EDIN HODŽIĆ AND NENAD STOJANOVIĆ

NEW/OLD CONSTITUTIONAL ENGINEERING?

CHALLENGES AND IMPLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS DECISION IN THE CASE OF SEJDIĆ AND FINCI V. BiH

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EXECUTIVE SUMMARY

The judgment of the European Court of Human Rights on the application by Dervo Sejdić and Jakob Finci, issued on 22 December 2009, has been attracting wide media coverage and provoking academic and expert debates in Bosnia and Herzegovina. Yet the complexity of its execution seems not to have been adequately recognised in the rather intense debate that it triggered. This debate has been dominated by simplified interpretations that view the judgment either as a prelude to a gradual abandonment of ethnocracy and to the affirmation of citizens as individuals in the political system, or as an act opening up room for something akin to a *pluralisation of ethnocracy* simply by introducing the category of 'Others' into the tripartite structure of Bosnia and Herzegovina, a state of constituent peoples.

However, our research operates on the assumption that the possible approaches to the execution of the judgment, based on international and comparative law, are anything but simple.

The main intention of this research project is to offer *decision-makers*, *journalists* and *public officials*, as well as the academic community and the wider public, a systematic overview of the conceptual premises, relevant international standards, comparative experiences (especially those from other divided societies) and the past political practice in Bosnia with regard to the political participation of both the constituent peoples and 'Others'. This overview is necessary in order to identify potential directions that reform of the Bosnian Constitution and the amendments to relevant laws (above all, the Bosnian Election Law) could take in order to ensure the execution of the *Sejdić-Finci* judgment in ways that would not upset the system of power-sharing established between the three constituent peoples, while still ensuring the political participation of 'Others' on a non-discriminatory basis.

Our analysis, conceived and implemented as described, has led us to make a number of recommendations that, with due regard to the particularities of the Bosnian context, suggest mechanisms that could potentially be used to execute the judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*.

As regards the actual substance of the constitutional reform that could be undertaken in light of the *Sejdić-Finci* case, the findings of our research are the following:

- Bosnia and Herzegovina is not the only state exhibiting the conflict between specific consociational mechanisms and the imperative of ensuring equality and the full enjoyment of human rights in political and public life. For example, Italy has an almost equally problematic system of political participation in the province of South Tyrol, based on the principle of mandatory political 'aggregation' of individuals into dominant groups.

- In other countries, the mechanisms for representation of ethno-cultural identities have mostly developed in the context of minorities, that is as an exception from the liberal-civic principle of the neutrality of the state and representation of citizens as individuals. Where elements of ethnic federalism exist, political representation at the state level is for the most part ensured based on the territorial principle (i.e. on the principle of representation through federal units), as is the case in Canada, for instance. Also, in contexts where identity as such plays a significant role in political life (e.g. in Belgium), the politically relevant identity is determined based on membership to linguistic groups. Such groups are, by definition, much more open and inclusive than ethno-cultural groups since they can encompass different identities, including ethno-cultural ones.

- In view of the above, comparative experiences in the domain of political participation and identity representation certainly have some pertinence and importance when considering possible models for the execution of the judgment, but constitutional specificities of Bosnia and Herzegovina have to be taken into account.

- Almost all of the proposals identified for the execution of the part of the judgment concerning the Bosnian Presidency, including the views of the Venice Commission, are not without flaws: Those who propose indirect election of members of the Presidency by the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina disregard the possibility of additional political manipulation and unprincipled bargaining by political elites, as well as the fact that not one representative of the 'Others' has to date been elected to this legislative body; proposals aimed at increasing the number of members of the Presidency of Bosnia and Herzegovina to four or five, as a rule, do not offer mechanisms to prevent majorisation and manipulation of identities in this context; those who advocate the creation of two electoral units in the Federation of Bosnia and Herzegovina, as a rule, do not take into consideration the additional polarising effect that this option might have on the country's political life.

- As for the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, proposals have mostly focused on mechanisms to elect delegates from the ranks of 'Others' to this legislative body. They have for the most part disregarded the question of the House of Peoples' existing powers, which are, also

according to the *Sejdić-Finci* judgment, one of the key considerations in establishing the discrimination of 'Others'.

- Most proposals for the execution of the *Sejdić-Finci* judgment that have come before the public do not adequately address this complex problem. Moreover, the solutions offered have rarely been accompanied by appropriate elaboration or argumentation. In particular, there has been a chronic lack of new, innovative solutions that could meet the two-fold demand of representation for ethno-cultural groups and respect for the principle of non-discrimination.

- Political actors in BiH have not devoted the appropriate degree of attention to the execution of the judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. One proof of this inadequacy is the work of the Working Group set up by the Council of Ministers of BiH with the aim of executing the judgment: since its establishment in March 2010, it has yielded no results whatsoever. In addition, neither do the available platforms of political parties, even when they do address the issue, reflect or recognise its complexity, or offer appropriate elaboration and argumentation of their positions. Our interviews with some of the key actors in this process have for the most part also confirmed our assumption that there has been a lack of understanding of this complex issue and insufficient knowledge of the options available to decision-makers.

- The media discourse on the judgment itself and its implications has been very limited and unvaried, almost entirely focusing on possible sanctions and the general consequences for Bosnia and Herzegovina for failure to execute the judgment. There has hardly been any media coverage – at least in print media – focusing on the substance of the judgment or the consistent promotion of equality in the enjoyment of political rights by all citizens of Bosnia.

Combining descriptive, analytical, comparative and prescriptive elements, the present study concludes with four specific recommendations:

– It is certainly necessary for experts in constitutional and international law, as well as experts in comparative political and electoral systems, to become more actively engaged in the public discourse on the execution of the *Sejdić-Finci* judgment. With a view to this, and as a modest contribution to the project and to increasing the number of available constitutional options, we have formulated a proposal for a mechanism to elect the Presidency of BiH based on the principle of the so-called geometric mean. This, in our view, adequately balances out the demands of identity politics and the principle of non-discrimination. In addition, the proposal encourages cross-entity and

cross-ethnic cooperation, ensuring the introduction of a more moderate discourse in political campaigns and political life in general.

– When it comes to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, one should not look for relevant comparative experiences beyond Bosnia and Herzegovina itself: the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina and the Council of Peoples of the Republika Srpska are, in principle, models that can also be applied at the level of Bosnia and Herzegovina. The underlying principle is the following: if the Bosnian authorities wish to continue with the practice of exclusivity in determining the structure of this body and keep its current status as a *house of the constituent peoples*, its powers need to be significantly reduced, that is, reduced to the level of the protection of vital national interests. In other words, in this case the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina should be equivalent to the Council of Peoples of the Republika Srpska. Conversely, if its current powers are to be kept, the House of Peoples must also be open to delegates not only from the ranks of minorities, but also to all other persons belonging to the constitutional category of 'Others'. In other words, in this case the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina should replicate the model of the House of Peoples of the Federation of Bosnia and Herzegovina.

– Intra-party ethno-cultural pluralism is a necessary condition for ensuring multiethnic governance at all levels. This problem is best illustrated by the utterly disregarded fact that, as we have noted, neither the House of Peoples nor the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina has ever had a member drawn from the ranks of 'Others' although the Constitution and the Election Law of Bosnia and Herzegovina do not contain any formal obstacles to such a genuinely pluralistic composition of the House of Representatives. It is, therefore, necessary to carefully consider the legal and institutional mechanisms for ensuring intra-party pluralism in this domain.

– In view of all the problems, inconsistencies, inequalities and paradoxes inherent in the principle and practice of representing the constituent peoples and 'Others' as separate identities, which are unequivocally demonstrated in this report, Bosnia and Herzegovina needs, at least in the long term, to move from an ethnic federation to a territorial one that would introduce the principle of representation based on territory rather than based on ethno-cultural identities. However, reforms that would take the country in that direction are currently hampered by the prevailing approach and practice, whereby a territory is conceived of as a space of ethno-cultural domination and discrimination of all minority identities rather than that of openness, inclusiveness and equality, as is the case with most territorial federations, especially in Europe.

I. THE REACH AND POLITICAL IMPLICATIONS OF THE JUDGMENT

1. INTRODUCTION

The judgment of the European Court of Human Rights (hereinafter: ECtHR) in the case of *Dervo Sejdić and Jakob Finci v. Bosnia and Herzegovina*[1] (hereinafter: the *Sejdić-Finci* judgment), which established that there is systemic constitutional discrimination of all persons not belonging to the constituent peoples on account of their inability to stand as candidates for positions in the Presidency of BiH and the House of Peoples of the BiH Parliamentary Assembly, has posed a veritable challenge not only to Bosnia's constitutional system, but also to the theory and practice of constitutional engineering in divided societies.[2] In spite of this, the complexity of the execution of the judgment has for the most part not been adequately recognised in the very intense debate that it triggered in expert and political circles in BiH. The arguments that can be heard most often in the Bosnian public are based on simplified interpretations: the judgment is either viewed as a prelude to a complete shift from ethnocracy to full affirmation of citizens as individuals in the organisation of the state or portrayed as an act opening up room for something akin to a *pluralisation of ethnocracy* by merely including minorities in the state's tripartite structure and in the formula of power-sharing among the constituent ethnicities applied so far. However, this study operates on the assumption that possible formulas for executing the ECtHR's groundbreaking judgment, which are based on international human rights, principles of constitutional law and comparative political systems, are not all that easy to apply or free from problems or controversies.

On the one hand, the ECtHR judgment in the *Sejdić-Finci* case authoritatively established what a large section of the public had known ever since the Dayton Peace Agreement was

[1] Applications No. 27996/06 and 34836/06 of 22 December 2009.

[2] 'Divided society' is a concept primarily defined in political science and has been contested as an imprecisely defined notion. Although constitutional law has not until very recently adequately addressed the issue, perhaps the most precise definition of 'divided society' comes precisely from this field. As Sujit Choudhry points out, 'divided societies' are those in which ethno-cultural divisions are "politically salient – that is, they are persistent markers of political identity and bases for political mobilisation." In other words, a 'divided society' is a society in which "[e]thnocultural diversity translates into political fragmentation." See Choudhry 2008, p. 5.

signed in December 1995: Preventing only members of the constitutional category of 'Others' from standing as candidates for important political positions in the House of Peoples of the Bosnian Parliament and the Bosnian Presidency is an act of discrimination. In light of this, the *Sejdić-Finci* judgment is anything but surprising given that such arbitrary constitutional – and thus enduring – differentiation in political rights on the basis of ethnicity, as Gro Nystuen brilliantly and thoroughly elaborated in her study published as early as 2005,[3] was not allowed under international law even in the circumstances of the state of emergency in which the Dayton Peace Agreement was signed. However, the Court quite openly evaded providing an answer to the question as to whether the differential treatment of individuals according to their background and their ethno-cultural affiliation could be justified in the exceptional circumstances surrounding the end of the Bosnian conflict.[4] In other words, the Court did not engage in speculation as to what kind of judgment it would have issued in this case in, say, 1996, if it had been competent to rule on it at the time.

On the other hand, there is a near-consensus that the concept of the constituent peoples (Bosniaks, Serbs and Croats) and power-sharing among them was a precondition for the Dayton Peace Agreement, and also a key factor in the successful post-war transition.[5] This *consociational* concept of the organisation of government is based on adequate representation – in our case parity – of the dominant groups in public and political spheres. The main features of the consociational model are: group autonomy; grand coalition government, which includes the most important segments of society; the right of collective veto on key political decisions; and proportionality as the principle for representation of all groups in public service and for defining the election system. This model has a relatively long tradition in academic circles.[6] In addition, the tripartite structure of the state based on consociational principles also enjoys the support of local political actors in Bosnia[7] and of an important section of the

[3] See Nystuen 2005, especially Chapter 8. The *Sejdić-Finci* judgment also refers to this study.

[4] See the *Sejdić-Finci* judgment, *supra* note 1, paras. 45–46.

[5] Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD(2005)004, 11 March 2005, para. 74.

[6] A seminal and still the most authoritative study in this field is Arend Lijphart's *Democracy in Plural Societies: A Comparative Exploration* (1977). In the former Yugoslav linguistic area, the most relevant study advocating a consociational arrangement for Bosnia and Herzegovina as well is Mirjana Kasapović's book, *Bosna i Hercegovina: podijeljeno društvo i nestabilna država* (2005).

[7] See, for instance, Venice Commission, *Meeting of the Venice Commission Rapporteurs with representatives of Bosnian authorities and international community on the rights of persons belonging to national minorities in Bosnia and Herzegovina*, CDL(2002)32, 5 March 2002, para. 16. The programmatic principles of all major political parties in Bosnia, including such non-ethnic parties as the Social Democratic Party of BiH (SDP BiH) and Naša stranka, almost without exception accept a certain form of protection of ethnic interests of the constituent groups as a permanent feature of political life in Bosnia in the foreseeable future.

local expert community.[8] Finally, no relevant European[9] or international body[10] has come out with a clear demand of moving away from the concept of the constituent peoples, at least not in this phase of post-war transition in Bosnia.

In view of the above, and in particular given the complex political situation in the country, which, we should note, is afforded a significant place in the ECtHR judgment itself,[11] the real challenge could be summarised as follows: how to ensure the execution of the judgment while at the same time keeping the concept of three constituent peoples? Is it possible to reconcile a political and constitutional system essentially based on political privileges of the three dominant ethnic groups with the obligation of the state to adhere to the principles of equality and non-discrimination in the political sphere? The present study operates on the assumption that this poses a unique challenge to constitutional law, which has no equivalent comparative practice. This assumption finds additional grounds in the opinions of both relevant international officials and local experts.[12]

Against this background, the central aim of the present study is to examine the key theoretical concepts, the experiences of other divided societies, as well as the limited practice of collective political participation of both the constituent peoples and 'Others' in Bosnia and Herzegovina – which exists in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (hereinafter: the Federation) and the House of Peoples of the Republika Srpska (hereinafter: the RS). Such an examination is undertaken with a view to identify possible directions of constitutional

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[8] See, for instance, Constitutional Court of Bosnia and Herzegovina, Case No. U 5/98-III, 1 July 2000 (hereinafter: the Constituent Peoples Decision); see the thematic discussion published in Sarajevo-based weekly, *Dani*, Issues 477 and 478 (4 and 11 August 2006, respectively); see also the thematic issue of Mostar-based magazine, *Status*, Issue 9 (2006).

[9] See, for instance, Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on BiH*, ACFC/INF/OP/I(2005)003, 27 May 2004, paras. 21, 26 and 27.

[10] In its *Concluding Observations on Bosnia and Herzegovina's Report on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*, the United Nations Committee on the Elimination of Racial Discrimination noted that the state needed to abandon the tripartite structure of its principal institutions. See CERD/C/BiH/CO/6, 11 April 2006, para. 11. Nevertheless, the Committee did not explicitly establish that this also implied moving away from the concept of constituent peoples.

[11] See the *Sejdić-Finci* judgment, *supra* note 1, para. 48: "The Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule."

[12] Interview with Caroline Ravaud, Special Representative of the Secretary-General of the Council of Europe in Bosnia and Herzegovina, 26 August 2010. See Ademović 2010, pp. 10–11.

reform and changes to the relevant legal framework (with a special emphasis on election legislation) that would allow for both the maintenance of the system of power-sharing established between the constituent peoples and the political participation of 'Others' based on the principles of non-discrimination.

2. METHODOLOGICAL NOTES AND RESEARCH CONSTRAINTS

2.1. UNDERLYING PREMISES

The methodological framework of the present study is based on the following premises:

A fundamental problem of the constitutional and institutional design of divided societies is the lack of knowledge and awareness on the part of political leaders and decision-makers of the available options.[13] In the specific case of Bosnia and Herzegovina, this lack is best illustrated by the fact that during the fifteen years since the Dayton Peace Agreement no adequate research has been undertaken and no comprehensive study written that would properly address the problem of the discrimination of 'Others'.[14]

Traditional constitutional theory has not properly addressed the complex issue of the constitutional design for divided societies since, for a long time, the discipline insisted on the concept of a single and unified *demos*, assuming the unity of society and the state.[15]

On the other hand, the relevant literature in the field of political science dealing with issues of institutional set-up of divided societies has mainly focused on the challenges of peace-building and the establishment of functioning institutions and has, therefore, not devoted due attention to the problem of human rights in these societies.[16]

Finally, in the domain of international law, a clear trend of reinforcing the collective (ethno-cultural) dimension of political participation can be noticed in the past twenty

[13] Cf. Horowitz 2008, p. 1227.

[14] Rare exceptions include various reports by the Venice Commission on constitutional problems in Bosnia and Herzegovina, which contain fragmentary discussions of potential solutions to the problem.

[15] See in general Tierney 2004.

[16] The perspective of equality and human rights, for instance, does not figure among the six dominant streams of critique of consociational theory and practice identified by Arend Lijphart himself, the founder of this school of thought in political science. See Lijphart 2002, p. 40.

years. A legal reflection of this trend has been the right of minorities to participate in decision-making processes on all issues that concern them.[17]

2.2. RESEARCH QUESTIONS

Our central research question can be summed up as follows: What are the possible legal and institutional arrangements for the execution of the ECtHR judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina* that would ensure the enjoyment of individual and collective rights of political participation on an equal basis?

Our research assumption is that by consulting the relevant literature in the fields of law and political science, as well as the political practice of representation of individual and collective identities both in the Entities of Bosnia and Herzegovina and in other contexts similar to Bosnia and Herzegovina (with due regard for all the specific features of the country), we can identify the basic preconditions for and ways of executing the judgment.

In order to answer the above question as comprehensively as possible, we have formulated a number of specific questions at the operational level:

– Which international human rights standards are relevant in defining the framework for the execution of the *Sejdić-Finci* judgment? Which ECtHR cases and which experiences from the practice of corresponding bodies for the protection of human rights, in particular UN institutions, can serve as a guide for the execution of the judgment?

– Which concepts of minorities and majorities dominate political and legal theory and practice and to what extent are they relevant for understanding the position of the constituent peoples and 'Others' in Bosnia and Herzegovina?

– Which mechanisms of political participation by minority collectives exist in practice, in particular in countries where government is based on political power-sharing between the dominant ethno-cultural groups?

– What are the experiences and what is the quality of participation of political representatives not belonging to the constituent peoples in the upper houses of the Entity parliaments in Bosnia and Herzegovina?

– What is the level of awareness among political elites and other relevant actors (including representatives of the international community) of the paradoxical position

[17] See in general Ghai 2001; Weller 2010.

of delegates from the ranks of 'Others' in the House of Peoples of the Federation Parliament and the RS Council of Peoples, given the obvious fact that those delegates do not belong to the 'peoples' while the primary function of these institutions, by definition, is to protect the vital interests of the constituent peoples?

2.3. METHODOLOGICAL FRAMEWORK

The present research primarily provides a broad overview and analysis of the literature dealing with the theory and practice of organisation of political life in divided societies, as well as of mechanisms aimed at reconciling the demands of *identity politics* with the principles and values of non-discrimination, with a special focus on the political sphere.

The comparative dimension of the present study is especially important since it also examines, to a greater or lesser degree, the political practice of representation of citizens and ethno-cultural collectives in other countries, such as Lebanon, the United Kingdom (Northern Ireland), Italy (South Tyrol), Belgium, Switzerland, Cyprus and Slovenia.

In particular, we have sought to establish to what extent and with what implications international human rights law has evolved from the classical liberal, individualistic premise, under which "the state should never privilege a group of citizens whether on benign or malignant grounds",[18] towards the position that the state should provide mechanisms for the appropriate political participation of minorities.

We have also followed the activities of the main actors in the execution of the *Sejdić-Finci* judgment, which included monitoring and analysis of proposals, views and arguments presented as well as of the overall developments surrounding the execution of the judgment. The monitoring was mostly based on statements and information published in print media from the time of publication of the judgment on 22 December 2009 through 30 September 2010.[19]

Finally, we conducted interviews with more than twenty relevant interlocutors from Bosnia and Herzegovina (including international and political representatives and representatives of minority organisations), with a special focus on persons working in the two Entity parliaments, in which delegates from the ranks of 'Others' have been present and active for years now.

