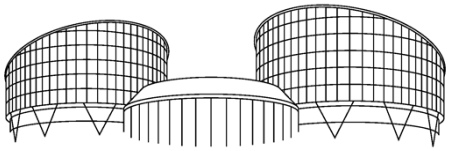

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BARALIJA v. BOSNIA AND HERZEGOVINA

(Application no. 30100/18)

JUDGMENT

Art 1 P 12 • General prohibition of discrimination • Impossibility to vote and stand in local elections for prolonged period of time • Difference of treatment depending on residence • No sufficient, objective and reasonable justification • State failure to adopt measures to hold democratic elections Art 46 • Respondent State to take measures of a general character • Legislative amendment

STRASBOURG

29 October 2019

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

In the case of Baralija v. Bosnia and Herzegovina,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 8 October 2019,

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

PROCEDURE

1. The case originated in an application (no. 30100/18) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Bosnia and Herzegovina, Ms Irma Baralija ("the applicant"), on 4 June 2018.

2. The applicant was represented by Ms Dž. Hadžiomerović, a lawyer practising in Sarajevo. The Government of Bosnia and Herzegovina ("the Government") were represented by their Agent, Ms B. Skalonjić.

3. The applicant complained of her inability to vote and stand in local elections.

4. On 15 January 2019 notice of the complaint concerning Article 1 of Protocol No. 12 to the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1984 and lives in Mostar. She is president of the local branch of her political party "*Naša stranka*".

6. Mostar is the most important city in the Herzegovina region, serving as its cultural and economic capital. With a population of 105,797[1], it is one of the largest cities in Bosnia and Herzegovina.

7. The last local elections in Mostar were held in 2008 in accordance with the legal provisions set out in paragraphs 17 and 19 below.

8. Following a request from the Croat Caucasus (see, for more details, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 7, ECHR 2009) to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, on 26 November 2010 the Constitutional Court declared section 19.2(1) to (3) and section 19.4(2) to (8) of the Election Act 2001, and section 17(1) of the Statute of the City of Mostar (see paragraphs 17 and 19 below) unconstitutional. The relevant part of the majority opinion reads as follows:

> "65. Establishing a satisfactory arrangement [for the organisation of the City of Mostar] turned out to be a long-term project. The Steering Board of the Peace Implementation Council, at its session held in Brussels on 11 December 2003, assumed responsibility for offering full support to the implementation of a solution to the issue of Mostar based on a single, coherent city administration with effective, guaranteed power-sharing mechanisms which prevent any one category of people having majority control of the City Council. In addition, the Commission for Reforming the City of Mostar ("the Commission"), which was established by the Decision of the High Representative No. 160/03 of 17 September 2003, stated, in its Report of 15 December 2003 that in the course of drafting a new Statute of Mostar it was guided by a set of principles as guidelines for its work, outlined by the High Representative in his *amicus curiae* opinion in the instant case. The guidelines were, *inter alia*, that the composition of the City Administration should reflect the last (1991) census and that the unified council and electoral system should provide for: representation of all constituent peoples and Others; and representation from all parts of Mostar. To explain the reasons for the arrangements adopted for Mostar, the amicus curiae opinion of the High Representative quotes the Venice Commission writing in 2001 to support the proposition that power-sharing between the constituent peoples is an essential part of the Dayton settlement making peace possible in Bosnia and Herzegovina, however problematic it may be for the law of discrimination. The High Representative also quotes from the report of the Commission, which referred to the difficulties experienced in reforming the city authorities of Mostar to increase their effectiveness and efficiency and to put in place a genuinely democratic political system in place of one based on the self-interest of politicians and the politics of fear. The Commission insisted in its report that 'any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of Others, through protection of vital national interests'. The Report presented data concerning the 1991 demographic structure of the pre-war municipality of Mostar - 43,856 Bosniacs (34.6%); 43,037 Croats (34%); 23,864 Serbs (18.8 %); 12,768 Yugoslavs (11.1%) and 3,121 Others (2.5%). The provisions of section 19.4(1) and (9) of the Election Act and section 16 of the Statute reflect the last census of the City of Mostar and ensure that there is representation of all constituent peoples and that none of the peoples has an absolute majority on the City Council.
>
> ...
>
> 71. ... [T]he Constitutional Court considers that the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular,

