appreciation" and does not raise the issue of constitutionality, and that the proportionate system and the method of its calculation constitutes one of standard models of the election system, which, in itself, is not contrary to Article I (2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court deems that Amendments CXI and CXII and Articles 2, 3, 4 and 5 of Amendments to the Election Law in the challenged part, are not contrary to Article I (2) of the Constitution of Bosnia and Herzegovina. Also, the Constitutional Court could not conclude that the mentioned provisions, which equally pertain to all members of the constituent peoples and Others raise the issues under Articles II (2), II (4) and III (3) (b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

Allegations on unconstitutionality of Amendment CXXVIII – use of census

125. Applicant Komšić contends that Amendment CXXVIII stipulates the application of different censuses as the basis for the formation of the legislative and executive branch in the F BiH and finds that this provision violates Articles I(2), II(2), II(4) and III(3)(b) of the BiH Constitution of BiH. In his opinion, the consequence of this is "the infringement of the integrity of the institutions and the electoral process while the citizens of F BiH are placed in a position of legal uncertainty." The challenged provisions of the Amendment CXXVIII to the Constitution of F BiH provide that the last census (i.e. the 2013 census) is the basis for the formation of the legislative branch. The existing paragraph 1 provides that the published results of the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented. Applicant Komšić also refers to

Article IX/11a paragraph 2 and 3 of the FBiH Constitution stating that it is established that such proportionate representation shall follow the 1991 census until Annex 7 is fully implemented, in line with the Civil Service Law of BiH. He also considers that the purpose of using the 1991 census for the formation of executive authorities, is to prevent the legalization of the outcome and results of ethnic cleansing in BiH (1992-1995) until the implementation of Annex 7 of the General Framework Agreement for Peace in BiH (Dayton Agreement), which requires the return of all exiles to their pre-war homes and places of living.

126. In examining these allegations, the Constitutional Court reiterates that it has examined this issue in the decision no. U-23/14. By this decision, it has, *inter alia*, established that the provisions of Article 20.16.A paragraph 2 items a-j of the Election Law in the part stating that "…until a new census is organized, the 1991 census shall serve as a basis so that each Canton will elect the following number of delegates…", are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina. In that case, the Constitutional Court stated:

> *"43. The Constitutional Court finds […]that the framer of the constitution established the principle of proportionality with regards to the selection of the delegates to the House of Peoples, whereby it has been provided that the number of delegates of one constituent people to the House of Peoples from certain canton is proportional to the participation of that constituent people in the number of the population of the relevant canton. The selection of the legislative body within the context of selection of delegates to the House of Peoples must imply that the number of delegates of certain constituent people matches the percentage of participation of that constituent people in respective canton of the Federation. The consequence of the principle of proportionality is that certain canton give more and other canton give less of the delegates to the House of Peoples and that is in accordance with the national structure of the respective canton. It follows that the established principle of proportionality is in the service of as complete representation of each of the constituent peoples in the Federation as it is possible. […]*
>
> *51. […] Bringing into connection the aforementioned role of the House of Peoples within the constitutional system of the Federation with the principle of the constituent status of peoples in the Federation, it undisputedly follows that the principle of the constituent status of peoples*

in the Federation, in the context of House of Peoples, may be realised only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation. Otherwise, an inadequate political representation of those represented and whose interests are represented amounts to a violation of the principle of the constituent status of peoples, i.e. leads to inequality between any of the constituent peoples, thereby violating Article I(2) the Constitution of Bosnia and Herzegovina […].”

127. After the General Elections in 2018, the CEC has adopted Instructions from which it follows that the preliminary number of delegates elected from the cantonal assembly, is determined based on the last census, i.e. based on the 2013 census. By its decisions on admissibility nos. U-24/18 of 31 January 2019 and U-3/19 of 28 March 2019 (available on www.ustavnisud.ba), the Constitutional Court rejected as inadmissible the requests for review of constitutionality of the Instructions due to lack of competence of the Constitutional Court to decide. In the decision no. U-24/18, the Constitutional Court stated:

“36. […] that the impugned Instruction on Amendments is an implementing regulation, passed by the CEC in order to implement the Election Law in the process of administering indirect elections for the bodies of authority in Bosnia and Herzegovina. The impugned Instruction on Amendments determined the preliminary number of delegates to the House of Peoples to be elected from cantonal assemblies. Accordingly, and taking into account the fact that it concerns a temporary provision, the Constitutional Court concludes that in the present case it is not about a general act which, being the subject of review of constitutionality, falls under the jurisdiction of the Constitutional Court within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Moreover, taking into account the content of the request in the case at hand and Article 31 of the Rules of the Constitutional Court, the Constitutional Court does not find any reason why the impugned implementing act of the CEC would raise an issue of violation of human rights and fundamental freedoms. […]”

128. Therefore, the Constitutional Court observes that as a result of these decisions, the House of Peoples of F BIH in mandate 2018-2022 has already been formed according to the results of census from 2013. The applicant now contests the use of that census. In addition,

the Constitutional Court observes that from the contents of the Amendment CXXVIII it follows that it would result in "more complete representation of constituent peoples and Others in that House" in accordance with the Decision of the Constitutional Court in the case *U-23/14*. In addition, in the present case it is obvious that Article 20.16A paragraph 2 items a-j of the Election Law based on which the census from 1991 was applied, was rendered ineffective by the ruling on non-enforcement of the Constitutional Court in the case *U-23/14* (see paragraph 20 of this decision).

129. The applicant alleges that the formation of the House of Peoples, as a legislative body, cannot be separated from the administrative and executive bodies, while using different methods and bases for filling these bodies. With respect to that, the Constitutional Court notes that the principle of proportional representation under Article IX(11)(a) of the Constitution of F BiH, valid for employment and appointment in the public authorities, including courts and principle of proportionality relating to the election of the delegates into the House of Peoples of F BiH, do not have the same constitutional law significance nor do they serve equal purpose. Indeed, proportional representation in the public authorities, including the courts in the Federation of BiH, do not have a direct function of representation of constituent peoples or Others nor they are entrusted a direct role of vital national interest protection as awarded to the caucuses in the House of Peoples. Therefore, the Constitutional Court finds that the use of two different censuses for different branches of government, do not fall outside the scope of free margin of appreciation of the state. Therefore, the claims that this infringes upon the principle of democracy under Article I(2) of the Constitution of BiH cannot be accepted as founded. In addition, as to allegations of the applicant that "the structure of the executive branch must reflect the structure of the legislative branch," the Constitutional Court emphasizes that it is not the task of the Constitutional Court to decide whether it would be justified the last census is applied in case of public government authorities, including courts. Indeed, this is the task of the public authorities, which have a wide scope of margin of appreciation in that regard.

130. In addition to the aforesaid, the Constitutional Court notes that it is not disputable that Article 1 (3) of the Annex 7 of the General Framework Agreement, Bosnia and Herzegovina and entities shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. Article 2 provides that they will undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious

reintegration of refugees and displaced persons, without preference for any particular group. The Constitutional Court also indicates that it considered also Article II(5) of the Constitution of BiH, that stipulates that all refugees and displaced persons have the right freely to return to their homes of origin. However, the Constitutional Court could not conclude that the challenged Amendment CXXVIII, relating to the manner of calculation of the number of mandates in the House of peoples of F BiH and in that manner protection of collective rights of constituent peoples and others, brings into question the implementation of Annex 7 of the General Framework Agreement or raise issue of protection of refugees or displaced persons under Article II(5) of the Constitution of BiH. Therefore, the claims of applicant Komšić that Amendment CXXVIII represents a "flagrant violation" of Annex 7 of the General Framework Agreement are unfounded as well.

131. Therefore, starting from these reasons, the Constitutional Court could not conclude that Amendment CXXVIII is inconsistent with Article I(2) of the Constitution of Bosnia and Herzegovina. The Constitutional Court has also in this context considered the contents of the provisions of Articles II(2), II(4) and III(3)(b) of the Constitution of BiH and Article 1 of Protocol no. 12 to the European Convention, the applicant referred to, but concluded that the challenged amendment does not raise issues of violation of these provisions.

c) As to the provisions related to the election of the President and Vice-President of the Federation of BiH

132. The applicant contends that the provisions of Amendment nos. CXX and CXXI and Article 1of the Amendments to the Election Law, Chapter 9A with regard to Articles 9.13, 9.14, 9.15, 9.17, 9.18 and 9.19, which refer to the procedure for proposing and appointing the President and Vice-President of FBiH, are in contravention to the provisions of Articles I(2) II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights. Namely, the applicant considers that the aforementioned provisions did not eliminate discrimination in the election of the President and Vice-President of FBiH, which the Constitutional Court already declared unconstitutional in Decision *U-14/12*.