[18] Kis 1995, p. 223.

[19] For this purpose we chiefly used the services of the Infobiro database of Sarajevo-based Mediacentar.

2.4. CONCLUDING METHODOLOGICAL NOTES ON THE FOCUS OF THE RESEARCH

Indirect implications of the *Sejdić and Finci* judgment are indeed manifold. A significant number of provisions of Entity and cantonal constitutions, as well as a number of other legal rules and regulations providing for differential treatment of persons belonging to constituent peoples in political and public life, will most probably have to be amended if the state wants to prevent a possible avalanche of complaints to the ECtHR similar to those submitted by Sejdić and Finci. However, this present study focuses on the issue of the execution of the *Sejdić and Finci* decision *per se*, which is not to deny that some of its elements – in particular theoretical, international legal, and comparative considerations – have relevance for the potential undertaking of a comprehensive constitutional reform aimed at changing those provisions in the legal system of BiH that are potentially discriminatory towards persons belonging to the constitutional category of 'Others'.

It is important to note that even the subject we dealt with is extremely complex and multilayered inasmuch as it concerns not only the rights to vote and to stand for election, but also the structure of democratic institutions, the effectiveness of state government, the balance between available resources and the demands posed by the pursuit of identity politics in a consistent manner. Specifically, the issue of the composition of the House of Peoples of the Bosnian Parliament is inextricably linked to its work and functioning, which is, in turn, in direct correlation to the structure and powers of the House of Representatives, its composition, the practice of Entity veto powers etc. Nevertheless, we should note that this present research does not deal with the effectiveness of state institutions, which we are very much aware is an important aspect of democratic practice, and even of the 'emerging right to democratic governance'[20] that is gradually being articulated in international law. In addition, the decisions of the Constitutional Court of Bosnia and Herzegovina, too, have pointed out the inextricable link between 'institutional multiculturalism' and the imperative of not compromising the effectiveness of state governance.[21]

[20] See especially Franck 1992.

[21] See, for instance, the *Constituent Peoples Decision*, *supra* note 8, para. 55 (on the necessity to balance the right of ethnic veto with the demand for functioning institutions of the state).

Yet, the main perspective of the present study is informed, above all, by the right to stand for election as the core issue dealt with in the *Sejdić-Finci* judgment, as well as by the concept and practice of political representation, which are closely linked to the concept and exercise of that right. Our decision to focus on this aspect is obviously based above all on the requirements and implications of the ECtHR judgment itself, but also on our wish for the research whose findings we present in this study to be as focused and useful as possible. Even where we went beyond the immediate topic of our research, we always did so with the perspective of the subject of this study, wishing to shed more light on some of its important aspects. The subject on which we focused alone is, as the rest of this volume will show, sufficiently complex for one to get easily lost in its labyrinths. We hope that we have found a way out and offered a framework for understanding the *Sejdić-Finci* judgment, and also for thinking about the modalities of its execution.

Having said this, the present study does not provide all the answers to numerous questions regarding the upcoming constitutional reform, which we are convinced will be additionally accelerated by the judgment itself. We do not prejudge the future focus of attention of analysts and academics, but rather hope to see fresh research and analyses that will coherently address some of the indicated aspects that are closely linked to the subject of our study. We should also note that our focus on the judgment itself and on the two state institutions it directly and explicitly deals with is of a methodological, and not political, nature: our study does not prejudge the scope of the future constitutional changes and does not necessarily suggest that the execution of the *Sejdić-Finci* judgment is sufficient in and of itself to resolve the permanent Bosnian constitutional crisis. However, we believe that the discussion of the implications of the judgment raises many significant issues and suggests important answers for improving the constitutional situation in Bosnia and Herzegovina.

We hope that the present study will make a modest contribution to identifying at least some of these answers.

3. DETAILS OF THE SEJDIĆ-FINCI JUDGMENT

The ECtHR judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina* is the first judgment in the Court's history challenging the constitutional order of a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or ECHR).[22] Although it found some provisions of the Bosnian Constitution to run counter to the non-discrimination provisions of the Convention, the ECtHR, led by the doctrine of the margin of appreciation applied by states in deciding on adequate models for the execution of the judgment,[23] did not indicate the ways in which the Bosnian Constitution and relevant laws should be amended in line with the judgment. All that the Court found is that preventing persons belonging to the constitutional category of 'Others' from being elected as delegates to the House of Peoples of the Bosnian Parliament was an act of discrimination under Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No. 1 to the Convention. At the same time, the Court found that reserving the possibility of standing as candidates for the Bosnian Presidency only for members of the constituent peoples violated the general non-discrimination provisions of Protocol No. 12 to the Convention - this being the first time in history that the ECtHR has found a violation of this protocol. It is important to note that the judgment of the Grand Chamber of the ECtHR in this case was not unanimous; the two dissenting opinions offer interesting and telling arguments that we shall analyse below.[24]

As for the section of the application concerning the House of Peoples of the Bosnian Parliament, the Court first had to establish whether Article 3 of Protocol No. 1 applied

[22] See the partially dissenting opinion of Judge Ljiljana Mijović in the *Sejdić-Finci* judgment; Milanović 2010; Ademović 2010, p. 15.

[23] This concept is based on the assumption that the authorities of the given state are better positioned than international judges to decide which mechanisms are adequate for the implementation of the ECtHR judgment in a given case, taking into account the different interests and goals that need to be balanced in each individual case. See more in Van Dijk et al. 1998, pp. 82–92.

[24] For a brief presentation of the most important aspects of the opinion of Judge Mijović on her partial dissent (joined by Judge Hajiyev) and of the dissenting opinion of Judge Bonello, see Sections 9 and 14 of the present study.

at all to those parliamentary chambers whose composition is not determined through direct elections. In this sense, the Court noted the following:

> This provision applies only to elections of a 'legislature', or at least of one of its chambers if it has two or more. However, the word 'legislature' has to be interpreted in the light of each State's constitutional structure… and, in particular, its constitutional traditions and the scope of the legislative powers of the chamber in question.[25]

Following this logic, confirming the applicability of Article 14 taken in conjunction with Article 3 of Protocol No. 1, the Court emphasised that "the extent of the legislative powers enjoyed by it [the House of Peoples] is a decisive factor here".[26] Pointing to positive post-conflict developments in the country, especially in the field of preservation of peace and security,[27] and referring to the relevant opinions of the Venice Commission, the Court noted that "there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities".[28]

As for the Bosnian Presidency, the Court indicated that the concepts of discrimination from Article 14 of the Convention (prohibiting discrimination in terms of the enjoyment of other rights envisaged in the Convention) and Article 1 of Protocol No. 12 (prohibiting discrimination in terms of any right envisaged by law) are to be interpreted in the same manner.[29]

Accordingly, the Court concluded that the same legal logic needed to be applied both in the case of the House of Peoples and in the context of the Bosnian Presidency:

> It follows that the constitutional provisions which render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol No. 12, the Court not considering that there is any pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of Bosnia and Herzegovina.[30]

Importantly, the Court found that discrimination with regard to political rights on grounds of ethnicity might have been justified as an *interim* measure for establishing peace, but that, due to the country's progress in post-conflict reconstruction, this differentiation between the constituent peoples and 'Others' had lost its objective and reasonable justification.[31] This view of the ECtHR seems to be in contradiction with the view taken by the Bosnian Constitutional Court in the case of *Party for Bosnia and*

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[25] The *Sejdić and Finci* judgment, *supra* note 1, para. 40.

[26] Ibid., para 41.

[27] The *Sejdić and Finci* judgment, *supra* note 1, para. 47.

[28] Ibid., para. 48.

[29] Ibid., para. 56.

[30] Ibid.

[31] The *Sejdić-Finci* judgment, *supra* note 1, paras. 45–50.

Herzegovina and Ilijaz Pilav with regard to the applicant (a Bosniak) being constitutionally prevented from running as a candidate for the post of member of the Bosnian Presidency from the RS. As the Bosnian Constitutional Court noted, this constitutional and legal restriction of political rights "is justified at this moment since there is a reasonable justification for such treatment".[32] Moreover, this restriction vis-à-vis the applicant is founded and proportional to "the objectives of general community in terms of preservation of the established peace, continuation of dialogue, and consequently creation of conditions for amending the mentioned provisions of the Constitution of Bosnia and Herzegovina and the Election Law".[33] Thus, the Constitutional Court of BiH applied a different value judgment (which the evaluation of proportionality indeed implies), noting – somewhat paradoxically – that the discrimination of non-Serbs in the election process in the RS (and, *mutatis mutandis*, of non-Croats and non-Bosniaks in the Federation) was a necessary condition for the gradual elimination of discrimination in BiH. It remains to be seen what epilogue the *Pilav* case will have as it is currently being dealt with by the ECtHR.

[32] *Party for Bosnia and Herzegovina and Ilijaz Pilav*, Case No. A-2678/06, 29 September 2006, para. 22.

[33] Ibid.

4. CONTEXT AND CHRONOLOGY

According to both applicants in the case of *Sejdić and Finci v. Bosnia and Herzegovina*,[34] their immediate motive in addressing the ECtHR was the signing and ratification by Bosnia and Herzegovina of Protocol No. 12 of the Convention. Before the instrument entered into force for Bosnia and Herzegovina, on 1 April 2005, neither applicant believed he had a legal basis for an application. A further motive shared by Dervo Sejdić and Jakob Finci[35] was the failure of the so-called April Package of constitutional reforms in 2006, which fell only two votes short of adoption by the Parliamentary Assembly of BiH.[36]

From its issuance until the start of the election campaign in September 2010, the *Sejdić-Finci* judgment was at the centre of attention for the Bosnian public and international organisations.

In accordance with its obligations assumed under the Convention, including the implementation of ECtHR judgments, BiH undertook a series of activities necessary to execute the judgment.

At the same time, the Council of Europe, in accordance with its obligations and powers in the context of execution of ECtHR judgments, also undertook a number of activities in the matter. In addition, other international actors, especially European organisations dealing with issues of BiH's European integration, occasionally voiced their views on the issue in accordance with their respective mandates.

In late January 2010, the ECtHR asked the Bosnian authorities to submit an official report on measures that they intended to take in order to address the human rights

[34] Personal interviews with Jakob Finci (4 September 2010) and with Dervo Sejdić (23 July 2010).

[35] Ibid.

[36] The April Package of constitutional changes, which was to be adopted in April 2006, proposed the most comprehensive set of constitutional reforms so far. An unofficial translation of the document into local languages is available at: http://www.ustavnareforma.ba/files/articles/20060324/249/bs.%20Amandmani_%20na_%20Ustav_%20BiH_%20Aprilski%20paket,%2024.03.2006.pdf.

violations found in the judgment, as well as to indicate a timeframe for the implementation of those measures. The execution of the judgment was discussed by the Committee of Ministers of the Council of Europe on 4 March 2010, as at that point three months had passed from the issuance of the judgment.[37] The meeting concluded that, in light of the Convention's standards, the electoral legislation in Bosnia was to be revised where necessary; that the Constitution needed to be aligned with European human rights standards as soon as possible; and that in consideration of the measures to be taken to execute the judgment, the Bosnian authorities needed to take into account the relevant opinions of the Venice Commission. Bearing all this in mind, the Committee noted that the Bosnian authorities had embarked on the necessary activities, encouraged them to reinforce their efforts to remove the discriminatory provisions from the Constitution of BiH and the Election Law, and decided to continue discussing the issue at its 1086th session in June 2010, in light of fresh information on an integrated action plan and general and individual measures to be taken.[38]

On 26 January 2010, the Parliamentary Assembly of the Council of Europe (hereinafter: PACE) adopted a resolution on the functioning of democratic institutions in Bosnia and Herzegovina.[39] The report on which the resolution was based[40] noted that Bosnia had lately achieved very little progress and, therefore, suggested that a multilateral conference on BiH be organised. On that occasion, the need was also emphasised to urgently reform the Constitution in order for the October 2010 elections to be held in accordance with democratic principles.[41]

Meanwhile, at its 114th regular session held on 11 February 2010, the BiH Council of Ministers adopted a report on the judgment submitted on 25 January 2010 by the Government Agent Office before the ECtHR, which asked for general measures to be taken in accordance with the Committee of Ministers' Rules for the supervision of

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[37] "Vanredno o presudi protiv BiH", *Oslobođenje* (22 January 2010).

[38] See "'Finci i Sejdić': Prvo reformirati Ustav pa onda Izborni zakon BiH", available at: http://www.dnevnik.ba/novosti/bih/finci-i-sejdi%C4%87-prvo-reformirati-ustav-pa-onda-izborni-zakon-bih; "Ubrzati eliminaciju diskriminacije", *Oslobođenje* (12 March 2010); "Reforme Ustava BiH vrata su u Strasbourg", *Oslobođenje* (13 March 2010); a press release by the Ministry for Human Rights and Refugees, 15 March 2010, available at: http://www.mhrr.gov.ba/ured_zastupnika/novosti/?id=1020.

[39] Resolution 1701, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1701.htm

[40] The report was drafted by the Council of Europe Special Rapporteurs for BiH, Mevlut Çavuşoğlu and Kimo Sasi. Presenting the report, Mr Sasi noted the failure of the so-called Prud and Butmir processes. He especially commented on the *Sejdić-Finci* judgment, noting that Bosnian politicians had to take the country's fate into their own hands and embark on constitutional reform as soon as possible.

[41] "Multilateralna konferencija o BiH", *Oslobođenje* (27 January 2010).

the execution of ECtHR judgments, working methods and other documents. At the same session, the Council of Ministers adopted a conclusion instructing the Ministry of Justice to prepare, in coordination with the Ministry for Human Rights and Refugees and the Ministry of Civil Affairs, and submit an action plan for the execution of the *Sejdić-Finci* judgment to the Council of Ministers within twenty days.[42]

At its 11th thematic session held on 4 March 2010, the Bosnian Council of Ministers discussed and adopted an action plan for the execution of the judgment, establishing a Working Group to implement the action plan. It instructed the Ministry of Justice to submit a draft decision on the appointment of the thirteen-member Working Group (one representative from each of the three above-mentioned ministries, seven representatives from the caucuses of the BiH Parliament's House of Representatives, and three representatives of the ethnic caucuses of the House of Peoples) at the next session of the Council of Ministers. The Working Group was to hold its inaugural meeting and adopt its rules of procedure by 15 March 2010, and to prepare and submit draft amendments to the BiH Constitution to the Council of Ministers by 29 March 2010. The Council of Ministers was then supposed to discuss the proposed amendments on 1 April 2010 and submit them for parliamentary procedure.[43]

The Working Group held a total of seven meetings. The text below provides, among other things, a description of the process and an analysis of gaps identified in the work on the execution of the judgment in procedural terms.[44]

On 16 March 2010, the Working Group held its first meeting, during which the chair of the Working Group was appointed and its rules of procedure analysed and adopted. Under the rules of procedure, the Working Group could hold a meeting only if it had a quorum – made up of nine members – including three representatives of each constituent people. Following this meeting, the representative of the Social Democratic Party of BiH (SDP BiH) left the Working Group.

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[42] "20 dana za akcioni plan", *Oslobođenje* (12 February 2010).

[43] See "Provođenje presude u 'slučaju Sejdić i Finci' do oktobra", available at: http://www.sarajevo-x.com/bih/politika/clanak/100304083.

[44] The chronology is mostly based on the Action Plan for the execution of the judgment and the Report of the Working Group. The mentioned documents, sent to Analitika's research team by e-mail on 30 August 2010, were produced by the BiH Ministry of Justice, which coordinated and provided administrative support in the process of implementing the judgment. Additional sources included some of the documents of the Council of Europe's Office in Bosnia and Herzegovina, kindly shared by Ms Caroline Ravaud, Special Representative of the Council of Europe Secretary-General in Bosnia and Herzegovina.

The second meeting of the Working Group was held on 22 March 2010. At the previous meeting, the parties had been asked to submit written proposals for the execution of the judgment, which their representatives did on this occasion (for more details on the proposals themselves, see the next section).

The third meeting of the Working Group, held on 29 March 2010, reached no agreement on constitutional amendments, which meant that the deadline that the Council of Ministers had set for the Working Group was not met.

Following this failure, at its 119th session, held on 22 April 2010, the Council of Ministers adopted a report by the Working Group instructing it to produce a new action plan with realistic timeframes.

Meanwhile, on 29 April 2010 PACE held an extraordinary debate and adopted a resolution on the urgent need for constitutional reform in Bosnia (Resolution 1725).[45] The resolution expressed serious concern over the fact that past initiatives by Bosnian authorities had yielded no results and called on the authorities to launch a serious institutional process before the October 2010 elections in order to prepare a comprehensive package of constitutional amendments in accordance with the country's post-accession obligations. This message was personally conveyed to the Working Group by the Council of Europe Representative in Bosnia, Ms Caroline Ravaud, at the Working Group's fourth meeting on 5 May 2010. This meeting discussed the possibility of fulfilling Bosnia's obligations under the judgment as well as an update to the Action Plan. On this occasion, Ms Ravaud also noted that the Council of Europe would provide technical support in the creation of an expert body to work on amending the Constitution, with all members of the Working Group agreeing that there was a need to create such a body. It was concluded that the members of the Working Group should come to the next meeting, scheduled for 11 May 2010 with their proposals, or rather, written opinions on the creation of an institutional framework to reform the Constitution.[46]

On 11 May 2010, a fifth meeting of the Working Group was held, which discussed different options for the composition and terms of reference of the body, or rather the committee that would work on the constitutional amendments. The meeting concluded by instructing the BiH Ministry of Justice to produce a document including all the proposals by the parties in this regard.

[45] Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1725.htm.

[46] The Report of the Working Group, *supra* note 44.

On the same day, the Committee of Ministers of the Council of Europe adopted a declaration on Bosnia which directly referred to Resolution 1725.[47] The declaration listed five points reflecting the Committee's expectations of Bosnia, emphasising the necessity to make the alignment of the Constitution and legal framework with the Convention a priority, as well as the possibility and need to make use of international assistance and close coordination with international representatives in order to "guarantee a coherent and effective common international approach to the constitutional reform in Bosnia and Herzegovina as required by the judgment of the European Court of Human Rights".[48]

The sixth meeting of the Working Group was held on 31 May 2010, following the cancellation of the 19 May meeting because a quorum had not been reached. At this meeting, BiH Minister of Justice Bariša Čolak offered two proposals for discussion: the draft Law on the Constitutional Committee and the draft Decision on the Constitutional Committee. Two versions of the law and of the decision were produced, differing in how they defined the Committee's mandate. Namely, regardless of whether the Committee was to be established under a decision or under a law, a distinction was made in the definition of the term 'comprehensive', that is, in terms of whether the Committee was tasked with drafting comprehensive constitutional changes or only constitutional changes that would meet Bosnia's post-accession obligations towards the Council of Europe and ensure the country's progress towards Euro-Atlantic integration, with a primary focus on the execution of the *Sejdić-Finci* judgment. Following a discussion of several hours that did not yield any specific conclusions, the Working Group members were asked to submit their respective parties' views on the issue and possible proposals for amendments to the Ministry of Justice by the next Working Group meeting, scheduled for 14 June 2010.

Based on a report by Doris Pack, the European Parliament adopted a resolution on the situation in Bosnia on 11 June 2010.[49] The resolution pointed out, among other things, the need for constitutional reform and for meeting other priority obligations that Bosnia had in the process of European integration.

The seventh meeting of the Working Group, held on 14 June 2010, noted that the parties had not submitted their amendments to the above proposals. The Ministry of

[47] CM(2010)59, 11 May 2010, available at: https://wcd.coe.int/ViewDoc.jsp?id=1620849&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[48] Ibid., item 4.