---

1. The most recent census of Bosnia and Herzegovina was held in 2013.

remain such that it remains reasonable to approach the political organisation of the City of Mostar on the basis established in 2003. Applying a test of proportionality, the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe. The measures serve a legitimate aim in that they put in place a power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. They are rationally related to that legitimate aim. They may result in the City Council being constituted in a way that does not accurately reflect the expression of views of the electorate in elections, and that is a significant disadvantage in terms of the democratic legitimacy of the system. On the other hand, the practical impact of the differences between the ability of Croats in Mostar and of members of other constituent peoples and Others in Sarajevo, Banja Luka and other cities in Bosnia and Herzegovina seems to the Constitutional Court to be likely to be relatively small, at least in comparison with the importance of the legitimate aim for the measures and the risk to all inhabitants of Mostar if the attempt to establish an effective system of representative democracy in Mostar fails. At any rate, on the very sparse information currently available, it is not possible to say that the impact is likely to be disproportionate to the importance of the aim.

...

77. ... [T]he Constitutional Court considers that the need to deal with post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, continues to represent a legitimate aim which might justify departing from the normal, democratic principle that, so far as possible, each elector's vote should have similar weight. However, the Constitutional Court is not satisfied that the differences between the weights attaching to votes of electors in different constituencies are proportionate, in the sense of being objectively and rationally related, to the legitimate aim of developing a multi-ethnic, power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. The scale of the differences, noted in paragraph 76 above, results directly from two decisions: first, to base the constituency boundaries directly on the boundaries of the former city areas; secondly, to allocate the same number of councillors to each of those constituencies. It seems to the Constitutional Court that both those decisions flowed from a desire for administrative simplicity rather than being necessary, reasonable or proportionate steps to develop a power-sharing structure or a multi-ethnic community in Mostar. The Constitutional Court therefore holds that a variation on this scale cannot be justified as being necessary or proportionate to any legitimate aim. In addition, the Constitutional Court establishes that the provisions of section 19.4(2) of the Election Act and section 17(1) of the Statute in the part that reads: *Each City area shall elect three (3) City Councillors* are inconsistent with Article 25 of the International Covenant on Civil and Political Rights. It would not be appropriate for the Constitutional Court to quash the relevant legislation with immediate effect, as this would leave the affected constituencies entirely disenfranchised until the legislature passes new legislation to redefine constituency boundaries. The Constitutional Court therefore allows a period of six months following the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* for the appropriate authorities to harmonise the relevant provisions with the Constitution of Bosnia and Herzegovina, in accordance with this decision.

...80. The Constitutional Court notes that the provisions of section 19.2 of the Election Act and the provisions of section 15 in conjunction with sections 5 and 7 of

> the Statute provide that the members of the City Council will be elected in a city-wide electoral constituency and city area electoral constituencies that match the former city municipalities. In view of the aforesaid, the Constitutional Court reiterates that six municipal areas or 'city municipalities' were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). Furthermore, ... according to the Interim Statute, the Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration. Accordingly, it follows that the Central Zone did not constitute a 'city municipality' according to the Interim Statute, nor does it constitute a 'city area' under the new Statute.
>
> 81. ... [T]he residents of the Central Zone of Mostar are entitled to vote only for the 17 councillors who represent the city-wide constituency. Unlike residents of the six City Municipalities, they do not have the opportunity to vote also for three councillors to represent their area of the city on the City Council. In consequence of the manner in which committees of the Council are constituted, the Central Zone is the only area of the city which is not represented on committees.
>
> 82. The Constitutional Court considers that this arrangement fails to secure 'equal suffrage' for the voters of Mostar, and is incompatible with Article 25.b) of the International Covenant. Most voters in Mostar can vote for two classes of councillors. Voters in the Central Zone can vote for only one class. This evident inequality cannot be justified, bearing in mind that, as the Constitutional Court has noted earlier, the reason for adopting the arrangement was mainly administrative convenience rather than as a rational way of pursuing the legitimate aim of adapting the electoral system to take account of historical difficulties afflicting the Constituent Peoples in Mostar. It follows that the arrangements also violate the guarantee of protection against discrimination under Article II.4 of the Constitution of Bosnia and Herzegovina ..."

9. The Constitutional Court ordered the Parliamentary Assembly of Bosnia and Herzegovina to amend the unconstitutional provisions of the Election Act 2001 in accordance with its decision within six months of the publication of its decision in the Official Gazette. It also ordered Mostar City Council to inform it of the steps taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina within three months of the publication in the Official Gazette of amendments made by the Parliamentary Assembly to bring the Election Act 2001 into line with the Constitution of Bosnia and Herzegovina in accordance with its decision.