133. The Constitutional Court recalls that in its Decision in case no. *U-14/12*, it determined that the provisions of Article IV.B.1., Article 1 paragraph 2 (as amended by Amendment XLI) and Article IV.B.1, Article 2, paragraphs 1 and 2, (amended by Amendment XLII) of the FBiH Constitution, as well as Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law are not in accordance with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention. However, in its reasoning (see paragraph 18 of this decision), the Constitutional Court concluded that the decisions of the European Court in the case of *Sejdić and Finci* and in the case of *Zornić* clearly show that the Constitution of BiH should be amended. The Constitutional Court noted that it is impossible to predict the scope of these amendments that have yet to be made. Therefore, the Constitutional Court decided that it will not quash the mentioned provisions of the Entity constitutions and the Election Law, that is, it will not order the Parliamentary Assembly of BiH, the National Assembly of the RS and the Parliament of FBiH to harmonize the mentioned provisions, until the domestic legal system adopts constitutional and legislative measures ending the existing non-compliance of the BiH Constitution and the Election Law with the European Convention established by the European Court in the aforementioned cases.

134. The Constitutional Court notes that from the Preamble of the Decision of the High Representative, as well as the submitted observations of the High Representative, it clearly follows that the *ratio* of the contested provisions was not to eliminate unconstitutionality established by the decision of the Constitutional Court in case no. *U-14/12*, nor to implement the decisions of the European Court in the cases of *Sejdić and Finci*, *Zornić*, and *Pilav* and other related decisions referred to by applicant Komšić. Even applicant Komšić states in the request that the High Representative *only changed the number of delegates who must support the candidates standing for election as President or Vice-President of the Federation of Bosnia and Herzegovina*. Thus, the content of the contested provisions of Amendments nos. CXX and CXXI, and Chapter 9A with regard to Articles 9.13, 9.14, 9.15, 9.17, 9.18 and 9.19 of the Amendments to the Election Law, confirms the fact that the Amendments did not change the provisions of the FBiH Constitution that referred to the possibility that members of the group of Others could stand as candidates for the election of the President and Vice-Presidents of the FBiH.

135. In this context, the Constitutional Court reminds that after adopting the decision in the case no. *U-14/12*, it repeatedly reiterated the position in its subsequent decisions that the implementation of the judgments in the cases of *Sejdić and Finci*, *Zornić,* and *Pilav* and other similar cases, first implies that the provisions of the Constitution of Bosnia and Herzegovina which were found to be discriminatory must be amended (see Decisions on Merits no. *U-3/17* of 6 July 2017, paragraphs 35 and 36, and no. *U-14/22* of 26 of May 2022, paragraphs 37 and 38, available at www.ustavnisud.ba). This means that the implementation of the aforementioned judgments and amendments to the Constitution of Bosnia and Herzegovina continue to remain necessary for the implementation of the decision of the Constitutional Court in case no. *U-14/12*. Therefore, given the indisputable fact that the contested provisions do not refer to the implementation of the aforementioned judgments of the European Court, nor the decision of this court in case no. *U-14/12*, the Constitutional Court considers that the obligation of public authorities to implement them remains. In doing so, it is important to emphasize that in Decision no. *U-14/12*, the Constitutional Court did not question the constitutionality of the provisions prescribing the method of electing the President and Vice-President of the Federation of BiH from the caucuses of delegates of the constituent peoples. It stated that it must be ensured that the members of the group of Others are able to propose and elect candidates for the mentioned offices, as it is ensured for the constituent peoples.

136. In the circumstances of the present case, the Constitutional Court considers that the contested provisions imposed by the High Representative were aimed at implementing the decision of the Constitutional Court in case *U-23/14* and preventing a blockage in the formation of the government. At the same time, the Constitutional Court points out that there is nothing to indicate that these provisions further deepen the discrimination that has already been established with regard to the possibility of the group of Others standing as candidates for President and Vice-President of the Federation of BiH, as applicant Komšić has attempted to show in the request. Therefore, based on the fact that the unconstitutionality of the previously valid provisions was established for reasons that do not relate to the procedure for electing the President and Vice-Presidents of FBiH, the Constitutional Court cannot conclude that the challenged legal provisions, which essentially only change the number of delegates who must support the candidates for President and Vice-President of FBiH, are unconstitutional in themselves.