[49] Available at: http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0342/2010.

Justice, instead, presented the draft Law on the Committee for the Constitution and the draft Decision on the Committee for the Constitution, which both established a mandate in accordance with PACE's Resolution 1725. The body's terms of reference, under the mentioned proposals, was to include drafting constitutional changes to implement the *Sejdić-Finci* judgment; fully harmonising the Bosnian Constitution with provisions of the Convention; drafting comprehensive constitutional changes to meet Bosnia's post-accession obligations towards the Council of Europe; ensuring the country's accelerated progress towards Euro-Atlantic integration; and submitting the prepared package of constitutional changes to the BiH Parliamentary Assembly.

In the discussion that ensued, the above-mentioned proposals by the Ministry of Justice were not adopted. The parties advocated the following positions: The Croatian Democratic Union (HDZ) representatives presented the view that Resolution 1725 was clear and specific and that the act establishing a committee or a different type of body should have the form of a law. They further noted that the Working Group members should hold additional talks with their party chairmen by the next meeting. The Party of Democratic Action (SDA) was of the view that the text of Resolution 1725 was the foundation to be adhered to and that the presented proposals of Law and Decision were the minimum, in view of Resolution 1725. Accordingly, in their view, it was necessary to pass a law aimed at implementing comprehensive constitutional changes. For this reason, they suggested that one more meeting of the Working Group should be held in order to produce a work report. The view of the Party for Bosnia and Herzegovina was that the act establishing a committee for constitutional changes should have the form of a law. The Alliance of Independent Social Democrats (SNSD) was of the opinion that the work of the committee should focus on the execution of the *Sejdić-Finci* judgment and that the act establishing the committee should have the form of a decision. The representatives of the Serb Democratic Party (SDS) and Party of Democratic Progress (PDP) parties expressed the view that the founding act of the future committee should be a decision. They at the same time noted that the *Sejdić-Finci* judgment was the priority for the Working Group. It was concluded that all the Working Group members should come to the next meeting, planned for 22 June 2010, with their final positions on the proposed Law and Decision and that a work report of the Working Group would be produced at the same meeting.

From this point on, the Ministry of Justice scheduled Working Group meetings on four occasions (22 June, as well as 12, 19 and 21 July 2010). However, the lack of a quorum resulting from the absence of SNSD and SDS representatives made it impossible to hold any of these meetings.

Given the failure of the Working Group to reach an agreement on the creation of an institutional framework for constitutional reform, the Ministry of Justice proposed to adopt the following conclusions to the Council of Ministers: the Work Report of the Working Group for the implementation of the Action Plan on the execution of the judgment be adopted and the Working Group be instructed to continue its activities immediately after the general elections of 3 October 2010 and to report to the Council of Ministers on its work no later than within thirty days.

This detailed chronology has been presented in order to shed light on the depth of the procedural labyrinth in which the opportunity to execute the judgment before the elections in October 2010 was lost. In addition to the failure of Bosnian authorities to respond to this task by agreeing on substantial changes, it is also necessary to stress the fact that the entire process was rather bureaucratic and non-transparent. To our request to receive transcripts from the Working Group meetings, the Ministry of Justice's representative said that they could not send them to us without the consent of each individual member of the Working Group.[50] Those transcripts would have shed more light on the degree of seriousness and professionalism of the Working Group members to live up to this complex task, and we can only express our regret at not being able to receive them. From media statements and our interviews with representatives of some political parties in Bosnia, one gets the impression that the execution of the judgment has, in actuality, not been a top priority for political actors in the country. The proposals that came from the parties themselves were, as a rule, insufficiently clear, not well-argued, principled or elaborate; most often it was not possible to get an answer to the simple question of why a particular solution was being proposed rather than a different one.

The chronology also clearly shows the absence of political will among the key actors to seriously address the issue, which is evident from the cancellation of meetings due to lack of quorum as well as from the fact that the parties were not able to agree even on the form or the procedure for activities in the field of constitutional reform (for the platforms and positions of the political parties themselves on the execution of the judgment, see the next section).

A second question arising in this context has to do with the timeframes for the execution of the judgment: How realistic was it to expect that this complex constitutional intervention – which had been continuously postponed since the Dayton Peace Agreement not only in terms of concrete constitutional interventions but also in terms of specific but well-elaborated proposals to change the tripartite

[50] E-mail communication from 30 August 2010.

composition of the Bosnian Presidency and the House of Peoples of the Bosnian Parliamentary Assembly – could be undertaken within several months from the issuance of the judgment?[51] Caroline Ravaud, Special Representative of the Secretary-General of the Council of Europe in Bosnia and Herzegovina, noted that the timeframes and expectations of relevant European institutions were not unrealistic and that the democratic legitimacy of the election process could have been achieved through simple interventions aimed at removing the discriminatory provisions from the Constitution.[52] However, as our analysis below will show, easy solutions for the execution of the *Sejdić and Finci* judgment seem simply not to exist.

Nevertheless, one gets the impression that the short deadlines were not the expression of a principled position of the European institutions but rather a means of pressure on Bosnian authorities to make the necessary changes and seek to implement the required reforms before the October 2010 elections. The chances of BiH suffering major sanctions over the failure to execute the judgment, as was initially expected, are reasonably small, although the State's inaction on the issue will quite certainly jeopardise and slow down its progress towards European integration.[53] The contradiction lies in that, as is now increasingly noted, there is no clear deadline for the execution of the judgment. In addition, it is not unusual for ECtHR deadlines to be considerably more flexible when the execution of its judgment requires structural reforms.[54] The current position of the relevant Council of Europe institutions is that they will certainly seek to have the priority reforms carried out as soon as possible. According to Caroline Ravaud, at the moment the European institutions only know what is absolutely unacceptable: to have the next

[51] Cf. Milanović 2010.

[52] Personal interview with Caroline Ravaud, 26 August 2010.

[53] Personal interview with a high-ranking international representative in BiH, 27 October 2010.

[54] The Committee of Ministers of the Council of Europe, under Article 54 of the Convention, supervises the execution of ECtHR judgments and has adopted a number of rules on the exercise of this function. The rules, in principle, do not envisage strict deadlines for the execution of the court's judgments. The only timeframe indicated in the rules applies to cases in which the judgment has so-called systemic implications. In such cases, it is envisaged that the Committee wait six months to pass between two discussions on specific measures that a state has taken in order to execute a judgment. It is also important to note that this 'waiting' period may be renewed if the state itself requests so. See the Rules for the supervision of the execution of judgments and of the terms of friendly settlements of 10 May 2006. The rules are available at: https://wcd.coe.int/ViewDoc.jsp?id=999329&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383. Yet, even this flexible timeframe is often not respected. In addition, significant delays have also been registered in cases where the payment of just compensation is envisaged. Although the deadline for such payments is three months, many states were more than six months late in fulfilling this obligation. See Lambert-Abdelgawad 2008, p. 6; In this context, Milanović (2010) also quotes the example of the Hirst case before the ECtHR, in which the UK government has failed for five years now to execute a judgment finding that prisoners cannot be deprived of their right to vote solely on grounds of their status.

general elections, in 2014, carried out in accordance with the current discriminatory provisions of the BiH Constitution and Election Law.[55]

In addition, one gets the impression that the criticism and threats coming from the international community were much stronger in the initial period after the issuance of the judgment, and especially while concrete results of the activities undertaken by Bosnian authorities were being awaited. Once the working group 'failed', that is, once the October 2010 general elections were scheduled without substantial changes having taken place, the international community continued issuing statements, but no longer using strong language by referring to sanctions that BiH might face if the judgment was not executed within a reasonable timeframe.

Besides looking at the role of European structures in the process of executing the judgment so far, it is also necessary to say a few words about the position of relevant European institutions on the very substance of the constitutional changes implied in the judgment. Namely, although public statements by European officials and relevant documents and resolutions repeatedly pointed out variations to the concept of margin of appreciation, according to which a state has a certain freedom in choosing the adequate modalities for the execution of a judgment,[56] those same actors and official documents rarely failed to refer to the relevant opinions of the Venice Commission. The contradiction lies in that the opinions of the Venice Commission, as the rest of our analysis will show, do not leave much margin of appreciation but rather point to acceptable solutions and to those that do not ensure progress in this context. According to the Council of Europe Representative in Bosnia, however, there is not much contradiction here: By referring to the opinions of the Venice Commission, the European institutions only noted what they themselves understood by constitutional reform and the execution of the judgment.[57] However, the question arises as to the degree to which these advisory opinions are prescriptive and the extent to which they also express the views of the Committee of Ministers of the Council of Europe as the only body formally responsible for supervising the execution of judgments.

It is also interesting to note an indicative fact that the media provided intense coverage of the developments surrounding the *Sejdić-Finci* judgment in the period from late December 2009 to late March 2010. After that, they continued to follow

[55] Personal interview with Caroline Ravaud, 26 August 2010.

[56] See, for instance, Resolution 1725 of PACE, *supra* note 45, para. 7.

[57] Personal interview with Caroline Ravaud, 26 August 2010.

relevant developments, but with reduced intensity and interest. They mostly reported on reactions to specific developments and activities that followed the publication of the judgment, without showing any investigative or analytical initiative. In addition, media reports for the most part focused on the process itself and possible sanctions that Bosnia might face due to its failure to timely execute the judgment. Of more than one hundred relevant media reports that we consulted, only a handful did not focus on this issue. Accordingly, one gets the impression that little was done to promote the judgment itself, its content, the essence of the discrimination of the 'Others', or the actual reasoning and arguments on which the judgment is based. In this way, the Bosnian media contributed to the execution of the judgment being linked to an unclear European dictate, rather than to the exercise of a whole range of important rights by one group of Bosnian citizens.

5. MODALITIES FOR THE EXECUTION OF THE JUDGMENT PROPOSED SO FAR

At the outset, we should note that some proposals had already been publicly circulated at an earlier point in time but gained importance and relevance only once the judgment was issued. The Venice Commission had already discussed most of the proposals in one form or another in its earlier analyses and opinions, notably the one on the constitutional situation and the powers of the High Representative.[58]

The fundamental differences between the proposals that have been publicly circulated since the *Sejdić-Finci* judgment lie in the proposed *modalities of election* (direct or indirect) of the members of the Presidency. The first group of proposals, with more or less variation, suggests that the existing system of direct election of the three-member Bosnian Presidency should be replaced by the practice of having the members of the Presidency appointed by Parliament, with an essentially equal role played by both Houses.[59] Apart from this, the variations mostly have to do with the *number of members* of this governmental institution: some argue that Bosnia and Herzegovina should have only one president,[60] while others

[58] The Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, *supra* note 5. Given their importance and comprehensiveness, and frequent references to them in relevant documents of European institutions on BiH, the Venice Commission's opinions are elaborated and critically analysed in Section 14 of this study.

[59] As a rare exception, the Venice Commission believed that the most favourable arrangement was the one under which the members of the Presidency would be independently elected by the House of Representatives of the BiH Parliamentary Assembly (see Section 14, *infra*). The April 2006 Package of constitutional amendments, for instance, envisaged indirect election of members of the Presidency (including one president and two vice-presidents, for whom the possibility to rotate the post of President during a four-year term in office was foreseen, on which the Bosnian Parliament was to subsequently decide) among the delegates in the House of Representatives of the Parliament and by the House, but at *the proposal of the House of Peoples*. The same arrangement was also envisaged by the so-called Butmir Package of constitutional changes of November 2009. An overview of changes to the Bosnian Constitution under that document is available at: http://www.ustavnareforma.ba/files/articles/20091101/274/bs.Amandmani_na_Ustav_BiH_Butmirski_paket,%2001.11.2009..pdf.

[60] See for example: Vehabović and Zaimović-Kurtović 2010, p. 7; Nedžad Jusić, President of the Council of National Minorities of Bosnia and Herzegovina, "Jedan predsjednik ili četiri člana", *Oslobođenje* (25 February 2010); personal interview with Dervo Sejdić (23 July 2010). In its 2009 Political Principles for the Constitutional Organisation of Bosnia and Herzegovina, Naša stranka also made the same proposal, but with the requirement that at each subsequent election the president should be from a different constituent people or from the group of 'Others' (available at: http://nasastranka.ba/index.php?option=com_content&task=view&id=284&Itemid=77).

advocate an arrangement whereby in addition to a president there would be two or three vice-presidents, with the possibility of rotation during the course of one election cycle.[61] The April Package of constitutional arrangements of 2006 envisaged precisely this model. The Venice Commission also noted this proposal as the most favourable because it simplified the election process, strengthened the state and favoured inter-ethnic cooperation, while elegantly avoiding ethnic exclusivity in the context of the right to run for office in this governmental institution of BiH.[62] In addition, some relevant actors in Bosnia, such as the Croatian Democratic Union (HDZ), also said that this arrangement would eliminate the numerous existing flaws in the election of members to this institution.[63] In this way, as advocates of this model point out, the ethnic determinants of election to the Presidency could be eliminated, while adequate representation of ethno-cultural groups would be ensured through the practice of the BiH Parliamentary Assembly, whose composition and procedures of Entity and ethnic vetoes provide sufficient guarantees for a pluralistic composition of the Presidency.

The second approach to the execution of the judgment keeps the current number and status of members of the Presidency, including direct election. This approach only envisages the introduction of a neutral constitutional provision that would not indicate the ethnicity of members of the Presidency but rather state that one member must be elected from the Republika Srpska while the remaining two would be elected from the Federation of Bosnia and Herzegovina.[64] This solution has been labelled as minimalistic from the outset, but also as one that could have ensured swift implementation of the judgment as well as that the recent elections would have been carried out based on the principles of non-discrimination.[65] The only difference in the overall approach in this

[61] The Croatian Democratic Union of Bosnia and Herzegovina (HDZ BiH) (see the Constitution of Bosnia and Herzegovina – amendments, available at: http://www.hdzbih.org/e-dokumenti/hdz-bih.html); Croatian Democratic Union 1990 (HDZ 1990) (see the document Platforma za novi ustav, available at: http://www.hdz1990.org/category/hdz1990/noviustav/); Party of Democratic Action (SDA) (see the document "Platforma za ustavnu reformu", available at: http://www.sda.ba/files/file/Platforma%20SDA%20za%20ustavnu%20reformu.pdf). A further variation is the proposal under which, in addition to the president, this executive body is made up of three vice-presidents, the one additional member being introduced to represent national minorities and those who have refused to declare their ethnicity (Mujakić et al. 2010, p. 20).

[62] See the Venice Commission, *Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina*, CDL-AD(2006)004, 20 March 2006.

[63] Personal interview with a high-level HDZ official, 2 August 2010.

[64] This was, for instance, the position of the Alliance of Independent Social Democrats (SNSD) and the Serb Democratic Party (SDS). See PACE's draft resolution on the urgent need for constitutional reform in Bosnia and Herzegovina and the explanatory report produced by Kimo Sasi and Karin S. Woldseth, 27 April 2010, para 16 (available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12222.htm).

[65] See Damir Banović and Saša Gavrić, "Jedan prijedlog privremene reforme", *Oslobođenje* (6 February 2010), p. 29.

second model lies in that certain actors, mostly RS parties, saw this solution as the maximum amount of acceptable constitutional reform at this stage,[66] while others, mostly representatives of parties from the Federation, the international community and European institutions, stressed that this first step in constitutional reform should not exclude necessary, subsequent constitutional changes.[67]

A third group of proposals have the maintenance of the direct election of Presidency members as their common denominator, but also the belief that achieving genuine equality of citizens and collectives in Bosnia and Herzegovina requires an increased number of members of the collective Head of State. This number varied from four, including three from the ranks of the constituent peoples and one from the group of 'Others' – which was proposed not only by advisory bodies of national minorities in Bosnia,[68] but also by the Party for Bosnia and Herzegovina[69] – to five, which election systems expert Daniel Bochsler suggested in his talk to the Bosnian Parliament in March 2010. According to Bochsler's exceptionally interesting proposal, the three Presidency members would continue to be elected according to ethnic criteria, while the election of the remaining two members would be based not on ethnicity but on an electoral competition for cross-ethnic votes on the basis of joint platforms and projects.[70]

With the exception of the old, radical and by all appearances, politically unrealistic proposal of the Venice Commission that envisaged abolishing the House of Peoples of the BiH Parliament and transferring the procedure of protection of vital national interests to the House of Representatives,[71] there has been less variation in proposals concerning this legislative chamber. Yet, the difference between the two

[66] For instance, this is referred to in the recent position agreed by the SNSD and SDS. See "SNSD i SDS: Ustavne promjene samo u slučaju 'Sejdić – Finci'" *Dnevni avaz* (28 October 2010).

[67] Personal interview with Caroline Ravaud, 26 August 2010. See also the European Parliament resolution on the situation in Bosnia and Herzegovina, *supra* note 49.

[68] See the *Proposed Amendments to the Constitution of Bosnia and Herzegovina* of the Council of National Minorities of Bosnia and Herzegovina, document No. 03-50-1-460-11/10, 26 March 2010, Amendment IV.

[69] "Nakon presude suda u Strazburu: SBiH traži četvrtog člana u Predsjedništvo BiH", *Dnevni avaz* (27 January 2010); "Belkić Markert: Promjena Ustava", *Oslobođenje* (29 January 2010).

[70] Bochsler 2011. Apart from the above proposal, Bochsler offered an alternative suggesting the introduction of the rule of 'geometric mean' (whereby the number of Presidency members may, but does not have to, be five). See Section 14 of this study.

[71] Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina..., supra* note 5, paras 36 and 80. Interestingly, some authors interpreted the provision of Article 4(3) Item g) of the BiH Constitution (which speaks of the possibility to disband the House of Peoples following a decision by the Bosnian Presidency or the Council of Peoples itself) as an indicator that the House of Peoples was explicitly conceived as a temporary legislative chamber. See Slye 1996, p. 464, fn. 28.

dominant options offered in this context is very interesting and telling and therefore deserving of a separate discussion, to be found in Section 15 of the present study. Here we need only to note that all the relevant actors from the current political structures suggested in near-consensus that changing the constitutional provision on the composition of the House of Peoples should simply go in the direction of expanding this legislative body, by including delegates from the ranks of 'Others'. An exception were some HDZ representatives who, contrary to the platform of their own party on this issue,[72] noted that the House of Peoples should remain a house of delegates from the ranks of the constituent peoples since 'Others' were already represented in the House of Representatives, which is a house of all citizens.[73] In addition, as a prominent HDZ representative emphasised, minorities are already adequately represented in the political process at the level of Bosnia and Herzegovina through the Council of National Minorities, a special advisory body of the Parliamentary Assembly of Bosnia and Herzegovina.[74]

Interestingly, the prevailing approach among political parties largely departed from the arrangements offered in the April and Butmir Packages of constitutional changes proposed in 2006 and 2009, respectively. Both of these Packages envisaged reducing the powers of the House of Peoples to the protection of vital national interests and keeping this legislative body reserved only for delegates from the ranks of the constituent peoples.[75] This certainly points to a worrying lack of continuity in the policies of key actors in Bosnia on this important issue, even over a period of only a few years.

In their media statements, the dominant parties, as a rule, did not put forward special requirements and criteria for the selection of delegates from the group of 'Others', implying for the most part the current constitutional definition of this group, which

[72] See *supra* note 61.

[73] Personal interviews, 2 August and 25 August 2010.

[74] Personal interview, 2 August 2010.