10. On 18 January 2012 the Constitutional Court adopted a ruling on the non-enforcement of its decision of 26 November 2010 by the Parliamentary Assembly. It established that the impugned provisions of the Election Act 2001 would cease to be in effect on the day following the publication of its ruling in the Official Gazette. On 28 February 2012 the relevant provisions of the Election Act 2001 lost their legal validity.

11. Local elections in Mostar could therefore not be held in the election cycles of 2012 and 2016. According to the latest information provided by the Government on 13 September 2019, the relevant provisions of the Election Act 2001 regulating elections to the city council have still not been adopted.

12. The current mayor of Mostar was elected by the city council in 2009. Since 2012 he has had a "technical mandate" in the absence of local elections in Mostar.

13. In the fiscal year of 2013 the mayor substituted the city council in the adoption of the city budget, as the council could not be constituted.[2] In 2014 the Parliament of the Federation of Bosnia and Herzegovina[3] amended the entity's legislation on budgets, exceptionally allowing the mayor of Mostar, with the consent of the official in charge of the city's finances (*načelnik za finansije*) to adopt the budget for that fiscal year in lieu of the city council. Since then, each fiscal year the Parliament has been amending the relevant legislation, renewing that exception for Mostar[4].

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Bosnia and Herzegovina

14. The relevant domestic law was outlined in *Sejdić and Finci v. Bosnia and Herzegovina* (cited above, §§ 11-18). Notably, the Constitution of Bosnia and Herzegovina makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs[5], Croats[6], and Serbs[7]) and "others" (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or for other reasons). The relevant provisions of the Constitution of Bosnia and Herzegovina read as follows:

---

2. On 1 October 2013 the Constitutional Court of the Federation of Bosnia and Herzegovina published Opinion no. U-25/13 (Official Gazette of the City of Mostar, no. 8/13), in which it considered such action by the mayor to be constitutional, given the exceptional circumstances of Mostar, but underlined that he could not undertake any other actions that may fall within the competences of the city council.

3. Bosnia and Herzegovina consists of two Entities, the Federation of Bosnia and Herzegovina, and the Republika Srpska and Brčko District.

4. Official Gazette of the Federation of Bosnia and Herzegovina, nos. 13/14, 8/15, 102/15, 104/16, 5/18, and 11/19.

5. Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

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

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

Article II/4

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

Annex I

(Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina)

"...

7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto.

..."

B. Constitution of the Federation of Bosnia and Herzegovina

15. The relevant provisions of the Constitution of the Federation of Bosnia and Herzegovina (*Ustav Federacije Bosne i Hercegovine*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, and 88/08), read as follows:

Article II.A.2.

"(2) All citizens enjoy the right:

...

(b) To political rights: to participate in public affairs; to have equal access to public service; to vote and stand for election.

..."

Article IV.A.

"...

(2) The city shall be responsible for: a) finances and tax policy, in accordance with federal and cantonal legislation; b) joint infrastructure; c) urban planning; d) public transport; e) other responsibilities assigned to the city by the canton or municipalities.

...

(5) The city council shall: a) prepare and, by a two-thirds majority vote, approve the city Statute; b) elect the mayor; c) approve the city budget; d) enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the Statute.

(6) The mayor shall be responsible for: a) appointing and removing city officials; b) executing and enforcing city policy and city regulations; c) ensuring the cooperation of city officials with the ombudsmen; d) reporting on the implementation of city policy to the city council and the public."

Article IV.C.

"...

(3) The organisation of the city of Mostar is regulated by law and by the Statute of the city of Mostar ...

(4) The city areas are electoral constituencies. The Statute determines the composition of the city council, while the electoral procedure is regulated by the Election Act of Bosnia and Herzegovina and the Statute ..."

C. The Election Act 2001

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

Section 1.4

"(1) Every national of Bosnia and Herzegovina (hereinafter: BiH national) who has attained eighteen (18) years of age shall have the right to vote and to be elected ... pursuant to this Act.

(2) To exercise his or her right to vote, a BiH national must be recorded in the Central Voters' Register, pursuant to this Act."

Section 1.5

"(1) All BiH nationals who have the right to vote, pursuant to this Act, shall have the right to vote in person in the municipality of their permanent residence."