137. Finally, applicant Komšić questions the indirect method of election for the offices of President and Vice-Presidents of the Federation of Bosnia and Herzegovina and considers that they lack democratic legitimacy, as the voters do not elect them directly. He also points out that the Members of the BiH Presidency, *i.e.* the President and Vice-President of the RS, are elected directly. He contends that this is contrary to the principles of "rule of law" and "democracy" under Article I(2) of the Constitution of BiH.

138. The Constitutional Court recalls that the Constitution of Bosnia and Herzegovina does not contain provisions on the political or administrative organization of the Entities. Therefore, according to the Constitution of Bosnia and Herzegovina, there is no constitutional obligation that the Entities have the same political-administrative structure, nor that the method of electing the President and Vice-President of FBiH must be the same as that in RS or at the state level. In this regard, the Constitutional Court reiterates that the aforementioned rules are subject to the normative regulation of the legislator in the Entities, and the legislator has broad discretion to regulate them, and such a solution does not indicate a deviation from the principles of the Constitution of Bosnia and Herzegovina. In addition, the Constitutional Court notes that the Constitution of Bosnia and Herzegovina determines the method of election exclusively for the Members of the BiH Presidency. The fact that the President and Vice-President of the Federation of BiH are not directly elected does not amount to a violation of the Constitution of Bosnia and Herzegovina, given that the Constitution of Bosnia and Herzegovina does not prescribe how the President and Vice-President of the Federation of BiH should be elected. Moreover, the Constitutional Court observes that it cannot be claimed that the President and Vice-President of the Federation of BiH lack democratic legitimacy, because they were not elected in direct elections, given that the manner of their election is also an issue regarding which the relevant public authorities have a broad discretion. In this regard, the Constitutional Court points to paragraph 56 of the Code of the Venice Commission stating: "even though the President of the Republic is often directly elected, this is a matter for the Constitution of the individual state." The Constitutional Court recalls that since the adoption of the FBiH Constitution in 1994, the indirect method of election of the President and Vice-Presidents of FBiH has been a characteristic of the constitutional arrangement of that Entity, and this aspect was not affected by the acts of the High Representative.

139. Therefore, the Constitutional Court cannot conclude that the contested provisions of Amendment nos. CXX and CXXI and Article 1 of the Amendments to the Election Law, Chapter 9A with regard to Articles 9.13, 9.14, 9.15, 9.17, 9.18 and 9.19 are in contravention to Article I(2) of the Constitution of Bosnia and Herzegovina and Article II(4) of the Constitution of Bosnia and Herzegovina, as well as Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights. In this context, the Constitutional Court also kept in mind the content of Article II(2) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina, to which the applicant referred, but concludes that the contested provisions do not raise issues of violation of these provisions of the Constitution.

d) As to the allegations of violation of the principle of legal certainty under Article I(2) of the Constitution of Bosnia and Herzegovina

140. Applicant Džaferović contends that the contested provisions are not in accordance with the principles of "clarity," "precision" and "foreseeability" enshrined in Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant reasoned this claim by referring to the statements of the CEC officials that it is not yet known how to implement the contested provisions, that the problem concerns distribution of delegates to the House of Peoples of FBiH, and that the CEC is aware that it will have to pass an act according to which delegates will be delegated from cantonal assemblies to the House of Peoples of FBiH. The applicant further stated in regards to principles of "clarity" and "foreseeability" that the election rules must be known to the voters in advance, but this is not so in this case because they were changed immediately after the elections.