[75] Amendment II Item 2(d) from the April Package of constitutional changes clearly envisages that the House of Peoples of the Bosnian Parliament should remain closed to 'Others'. On the other hand, the constitutional amendments from the so-called Butmir package contain a somewhat unclear provision according to which "for each constituent people, at least six [out of a total of seven] delegates will belong to that constituent people". The neutral provision on fourteen delegates from the Federation and seven delegates elected from the Republika Srpska is, thus, additionally complicated by this seeming openness to 'Others', which applies provided that they are in a certain way linked to the constituent peoples. See *supra* notes 36 and 59.

includes both minorities and other citizens.[76] Vehid Šehić of the NGO Forum of Tuzla Citizens, who was very active in this context in his capacity as an expert adviser to the BiH Council of National Minorities of the Bosnian Parliament, noted, for instance, that, in addition to persons belonging to the constituent peoples, only delegates from the ranks of minorities should have a place in the House of Peoples since "the function of the House of Peoples is…to protect the ethno-national interests of both majority and minority peoples in Bosnia and Herzegovina." This, at the same time, means that there is no place in the House for "those citizens of Bosnia and Herzegovina who are non-affiliated ethno-nationally because they do not have a national interest as a people in Bosnia and Herzegovina and therefore the logical question arises of which national interest they would be protecting".[77] In a similar vein, although with somewhat more comprehensive implications, Faris Vehabović, judge of the Constitutional Court of the Federation, noted that all those ethno-cultural identities whose interests can be collectively formulated as vital interests should also be represented in the House of Peoples.[78] Other authors had more explicit views when it came to the structure of 'Others' in the future House of Peoples, noting that the presence of delegates from the ranks of national minorities and citizens not affiliated with a particular ethnic group should also be ensured in this legislative body, whereby the delegates from these two groups would be combined into one caucus.[79]

An especially telling 'compromise' solution was offered by the Butmir Package of constitutional amendments of 2009, which left open the possibility (but did not provide a guarantee!) of the election of three delegates drawn from the ranks of 'Others' to the House of Peoples (out of a total 21 as envisaged by the proposal). However, in addition to the lack of guarantees that 'Others' would actually have their delegates in the House of Peoples of the Bosnian Parliament, there was the problem of the mentioned establishment of a clear link (would it be identity-based or political?) between such delegates and the constituent peoples. Equally problematic and indeed

[76] See, for instance, the platforms of the SDA and HDZ, supra note 61, whereby the SDA explicitly states that both delegates from the ranks of minorities and other citizens need to be included in the House of Peoples, while the HDZ uses a negative definition: representatives of those who do not declare themselves as members of the constituent peoples. See also Vehabović and Zaimović-Kurtović 2010, p. 5.

[77] "Nacionalne manjine i izmjene Ustava", *Oslobođenje* (23 March 2010).

[78] See Vehabović 2010. Although he speaks of the collective rights of 'Others', the author seems to have national minorities in mind above all since he refers in several places to the Framework Convention for the Protection of National Minorities.

[79] See Mujakić et al., 2010, p. 16. See also Banović and Gavrić, *supra* note 65.

an indicative element of the Package was the provision according to which delegates from the ranks of 'Others' could join the corresponding caucuses of the delegates of constituent peoples[80] due to the absence of their own caucus.

In addition to these exceptionally important conceptual considerations,[81] some actors also addressed the number of delegates from the ranks of minorities that needed to be included in the House of Peoples of the BiH Parliamentary Assembly. The Party for Bosnia and Herzegovina, thus, proposed three delegates,[82] while the BiH Council of National Minorities suggested four (two from each Entity).[83]

The modality of electing delegates to the House of Peoples, however, caused major conceptual discrepancies between the political parties, on the one hand, and representatives of national minorities, on the other. The political parties for the most part did not give any special consideration to this issue, probably assuming that the delegates from the group of 'Others' would be elected like their colleagues from the constituent peoples - through the Entity Parliaments.[84] However, the proposal of constitutional amendments agreed by the advisory bodies for national minorities at the state and Entity levels envisages a very innovative arrangement for Bosnian practice, under which delegates from the ranks of 'Others' would be decided upon by the BiH Council of National Minorities based on corresponding proposals by the national minorities' advisory bodies attached to the Entity Parliaments.[85] The main reason why representatives of minorities have been advocating this arrangement, which would depart from the practice of selecting delegates from the group of 'Others' in the Federation Parliament's House of Peoples and the RS Council of Peoples,[86] lies, as they have noted, precisely in the negative experiences from the Entity level: representatives

[80] See *supra* note 59.

[81] For the importance of the definition of 'Others' in this context, see the analysis in Section 7 of this study.

[82] See sources cited in *supra* note 69.

[83] The Council of National Minorities, *Proposed Amendments...*, *supra* note 68.

[84] Under Article 4.1(a) of the Constitution of Bosnia and Herzegovina, delegates in the House of Peoples of the Bosnian Parliament from the Federation are elected by "Croat and Bosniaks delegates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina respectively," while delegates from the RS are elected by the RS People's Assembly. Cf. the proposal seeking to create symmetry in this regard by having RS delegates, too, decided on by the RS Council of Peoples, in Vehabović and Zaimović-Kurtović 2010, p. 5, and Mujakić et al. 2010, p. 16. See also a proposal which envisages determining the members of the House of Peoples of the Parliamentary Assembly of BiH through direct elections (Džihanović, 2010).

[85] The Council of National Minorities of Bosnia and Herzegovina, *Prijedlog amandmana...*, *supra* note 68, Amendment III.

[86] Under Article IV.A.2.8. of the Constitution of the Federation, in accordance with Amendment XXXIV, delegates to the House of Peoples of the Federation Parliament are elected from cantonal assemblies. Under Article 70 of the RS Constitution (amended through Amendment LIX), delegates to the RS Council of Peoples are elected by the RS People's Assembly.

of 'Others' in parliaments at all levels have proven to be but instruments of their own parties and, as a rule, show no wish to represent the special interests of minorities or to engage with them.[87]

However, as the rest of our analysis will show, most of the mentioned proposals for restructuring the Bosnian Presidency suffer from major flaws. At the same time, the House of Peoples of the Bosnian Parliament is an especially sensitive issue. It is particularly interesting that there have been very few, if any, voices in the Bosnian public, both before and after the *Sejdić-Finci* judgment, who raised the issue of the status and role of delegates from the ranks of 'Others' in the Houses (and the Council) of Peoples of the Entity parliaments. Namely, what is being neglected is the fact that since amendments to the Constitutions of the Federation and the RS were adopted following the Bosnian Constitutional Court's decision on the *Constituent Peoples* case, delegates from the group of 'Others' have been taking part in the work of the upper houses of both Entity parliaments. However, having in mind that the main function of these houses, just like that of the upper house of the Bosnian Parliament, is to protect vital national interests, which are limited only to the constituent peoples by force of the Constitution, these institutions – Professor Neđo Miličević being among the very few to note this – additionally reinforce the status of minorities as mere observers of the political process in BiH.[88]

The remaining sections of the present study will offer a discussion of the basic parameters to be borne in mind when deciding on further steps in the execution of the judgment. Special emphasis will be placed on the conceptual challenges and problems surrounding the *Sejdić-Finci* judgment and on those arising from international law and political theory. The guiding thought in the section to follow, as has already been indicated, is balancing the political reality with the imperatives of non-discrimination in political life. A second guiding idea is to add to the question that the mentioned proposals deal with almost exclusively – that of *how* to execute the judgment – the necessary complement of *why* execute it in a certain way and what the advantages and shortcomings of a certain modality of execution are.

Before moving to the next section, we should note that the standards of international law do not offer sufficient guidelines for defining constitutional arrangements that would provide for an adequate execution of the *Sejdić-Finci* judgment. Nevertheless,

[87] Personal interview with Nedžad Jusić, President of the Council of National Minorities of Bosnia and Herzegovina, 24 August 2010; Personal interview with Jakob Finci, 4 September 2010. E-mail communication with Stevo Havreljuk, President of the RS Association of National Minorities, 23 August 2010. For a detailed analysis, see Section 15 of this study.

[88] Miličević 2002, pp. 300–301.

the introductory theoretical discussion, based on the requirements and dilemmas of international – and to a certain extent constitutional – law, as well as on comparative experiences in issues of political participation and political representation of different identities, will serve as an important framework for the analysis of concrete proposals for constitutional reform in Bosnia in the context of the execution of the *Sejdić-Finci* judgment. We shall address these proposals in the third part of the present study. We hope that this introductory discussion will provide the *framework and standards that should inform the discussion on upcoming constitutional changes*, at least when it comes to executing the *Sejdić-Finci* judgment.

II. THEORETICAL PREMISES AND COMPARATIVE EXPERIENCES

6. CONSTITUENT PEOPLES, MINORITIES, 'OTHERS': COLLECTIVITIES AND THEIR RIGHTS

The issue of institutional arrangements in regard to the execution of the *Sejdić-Finci* judgment is very closely linked to conceptual questions, such as: in which way and why are the constituent peoples actually 'constituent'; who are the 'Others'; which identities can be considered as minorities; how are minorities different from 'Others'; and how are all these categories different from the concept of the citizen as an individual and the civic identity that is based on it? Political representation in Bosnia as a divided society is largely based on the principles of 'differentiated citizenship'.[89] The understanding of each of the mentioned identities, therefore, has direct implications, most significantly for the principles and models of political participation.

The issue of the execution of the *Sejdić-Finci* judgment has, rightly or not, prevalently been perceived as an issue of collective rights, or an issue of minority rights in Bosnia and Herzegovina. We, therefore, first need to consider this complex issue.

6.1. WHAT DOES IT MEAN TO BE A 'MINORITY' IN A SOCIETY?

When analysing the notion of politically relevant identities, that is of 'majorities' and 'minorities', we should keep in mind the existence of three different points of view (statistical, socio-political and constitutional) and three different dimensions (identity, time and space) when looking at these categories.[90]

[89] Among the numerous works advocating the introduction of the concept and practice of differentiated group rights, see e.g. Young 1989.

[90] We have developed the typology suggested here independently and exclusively for the purposes of the present study, but naturally taking into account the existing literature in the field. See e.g. Seymour 2002; Heinze 1999; PACE, Recommendation 1201, 1993; Hilpold 2004.

6.1.1. The statistical point of view

From a statistical point of view, a minority is a group of people that is smaller in number than a given whole, i.e. a group that accounts for less than 50% of the overall population. It is especially important here to differentiate between the following three dimensions of the notion of 'minority': (a) the identity criteria, (b) the time of observation (relativity of time) and (c) the relevant territory (relativity of space).

The identity criteria are divided into two groups: permanent (i.e. ascriptive) and contingent. The first set includes, above all, gender differences (male vs. female), skin colour ('race'), eye shape etc. These are all features that an individual cannot change during his or her lifetime, or that are very difficult to change (be it for medical/technical or financial reasons). The second set includes features that can be changed more (e.g. political orientation) or less (citizenship) easily. Of course, the distinction is not simple and it is not possible to put every feature in one or the other set (as the examples of language and religion show).

Whether the criteria of minority identity, such as language or religion, are rather permanent or contingent in nature will depend on the social context. In some societies, these two elements (taken together or separately) will be perceived as contingent. In Switzerland, for instance, it is enough for a person to move from a German-speaking to an Italian-speaking region and learn Italian (preferably without the wrong accent) in order to be socially perceived as a member of the Italian-speaking group.

On the other hand, in some societies membership of one group or another is perceived as something that is inherited, i.e. as a permanent element of personal identity. In such societies, language or religion turn into (pseudo)ethnic differences and are passed on from one generation to the next. This is the case with religion in many countries of Southeast Europe, including Bosnia and Herzegovina, where a given religion is often linked to the notion of a 'people' (i.e. nation, nationality, ethnic group etc.) and where an individual – *whether he or she wants to or not* – is most often put into the first, second or third ethno-national basket based on his or her first and/or last name.

The second dimension of the notion of minority is its relativity in terms of time. Minorities or majorities sometimes change from one minute to the next. In countries with well-established forms of so-called direct democracy (e.g. referendums), such as Switzerland, Italy or some federal units (states) in the US, every citizen can find himself or herself in the majority or in the minority. Sometimes even on one and the same day they can be both in the minority and in the majority (for instance, if citizens have had

a chance to vote in several referendums in one day). It is important to underline that this dimension does not apply only to contingent identity criteria, but also to those that are more or less permanent in nature. Demographic changes (whose causes might be immigration/emigration, birth rate/death rate, wars etc.) might make a group that used to be a minority in a certain territory become a majority, and vice versa. Some studies have shown for instance that Jews will stop being the majority in Israel around 2050.[91]

The third dimension of the notion of minority is territory, i.e. its relativity in space. Person X might be a member of the majority in his or her town, of a minority in his or her region, but again of the overall majority country-wide, and then again of a minority in a supranational confederation of states. Let us take the example of an Italian woman living in Bolzano. She is a member of the majority in her town (i.e. the municipality of Bolzano, where 73% of the population speak Italian and 26% German); a member of a minority at the level of the Autonomous Province of Bolzano (in which 69% of the population speak German, 26% Italian, and 4% Ladino); and then again a member of the majority at the level of the Autonomous Region of Trentino-Alto Adige (where 65% of the population speak Italian, 32% German, and 3% Ladino).

We should draw one important conclusion from this brief elaboration: Statistically speaking, every person is both in the minority and in the majority, especially if identity is observed in the context of time and space.

6.1.2. The socio-political point of view

That minorities/majorities do not necessarily have to be defined in statistical terms is shown by the example of women. In most countries, the share of women is numerically somewhat higher than the share of men (around 52%). Regardless of this fact, women are considered a 'minority', above all for two reasons: explicit discrimination (e.g. when women do not have the right to vote, as was the case in Switzerland until 1971) and implicit discrimination (e.g. if a woman receives a much smaller remuneration than a man for the same job). A second example is that of blacks in South Africa during apartheid. Although they were a large numerical majority in the country compared to the whites, up until 1994 they were a minority in the country's social and political life. A third example is the Flemish in Belgium until the beginning of the 20th century. Although a majority in terms of their share in the overall population, they were a minority in politics and in society, since during the first decades of the existence of the Belgian state, French was the only official language throughout the country.[92]

[91] Della Pergola 2007.

[92] See e.g. Dorchy 1991.

Still, it is important to note that in most cases a minority group is a minority from both the statistical and the socio-political point of view.

6.1.3. The constitutional law point of view

Some groups are minorities in both statistical and socio-political terms but are nevertheless not minorities *de jure*, i.e. as a constitutional category. This is the case in Switzerland, whose constitutional system does not recognise the notion of 'minority' or 'majority'. Swiss citizens who speak Italian make up 4–5% of the overall population and are without a doubt a statistical minority. They are even a socio-political minority at the federal level (but not at the level of the Canton of Ticino, in which they are the majority). This is, for instance, evident from the fact that civil servants or MPs from the Canton of Ticino must use either German or French in their daily work. Regardless of this, they are not a minority *de jure* since the federal constitution recognises Italian as one of the four national languages and one of the country's three official languages and guarantees the same rights to all citizens.

The Swiss example is not an exception to the prevailing rule since Switzerland is a liberal democracy in which the 'people' is a constituent element of the state (together with the cantons, in accordance with Article 1 of the Swiss Constitution), but membership of the people is defined according to civic-liberal criteria. Namely, every Swiss citizen – irrespective of his or her language, religion, skin colour or origin – belongs to the 'Swiss people'.[93] A similar situation is found in a large majority of Western countries (e.g. in France and the US).

This, however, is not necessarily the case in other countries, especially in Eastern Europe. In some cases, these are nation-states whose constitutions explicitly recognise certain minorities (thus underlining that they are not typical civic states but rather nation-states).[94] The Constitution of the Republic of Croatia, for instance, states that "the Republic of Croatia is hereby established…as the national state of the Croatian people and a state of members of the autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians and others who are its citizens".[95] In other cases, there are *multinational*

[93] Some authors subscribe to the view that Switzerland is a 'multinational' state consisting of several nations defined according to their linguistic identity, and that, consequently, one cannot speak of 'one' Swiss nation (or people). This is for instance the view of Will Kymlicka (1995, p. 13). For a critical view of this argument, see Stojanović 2000.

[94] For an overview of ethnic constitutional regimes in Eastern Europe, see Dimitrijević 2002.

[95] Available at: http://www.usud.hr/default.aspx?Show=ustav_republike_hrvatske&m1=13&m2=21&Lang=hr.

states in which two or more groups compose the state (i.e. are 'constituent' peoples), while citizens who do not belong to any of these groups are considered to be minorities. In addition, unlike liberal nation-states, in multinational states, such as Canada, there is an additional level of political life in which these states "engage in constitutive constitutional politics, which concern existential questions that go to the very identity, even existence, of the political community as a multinational political entity."[96] The almost daily calls for secession, the abolition of the two political Entities or the introduction of a "third entity" show the absolute domination of "constitutive constitutional politics" in BiH, all of which additionally confirms that it is a complex, multinational state

6.2. THE APPLICATION OF THE CONCEPT OF 'MINORITY' IN THE BOSNIAN CONTEXT

In BiH, none of the constituent peoples is a majority or minority in constitutional terms, neither at the central level nor at the level of the Entities. At the same time, the 2003 Law on the Protection of the Rights of Members of National Minorities lists 17 officially recognised minorities.[97] In other words, in constitutional, territorial and temporal terms, the constituent peoples are not and cannot be minorities in BiH. However, depending on the territory or administrative unit in question, the constituent peoples, too, are minorities in statistical and socio-political terms: Bosniaks and Croats in the Republika Srpska; Serbs in the Federation; Bosniaks and Serbs in Livno Canton, and so forth.

In accordance with the above identity formula, Bosnia and Herzegovina is sometimes also described as a country of minorities since it does not have one dominant nation, as is the case in Croatia, Slovenia or Bulgaria and, indeed, in a large majority of countries around the world. In this regard, Bosnia is similar to, for instance, Nepal or Papua New Guinea, where an even larger number of groups partake in the overall state identity.[98]

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[96] Choudhry 2007, p. 611.

[97] Article 3: "Bosnia and Herzegovina protects the status and equality of members of the following national minorities: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, Ukrainians and others meeting the requirements from Paragraph 1 of this article." *Official Gazette of Bosnia and Herzegovina*, 12/03 and 76/05. Available at: http://www.bhric.ba/dokumenti/legislativa/BHS%202%20Zakon%20o%20manjinama.pdf.

[98] See e.g. Subedi 1999. Papua New Guinea is especially interesting in this context because out of its population of seven million, the largest linguistic group has around 150,000 members. See e.g. Reilly 2000.

However, one of the key concepts determining Bosnia's current constitutional set-up is that of the 'constituent peoples'.[99] One feature of this concept is, as noted by Gro Nystuen, precisely that the three dominant groups can in no case be considered minorities.[100] We should note here that this is not only a provision in the Constitution, but also the consistent position of all relevant political actors in Bosnia, who point out that minority status is unacceptable for the constituent peoples under "the current legal scenario".[101]

The preamble of the BiH Constitution, which, according to the authoritative stance of the Constitutional Court of BiH, should be considered an inseparable part of the normative section of Bosnia's highest legal act,[102] defines Serbs, Croats and Bosniaks as the constituent peoples who, together with 'Others', adopt the Constitution. In addition to the fact that not even the Constitutional Court's *Constituent Peoples* decision has significantly changed the domination of Serbs, Bosniaks and Croats in the very text of the Constitution, the constituent nature of the three largest ethno-cultural collectives in Bosnia and Herzegovina is reflected in a number of privileges, above all in the political sphere. In the House of Peoples of the Federation Parliament and the RS Council of Peoples, delegates from the ranks of the constituent peoples, organised in caucuses, have a privileged status. This status is reflected, among other things, in the important role that they play in convening sessions and deciding on the agenda, and in the right of veto aimed at protecting 'vital national interests.' In addition, the three collectivities enjoy privileges in a whole range of state institutions such as the Bosnian Constitutional Court, the Entity constitutional courts or the Ombudsman of Bosnia

[99] It is important to note that the concept of 'constituent peoples' is not unknown in the theory of nations and nationalism, even if it does not always show up under the same name. The concept is especially used by authors advocating the idea of a 'multinational state': all the nations comprising, that is constituting, such a state have a special status and special collective rights. For instance, Michel Seymour (2001) asserts, "In order to guarantee the viability of a multinational state, it is necessary to incorporate the principle of recognition of constituent nations and accept the institutional consequences of this approach (special status, asymmetrical federalism, the right of veto, etc.)" (original in French). In practice, nevertheless, it is rather difficult to find states in which the notion of 'constituent peoples' has the same importance as in BiH, in particular when it comes to liberal-civic democracies in which the main holder of sovereignty is precisely the 'citizen' and not a 'community' or a 'nation' defined in ethnic terms. In Canada, for instance, there is often talk of the 'founding peoples', i.e. of Franco-Canadians or Anglo-Canadians. However, citizens' affiliation with one or the other people is not based on ethnic criteria, as is the case in Bosnia, but rather on a specific combination of linguistic and cultural characteristics. Similarly, Kofi Annan's failed plan for Cyprus (2004) envisaged the concept of "constituent states" (Greek Cypriot and Turkish Cypriot states within the United Republic of Cyprus), which would guarantee 'equal status', whereby the main feature of their relationship would be 'political equality' and not a majority/minority relationship (see http://unannanplan.agrino.org/Annan_Plan_MARCH_30_2004.pdf).