Section 19.1

"This Act shall govern the election of councillors to the Council of the City of Mostar (hereinafter: "the City Council") ..."

17. The relevant provisions of the Election Act 2001 which were declared unconstitutional (see paragraph 10 above) read as follows:

Section 19.2

"(1) The City Council shall be composed of 35 members. Members of the City Council shall be elected in a city-wide electoral constituency and city area electoral constituencies, in the manner set forth in section 19.4 hereof.

...

(3) For the purpose of subsection (1) above, "city area electoral constituencies" shall be the former city municipalities, as defined by sections 7 and 15 of the Statute of the City of Mostar."

Section 19.4

"...

(2) Three (3) councillors shall be elected from each of the six city area electoral constituencies.

(3) City area electoral constituency 1 shall consist of the former Mostar North city municipality.

(4) City area electoral constituency 2 shall consist of the former Mostar Stari Grad city municipality.

(5) City area electoral constituency 3 shall consist of the former Mostar South-East city municipality.

(6) City area electoral constituency 4 shall consist of the former Mostar South city municipality.

(7) City area electoral constituency 5 shall consist of the former Mostar South-West city municipality.

(8) City area electoral constituency 6 shall consist of the former Mostar West city municipality."

D. The Statute of the City of Mostar

18. The relevant provisions of the Statute of the City of Mostar (*Statut grada Mostara*, Official Gazette of the City of Mostar, no. 4/04), which entered into force on 15 March 2004, read as follows:

Section 13

"The organs of the City are the City Council and the Mayor."

Section 14

"The City Council ... shall consist of 35 councillors, who are elected in free, democratic and direct elections in accordance with the Election Act of Bosnia and Herzegovina."

Section 15

"(1) Members of the City Council shall be elected in electoral constituencies.

(2) The electoral constituencies in the City shall be the area of the City and six City areas, as defined in sections 5 and 7 of this Statute and in the map appended to the Interim Statute published in the Official Gazette of the City of Mostar of 20 February 1996 ... which forms an integral part of this Statute."

Section 28

"(1) The City Council is the highest body of the City and shall be responsible for all matters falling within its competencies in accordance with the Constitution and the law.

(2) The City Council shall supervise the administration of the City, including the Mayor's Office ..."

Section 44

"(1) Only members of the City Council may be elected as Mayor.

(2) The election of the Mayor shall be carried out at the first session of the City Council after the elections.

..."

19. The relevant provision of the Statute of the City of Mostar which was declared unconstitutional (see paragraph 10 above) reads as follows:

Section 17

"(1) Each City area shall elect three (3) City councilors. The remaining seventeen (17) councilors shall be elected in the area of the City as one electoral constituency (hereinafter: the City-wide list)."

E. The practice of the Constitutional Court on transitional measures

20. In its decision no. U-44/01 of 27 February 2004 the Constitutional Court found that part of the legislation regulating the names of the cities in Republika Srpska was not consistent with the Constitution. On 22 September 2004, after the said entity had failed to remove the established inconsistencies within the period provided for, the Constitutional Court decided that the impugned provisions would cease to be in force. In a separate decision adopted on the same day, it ruled that, until the inconsistencies established in its decision of 27 February 2004 had been removed, the names of the cities which ceased to be in force would be temporarily replaced with new names, which it would designate.

III. RELEVANT INTERNATIONAL MATERIAL

A. United Nations

21. Article 25 of the International Covenant on Civil and Political Rights ("the ICCPR") reads as follows:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

...

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

..."

22. In its General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, the United Nations Human Rights Committee held as follows:

> "1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.
>
> ...
>
> 9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.
>
> ...
>
> 11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right."

23. The relevant part of the 54th Report of the High Representative to the Security Council of the United Nations, delivered on 6 November 2018, reads as follows:

> "The responsible political parties could not reach an agreement to enact amendments to the BiH Election Law that would enable the holding of local elections in the City of Mostar, where there have been no local elections since 2008. Although the Mostar City board of nine parliamentary parties (SDA, HDZ BiH, HDZ 1990, SDP, SBB, DF, BPS, SNSD and SDS) met nine times from February to June [2018] on this issue and found agreement on some areas, they failed to reach a final agreement and held no further talks. I continue to urge the parties to find a compromise to enable the citizens of Mostar to enjoy the same democratic right to elect their local leaders as the citizens in the rest of the country enjoy."