141. The Constitutional Court observes that the principle of the rule of law is not confined only to the formal adherence to the principle of constitutionality and lawfulness, but also requires that all legal acts (regulations and laws) must have a certain content, that has a quality that is appropriate to a democratic system, so that they protect human rights and freedoms as regards a relationship between citizens and governmental bodies within a democratic political system. In this connection, the Constitutional Court recalls that the standard of quality required of a law is that the legal norm it contains must be adequately accessible for persons to whom it will be applied and it must be foreseeable, meaning that it must be formulated with sufficient precision, so that the persons can know actually and

specifically know their rights and obligations, to a degree that is reasonable in the circumstances, in order to regulate their conduct accordingly (see Decision on Admissibility and Merits no. *U-15/18* of 29 November 2018, paragraph 26). In its earlier case law, the Constitutional Court adopted the case law of the European Court, according to which the expression "law" does not relate to the mere existence of law, but also relates to the quality of law, requiring that the law with the rule of law and that its norms are sufficiently precise, clear and foreseeable. Law must give the sufficiently clear scope of any discretionary right given to public authorities as well as the manner in which it is executed (ibid., *U-15/18*, paragraph 26).

142. Considering the allegations of applicant Džaferović, the Constitutional Court first indicates that it does not see anything in the wording of the disputed provisions of the Amendments and the Election Law that would indicate their "ambiguity" or "imprecision," nor does this follow from the allegations of the request. Namely, the Constitutional Court notes that the applicant stated that he contested all the provisions of the Amendments and the Amendments to the Election Law, whereby, with the exception of reference to the articles in media, not a single example was quoted regarding a provision that could be considered imprecise. Therefore, the Constitutional Court cannot conclude that the disputed provisions are imprecise, unclear and unforeseeable, or that they do not have the necessary quality of law. In addition, the Constitutional Court notes that the relevant participants were given sufficient time to adjust to the aforementioned regulations that related to the conduct of direct elections. As for the "foreseeability" of the contested provisions, within the meaning of "projection of expected election results" or "confusion" that these provisions could allegedly cause among voters because they entered into force immediately after the voting was completed at the polling stations, the Constitutional Court has given its reasoning in this regard, analysing the allegations of violation of the right to free elections under Article 3 of Protocol No. 1 to the European Convention. In that context, the Constitutional Court stresses that the "foreseeability" as an element of principle of rule of law and legal security, cannot be considered an absolute requirement as it is not possible to attain absolute foreseeability of legal norms. Therefore, bearing in mind the conclusions of the Constitutional Court in connection with Article 3 of Protocol No. 1 to the European Convention and the conclusions of the Constitutional Court on other issues considered in this decision, the Constitutional Court could not conclude that the principle of legal certainty was violated within the meaning of Article I(2) of the Constitution of Bosnia and Herzegovina.

143. Therefore, the Constitutional Court considers that from the previously stated reasoning it indisputably follows that the contested provisions meet the standard of “quality of law” with regard to the relevant criteria of precision, clarity and foreseeability, and that the contested provisions are in accordance with Article I(2) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

144. The Constitutional Court concludes that the Amendments and Amendments to the Election Law are in accordance with Articles I(2), II(2), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, Articles 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 25 of the International Covenant on Civil and Political Rights.

145. Pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 59 (1) and (3) of the Constitutional Court’s Rules of, the Constitutional Court decided as in the enacting clause of this decision.

146. Under Article 43 of the Rules of the Constitutional Court, Separate Dissenting Opinion of Vice-President Mirsad Ćeman and Judges Angelika Nussberger and Ledi Bianku are annexed to this decision.

147. 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
/signed/

Separate Dissenting Opinion of Vice-President Mirsad Ćeman and Judges Angelika Nussberger and Ledi Bianku

I) Introductory remarks on the context of the High Representative's decisions

The interference of the High Representative of Bosnia Herzegovina with the general elections held on 2 October 2022 is unheard of; it is a unique case. In the practice of the European Court of Human Rights and the Venice Commission there are cases of changes of election laws adopted before the elections[1] or after the elections.[2] But in the case at hand the Decision of the High Representative Enacting Amendments to the FBiH Constitution no. 06/22 and the Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina no. 07/22 were adopted in the middle of the election process, after the polling stations had closed and before the procedure of counting the votes started, at 7 pm on the election day. The Constitutional Amendments were published in the Official Gazette of Bosnia and Herzegovina and entered into force immediately, i.e. at 7 pm on the election day, the Amendments to the Election Law entered into force on the first day after their publication in the "Official Gazette of Bosnia and Herzegovina", i.e. on 8 October 2022[3].

The majority of the Constitutional Court found the High Representative's Decisions compatible with the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights; with the double vote of the President of the Constitutional Court, the necessary quorum was reached to decide the case. Although we respect the arguments of our colleagues, we cannot follow them. In our view, the Decisions of the High Representatives violate Article I (2) the Constitution of Bosnia and Herzegovina as well as Article 3 of Protocol No. 1 to the European Convention of Human Rights.