[100] Nystuen 2005, p. 138, fn. 437.

[101] Venice Commission, *supra* note 7, para. 16; personal interview with Caroline Ravaud, 26 August 2010.

[102] The Constitutional Court of Bosnia and Herzegovina, the *Constituent Peoples* Decision, *supra* note 8.

and Herzegovina, in which key positions are reserved, be it explicitly or implicitly, only for members of the constituent peoples. Particularly interesting and telling in this sense is the paradoxical formulation in the current Law on the Ombudsman of Bosnia and Herzegovina, which stipulates that ombudsmen are "appointed from the ranks of the three constituent peoples" but that this "does not rule out the possibility of appointing persons from the ranks of Others".[103] In this sense, Bosnia and Herzegovina as a state is rightly described as a multinational or paritarian state of three peoples.[104] However, a special problem, which the *Sejdić-Finci* judgment also clearly points to, is how this parity affects the rights of other collectivities, but also of those individuals who do not wish to declare themselves as members of an ethno-cultural group.

It is especially interesting to look at the concept of constituent peoples in light of the most authoritative definition of minority articulated in international law, according to which the most important objective characteristics of a minority are its numerical inferiority vis-à-vis the rest of the population *and* its non-dominant position in the state.[105] Each of the constituent peoples, both according to the pre-war population census[106] and relevant recent estimates,[107] is statistically inferior vis-à-vis the rest of the state's population. The only respect in which these collectives are different from minorities *per se* is their collective political position and their status of tripartite socio-cultural domination, which has its basis in the Constitution, and according to some authoritative views, its historical continuity as well.[108] However, despite the *Constituent Peoples* decision of the Bosnian Constitutional Court, which declared the principle of 'collective equality' of the constituent peoples throughout the country (meaning both at the central level and in the entities, as well as in the ten cantons of the Federation), the situation with regard to collective domination or non-domination in the Bosnian context is rather complex and deserving of additional discussion.

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[103] Article 3, para. 7 of *The Law on Amendments to the Law on the Human Rights Ombudsman of Bosnia and Herzegovina*, available at: http://www.ombudsmen.gov.ba/materijali/o%20nama/zakon%20o%20izmjenama%20i%20dopunama%20zakona.pdf.

[104] See Palermo and Woelk 2003, p. 228.

[105] Capotorti 1991, p. 96, para. 568.

[106] See Etnička obilježja stanovništva: Rezultati za republiku i po opštinama 1991, Zavod za statistiku Republike BiH, Sarajevo, October 1993, available at: http://www.bhas.ba/arhiva/census1991/Etnicka%20obiljezja%20stanovnistva%20bilten%20233.pdf.

[107] See e.g. *Lična karta BiH*, available at: http://www.predsjednistvobih.ba/o-bih/?cid=8143,2,1.

[108] See e.g. the Constitutional Court of Bosnia and Herzegovina, Decision No. U-5/04, 27 January 2004, para. 22 ("the Constitutional Court recalls that, since the beginning of Bosnia and Herzegovina's modern statehood, the principle of multiethnicity, i.e. of the constituent nature of peoples [Bosniaks, formerly Muslims; Serbs; and Croats], was one of the most important elements to find its place in the constitution, as the highest legal act of a country").

Above all, we should note that the perspective and practice of international law when it comes to the definition and distribution of minorities and majorities in a state are somewhat confusing and inconsistent. According to the Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereinafter: the FCNM), the constituent peoples could be considered minorities for the purposes of the Convention, in particular when it comes to their protection in the territories and in the Entities in which they are *de facto* in the position of a minority.[109] Similarly, the Venice Commission stressed in its opinion on Belgium that the international standards of protection of minorities in principle also apply to those collectives that are dominant at the level of a country but are in a statistically inferior position in a particular territory.[110] On the other hand, in its decision in the case of *Balantyne et al v. Canada*,[111] the UN Human Rights Committee, which supervises the application of the International Covenant on Civil and Political Rights and decides on petitions by individuals alleging violations of their rights protected under the Covenant, noted that the English-speaking inhabitants of Quebec could not be considered a minority in the province (and therefore have only individual but not minority rights to language, culture and education) because they make up the majority in Canada as a whole.

The constituent peoples in Bosnia are, as a rule, statistically dominant, both at the level of municipalities and at the level of mid-level government units. However, as is well known even outside Bosnia and Herzegovina, in its *Constituent Peoples* decision the Bosnian Constitutional Court introduced a different principle in defining majorities and minorities both at the level of Entities and at the cantonal level. Under this decision, which is based on a particular interpretation of the right to non-discrimination which implies the prohibition of both assimilation and segregation, the constituent peoples enjoy 'collective equality' throughout the country – meaning that they are constituent in both Entities, including the cantons. As Anna Morawiec-Mansfield notes in her analysis, the *Constituent Peoples* decision of the Bosnian Constitutional Court was widely praised not only because it ensured equal collective rights for all the three peoples in both Entities, but also because at the same time, it maintained the legal fiction in a consistent manner according to which the constituent

[109] Advisory Committee on the Framework Convention on the Protection of National Minorities, *Opinion on Bosnia and Herzegovina, supra* note 9, para. 28.

[110] Venice Commission, *Possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium*, CDL-AD(2002)1, 8–9 March 2002.

[111] Communications No. 359/1989 and 385/1989, U.N.Doc. CCPR/C/47/D/359/1989 and 358/1989/Rev.1 (1993).

peoples are sufficiently different from each other to deserve the enjoyment of separate collective rights.[112] Nevertheless, as a former judge of the Bosnian Constitutional Court indicates, the *Sejdić-Finci* judgment points to the necessity of expanding the concept of collective equality of the constituent peoples to include minority groups in BiH, that is the 'Others'.[113]

This conceptual discussion is very important for understanding the peculiar combination of territorial and ethnic federalism in the Bosnian context. Territorial federalism as a form of organisation of state government is the preferred model in theory and comparative practice. Yet, as we shall elaborate below, due to the non-liberal character of the dominant politics in the Entities and the cantons, it also has to include, at least as an interim arrangement, elements aimed at achieving collective equality that are emphasised in the *Constituent Peoples* decision of the Constitutional Court.

[112] Morawiec-Mansfield 2003, pp. 2052–2053.

[113] See Marko 2010, p. 143.

7. WHO ARE THE 'OTHERS' IN BOSNIA AND HERZEGOVINA?

Taking different viewpoints and dimensions of the notion of 'minorities' into account, the question arises as to where to assign and how to determine the position of 'Others' in Bosnia.[114]

Before we do that, it is necessary to clarify who makes up the category of 'Others' in more detail. They are, in the first place, the following persons (the descriptive features listed not being mutually exclusive):

a. From a constitutional law point of view, they are all individuals who do not belong to any of the three 'constituent' peoples. This definition results from the Dayton Constitution of Bosnia and Herzegovina although, in principle, membership to the constituent peoples, as well as to other ethno-cultural groups in Bosnia, is expressed only through subjective identification (be it active, i.e. the way an individual himself or herself feels, or passive, i.e. the way others perceive and identify an individual). Earlier, this identification was recorded in official documents, e.g. in an official application for identification card before the 1992–1995 war and also in the first few years after the war. Today, 'ordinary citizens' are rarely asked to do so; however, it is for instance requested of candidates standing for election (under the 2001 Election Law).
b. The 'Others' are, nevertheless, citizens of Bosnia and Herzegovina, which is not the case with foreign nationals residing in its territory, even if they belong to one of the constituent peoples (e.g. Croats from Croatia or Vojvodina; Serbs from Serbia, Krajina or Montenegro; Bosniaks from Montenegro or Serbia; etc.).
c. Thus, the 'Others' are (1) persons belonging to other peoples, nationalities, ethnic groups and the like, e.g. Roma, Jews, Albanians, Slovenians, Montenegrins, Czechs, Ruthenians, etc., (2) persons from so-called mixed marriages, (3) persons who for personal/ideological/principled reasons do

[114] See generally Bogdanović 2008.

not want to belong to any ethnically-defined community (for instance, because they only want to be citizens of Bosnia and Herzegovina).

The 'Others' are a minority in Bosnia – both in statistical, socio-political, constitutional and international legal terms (which is evident from the Constitution and a number of other acts exclusively protecting and promoting the rights of the constituent peoples), as well as in temporal (the past, the present, the future) and spatial terms (in municipalities, cantons, entities and the state). Under the current constitutional framework, the sole possibility (however questionable it may be in moral or legal terms – as the rest of our analysis will show)[115] for members of this heterogeneous group to transcend their minority status and the position in which they are unable to participate on an equal footing in the country's political and public life, is to formally join one of the three constituent peoples. This can also be done fictitiously, taking advantage of the fact that it is not formally defined anywhere how someone's 'belonging' to a people should or can be verified. In other words, legally speaking, nothing is preventing Mr Sejdić or Mr Finci, as explicit members (and even representatives) of Roma and Jews in BiH, to declare themselves in the elections as candidates from the ranks of Bosniaks, Croats or Serbs.

We should also note, following the 2008 amendments to the Election Law, seats for national minorities (defined under the 2003 state-level Law on the Protection of Rights of Members of National Minorities) are guaranteed at the local level if they make up more than three percent of the municipality's population according to the 1991 population census.[116] Regardless of the fact that here, too, we are facing a similar dilemma (how can one reliably establish who 'belongs' to Ruthenians in municipality X?), it is important to note that this law still *does not* change (i.e. does not improve) the situation of some of the 'Others' from the first or second category (see item c above) and of those who, as we have indicated, *cannot and/or do not want* to be perceived as members of an ethnic group but rather only as citizens of Bosnia and Herzegovina.

[115] For a more detailed elaboration of this problem, see Section 13 of the present study.

[116] An unofficial revised version of the Election Law of Bosnia and Herzegovina with all its amendments is available at: http://www.izbori.ba/documents/ZAKONI/POIZpw110508.pdf. For more on problems in the implementation of this provision of the law, see Crnjanski-Vlajčić and Fetahagić 2009.

8. THE POLITICAL PARTICIPATION OF MINORITIES: DESCRIPTIVE AND SUBSTANTIVE REPRESENTATION

Since the *Sejdić-Finci* judgment has to do with discrimination in public and political life, this section seeks to explain the main categories in that field.

8.1. THEORETICAL PREMISES

Equality is the main principle of liberal democracy and as such also applies to political rights, i.e. active and passive voting rights. The active voting right is the right to vote based on the principle 'one person, one vote'. The passive voting right implies the right of every citizen to stand for election. On the other hand, no citizen has the right to *be* elected. Naturally, this right, which in ancient Greece was considered 'the right to serve' the political community, is not possible to achieve in the theory and practice of representative democracy.[117]

Over the past twenty years, there has been more and more talk in political theory of the possibility and especially the need to transcend the classical liberal principle of 'one person, one vote' and to allow, in addition to (but not instead of) individual rights, the exercise of collective rights, e.g. through so-called 'group representation'.[118] Our discussion of the political rights of ethno-cultural identities in Bosnia obviously falls into the category of collective rights.

Before we explain the notion of group representation, it is necessary to point to an important distinction developed in theories of representation – that between substantive and descriptive representation.[119] The following example will best serve this purpose.

There are concrete examples in the US of non-African American congressmen – above all from the Democratic Party – actively advocating regulations and laws benefiting a

[117] Pitkin 1967, p. 73.
[118] See Kymlicka 1995.
[119] See Pitkin 1967.

large majority of African Americans: affirmative action; anti-discrimination; universal healthcare; fight against poverty; an inclusive education system. They, thus, represent the *substantial* interests of the majority of the African American population although they do not share their skin colour, i.e. precisely the feature that is most often a source of or ground for discrimination. On the other hand, certain members of Congress – above all from the Republican Party – are African Americans but *do not* especially advocate the interests of the majority of the African American population. They, thus, represent this population *descriptively* but not substantively.

Descriptive representation is sometimes also referred to as 'mirror representation', i.e. "[T]he legislature is said to be representative of the general public if it mirrors the ethnic, gender, or class characteristics of the public".[120] Under this concept of representation, representation "is not acting with authority ... or any kind of acting at all".[121] This type of representation, as Hanna Pitkin notes, "depends on the representative's characteristics, on what he is or is like, on being something rather than doing something. The representative does not act for others; he 'stands for' them, by virtue of a correspondence or connection between them, a resemblance or reflection."[122] Nevertheless, in her classical work, Pitkin deals with citizens in general and does not develop a corresponding theory of group or collective representation. Vernon van Dyke was among the first to strongly criticise this approach, recalling that even at the time when Pitkin wrote her study, groups *as groups* were represented in the political life of some countries (quoting the examples of Fiji, New Zealand, Lebanon and Belgium). Moreover, as Van Dyke notes, groups have the right to be represented in politics since, in addition to the demands for equality and freedom, there is also the pursuit of a community, i.e. a group.[123] Meanwhile, Van Dyke's pioneer work has gained a significant following, and the idea of group representation has already taken strong roots in democratic theory and also in the field of international legal standards.[124]

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[120] Kymlicka 1995, p. 138.

[121] Pitkin 1967, p. 61.

[122] Ibid.

[123] Van Dyke 1995, p. 49.

[124] See in general e.g. Kymlicka 1995, and Mansbridge 1999. In the field of international human rights law, above all see so-called soft law documents such as the *Lund Recommendations on the Effective Participation of National Minorities in Public Life,* OSCE (September 1999)*, and the Commentary of the Advisory Committee on the FCNM on the Effective Participation of Persons Belonging to National Minorities in Cultural, Economic and Social Life and in Public Affairs*, ACFC/31DOC(2008)001, 5 May 2008.

It is important to bear in mind the mentioned distinction between descriptive and substantive representation since the demand for so-called descriptive representation often implies that improving this type of representation in parliament (in concrete terms: better representation of minorities) also leads to improving substantive representation of minorities. Of course, this does not have to be the case. As critics of descriptive representation note, the very logic of the representative model of democracy is opposed to this idea. The said logic requires that every citizen be free to choose his or her representatives depending on the *ideas* that those representatives defend and not on the personal characteristics of the representatives themselves.[125] But if a certain MP has to be a woman in order to represent women's interests, Jewish in order to defend the rights of Jews or have black eyes in order to advocate the interests of black-eyed people etc., the key question arises as to *how it is at all possible for a member of parliament to represent the interests of any other citizen but herself*. For this reason, even Kymlicka himself is forced to admit, "If 'no amount of thought or sympathy, no matter how careful or honest, can jump the barriers of experience' [here Kymlicka quotes Anne Phillips], then how can anyone represent anyone else?"[126] Upon further reflection, the only possibility to guarantee *descriptive* representation (although not also substantive representation) of all categories of persons in society is precisely for members of parliament to be elected randomly, through lottery/throwing dice, and not through elections.[127]

8.2. DESCRIPTIVE VERSUS SUBSTANTIVE REPRESENTATION IN BOSNIA AND HERZEGOVINA

The said difference between descriptive and substantive representation should certainly be kept in mind when thinking about collective representation in Bosnia. The current requirement that members of the Presidency from the Federation of BiH must be a Bosniak and a Croat and that the member from the Republika Srpska must be a

[125] For the difference between 'politics of ideas' and 'politics of presence', see Phillips 1995.

[126] Kymlicka 1995, p. 41.

[127] The selection of political representatives through throwing dice/lottery is based on the principle of random selection, and the idea is that all citizens should be involved in the process. This principle guarantees every person the same probability of being elected to government bodies (e.g. to the Parliament), and at the same time that all the groups will be represented proportionately to their share in a given society. This system was used in ancient Greece, and in the Middle Ages in some city-republics in Italy as well (e.g. in Florence and Venice). See e.g. Carson and Martin 1999.

Serb, is essentially a reflection of the concept of descriptive representation. However, despite occasionally different interpretations by Presidency members themselves and their strong reliance on certain, ethnically-defined constituencies in Bosnia, the Bosniak and Croat Presidency members from the Federation and the Serb member from the Republika Srpska do not represent ethnic groups (except in an explicitly descriptive sense), as is often noted, but are only members of those collectives. In other words, under the current constitutional formula, Presidency members above all substantively represent the entities as territorial and electoral units in BiH, while in descriptive terms they represent the constituent peoples, irrespective of where in BiH they might live.

A somewhat different model of representation applies to the House of Peoples. Delegates to the House of Peoples in the Bosnian Parliament are elected indirectly as ten delegates (five Bosniaks and Croats each) are elected by the Federation House of Peoples and the other five (Serbs) by the RS People's Assembly. Delegates in the Federation House of Peoples represent ethnic groups and look after their vital interests, but they were in fact originally elected based on the civic-territorial principle (in cantonal assemblies). Thus, ethnically-defined electors whose legitimacy is derived from the civic principle elect ethnic delegates to the House of Peoples in the Bosnian Parliament. In the Republika Srpska, delegates in the People's Assembly – themselves also elected in general, civic elections – elect the ethnic delegates to the House of Peoples in the Bosnian Parliament.[128] It is interesting, therefore, how in both these cases ethnic legitimacy is derived from the civic-territorial one, although under somewhat different formulas. It is also interesting and telling how in general in the context of public office, *member* and *representative* of a people are often used as synonyms in public discourse in BiH. This points to the fact that the concepts of descriptive and substantive representation, too, are very often used as synonyms in the Bosnian public. Yet, as the rest of our analysis will show, these concepts of representation are not mere theoretical constructs – they entail significant institutional, and even legal, consequences.

[128] See the *BiH Election Law, supra* note 116, Article 9.12 – 9.12e.

9. KEY CONCEPTS AND INTERNATIONAL STANDARDS OF ORGANISATION OF THE POLITICAL SPHERE

Notwithstanding the caution expressed in the partly dissenting opinion of Judge Mijović and the apocalyptic visions of Judge Bonello, according to which the *Sejdić-Finci* judgment might lead to renewed conflict in Bosnia,[129] the legal basis for the opinion of the overwhelming majority of judges in this case, according to which persons belonging to the category of 'Others' have the right to stand as candidates for posts that are inaccessible to them by force of the Constitution, is completely clear. This right belongs to them not only under the relevant provisions prohibiting discrimination and envisaging free and fair elections which the Court applied, but also under global standards of political participation,[130] in conjunction with the norms of equality and non-discrimination.[131] The special importance of ensuring non-discrimination in the political sphere is confirmed by Article 5 (Paragraph 1, Item 3) of the International Convention on the Elimination of all Forms of Racial Discrimination, under which States Parties to the convention undertake, among other things, to eliminate racial discrimination and to ensure the equality of all citizens before the law in the domain of the rights to vote and to stand for election, the right to take part in government, and the right to equally access the public service.