24. The relevant part of the 55th Report of the High Representative to the Security Council of the United Nations, delivered on 8 May 2019, reads as follows:

> "In the reporting period [from 16 October 2018 through 15 April 2019], the responsible political parties held no discussions to reach an agreement to enact amendments to the BiH Election Law that would regulate local elections in the City of Mostar, where there have been none since 2008. I urge the parties to initiate talks to finally resolve this issue and enable the citizens of Mostar to enjoy the same democratic right to elect their local leaders as the citizens in the rest of the country enjoy."

B. Council of Europe

25. The European Charter of Local Self-Government reads, in so far as relevant:

Preamble

"...

Considering that the local authorities are one of the main foundations of any democratic regime;

..."

Article 3 – Concept of local self-government

"1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute."

26. The relevant part of Recommendation 399 (2017) of the Congress of Local and Regional Authorities, adopted on 30 March 2017 following observation of the 2016 local elections in Bosnia and Herzegovina, reads as follows:

"7. ... [The Congress] is concerned about the situation of local democracy in the City of Mostar where again no elections were held on 2 October, and calls upon all political stakeholders to find a suitable and sustainable solution to the current deadlock."

27. As a follow-up to that Recommendation, the Congress also organised a mission in the framework of its post-electoral dialogue with the authorities of Bosnia and Herzegovina, with a focus on the City of Mostar. On 8 September 2017 it published an Information Note on that mission, the relevant part of which reads as follows:

"27. The current situation in Mostar also needs to be seen in the broader context of an overall political conflict over changes in electoral legislation in Bosnia and Herzegovina. The needed amendments to the Statute of Mostar have been politicised as part of a broader political debate which notably includes the implementation of two judgements of the European Court of Human Rights and a recent Decision of the Constitutional Court of Bosnia and Herzegovina.

...

33. The Congress calls upon all stakeholders, notably those participating in the Inter-Agency Working Group on changes to election legislation, to take action in order to ensure that consensual amendments are adopted in a timely manner. The complexity of the overall situation with regard to the Election Law should not be taken as an excuse not to put forward technical improvements to the electoral processes.

34. Along these lines, it urges authorities at all levels to work on a sustainable solution to restore local democracy in the City of Mostar. In particular, amendments to the Election Law and the Statute of the City should be negotiated separately and the obstacles to achieve progress with regard to amendments of the Election Law should

not be used as a pretext not to find a solution for the City of Mostar. In this process, the interests of the residents of Mostar should be fully and accurately taken into account."

28. The relevant part of Resolution 2201 (2018) of the Parliamentary Assembly of the Council of Europe, adopted on 24 January 2018, reads as follows:

"9. The Assembly also urges the authorities of Bosnia and Herzegovina to adopt the changes required for the implementation of decisions by the Constitutional Court on the electoral system for the city of Mostar ...

10. For the Assembly, it is highly problematic that the authorities cannot muster the political will necessary to end a situation where the citizens of Mostar have been prevented from exercising their right to choose their representatives in the city council for over eight years.

...

16. The Assembly is very concerned about the increasing disrespect for the rule of law in Bosnia and Herzegovina and urges the competent authorities to abide by decisions of the Constitutional Court ... which are final and binding. It regrets in particular ... the protracted delay by the State parliament in implementing the decision of the Constitutional Court on Mostar."

C. European Union

29. The relevant part of the Opinion of the European Commission on Bosnia and Herzegovina's application for membership of the European Union, delivered on 29 May 2019, reads as follows:

"As for local elections, due to the lack of legal framework the citizens of Mostar have not been able to elect a municipal council since 2008.

...

The Commission considers that negotiations for accession to the European Union should be opened with Bosnia and Herzegovina once the country has achieved the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria requiring the stability of institutions guaranteeing notably democracy and the rule of law. Bosnia and Herzegovina will need to fundamentally improve its legislative and institutional framework to ensure it meets the following key priorities:

Democracy / Functionality

1. Ensure that elections are conducted in line with European standards by implementing OSCE/ODIHR and relevant Venice Commission recommendations, ensuring transparency of political party financing, and holding municipal elections in Mostar.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

30. The applicant complained that her inability to vote or stand in local elections in the city of Mostar amounted to discrimination on the grounds of her place of residence. She relied on Article 1 of Protocol No. 12 to the Convention, which reads as follows:

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

A. Admissibility

1. The Government's objections as to admissibility

31. The Government submitted that the present application was an *actio popularis*, given that the applicant had not been directly disenfranchised as a result of a specific and individual measure of interference. They further argued that the applicant had not used any domestic legal remedies for the alleged violation of her rights, and that the present application was therefore also inadmissible for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention.