For the competent Parliament, it would technically not have been possible to adopt decisions on changing the Constitution of the Federation of Bosnia and Herzegovina and the Election law of Bosnia and Herzegovina at this specific point in time as the legislative procedure is complex and takes time. It is and has to be transparent, has to be prepared in advance and publicly discussed. Similar legislative acts on electoral reforms could never have been passed by Parliament with such a "surprise effect" on the evening of the voting day as the Decisions of the High Representative, which came completely "out of the blue" for everybody[4].

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1 See e.g. *Ekoglasnost v. Bulgaria*, no. 30386/05, 06/11/2012.
2 See e.g. *Lykourezos v. Greece*, no. 33554/03, 15/06/2006.
3 See respectively Article 2 of the Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina, 07/22 of 2 October 2022, and Article 7 of the Law" On Amendments to the Election Law of Bosnia and Herzegovina".
4 We recall that in the case of Animal Defenders International v. the United Kingdom, the ECtHR pointed out the following*: In order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (...) The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation* (see, European Court of Human Rights, *Animal Defenders International v. the United Kingdom*, (GC), Judgment of 22 April 2013, Application No. 48876/08, paragraph 108).

Yet, the High Representative could act with such a timing on the basis of the so-called Bonn powers. According to the Constitution of Bosnia and Herzegovina, his Decisions replace ordinary legislative acts. This, however, means, that – in whatever way the decisions were adopted – they have to be in line with the Constitution and with international standards, in so far as they are applicable.[5]

From the very outset we want to stress that we assume that the High Representative acted with the intention to overcome a constitutional blockade that had existed in Bosnia and Herzegovina (in the Federation of Bosnia and Herzegovina) already for several years.[6] As the political negotiations on the adoption of an electoral reform had failed and no compromise could be reached in time before the elections[7] the High Representatives imposed a model that should – in his view – be acceptable for all. Yet, we do not share the majority's view that the – admittedly difficult – political evolution in Bosnia-Herzegovina justified a breach of the most basic standards of fair and transparent elections, as it was considered to be the "lesser evil". In our view the trust in fair elections, regulated by law, is more important than the (partial) solution of a transitory crisis, this even more so as the success of the solution imposed is not at all guaranteed.

II) Premises of the majority's judgment

The majority's judgment is based on five premises that we cannot accept.

First, the judgment of the majority is based on the idea that the change of the election rules immediately before or after the elections would not be contrary *per se* to Article 3 of Protocol No. 1.[8] In this connection the majority refers to the ECtHR's case-law in *Lykourezos v. Greece*[9] and *Georgian Labour Party v. Georgia*.[10] We think, however, that this case-law is not applicable to the case at hand. Both cases concern completely different situations, the case of *Lykourezos* the disqualification of a deputy elected on the basis of a court judgment **three years after the election**, the case of Georgian Labour Party the dilemma of having to remedy **manifest shortcomings in the electoral rolls** before the elections within very tight deadlines in a "post-revolutionary" political situation. The principles elaborated in those cases are not applicable to the case at hand.

In reality, the Court has never decided on an interference with elections **during an on-going election process**, i.e. between the direct and the indirect elections. As already noted, such an interference is unheard of and could not happen in a legal system where laws are only adopted by Parliament and not by a High Representative.

5 See on this point para. 74 of the Judgment.
6 See on the details para. 20 et seq.; 109 et seq. of the Judgment.
7 See on the details para. 25, 111 of the Judgment
8 See para. 89 of the Judgment.
9 See above footnote 1.
10 See above footnote 2.

The second main argument in the majority's judgment is the distinction between direct and indirect elections. They are seen as separate issues and not as one whole. Therefore, in the view of the majority, the change of the rules after the direct elections – having an immediate effect on the indirect elections – is not relevant.[11] The assumption is that the trust of the electorate is not shaken by a change of the rules amidst the process of elections as the voters could in any way not have had a direct influence on the outcome of the elections to the House of Peoples and on the election of the President and Vice-President of the Federation of BiH.[12] According to this vision, the right to vote does not necessarily include the right to know how the votes will be used in the follow-up process, especially, how many representatives of the constituent peoples and the Others and how many representatives from which caucus will be sent to the House of Peoples on the basis of the election to the cantonal legislatures and what procedure has to be followed in the event there are no delegates in the cantonal legislatures or no delegates are elected from among one or more constituent peoples or from among Others.