It is especially important to point out that Article 3 of Protocol No. 1 of the European Convention on Human Rights obliges States Parties signatories to organise "free elections by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." A somewhat more comprehensive formulation of this right, which goes beyond the right to free elections, is contained in Article 25 of the International Covenant on Civil and Political Rights, which prescribes that every citizen has the right and opportunity to participate, without any discrimination or unreasonable restrictions, in the conduct of public affairs; to vote

[129] The *Sejdić-Finci* judgment, *supra* note 1, dissenting opinion of Judge Bonello.

[130] Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

[131] Article 26 of the ICCPR, Article 14 of the ECHR, as well as Protocol No. 12 to the ECHR.

and be elected in "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"; and to be recruited into the public service under general and equal conditions. In addition to the right of political participation, international law has also articulated the specific right to democracy as a form of government, which is, as is often noted, essential for the enjoyment of other human rights.[132] However, according to one of the most authoritative critical discussions of the right to political participation, this right is almost fully focused on electoral rights, while the provision on "participation in the conduct of public affairs", which also implies continuous communication between citizens and their political representatives, has been pushed to the background.[133]

Thus, although the right to active and passive participation in the election process is clearly formulated in international law, it is not free of controversy or dilemmas either. First and foremost, the rights to vote and to stand for election are not absolute. States, as the *Sejdić-Finci* judgment also points out, have the right to determine their own election systems and rules on which they organise representative and other governmental bodies. Those rules can be adjusted to the specific historical and socio-political characteristics of every state.[134] Also, although democracy is the only political model envisaged in the Convention and the only model compatible with it,[135] the Convention in and of itself does not oblige states to adopt a certain election system.[136] At the same time, no group has the right to determine the mechanisms of participation alone, nor does it have an unconditional right to be represented as a group in political processes.[137] Nevertheless, Article 3 of Protocol No. 1 of the Convention may require special election arrangements, such as the partial introduction of a proportional election system, which is generally considered to be more favourable for minorities.[138] According to an important view of the European Commission of Human Rights, "[a] system taking into account the specific situation

[132] See in general Franck 1992; cf. Fox and Roth 2001, p. 333.

[133] Steiner 1988; cf. Marks 2003.

[134] See e.g. *Hirst v. the United Kingdom* (No. 2), App. No. 74025/01, 6 October 2005, para. 61 ("it is for each Contracting State to mould [their political model] into their own democratic vision").

[135] E.g. the case of the *Refah party v. Turkey*, Application No. 41340/98, 41342/98 and 41343/98, 13 February 2003, para. 86.

[136] *Yumak and Sadak v. Turkey*, App. No. 10226/03, 8 July 2008, para. 131.

[137] *Mikmaq Tribal Society v. Canada*, Communication No. 205/l986, U.N. Doc. CCPR/C/43/D/205/l986 (1991), para. 40.

[138] See e.g. *Lindsay v. the United Kingdom*, Application No. 8364/78, 8 March 1979. The application concerned the proportional system introduced in Northern Ireland, unlike in the rest of the country. The Commission found that this system was legitimate, especially in regions where voters vote along ethnic and religious lines.

as to the majority and minority" – in this concrete case, Northern Ireland – "must be seen as making it easier for the people to express its opinion freely…".[139]

The right to stand for election is also subject to certain restrictions, which could rather be considered 'reasonable rules of the political game'. In the case of *Podkolzina v. Latvia*, the ECtHR noted that making the right to stand for election contingent upon an adequate command of the country's official language is a restriction of political rights that does not necessarily constitute a violation of the rights recognised under Article 3 of Protocol No.1. This linguistic requirement serves a legitimate goal because only the Latvian language is spoken in parliament, and it is reasonable to require candidates to speak it.[140] Referring to the specific features of each country's political evolution and the margin of appreciation,[141] the Court once again pointed out that the only requirement for an election system under the Convention was that it should allow free expression of voters' will, in accordance with Article 3 of Protocol No. 1.[142]

Turning back to the context of Bosnia and Herzegovina, we should note that a recent decision of the BiH Constitutional Court confirmed that the failure to prescribe proportional representation of ethno-cultural groups in accordance with the 1991 population census in the House of Representatives of the Parliamentary Assembly of BiH, the House of Representatives of the Federation Parliament and the People's Assembly of the Republika Srpska did not violate the principle of the equality of constituent peoples. This is because although the relevant provisions of the Constitution and the Election Law do not explicitly prescribe such proportionality, they do not privilege any ethnic group.[143] In a different case having to do with minimal quotas for Bosniaks, Croats and 'Others' (but not for Serbs) in the City Council envisaged under the Statute of the City of Sarajevo, the Court noted that the City Council was not formed in accordance with the Constitution, and that the Statute of the City of Sarajevo discriminated against Serbs (under Article II/4 of the Bosnian

[139] Ibid., para. IX. 1.

[140] *Podkolzina v. Latvia*, App. No. 46726/99, 9 July 2002, para. 34.

[141] "...features [of the electoral process] that would be unacceptable in the context of one system may be justified in the context of another." Ibid., para. 33.

[142] Ibid.

[143] The Constitutional Court of Bosnia and Herzegovina, Case No. U-13/09 of 30 January 2010. Cf. also Decision No. U-7/05 of 2 December 2005, in which the Court rejected an application for evaluation of compliance of the statutes of the cities of East Sarajevo and Banja Luka with the Constitution, upholding, as Ademović notes, liberal neutrality and the democratic principle of majority rule according to the principle 'one person, one vote'. See more in Ademović 2010, p. 28.

Constitution, taken in conjunction with Article 5, Paragraph 1, Item 3 of the International Convention on the Elimination of Racial Discrimination) because it did not envisage a minimal quota of 20% councillors in the City Council for them regardless of the election result.[144] Summarising the past jurisprudence of the Bosnian Constitutional Court in this field, Ademović rightly states that, albeit contradictory at times, it essentially legitimises the possibility of different approaches for different levels of governance: from majority rule, via equal representation of the constituent peoples and 'Others', to a combination of these models through minimal quotas for the representation of the mentioned four identities.[145]

It is very important to note that the Bosnian Constitutional Court also recalled that in election lists at all levels, political parties are obliged to adhere to the *Constituent Peoples* decision and ensure appropriate ethno-cultural pluralism among candidates in accordance with the 1991 population census: "Otherwise, the political parties… shall be in a position where the election results would not correspond to the number of mandates to which a certain political party is entitled in a legislative body."[146] This important view of the Constitutional Court of BiH certainly echoes the recommendation from the PACE Resolution 1547 according to which political parties are responsible for ensuring fair representation of minorities in elected governmental bodies, taking into account the principle of proportionality. However, the Resolution leaves the states complete freedom in choosing the method through which they would achieve this goal.[147]

As for representation of certain identities, the Convention in and of itself does not oblige states to adopt particularly low election thresholds in order to enable minority representation. As the European Commission of Human Rights noted, rejecting the application of *Silvius Magnago and Südtiroler Volkspartei v. Italy* as unfounded, the proportional election system with a threshold of four per cent, which was in force in Italy at the time, served to promote "the emergence of sufficiently representative currents of thought" (and not a direct reflection of all political interests of any importance). According to the Commission, this is a legitimate goal under the Convention.[148] Nevertheless in a

[144] The Constitutional Court of Bosnia and Herzegovina, Case No. U-4/05 of 22 April 2005.

[145] Ademović 2010.

[146] The Constitutional Court of Bosnia and Herzegovina, Case No. U-4/05 of 22 April 2005, para. 30.

[147] PACE, Resolution 1547, State of human rights and democracy in Europe, 2007, para. 82.

[148] The European Commission of Human Rights, *Silvius Magnago and Südtiroler Volkspartei v. Italy*, Application No. 25035/94, Decision on Admissibility of 15 April 1996.

different case,[149] the ECtHR, although it did not find that the election threshold of ten per cent was too high for the specific elections in Turkey – because it was established that other mechanisms also existed that allowed persons adversely affected by the election threshold to be represented in parliament – pointed out that this threshold was, in principle, too high and that it needed to be lowered. Although there are no binding standards or recommendations at the level of European institutions in terms of an adequate election threshold, in its resolution adopted in 2007, PACE stated that in developed democracies the threshold for parliamentary elections should not be higher than three per cent. According to this resolution, "[e]xcluding numerous groups of people from the right to be represented is detrimental to a democratic system." It is therefore necessary to find a balance between "fair representation of views in the community and effectiveness in parliament and government".[150] Nevertheless, as the ECtHR also confirmed, although an election threshold of five per cent is closer to the practice in the Council of Europe member countries, specific details of a country's election system should be assessed in light of its specific historical and constitutional development.[151]

In the context of the *Sejdić-Finci* judgment and the present study, however, the question arises as to whether and under what conditions consociational democracy is compatible with human rights in the domain of political and public life.[152] In other words, whether and under what conditions the special characteristics of a consociational election process based on a combination of procedural democracy and reservation of certain political functions for the dominant groups, can be considered "free and fair elections" and an "expression of the opinion of the people" (in accordance with Article 3 of Protocol No. 1 of the Convention).

[149] *Yumak and Sadak v. Turkey*, *supra* note 136, para. 147.

[150] PACE, Resolution 1547, *supra* note 147, para. 58.

[151] *Yumak and Sadak v. Turkey*, *supra* note 136, para. 132.

[152] Cf. Machnyikova and Hollo 2010, pp. 141–142.

10. NEW INTERNATIONAL STANDARDS – COLLECTIVISATION OF POLITICAL PARTICIPATION?

It is important to note that the principles and arguments referred to in the previous section on international standards are 'universalistic', in the sense that they apply equally to all citizens of a state regardless of their origin or individual characteristics. A further, equally important question that needs to be raised in the context of the present study is that of the rights of minorities. Of course, the ECtHR could not look at this issue in the *Sejdić-Finci* case since the Convention does not contain specific provisions on the protection of minorities. However, this issue is relevant not only in the context of the *Sejdić-Finci* judgment but also in light of recent international standards, especially those developed in Europe,[153] which imply the obligation of states to ensure adequate political participation of minorities in all issues that directly concern them. It is also important because, as we concluded from the interviews we conducted with relevant actors in Bosnia, in the potential new constitutional arrangements for Bosnia the category of national minorities is being perceived and positioned quite differently from other identities within the category of 'Others'. Their rights are being seriously discussed in connection with collective political representation and the collective protection of their interests in the political sphere.[154] A good example of such treatment of minorities is proposal for the introduction of a fourth member of the Presidency to be elected from amongst minority collectivities. Moreover, at numerous panel discussions, conferences and events held since 22 December 2009 where political officials have gathered, the question of the execution of the *Sejdić-Finci* judgment has very often been interpreted primarily, if not even exclusively, as a question of minority rights.[155]

[153] See Article 15 of the FCNM (1995); Article 2(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). See also the OSCE's *Lund Recommendations* (1999).

[154] Several interlocutors interviewed during our research pointed out that minorities are the only ones from the category of 'Others' who can have a collective interest equivalent to the interest of the constituent peoples.

[155] E.g. the public debate on the consequences of not executing the *Sejdić-Finci* judgment, organised in the Bosnian Parliament by the Bosnian Council of National Minorities on 17 September 2010.

Article 15 of the FCNM prescribes that signatories "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them". Despite the rather limited and ambiguous wording of this article, experts and analysts note that the Advisory Committee on the FCNM has developed a very strong interpretation of the right to political participation of minorities, which implies not only that their voice should be heard in the process of making decisions that concern them, but also that it should be clearly reflected in the final outcome.[156] In order to achieve this result, two general procedural and institutional options are available: consultation (through different advisory bodies for minorities) and political representation. According to the relevant opinions of the Advisory Committee on the FCNM, these two options are not mutually exclusive.[157] Although General Comment No. 25 of the UN Human Rights Committee points out that elections need to be conducted in line with the liberal principle 'one person, one vote',[158] global standards of minority rights protection also foresee special positive measures with a view to the protection of the identity of minorities and of the rights of persons belonging to those groups.[159] In the case of *Gorzelik v. Poland*,[160] the ECtHR, too, endorsed the practice of special measures to protect minorities, noting that "democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[161]

However, the main problem in the BiH context lies in that the mentioned new standards are not only used as arguments in the discourse on minority rights, but are also often cited by experts and commentators as a legal basis for the collective political rights of the constituent peoples.[162] In other words, although these standards indicate that ethno-cultural groups can have distinct rights in the political sphere, they do not provide guidelines for the potential distribution of such rights among different groups of the same category. It is an obvious fact that not all ethno-cultural groups can be recognised as separate right-holders in the political sphere. This is

[156] See generally Henrard 2008.
[157] See e.g. Verstichel 2003.
[158] The UN Human Rights Committee, General Comment No. 25, 1996, para. 21.
[159] The UN Human Rights Committee, General Comment No. 23, 1994, para. 6.2.
[160] *Gorzelik v. Poland*, Application No. 44158/98, 17 February 2004.
[161] Ibid., para. 90.
[162] See e.g. Gilbert 2002, p. 322.

why, for instance, political and legal theory indicates different criteria that can be applied towards this purpose: the size of the group;[163] the consistent application of the democratic principle to ethno-cultural collectivities;[164] or internal cohesion, that is, the 'collective individuality' of the group.[165] An elaboration of these criteria goes beyond the scope of the present research. Nevertheless, it is sufficient to note that none of the above-mentioned criteria is particularly reliable or free of controversy. As mentioned above, states have a considerable margin of appreciation with regard to the distribution of collective political rights. However, as the rest of our analysis will show, this margin is not unlimited.

[163] See e.g. Tamir 1993, p. 75.

[164] Put in simplified terms: the larger the number of those putting forward a demand, the better-founded the demand. See e.g. Murphy 2001.

[165] Raic 2002, p. 269.

11. THE PRINCIPLES AND MECHANISMS OF REPRESENTATION OF COLLECTIVE IDENTITIES

In accordance with the said new standards of minority rights as well as the general trends in this field, the relevant international instruments, as Joseph Marko summarises, speak of two dimensions of minority participation: the right of all persons to vote and stand for election, and the collective right of proportional representation in state institutions.[166]

Although it concerns access to the election process in the context of the BiH Presidency and the practice of delegation to the upper house of the Bosnian parliament, to a considerable extent the *Sejdić-Finci* judgment has to do with the concept and practice of political representation. Due attention should therefore also be devoted to this issue.

Palermo and Woelk[167] draw a distinction between politically 'ensured' and legally 'guaranteed' representation of minorities. The former is based on methods of political practice such as the introduction of a low election threshold, which enables (but does not guarantee) the presence of representatives of minorities in parliament. The latter is based on guaranteed seats in parliament for members of minorities. The constitutions of countries such as Romania, Croatia, Hungary and Slovenia contain a provision on reserved seats in parliament for representatives of minorities, irrespective of their election results.[168]

In practice, the political representation of minority groups is achieved through different institutional and procedural mechanisms – from defining electoral districts in ways that improve the odds for candidates from the ranks of minorities to be elected, via introducing an obligation for political parties to include members of minority communities in their election lists, to reserving seats in parliament for representatives

[166] Marko 2003, pp. 182–183.
[167] Palermo and Woelk 2003.
[168] Marko 2003, p. 183; cf. Htun 2004.

of minorities.[169] In Slovenia, for instance, Hungarian and Italian minorities not only have the right to elect their representatives in parliament from separate minority lists, but their representatives also have the right to veto decisions that directly affect their respective groups.[170] In Croatia, too, the representation of minorities recognised under law is ensured through reserved seats in parliament.[171]

In addition to the representation of minority groups in parliament and government, an important instrument for ensuring the political participation of minorities are specialised advisory bodies. They institutionalise dialogue between minority organisations and authorities on all issues concerning minority communities.[172] Their role is particularly important to make the voice of the minorities heard in the political process before decisions are taken, given the fact that minority representatives by definition are not able to significantly influence actual decision-making, since they are numerically small.[173]

Nevertheless, it is important to keep in mind that minority rights, including the recent standards of political participation of minorities, are foreseen, both historically and conceptually, as a compensation of sorts for the individualistic, civic conception of a state (expressed in the political sphere through the principle 'one person, one vote').[174] According to some influential interpretations, such a structure of the state inevitably, although implicitly, favours the dominant ethnic group (e.g. Croats in Croatia or Bulgarians in Bulgaria).[175] Having in mind this very important theoretical and empirical insight, and taking into account the fact that there is no such dominant culture in Bosnia and Herzegovina, the challenge of political participation of minorities and of non-constituent collectivities in general in view of the ECtHR judgment in the *Sejdić-Finci* case, lies in putting in place minority rights

[169] See e.g. Venice Commission, *Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries*, CDL-AD(2005)009, 15 March 2005; cf. Bochsler 2010.

[170] Venice Commission, *Report on Electoral Rules and Affirmative Action…, supra* note 169, paras. 54–57.

[171] Under Article 19 of the Constitutional Law on the Rights of National Minorities (2002), there are guaranteed seats in the Croatian Parliament for national minorities: five to eight seats for representatives of the minorities making up more than 1.5 per cent of the population, and at least four seats for all other national minorities. Under the 2010 amendments to this law, the latter also have an additional voting right and the possibility to elect their representatives from the lists of parties of national minorities or lists of minority associations.

[172] See the OSCE *Lund Recommendations* (1999), Recommendations 12 and 13.

[173] Cf. Eide, 1998, para. 2.3.

[174] See e.g. General Comment No. 25 of the UN Human Rights Committee.

[175] See generally Kymlicka 1995; see also Bader 1997, p. 771.

not as a supplement to liberal democracy but to ethnocracy, i.e. the institutional balance of power between the three dominant groups.

This requirement can also be inferred from the *Sejdić-Finci* judgment itself. Namely, referring to the relevant opinions of the Venice Commission, the ECtHR noted that there exist power-sharing arrangements that do not necessarily exclude members of the other (non-constituent) communities. In this sense, the Court states that "the possibility of alternative means achieving the same end is an important factor in this sphere".[176]

In the analysis below, we elaborate the main elements unique to Bosnia and Herzegovina that should be taken into account when looking for such alternative means.

[176] The *Sejdić-Finci* judgment, *supra* note 1, para. 48.

12. THE RIGHT TO SPECIAL REPRESENTATION, THE 'ETHNIC KEY' AND THE SEJDIĆ-FINCI CASE

Will Kymlicka, one of the most important modern theorists of multiculturalism, is in principle opposed to the idea of descriptive representation,[177] more specifically to the introduction of quotas for certain groups, except in two limited cases:[178]

– if a certain group was systematically discriminated against and oppressed in the past (e.g. African Americans in the US);

– when it comes to groups who have the right to self-government, which especially applies to nations making up a multinational state. This right does not exist for ethnic groups who do not represent autochthonous elements in a certain state but have moved there from other states (e.g. through immigration, like Turks in Germany). In such cases, Kymlicka speaks of polyethnic states and polyethnic rights, which are considerably narrower than the right to self-government and do not have explicit political connotations.

However, the perspective of international law on this issue is not unified or consistent. As observed above, states have a rather wide margin of appreciation in regulating relations between dominant and non-dominant groups within their own territories. A discussion of the complex relationship between the right to self-determination (which is subject to an increasingly strong tension between civic and ethnic interpretations, between the rights of the state and the rights of ethno-cultural collectivities) and minority rights[179] is beyond the focus of the present study. The tendencies are, however, such that boundaries between the autochthonous population and the so-called new minorities seem to be progressively erased, both in the theoretical sphere and in the sphere of legal practice. Thus, for instance,

[177] "…the idea of mirror representation should be avoided as a general theory of representation." (Kymlicka 1995, p. 140).

[178] Ibid., pp. 141–145.

[179] See generally Musgrave 1997.