32. The applicant disputed those arguments.

2. The Court's assessment

(a) Compatibility *ratione personae*

33. The Court reiterates that in order to be able to lodge a petition by virtue of Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. It is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is a member of a class of people who risk being directly affected by the legislation (see *Burden v. the United Kingdom*

[GC], no. 13378/05, §§ 33-34, ECHR 2008). The Court considers that the same applies when the absence of legislation is likely to affect certain categories of people.

34. In the present case, there is no dispute between the parties that the applicant, as a member of a political party and the head of its Mostar branch (see paragraph 5 above), is a politically active person. Given her active participation in public life, it would be entirely coherent that she would in fact consider voting and running for election to the city council (see, *mutatis mutandis*, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 29, ECHR 2009). The applicant is therefore a member of a class of people who is directly affected by the situation complained of; she may therefore claim to be a victim of the alleged discrimination.

35. The Court therefore rejects the Government's objection under this head.

(b) Exhaustion of domestic remedies

36. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, §§ 69-70, ECHR 2010; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014; and *Parrillo v. Italy* [GC], no. 46470/11, § 87, ECHR 2015).

37. As to legal systems which provide constitutional protection for fundamental rights, such as that of Bosnia and Herzegovina, the Court reiterates that it is incumbent on the aggrieved individual to test the extent of that protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, with further references).

38. That said, the Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69, and *Selmouni v. France* [GC], no. 25803/94, § 77, ECHR 1999-V).

39. Turning to the present case, the Court notes that the applicant failed to use a constitutional appeal before lodging her application. However, in view of the fact that the national authorities have not complied with the Constitutional Court's decision of 26 November 2010 (see paragraphs 9-10 above), it cannot be said that a constitutional appeal would have been effective in her case.

40. The Government's second objection must therefore also be dismissed.

3. Conclusion

41. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

42. The applicant reiterated her complaint. Furthermore, she submitted that the legitimate aim put forward by the Government as justification for the non-implementation of the judgment of the Constitutional Court, namely the establishment of a viable and sustainable power-sharing mechanism, seriously undermined the credibility of the judiciary and was incompatible with the principle of the rule of law and the general objectives of the Convention. Even if the legitimate aim were accepted by the Court, there could be no objective and reasonable justification for the difference in treatment, as there was no reasonable relationship of proportionality between the means employed and the aim pursued. Relying on *Mathieu-*

Mohin and Clerfayt v. Belgium (2 March 1987, § 52, Series A no. 113), the applicant argued that the Government's inaction and wilful non-implementation curtailed the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.

2. The Government's submissions

43. The Government accepted that the applicant had a right to vote and stand in local elections, as set forth by national law, and that she also met the general conditions for the exercise of that right. Citing *Carson and Others v. the United Kingdom* ([GC], no. 42184/05, ECHR 2010), they also accepted that the place of residence constituted one aspect of personal status for the purpose of review under Article 14 of the Convention. They submitted that that conclusion should be applicable to Article 1 of Protocol No. 12 as well. The specific situation of the applicant should be assessed in relation to that of other citizens of Bosnia and Herzegovina who actively participated in local elections. In the present case there was an objective and reasonable justification for the difference in treatment based on the applicant's place of residence.

44. The Government maintained that the legitimacy of the omission to implement the Constitutional Court's decision lay in the necessity of finding a sustainable, long-term and effective power-sharing mechanism based on the principles of equality and multi-ethnicity, so as to prevent any one constituent people from having majority control and domination in the city council. That aim was necessary in order to ensure peace and stability in Mostar, and it amounted to an objective and reasonable justification for a certain delay in the implementation of the Constitutional Court's decision. In reviewing the legitimacy of that aim, the Court should take into account the complexity of the process of implementing the Constitutional Court's decision, which entailed redefining the boundaries of the new constituencies in the urban area, as well as the complex political relations between the two most represented constituent peoples in Mostar, Bosniacs and Croats, which were still burdened with the wartime past. In this connection, the Government referred to the recent judgments of the International Criminal Tribunal for the Former Yugoslavia[8] in which six former high-ranking officials of "the Croat Republic of Herceg-Bosna", an unrecognized wartime Croat entity, were found guilty of crimes against humanity, violations of the laws or customs of war, and grave breaches of the Geneva Conventions committed against the non-Croat population between 1992 and 1994, particularly in the city of Mostar.