The "right to know in advance" is not only denied to the voters, but also to the political parties[13] although they necessarily have to develop strategies for direct elections followed by indirect elections and have to take into account the whole election process in order to be successful.

In our view, however, direct and indirect elections have to been seen together as a whole. The democratic legitimacy of the representatives in the House of Peoples as well as of the President and the Vice-President of the Federation of Bosnia and Herzegovina is conferred on them on the basis of a chain of elections; one depends on the other; direct and indirect elections are inextricably linked.

The expression of the "free will of the people" means that those who vote know the constitutional and legislative rules of the whole "game" and not only the rules of the first step in the game. What is called "informed consent" in other circumstances applies also to democratic elections.

Third, although the majority accepts – based on the judgment of *Sejdić and Finci v. Bosnia and Herzegovina*[14] – that Article 3 of Protocol 1 is fully applicable to the election to the

11 See para. 97 of the Judgment where the applicant Komšić's argument on unconstitutionality of the amendments is countered with the argument that "the applicant mistakenly conflates direct with indirect elections".

12 The majority expects the applicant to prove such an influence (see para. 99 of the Judgment). While such a prove is impossible, it is obvious that "strategic voting" is a characteristic element of direct elections followed by indirect elections.

13 See para. 102 et seq. of the Judgment.

14 Nos. 27996/06 34836/06, [G.C.], 22/12/2009. See paragraph 41 of that judgment where the Grand Chamber states that: *As regards the House of Peoples of Bosnia and Herzegovina, the Court notes that its composition is the result of indirect elections, its members being appointed by the Entities' legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore,*

House of Peoples[15] – it differentiates between the principles applicable to direct and to indirect elections.

We do not accept this interpretation of the Court's case law. In our view, all principles developed by the ECtHR in relation to the right to free elections are fully applicable in the case of the election to the House of People in Bosnia and Herzegovina, even in so far as the elections are "indirect".

In developing the principles of the electoral case law under Article 3 of Protocol 1, and especially in relation to the timing of modifications of electoral laws the ECtHR has consistently referred to the Code of Good Practices in Electoral Matters developed by the Venice Commission.[16] There is nothing in the case law of the ECtHR or in the Venice Commission Code that would suggest that those principles do not apply to indirect elections. Therefore, we cannot agree with the majority's opinion that the principles of the Venice Commission Code *"exclusively relate to the direct, but not to the indirect elections"*.[17] This is all the more true insofar as the Code refers to basic principles of rule of law.

Forth, the majority judgment plays down the significance of the changes introduced by the Decisions of the High Representative.[18]

In our view, however, the changes are significant. The amendments to the electoral rules, both at Constitutional and legislative level, change, *inter alia*, the number of mandates in the House of Peoples of the Federation of BiH, the number of delegates elected from the cantonal assemblies and affect the number of delegates required for proposing and appointing the holder of executive power. Such changes are not of a technical nature but concern "the fundamental elements of the electoral system". In this context, respect for the principle of stability of the electoral system is required. Thus, the Venice Commission Code principle of stability of electoral law[19] is, in our opinion, entirely pertinent in the case at hand.

Fifth, the majority holds that the Constitutional Court does not have jurisdiction to establish time limits for the High Representative to make binding decisions as this would go beyond the framework of the theory of functional duality.[20] At the same time, it accepts to analyse the

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the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of Bosnia and Herzegovina and approves a budget of the State institutions (see Article IV § 4 (b)-(c) of the Constitution). Lastly, its consent is necessary before a treaty can be ratified (see Articles IV § 4 (d) and V § 3 (d) of the Constitution). Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1. Accordingly, Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

15 See para. 86 of the Judgment.

16 See e.g. *Tanase v. Moldova*, n° 7/08, 27/04/2010, § 168, 176.

17 See paragraph 112 of the Judgment.

18 See paragraph 113 of the Judgment.

19 See Venice Commission in the Code of Good Practices in Electoral Matters, Principle II.2.

20 See para. 79 of the Judgment.

applicants' contention that the timing of the enactment of the provisions is incompatible with the stability of the electoral system."[21] In our view, this is an irreconcilable contradiction. In our view, the timing of amendments to electoral laws is an essential part of the rule-of-law requirements and thus falls fully within the jurisdiction of the Constitutional Court.