Aukerman convincingly shows that, although there are considerable similarities in the dominant discourse and legitimisation of the rights of the autochthonous populations in North and South America and minority rights in Central and Eastern Europe, no clear line between the autochthonous population and the 'new' minorities can be drawn in Central and Eastern Europe itself.[180] Moreover, as Keating notes, throughout Europe, "just about every ethnic and national group can be considered either immigrants or natives, depending on what the cut-off date is and who is doing the defining."[181] Also, despite the mentioned right of states to determine their constitutional and legal definitions of minorities, in practice the implementation of the FCNM has also shown that in the sphere of international human rights law, the unified concept of a minority without clear distinctions drawn along the lines advocated by Kymlicka, continues to be promoted for the most part.[182]

Thus, a State's margin of appreciation is not unlimited for determining which groups should be ensured political representation and through which mechanisms. Slovenia is a case in point. A ruling by Slovenia's Constitutional Court concerning dual voting rights of minorities (to vote for candidates from both general and separate minority lists) found that the double elections for minorities constituted a special right in compliance with the Constitution, given that the Constitution prescribes affirmative action.[183] However, international human rights institutions have expressed concern and condemned exclusivity in the domain of political participation of minorities (i.e. the domination of the Hungarian and Italian minorities), which is tantamount to discrimination of other minority collectives in the country.[184] Similarly, Croatia has also been strongly criticised over insufficient proportionality in ensuring the political representation of minorities.[185]

As for the second case quoted by Kymlicka, however, there are clear indications that in the practice of international law, a link is being established between the continuous discrimination and marginalisation of a group and its overriding right to

[180] Aukerman 2000.

[181] Keating 2001, p. 42.

[182] See e.g. Verstichel 2003.

[183] The Constitutional Court of Slovenia, Decision No. U-I-283/94, 12 December 1999, paras. 35–36.

[184] The UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Slovenia*, CERD/C/304/Add.105, 1 May 2001, para. 8; see also CERD/C/62/CO/9, 2. June 2003, para. 9.

[185] The UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Croatia*, CERD/C/60/CO/4, 21 May 2003, para. 10.

special arrangements within and even outside the state in the sense of the right to self-determination, including secession.[186]

There is no doubt that Bosnia and Herzegovina can be considered a multinational state,[187] both from the constitutional (the three 'constituent peoples') and the social and individual point of view (i.e. how most of its citizens declare themselves, which is, for instance, shown by the 1991 population census), and according to many, from the historical point of view as well (whereby the evidence quoted most often are the *millet* system under the Ottoman rule; the Austro-Hungarian policy in Bosnia; the Kingdom of Serbs, Croats and Slovenians; the Bosnian Constitution from the ZAVNOBiH times; etc.). This means that, according to Kymlicka's formula, *it is not illogical* that certain state institutions (such as the Bosnian Presidency or the House of Peoples of the Bosnian Parliament) include seats reserved for representatives of Bosnia's three peoples.

At the same time, there are certain groups that *prima facie* seem to be able to invoke the mentioned argument of continuous discrimination. This is precisely the case with Jews and Roma. There is sufficient proof, and sufficient publication about discrimination, past and present, against Roma in the territory of Bosnia and Herzegovina and further afield.[188] Although Jews are better off today, we cannot forget their tragic fate during World War II, when Bosnia and Herzegovina was part of the Independent State of Croatia.

However, accepting the said formula would mean that representatives of one (or both) groups should be *guaranteed* places in state institutions, while in their applications before the ECtHR Sejdić and Finci only asked to be *allowed to stand as candidates* for posts in the Presidency and the House of Peoples of the Parliamentary Assembly of BiH. Moreover, the question arises as to whether the political and social marginalisation of all 'non-constituent' collectivities in Bosnia over the past fifteen years has made their demand for political participation gain additional legitimacy?

The above questions are certainly relevant for the discussion of moral, political and international legal dimensions of the execution of the *Sejdić-Finci* judgment. It is

[186] See e.g. African Commission on Human and Peoples' Rights, *Katangese Peoples' Congress v. Zaire*, 2000, AHRLR 72 (ACHPR 1995); see also the Supreme Court of Canada, *Reference re Secession of Quebec* [1998], 2 S.C.R. 217.

[187] See e.g. Woelk 2008.

[188] See e.g. the report by the European Roma Rights Centre *The Non-Constituents: Rights Deprivation of Roma in Post-Genocide Bosnia and Herzegovina*, June 2004, available at: http://www.errc.org/cikk.php?cikk=112.

quite possible, for instance, that the fact that the application before the ECtHR was lodged by Jewish and Roma representatives who are public figures and who would have had some chance – not only in theory but also objectively – of entering the Presidency or the House of Peoples of the Bosnian Parliament, carried additional weight in this particular case.[189] Also, particularly important in the very profiling of the judgment in the public discourse in Bosnia was probably the fact that the application had been lodged by members (but also representatives) of two communities who have been living in Bosnia for centuries. Namely, it is not certain that an application by representatives of communities who arrived in Bosnia only recently and who can be counted among 'immigrants with a Bosnian passport' (e.g. Chinese) would have carried the same weight and had the same implications.[190] The question also arises as to whether an application by an 'ordinary' citizen who has not declared himself or herself as member of an ethnic group and who insists only on his or her identity as an individual would have carried the same political or moral weight and provoked the same public reaction as the *Sejdić-Finci* case.[191]

All the above questions are legitimate at a speculative level. However, we are left to ask how the distinction between different ethno-cultural groups is drawn in comparative practice with the aim of their differentiated political participation, that is, in which way politically relevant identities are recognised and included in the political community of other countries. As the analysis will show below, comparative experiences do have certain pertinence and importance in the Bosnian context, but the special constitutional situation in BiH requires innovative arrangements for which there are no obvious parallels in other divided societies.

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[189] Para. 29 of the *Sejdić-Finci* judgment reads as follows: "In the present case, *given the applicants' active participation in public life*, it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency" (emphasis added). Of course, the reason why the ECtHR mentioned Sejdić's and Finci's public activity is that the Court does not have the competence to examine compliance of domestic regulations with the Convention *in abstracto* but can do so only in a specific case brought by potential victims of violations of the Convention. If 'ordinary' citizens from the group of 'Others' had lodged an application, the Court might have concluded that they were not victims of violations and that they do not have *locus standi* (although this is difficult to imagine). Namely, as confirmed by one commentator, the above reasoning by the ECtHR was completely unnecessary since this concerns structural discrimination under which it is not necessary to establish whether potential victims would have had a chance to stand for election. Cf. Bardutzky 2010, pp. 324–325.

[190] We here again recall the essential distinction drawn by Kymlicka (1995, Chapter 2) between multinational and polyethnic states.

[191] According to preliminary information, such a case is already being dealt with by the ECtHR.

13. INDIVIDUAL IDENTITY, PARTICIPATION IN POLITICAL LIFE AND EXERCISE OF THE RIGHT TO ACCESS TO PUBLIC SERVICE: COMPARATIVE EXPERIENCES AND THE SITUATION IN BOSNIA AND HERZEGOVINA

13.1. BELGIUM

Article 99 of the Belgian Constitution[192] establishes that half of the ministers in the federal government must be from the Flemish-speaking group and half from the French-speaking group. In addition, under Article 43, paragraph 1 of the Constitution, each member of the lower house of parliament is obliged to declare himself or herself as member of *one or the other* linguistic group in order to make the implementation of certain constitutional provisions possible, in particular the right to veto on 'vital' issues (the so-called 'alarm bell' procedure). This situation is particularly problematic from the point of view of Belgium's autochthonous German linguistic group, whose language is one of the country's three official languages and which is institutionally recognised as a constituent unit of the state, with its own parliament (admittedly, with limited powers, above all in the field of culture and education). The only distinguishing feature of the German-speaking group is that it is statistically (74,000 inhabitants, approximately 0.7% of the population) and socio-politically irrelevant in Belgium, its survival depending only on the balance of power between Flemish (approximately 60% of the population) and French-speaking (approximately 40%) groups.[193]

The only institution in which German-speaking Belgians have a guaranteed seat is the upper house of parliament – the Senate, where one of the 71 seats (i.e. 1.4%) is reserved for a person nominated by the Parliament of the German community, who at the same time must be member of that parliament.[194]

[192] Available at: http://www.senate.be/doc/const_nl.html#t1.

[193] See Stangherlin 2005.

[194] The Constitution of Belgium, *supra* note 192, Article 67.

13.2. LEBANON

The current Lebanese Constitution is based on the Ta'if Peace Agreement of 1989, which made it possible to end the civil war (1975–1990) in the country. Interestingly, the Constitution[195] states that 'the people' (singular!) is the source and holder of sovereignty.[196] Article 6 of the Constitution also refers to 'Lebanese nationality'. Moreover, the preamble (Item h) also states that "the suppression of political confessionalism is an essential goal", which is to be achieved gradually. What is implied by 'political confessionalism' is the distribution of posts in state institutions between Muslims and Christians. Article 12 of the Constitution stipulates that recruitment in the civil service should be exclusively merit-based. The sole exception is the highest officials of the civil service, among whom Muslims and Christians have to be more or less equally represented.[197]

The parliament consists of only one chamber (the House of Representatives) and has 128 members. The system of quotas in parliament is regulated in detail under Article 24 of the Constitution. However, this is preceded by an important provision according to which the quota system is of a *provisional* and not permanent character and will be in force "until such time as the House of Representatives enacts a new election law without confessional restrictions". This principle is even more explicit in Article 95 of the Constitution. In other words, overcoming political confessionalism is a very important constitutional goal of the Lebanese Republic, however difficult it may be to achieve it in practice, precisely because of the deep divisions in society along religious/political lines.[198]

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[195] We here use the official French version of the Constitution of Lebanon. It is possible that some terms in Arabic should be translated differently into English. The text of the Constitution is available at: http://www.presidency.gov.lb/FRENCH/THENATUREOFTHELEBANESESYSTEM/Pages/La%20constitution%20libanaise.aspx.

[196] Ibid., Preamble, Item d.

[197] Ibid., Article 94.

[198] For example, a recent initiative by Lebanese president Michel Suleiman to establish a state commission tasked with eliminating the confessional political system in the state was met with resistance and scepticism on the part of most political actors. See Taneja 2010, p. 190.

Meanwhile, the quota system reflecting a consociational model of democracy[199] is based on two principles: (a) parity (50% : 50%) between the Christians and the Muslims, i.e. 64 representatives from each community and (b) proportional (commensurate) representation of different sects within Christian and Muslim groups. Furthermore, what has also been introduced is (c) the principle of proportional representation for all regions. As for the executive branch, there are no explicit provisions on power-sharing between confessional groups. The informal rule is, however, for the president to be a Maronite Christian and for the head of government (i.e. of the Council of Ministers) to be a Sunni Muslim. The Speaker has traditionally been a Shiite Muslim. The government should also include a more or less equal number of persons from the ranks of all religious communities.[200]

Lebanon, thus, applies a complex confessional election system which does not foresee any place for 'Others' (non-Muslims and non-Christians). Moreover, there is not even an explicit provision in the Constitution referring to them.[201] Nevertheless, in practice one seat in parliament, within the Christian quota of 64 seats, is reserved for 'other Christians' (of the 12 official Christian confessions, six of them have permanent representatives in parliament, while the other six share one seat). Although this political system has been a constant target of criticism by international bodies for the protection of human rights,[202] the prospect of it being abandoned has seemed invariably slim for decades now.

13.3. NORTHERN IRELAND (THE UNITED KINGDOM)

The Good Friday Agreement of 1998, which consistently follows the consociational model of democracy,[203] is based on the principle of equality of the two main sections

[199] Kleven Horn 2008.

[200] This distribution of political functions dates as far back as the 1943 National Pact, a verbal agreement reached by the then Lebanese President (the leader of the Maronites) and the Prime Minister (the leader of the Sunnis) immediately after gaining independence from France. See e.g. Zahar (2005).

[201] On the other hand, the 2006 Lebanese Law on the Rights and Freedoms of Minorities stipulates that minorities "shall have the right to proportional representation in public service, state bodies and local self government bodies." (quoted from Palermo 2010, p. 443, fn. 21).

[202] See e.g. the UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Lebanon*, CERD/C/304/Add.49, 30 March 1998; CERD/C/64/CO/3, 28 April 2004, para. 10; cf. also the UN Human Rights Committee, *Concluding Observations on Lebanon*, CCPR/C/79/Add.78, 1 April 1997.

[203] See generally McGarry and O'Leary 2004.

of Northern Ireland's society: the unionists (Protestants) and nationalists (Catholics). Yet, one article of the Agreement[204] explicitly also refers to 'other': at the first session of the Assembly, all of its members – a total of 108 – must "register a designation of identity" – whether they are unionists, nationalists or 'other'.

What is immediately evident is that an individual's designation of identity is not a condition for his or her participation in the election process. The purpose of this provision on the *post festum* designation of identity by elected representatives is to allow for measuring cross-community support, which 'key decisions' must enjoy. It is necessary for key decisions to get either (a) a simple majority in the Assembly *and* a simple majority within each of the two groups or (b) 60% of votes in the Assembly *and* at least 40% support within each group. Key decisions primarily include the election of the Speaker, and the election of the Premier and Deputy Premier. Thus, nowhere in the Agreement is it stated that the Speaker or Premier cannot be 'other'. But, naturally, it is difficult to imagine someone who is 'other' in reality winning the majority (or at least 40%) within *each* of the two groups of representatives.

Of course, this concept of designation of identity in the Assembly, introduced for the purpose of consensual political decision-making, is not free from controversy. Critics have asserted that although the system was conceived as a mechanism aimed at achieving the legitimate goals of Northern Ireland's society as well as at implementing the new standards of political participation of minorities, reducing the political life to only two monolith religious/ethnic/political identities distorts the political picture of Northern Ireland, *a priori* making it impossible for parties not linked to either of the two groups to exert any significant influence in parliament.[205] In connection with this, given that under the Assembly rules, each MP has the right to change his or her initial designation of identity once during one term in office,[206] such new designations by members of the Assembly made in order to take some important decisions have been registered, whereby some parliamentarians who used to be 'other' chose to re-register, this time as unionists or nationalists.[207]

[204] Article 6 in "Strand One. Democratic Institutions in Northern Ireland" states: "At their first meeting, members of the Assembly will register a designation of identity - nationalist, unionist or other - for the purposes of measuring cross-community support in Assembly votes". Thus, in Northern Ireland there is no obligation for candidates to identify themselves before, but only after the elections, whereby members of the Assembly are also able to declare themselves as 'other', i.e. as neither 'nationalists' (i.e. Catholics) nor 'unionists' (i.e. Protestants). The text of the Agreement is available at www.nio.gov.uk/agreement.pdf.

[205] See e.g. Gilbert 1998.

[206] See e.g. Wilford and Wilson 2001.

[207] McCrudden 2004, p. 218.

Despite the said problems and controversies, an important difference with Bosnia lies in the fact that ethno-cultural identity in Northern Ireland is not, at least in the formal sense, a requirement or condition for exercising the right to political participation.

13.4. SOUTH TYROL (ITALY)

In the Italian province of South Tyrol, all positions in state bodies (at the municipal level and at the provincial level, both in elected bodies, e.g. assemblies, and the civil service) are reserved for *only three* ethno-linguistic groups: Italian, German and Ladino.[208]

The main purpose of the mandatory declaration of ethnicity is precisely the exercise of the right to access political functions and the public service.[209] Moreover, the identification of citizens is done every ten years through a population census (this system was employed for the first time at the 1981 population census). It is an ethnic census, meaning that the information on ethno-linguistic affiliation is subsequently not made anonymous for statistical purposes but included in a database accessible to state authorities. Accordingly, if person X stands for election to a certain post (e.g. for the parliament or for mayor), he or she is automatically included in the 'quota' for his or her ethno-linguistic group. Those who do not wish to declare their ethnicity are excluded from all posts.[210]

Having said this, it is worth noting that if citizen Y, for instance, declares himself or herself as Italian, in the following ten years (i.e. until the next population census) he or she cannot stand as candidate for any position as a member of, for example, the German linguistic group. Thus, this system is, as we shall see below, more rigid than the one in BiH, its flexibility consisting only in leaving citizens the right to declare themselves differently at the next population census. In addition, after a period of three years following a population census, every citizen also has the possibility to change his or her declaration of affiliation at his or her explicit request, which then enters into force only two years later.[211]

[208] In the context of the present study, we can also consider South Tyrol as something akin to a model since the political life of Cyprus, too, is organised in a similar way, with absolute domination and exclusive recognition of only the Greek and Turkish communities. See e.g. Varnava et al. 2009.

[209] Marko 2010, p. 145.

[210] See the case of Alexander Langer (Lantschner and Poggeschi 2008, p. 230).

[211] Lantschner and Poggeschi 2008, p. 227.

Since the 1991 population census, citizens have also been allowed to declare themselves as 'others.' However – and this is a detail which seems very important to us – 'others' have to be 'aggregated' into one of the three ethno-linguistic groups for the purpose of exercising his or her right to stand for election. It is important to note that this is a declaration that is considered to be an individual 'declaration of aggregation' and not a declaration of identity, i.e. membership of a certain group.[212] Let us recall that this approach is similar to the arrangement proposed by the so-called Butmir Package of constitutional amendments for the participation of delegates from the ranks of 'Others' in the House of Peoples of the BiH Parliamentary Assembly.[213] According to Francesco Palermo, Professor of Constitutional Law in Bolzano and former Senior Legal Adviser to the OSCE High Commissioner for National Minorities, this arrangement does not change much ("to the contrary, almost nothing") in practice, but from a legal point of view it reduces "but does not fully rule out" the possibility of complaints similar to those lodged by Sejdić and Finci.[214]

In any event, not a single application from South Tyrol has yet been lodged with the ECtHR over potential discrimination of 'Others' with regard to the enjoyment of political rights.[215] On the other hand, the Italian Supreme Court (*Corte di cassazione*) in 1999 (in the *Beltramba case*) concluded that a person's non-declaration of ethno-linguistic identity cannot result in him or her being denied their right to stand for election. In other words, in the very telling view of the court, the situation in South Tyrol is illegal.[216] However the main problem in this case lies in the fact that the judgment was issued by a court whose decisions only have an *inter partes* and not *erga omnes* effect, which means that the principle contained in the ruling cannot be implemented, i.e. imposed, in practice, although the judgment itself is very important from the point of view of legal argumentation.

[212] Ibid., p. 228.

[213] See notes 75 and 80 and the accompanying text.

[214] Francesco Palermo, personal communication via e-mail, 3 August 2010.

[215] Marko 2010, p. 145.

[216] Judgment No. 11048 of 24 February 1999.

13.5. ETHNO-CULTURAL IDENTITY IN THE POLITICAL SPHERE OF BOSNIA AND HERZEGOVINA

What conclusion can we reach if we consider the situation and experiences from the legal and political practice in states and regions such as Belgium, Italy (South Tyrol), the United Kingdom (Northern Ireland) and Lebanon? As we have seen, the situations in Lebanon and Northern Ireland are not of much help to us. In Lebanon, the problem of 'others' (non-Christians and non-Muslims, as well as persons who are not or do not wish to be identified according to their religious affiliation) is not addressed anywhere – although it is very important to recall that the Lebanese Constitution explicitly foresees the suppression of political confessionalism, which is not the case in Bosnia and Herzegovina. In Northern Ireland, 'others' are mentioned in relevant legal acts and are not explicitly banned from any political function, but the institutional position of the two dominant social groups – Protestants and Catholics – is so strong that it *de facto* does not allow, for instance, an 'other' to become Prime Minister or Deputy Prime Minister.