---

8. *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, IT-04-74-T, trial judgment, 29 May 2013, and *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, IT-04-74-A, appeals chamber judgment, 29 November 2017.

3. The Court's assessment

(a) General principles

45. The Court reiterates that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition on discrimination (see *Sejdić and Finci*, cited above, § 53).

46. The term "discrimination" used in Article 14 is also used in Article 1 of Protocol No. 12. The Court reiterates that notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of "discrimination", as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, cited above, § 55, and *Zornić v. Bosnia and Herzegovina*, no. 3681/06, § 27, 15 July 2014).

47. In order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *Molla Sali v. Greece* [GC], no. 20452/14, § 133, 19 December 2018, with further references, and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV). However, only differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other are capable of triggering the application of this provision. The words "other status" in the text of Article 14 have generally been given a wide meaning (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 61, 24 January 2017, and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 70, ECHR 2010), and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-59, 13 July 2010). The Court has previously recognised that the "place of residence constitutes an aspect of personal status for the purposes of Article 14" (see *Carson and Others,* cited above, §§ 70-71) and can trigger the protection of that Article.

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

this sphere will vary according to the circumstances, the subject matter and the background (ibid., § 82).

49. As to the burden of proof in relation to Article 14 of the Convention, and by extension under Article 1 of Protocol No. 12, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the latter was justified (see *Khamtokhu and Aksenchik*, cited above, § 65; *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 85, ECHR 2013 (extracts); and *D.H. and Others v. the Czech Republic*, cited above, § 177).

50. Lastly, the Court notes that the responsibility of the State would also be engaged if the discrimination complained of resulted from a failure on the State's part to secure to the applicant under domestic law the rights set forth in the Convention (see *Danilenkov and Others v. Russia*, no. 67336/01, § 120, ECHR 2009 (extracts)). When examining this question under Article 1 of Protocol No. 12 to the Convention, such failure on the State's part may concern "any right set forth by law" (see paragraph 45 above).

(b) Application of those principles to the present case

(i) Whether the applicant enjoyed a right set forth by law

51. The Court notes that it is not disputed by the Government that the applicant had a right set forth by law, namely the right to vote and stand in local elections (see paragraph 43 above), and indeed that she met the general conditions for the exercise of that right (see paragraphs 15-16 above). It sees no reason to hold otherwise.

(ii) Whether there was an analogous or relevantly similar situation and a difference in treatment

52. It is not disputed, either, that the applicant, as a person residing in Mostar, was in an analogous or relevantly similar situation to a person residing in another part of Bosnia and Herzegovina, as regards the enjoyment of the right to vote and stand in local elections.

53. It should be emphasised in this connection that this case does not involve regional differences of treatment – resulting from the application of different legislation depending on the geographical location of an applicant – which have been held not to be explained in terms of personal circumstances (see, for example, *Magee v. the United Kingdom*, no. 28135/95, § 50, ECHR 2000-VI). Rather, it involves the different application of the same legislation depending on a person's residence (see, *mutatis mutandis, Carson and Others*, cited above, § 70).

54. As the difference in treatment complained of is based on "other status" within the meaning of the Court's case-law (see paragraph 47

above), the applicant enjoys the protection offered by Article 1 of Protocol No. 12.

(iii) Whether sufficient measures were taken by the authorities to protect the applicant from the alleged discriminatory treatment

55. The Court takes note of the Government's argument that the delay in implementation of the Constitutional Court's decision was justified by the need to establish a long-term and effective power-sharing mechanism for the city council, in order to maintain peace and to facilitate a dialogue between the different ethnic groups in Mostar (see paragraph 44 above). A similar justification has already been examined in the context of the existing constitutional provisions, which were designed to end a brutal conflict marked by genocide and "ethnic cleansing", and were necessary to ensure peace (see *Sejdić and Finci*, cited above, § 45; *Zornić*, cited above, § 43; and *Pilav v. Bosnia and Herzegovina*, no. 41939/07, §§ 46-48, 9 June 2016). The Court has held that some of the existing power-sharing arrangements – insofar as they grant special rights for constituent peoples to the exclusion of ethnic minorities and persons who do not declare affiliation with any particular group – are not compatible with the Convention. It has also noted, however, that there is "no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule" (see *Sejdić and Finci*, cited above, § 48). However, whereas in previous cases the Court dealt with the existing legislative arrangements, in this case there is a legal void which has made it impossible for the applicant to exercise her voting rights and her right to stand in local elections for a prolonged period of time.