III) Violation of the stability of election law and the principle of rule of law

In our view, the principle of stability of electoral law, which is part of the principle of rule of law, has been violated by the Decisions of the High Representatives as they were adopted and entered into force during the on-going election process.

According to the Venice Commission, "truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met"[22]. The ECtHR has also specified that interferences with the right to vote have to be compatible with "the principle of the rule of law and the general objectives of the Convention"[23] and that the rule of law is one of the "foundations of an effective and meaningful democracy"[24].

Among the main elements of the rule of law principle, there are predictability, foreseeability and stability of the legislation[25]. These principles are of particular importance in electoral matters as emphasized by the ECtHR in its case law under Article 3 of Protocol 1.[26]

We recall that the impugned Constitutional Amendments entered into force on 2 October 2022, i.e. when they were published on the official website of the Office of the High Representative, and the Amendments to the Election Law entered into force on the first day after their publication in the "Official Gazette of Bosnia and Herzegovina", i.e. on 8 October 2022[27].

Such changes, on the election day, unannounced and unpredictable for the competent public institutions, political parties and the voters, i.e. for all actors involved in the electoral process, cannot be considered, in our opinion, as compatible with the criteria of stability of electoral law.

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21 See para. 80 of the Judgment.
22 See Explanatory Report to the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), § 2.
23 See *Ždanoka v. Latvia* [GC], no 58278/00, § 115, ECHR 2006 I, and *Miniscalco v. Italy*, no. 55093/13, §§ 94-95, 17/06/2021.
24 See *Uspakich v Lithuania,* no. 14737/08, 20/12/2016, § 87.
25 See *Magyar Kétfarkú Kutya Párt v Hungary* [GC] (no. 201/17), 20/01/2020, § 101.
26 See *Paschalidis, Koutmeridis and Zaharakis v. Greece*, nos. 27863/05 28422/05 28028/05, §§ 29-35, 10/04/2008.
27 See respectively Article 2 of the Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina, 07/22 of 2 October 2022, and Article 7 of the Law" On Amendments to the Election Law of Bosnia and Herzegovina".

We consider it important to underline in this regard, - and in reply to the argument of the majority[28] –, that the principle of rule of law cannot be applied in a reduced form and adapted to specific political circumstances. On the contrary, the essence of the principle of rule of law has always to be guaranteed. And part of the essence is the aspect of foreseeability[29]. If "absolute foreseeability" cannot be reached, as the majority pleads,[30] in a case where substantial changes to the Constitution and the election laws are made at the very moment of the closing of the polling stations, we would rather speak of "absolute unforeseeability" and thus an anathema to rule of law.

While the majority seems to be inclined to justify the interference in light of the particular situation of Bosnia and Hercegovina,[31] we are of the opinion that such a significant deviation from the principle of rule of law provided by the Constitution and the ECHR, cannot be justified in the situation in Bosnia and Hercegovina even if it may be complicated. It can never be justified.

For these reasons we have voted for finding a violation of the principle of stability of the electoral system, and thus of the principle of democracy and rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina as well as for a violation of Article 3 of Protocol 1 ECHR.

Finally, we would like to stress that, considering the reasons for which we believe that the decisions of the High Representative were in violation of the Constitution and the First Protocol to the ECHR, we did not refer to some other disputed questions raised by the applicants (for example, inconsistent application of the results of 1991 or 2013 census, etc.), as that was not necessary.

Vice-President Ćeman also adds that he was for and voted in favour of interim measure in this case prior to adoption of the decision on the merits in this case. However, this was not accepted.

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28 See para. 142 of the Judgment.

29 See the case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, [GC], no. 17224/11, 27/06/2017, where the ECtHR underlines that*: 70. In this regard the Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms, which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see Karácsony and Others v. Hungary [GC], no. 42461/13, § 124, ECHR 2016 (extracts), and Delfi AS v. Estonia [GC], no. 64569/09, § 121, ECHR 2015).*

30 See para. 142 of the Judgment.

31 See para. 111, 112 of the Judgment.