56. In the context of Article 3 of Protocol No. 1, the Court has held that the primary obligation with regard to the right to free elections is not one of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections (see *Mathieu-Mohin and Clerfayt*, cited above, § 50). The same viewpoint was adopted by the United Nations Human Rights Committee in the context of the rights under Article 25 of the ICCPR, which apply in Bosnia and Herzegovina by virtue of their constitutional status (see paragraphs 14 and 22 above).

57. The Court notes that local elections in Mostar were last held in 2008 (see paragraph 7 above). Since 2012 the city has been governed solely by a mayor who has a "technical mandate" and therefore does not enjoy the required democratic legitimacy. Moreover, he cannot exercise all the functions of local government, which consequently remain unfulfilled (see paragraphs 12-13 above). This situation is not compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers. There is no doubt that democracy is a

fundamental feature of the European public order (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports* 1998-I), and that the notion of effective political democracy is just as applicable to the local level as it is to the national level, bearing in mind the extent of decision making entrusted to local authorities (see paragraphs 15 and 18 above) and the proximity of the local electorate to the policies which their local politicians adopt (see, *mutatis mutandis*, *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 52, *Reports* 1998-VI). The Court also notes in this respect that the Preamble to the Council of Europe's European Charter of Local Self-Government proclaims that "local authorities are one of the main foundations of any democratic regime", and that local self-government is to be exercised by councils or assemblies composed of freely elected members (see paragraph 25 above).

58. Against this background, the Court is unable to conclude that the difficulties in reaching a political agreement for a sustainable power-sharing mechanism is a sufficient, objective and reasonable justification for the situation complained of, which has already lasted for a long time.

59. In sum, the Court considers that the State has failed to fulfil its positive obligations to adopt measures to hold democratic elections in Mostar. There has therefore been a violation of Article 1 of Protocol No. 12 to the Convention.

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

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

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

61. Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court has found to have been violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007; *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 and 14 others, § 17, 10 November 2009; *Burdov v. Russia (no. 2)*, no. 33509/04, § 125, ECHR 2009; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 106, ECHR 2010 (extracts); and *Zornić*, cited above, § 39).

62. It is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention (see *Broniowski v. Poland* [GC], no. 31443/96, § 193, ECHR 2004-V). However, the Court notes that the matter complained of in the present case results from a failure on the part of the respondent State to implement the decision of the Constitutional Court and its ancillary orders (see paragraphs 9-10 and 55 above). In this connection, the Court reiterates that the failure to implement a final, binding judicial decision would be likely to lead to situations that were incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 215, 29 May 2019). Consequently, having regard to these considerations, as well as to the large number of potential applicants (see paragraph 6 above) and the urgent need to put an end to the impugned situation (see paragraph 57 above), the Court considers that the respondent State must, within six months of the date on which the present judgment becomes final, amend the Election Act 2001 in order to enable the holding of local elections in Mostar. Should the State fail to do so, the Court notes that the Constitutional Court, under domestic law and practice (see paragraph 20 above), has the power to set up interim arrangements as necessary transitional measures.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. Article 41 of the Convention provides:

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

A. Damage

64. The applicant claimed 19,633 euros (EUR) in respect of pecuniary damage, this being the amount she would have received had she been elected to the city council, had local elections been held in 2012 and 2016. She also claimed EUR 5,000 in respect of non-pecuniary damage.

65. The Government maintained that the claims were unjustified.

66. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. With regard to the claim in respect of non-pecuniary damage, the Court considers, in the light of all the circumstances of the present case, that the finding of a violation constitutes in itself sufficient just satisfaction (see, *mutatis mutandis*, *Sejdić and Finci*, cited above, § 63, and *Pilav*, cited above, § 54).

B. Costs and expenses

67. The applicant also claimed EUR 5,000 for the costs and expenses incurred before the Court.

68. The Government maintained that the claim was excessive.

69. In accordance with the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum claimed, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

70. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 12 to the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Jon Fridrik Kjølbro
Deputy Registrar	President