Consequently, it seems more interesting to us, by way of preliminary discussion of constitutional arrangements for BiH, to try to find inspiration in the examples of Belgium and South Tyrol. Proceeding from the experiences of these two political communities, one solution might be to not change the current composition and modality of the election of members of the Presidency of BiH and delegates in the House of Peoples of the Parliamentary Assembly of BiH at all. Instead, it would suffice to merely introduce a provision into the Election Law stating that any candidate who does not belong or does not wish to belong to any 'constituent people' must be 'aggregated' with one of the three peoples, but primarily (if not even exclusively) for the purpose of election to government bodies. This would, for instance, mean that a Roma woman who has 'aggregated' with the Croat people remains a Roma in her private and public life; that a Jewish woman who has 'aggregated' with the Serb people remains a Jew; and that an Albanian woman who has 'aggregated' with the Bosniak people remains an Albanian.

However, this arrangement, controversial already at first glance, raises a number of fresh questions.

A) Does something similar exist already?

The Bosnian Election Law,[217] passed in 2001, for the first time introduced the relative obligation of ethnic declaration, i.e. declaration of affiliation with a particular constituent people or the group of 'Others' , for all candidates and for elections at all levels of government.[218] This declaration of affiliation with an ethno-cultural group, as the Law states, will be used "as the grounds for the exercise of rights to hold an elected or appointed office for which the statement of ethnic affiliation with the particular constituent people or the group of 'Others' is a condition in the election cycle for which the candidates list has been submitted."[219] Nevertheless, as we have just indicated, it is a relative obligation since the Law specifies that a candidate "shall be entitled not to declare his or her ethnic affiliation with a particular constituent people of the group of 'Others' on the candidacy list. However, any such failure to declare one's personal affiliation shall be considered as a waiver of the right to stand for an elected or appointed office for which the declaration of affiliation with a particular constituent people or the group of 'Others' is a condition."[220]

This means that:

1. All bodies in which there is no *de jure* ethnic key (be it only for the constituent peoples or for both them and 'Others') are in principle open to all Bosnian citizens, including those who (under Article 4.19, paragraph 7 of the Election Law) do not wish to declare their affiliation with a constituent people or the group of 'Others'. This is primarily the case with the House of Representatives of the Bosnian Parliament (an elected post), in which "no seats are reserved for the three nations",[221] although in practice, as far as we know, no citizen who is not a member of one of the constituent peoples has ever been elected to the House of Representatives.[222] This is also partially the case with the members of the Council of Ministers of BiH (appointed posts) because the 2002 Law explicitly guarantees one place (on the Council or in the post of the secretary-general

[217] See *supra* note 116.

[218] The Election Law of Bosnia and Herzegovina, supra note 116, Article 4.19, para. 5.

[219] Ibid., Article 4.19, para. 6.

[220] Ibid., Article 4.19, para. 7.

[221] Bieber 2006, p. 54.

[222] Ibid. Bieber, for instance, mentions that in the 2002–2006 term, the House of Representatives consisted of 22 Bosniaks, 12 Serbs and 8 Croats. Neither were there any representatives from the ranks of 'Others' in the House of Representatives of the Bosnian Parliament during the 2006-2010 term in office. Quoted from the Decision of the Bosnian Constitutional Court No. U-13/09 of 30 January 2010, para. 29.

of the Council) "for members of 'Others'".[223] Nevertheless, it is not quite clear whether this denies the right of appointment to those who have exercised the right of not declaring themselves as 'Others' either under Article 4.19, Paragraph 7 of the Election Law. The only case known to us of a person from the category of 'Others' who has served on the Council of Ministers is Foreign Affairs Minister (since 2007) Sven Alkalaj, who has declared himself as being of Jewish (Sephardic) origin.

It is important to note that in Bosnia and Herzegovina, there is no system for verifying a person's membership to the constituent peoples or 'Others', as is, for instance, the case in South Tyrol.[224] As Nystuen notes, the Dayton Peace Agreement does not envisage mechanisms to establish the politically relevant identity of a person, the reason being the assumption that "the traditional Yugoslav 'self-identification' would suffice".[225] This opens the door for any citizen of Bosnia and Herzegovina to declare himself or herself as he or she wishes. In other words, nothing prevents persons who do not belong to the constituent peoples from declaring themselves as Bosniaks, Serbs or Croats in order to be able to stand as candidates for the Bosnian Presidency.[226] In the past, as is universally known, ethno-national parties even denied membership to some candidates of 'their people,'[227] but their complaints (merely verbal and not official) yielded no results. This precisely confirms the exclusive relevance of subjective criteria in establishing the identity of an individual in the political life of BiH.

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[223] Article 6 of the Law on the Council of Ministers of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 30/03, 42/03, 81/06, 76/07, 81/07, 24/08. Available at: http://www.izbori.ba/documents/ZAKONI/POZVM110508.pdf.

[224] For different views in Bosnia on this issue, see e.g. "Nacionalnost kandidata niko ne provjerava", *Nezavisne novine* (14 October 2010), p. 5.

[225] Nystuen 2005, p. 143. In addition, as noted by Nystuen, at the time of Dayton negotiations, representatives of the Contact Group also did not wish to seek to elaborate procedures for establishing the identity of an individual since they wanted to weaken the ethnic dimension of the Dayton Agreement as much as possible (Ibid.).

[226] In this context, somewhat different principles apply to the House of Peoples of the Bosnian Parliament, which we shall elaborate below.

[227] Here, of course, we primarily have Željko Komšić in mind, who was elected to the Bosnian Presidency as the Croat representative in 2006 and again in 2010, and whose membership to that people has been contested by the HDZ and HDZ 1990, as well as by some intellectuals in Bosnia, who allege that, among other things, Komšić was not a Catholic and that he had declared that his mother tongue was Bosnian and not Croatian. See e.g. the statement by the HDZ Presidency: „We hereby invite Željko Komšić, *who has himself said that he is not a Croat member of the Presidency of Bosnia and Herzegovina, that he is not a Catholic and that he does not speak Croatian*, to act morally and hand in his resignation from the post that belongs to the Croatian people in order for the applicable constitutional form to be adhered". See the article "HDZ traži Komšićevu ostavku", *Nacional* (6 October 2006), available at: http://www.nacional.hr/clanak/28204/hdz-bih-trazi-komsicevu-ostavku.

Naturally, there is potential tension between the subjective identification of an individual in terms of his or her membership to a group and his or her objective characteristics, such as language, name, origin or the dominant view of the group itself of his or her identity (the element of acceptance). The instruments of international law, for instance, insist on the individualistic concept of minority rights (which is, as a rule, expressed through the phrase 'persons belonging to minorities' and not minorities as such).[228] Nevertheless, the dynamic relationship between the individual and the minority itself as a collectivity has not been elaborated clearly enough in international human rights law. However, as established by recent standards on the protection of minorities, it is clear that the right of an individual to choose to be treated as a member of a certain minority (or majority) is inalienable, and his or her choice in this regard must not entail any negative consequences.[229] In the well-known case of *Lovelace v. Canada*, the UN Human Rights Committee also favoured subjective identification over the denial of membership by a group of the identity and corresponding status of the given person.[230]

Still, frequent changes to the declaration of identity, especially those made in order to secure certain advantages in the community, would run counter to the very idea and purpose of collective rights. In the context of minorities, for instance, Thornberry notes that "it seems logical to premise membership of a minority on the definition of minority, incorporating subjective and objective criteria".[231] Therefore, the practice of setting the minimum period of time within which an individual must keep his or her publicly-declared identity, similar to that in South Tyrol, seems to be a constructive solution that "should minimise as much as possible 'opportunistic' declarations"[232] of identity, in particular in the context of political participation.

2. One can, nevertheless, posit that the previous item (1) might perhaps be relevant for the election of BiH Presidency members (however difficult it might be to implement

[228] See Article 23 of the ICCPR.

[229] Article 3 of the FCNM. The Advisory Committee on the FCNM has criticised the situation in South Tyrol precisely on this ground, noting that the state should consider election mechanisms that are fully in line with the requirements of the relevant provision of the FCNM. See the *Opinion on Italy* of the Advisory Committee on the FCNM, ACFC/INF/OP/I(2002)007, 3 July 2002, paras. 18–20.

[230] *Lovelace v. Canada*, Communication No. R.6/24, 30 July 1981, para. 14.

[231] Thornberry 1991, p. 175. See also Explanatory Report to the FCNM, par. 35 (elaborating on Article 3 of the FCNM, which provides for the right of a person to choose to belong to a minority or not, the Report confirms that this provision "does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity."

[232] Lantschner and Poggeschi 2008, p. 228.

in practice), but that this becomes objectively impossible when it comes to indirect election of delegates to the BiH House of Peoples, who are appointed by members of the Federation Parliament's House of Peoples and the Republika Srpska People's Assembly, and whose *electors* are mostly ethnically defined. This especially applies to the House of Peoples of the Federation Parliament, where they themselves are explicitly identified as members of ethno-national caucuses of delegates. In other words, even if it is possible for party X to propose a person who will only formally declare himself or herself as a member of a constituent people as candidate for the Presidency, and even if the person is elected by citizens, it is objectively not possible to expect that delegates in the Entity assemblies (who are themselves elected as members of a constituent people) to appoint persons 'known' (e.g. because they have declared that themselves) 'not to belong' to any constituent people to the House of Peoples of the Parliamentary Assembly of BiH. Similarly, it is almost certain that Željko Komšić would not have become the Croat member of the BiH Presidency if Presidency members had been elected by the Bosnian Parliament.

Yet, it is important to take into account the existence of a considerable obstacle (of a moral and not legal character) for persons from the category of 'Others' to declare themselves as members of the constituent peoples, which results from the very word 'belonging'. This expression has very strong connotations and can constitute an insurmountable (moral) obstacle for e.g. a Jew to declare himself as 'belonging' to the Croat people. We cannot ignore this remark because it is a question of dignity and recognition, which play important roles in the formation of the identity of every individual.[233]

B) Would this approach imply the obligation to introduce a nominal ethnic population census? If yes, with what consequences?

In principle not. It would be sufficient, and certainly necessary, to replace the 'declaration of affiliation', foreseen under the 2001 Election Law, by a different, more neutral term, as is, for instance, the case in South Tyrol ('declaration of aggregation').

C) And finally, is the core of ethno-national identity in Bosnia and Herzegovina really comparable with the situation in Belgium or South Tyrol?

It is not. In Bosnia, ethnic identity is not in and of itself stronger than, for instance, the identity of the Flemish-speaking Belgians or the German-speaking South Tyroleans. In each of these societies we will find persons who have the feeling of 'belonging' to a certain ethnic group to a greater or lesser extent, who perceive the relevance and

[233] See generally Taylor 1994 [1992].

strength of inter-ethnic boundaries in different ways, etc. Still, it seems that in BiH it is more difficult for an individual to cross the boundary (imagined or actual) separating the constituent peoples. The paradox perhaps lies precisely in that citizens of BiH speak what is essentially the same language, or very similar languages, and use other ways to identify their fellow citizens, above all names. In other words, the issue of belonging to a certain collectivity seems to have been objectified to a considerable extent in the public discourse due to the general ethnicisation of society and political life, which is certainly yet another consequence of war. This as a rule, is not the case in multilingual communities, where it is not rare to meet people who consider themselves members of one ethno-linguistic group regardless of having a first name and last name of a different group. In Belgium, for instance, many Flemish people have French first and/or last names and vice versa. A second reason lies in that ethnic identities in Belgium or South Tyrol are more linked to territory and language, which also contributes to them being conceived in a much more flexible and inclusive way: by changing the language they speak and the place of residence, citizens of Belgium and South Tyrol also change their politically relevant identity, while in BiH persons carry their identity, i.e. ethnicity, with them wherever they might live (and we know that they essentially speak the same language, or very similar languages, which is, of course, not the case in Belgium or South Tyrol).

In sum, it appears that the model of political aggregation of persons belonging to 'Others' into the dominant groups is neither realistically feasible nor a morally and legally justified option for ensuring the participation of 'Others' in political and public life. However, in addition to pointing out some illustrative comparative experiences, this present section served to underline some important conceptual issues which are often taken for granted in BiH. One such consideration is certainly the issue of establishing the identity of an individual and the possibility of manipulation of identities in the context of achieving paritarian political participation of constituent peoples and 'Others'. However, this is all we will say about this complex issue in the present study. In the next section we will return to the crucial issue of institutional design and electoral systems for the execution of the ECtHR judgment in the case of *Sejdić and Finci v BiH*.

III. FROM THE THEORETICAL AND COMPARATIVE PERSPECTIVE TOWARDS THE PRACTICE IN BOSNIA AND HERZEGOVINA

14. THE PRESIDENCY OF BOSNIA AND HERZEGOVINA

Having discussed the relevant theoretical premises and international legal standards, as well as comparative experiences that might be of relevance for BiH, be it as potentially applicable models or as part of an analytical framework for discussing the situation in the country, in this section we shall analyse proposals for reforming the Bosnian Presidency. In particular, we want to look at the Venice Commission's proposals from 2005, and the Venice Commission's opinion from 2006 on two other proposals that circulated within BiH at the time. The opinion from 2006 was issued upon the request of the then Chair of the Bosnian Presidency, Sulejman Tihić. The reason why we are pursuing this analytical strategy in this section lies in the fact that it is precisely the Venice Commission opinions, as mentioned in Section 4, that have been the fundamental reference for statements by the relevant bodies of the Council of Europe in the context of the execution of the *Sejdić-Finci* judgment. In addition, the Venice Commission and its views enjoy considerable authority in the public discourse in Bosnia and Herzegovina and are therefore also often referred to by domestic actors. Finally, the Venice Commission's opinions that we will look at in our analysis below essentially sum up all the past proposals for the execution of the *Sejdić-Finci* judgment concerning the Presidency of BiH.[234]

[234] See Section 5 of this study.

14.1. PROPOSAL 1 (P1): A WEAK PRESIDENT ELECTED BY THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

Proposal 1 (P1): A weak President elected by the Parliamentary Assembly of Bosnia and Herzegovina:[235]

(1) reducing the powers of the Presidency, i.e. strengthening the Council of Ministers;

(2) reducing the number of Presidency members from three to one;

(3) introducing a rotation rule in order to avoid, for instance, a newly-elected President being from the same constituent people as his or her predecessor;

(4) having the President be elected indirectly by Parliament (in the same document the Venice Commission suggests that the House of Peoples should be abolished; the President would, thus, be elected only by the House of Representatives of the Bosnian Parliament);

(5) introducing the rule of a qualified majority (which is not specified – it could, for instance, be 60% or two-thirds) in order to ensure that the president enjoys 'wide support within all peoples'.

Since this proposal resonated to a certain extent in the Bosnian political scene, in its opinion issued in 2006, the Venice Commission discussed two alternative proposals having underlined that because of the formal exclusion of 'Others' and also Bosniaks and Croats from the Republika Srpska and Serbs from the Federation from important aspects of political life in Bosnia, the *status quo* is not in accordance with the European Convention on Human Rights.[236] For this reason, our analysis will focus on these two proposals (P2 and P3), but will also discuss some aspects of P1, in particular the idea that the Parliament, and not citizens, should elect the members of the Presidency.

[235] The Venice Commission, *Opinion on the Constitutional Situation..., supra* note 5, para. 40.

[236] The Venice Commission, *Opinion on Different Proposals ..., supra* note 62.

14.2. PROPOSAL 2 (P 2): STATUS QUO MINUS THE ETHNIC DETERMINANT

14.2.1. The substance and main shortcomings of the proposal

The first alternative proposal is to maintain the current situation – one member of the Presidency elected within the Republika Srpska and the other two within the Federation – except that the provision referring to their ethnicity would be removed. In this way, the *de jure* discrimination of 'Others' would be avoided, which in the view of the Venice Commission would be "a step forward" and "a rational solution" compared to the *status quo*.[237]

Nevertheless, the Venice Commission at the same time asserts that this solution suffers from several major shortcomings:

(1) It is unclear how the pluri-ethnic composition of the Presidency would be ensured given that it is realistic to assume that two Bosniaks from the Federation might be elected.

(2) This problem could be avoided by introducing a provision under which not more than one Presidency member could be from the ranks of one and the same people or the group of 'Others'. But this would cause an additional problem because some candidates might be excluded although they won more votes than the candidates who were elected in the end.

(3) Bosniaks and Croats from the Republika Srpska, as well as Serbs from the Federation, still could not have a realistic possibility "to elect a candidate of their preference".

(4) The elections would remain reduced to the Entity level while it would be desirable to have them held at the state level in order to strengthen and promote the state as such.

(5) Direct elections bestow greater legitimacy on the Presidency as an institution; this would make it more difficult to reduce its powers in favour of the Council of Ministers, which, according to the Venice Commision, is one „of the overal aim[s] of constitutional reform."[238]

[237] Ibid., para. 9.

[238] Ibid., paras. 10–13.

14.2.2. Analysis of Proposal 2 and of the opinion issued by the Venice Commission

Proposal 2 tries to use territory as a functional proxy for ethnicity. Its greatest shortcoming, also identified by the Venice Commission, lies in that this approach works only for two constituent peoples (the Republika Srpska as 'proxy' for representation of Serbs, and the Federation as 'proxy' for representation of Bosniaks, statistically the largest people in this Entity). This proposal is, thus, likely to *de facto* secure one seat in the Presidency for Bosniaks and Serbs each, while it would be much more difficult (but, of course, not impossible) for candidates from the ranks of the third constituent people to be elected.

The Venice Commission has welcomed the idea of introducing a clause (let us call it 'the ethnic clause') under which not more than one Presidency member can be from one and the same constituent people or from the group of 'Others'. Still, this ethnic clause can be criticised for at least two reasons. Firstly, it leads to introducing once again through the back door, precisely that element – the ethnic one – which was thrown out through the front door by using territory as a functional proxy for ethnicity. The explicit goal of this ethnic clause – this being the second reason for our criticism – is to make the election of two Bosniaks impossible, which implies that it is 'normal' to have the following election result: (a) one Bosniak from the Federation, one Serb from the Republika Srpska and one Croat from the Federation, or (b) one Bosniak from the Federation, one Serb from the Republika Srpska and one person from the ranks of 'Others' from the Federation. In other words, the alternative boils down to 'either a Croat or an 'Other''. This is precisely the proposal's major weakness in the domain of *realpolitik* because it is not very likely to be accepted by Croat political representatives in BiH.

On the other hand, it is quite hard to understand (even if we were to forget our critical view of the idea of an ethnic clause) why the Venice Commission finds it problematic that certain candidates would not become Presidency members although they would have won more votes than the elected candidates. Was Željko Komšić not elected to the Bosnian Presidency as a Croat representative in 2006 although the number of votes he won (116,062) was considerably smaller than that won by a Bosniak candidate, Sulejman Tihić (153,683), who ended up not being elected?[239] There were similar

[239] See the website of the Central Election Commission of Bosnia and Herzegovina with the confirmed results of the 2006 elections for the Presidency of BiH, available at: http://www.izbori.ba/rezultati/konacni/predsjednistvo_bih/Predsjednistvo.asp?nivo=701&nivo1=702.

situations in previous elections as well.[240] We are not aware of anyone in the Bosnian public or in politics who has considered this to be a problem (but we know that many actors, especially Croat parties, found it problematic that Željko Komšić, as has been often speculated, got elected by 'Bosniak votes'[241]). This criticism by the Venice Commission is also hard to understand when seen from a broader comparative perspective. Namely, every election system based on the principle of quotas (be they territorial, ethnic, party or other) within one and the same electoral unit implicitly allows candidates who received fewer votes than other candidates to be elected. Even where there are no such quotas, the very nature of the election system can lead to similar situations. It is sufficient to recall that in 2000 George W. Bush was elected President of the United States of America although he had won half a million votes *fewer* than his counter-candidate Al Gore.

Thirdly, the criticism by the Venice Commission that Serbs from the Federation and Bosniaks and Croats from the Republika Srpska are not able to vote for candidates of their preference, as well as that there is no single electoral unit, is certainly justified. Since this concerns the election of the Presidency as the highest governmental body, it is desirable for the election to be held country-wide, while separate electoral units can still be used for parliamentary elections. In all countries where the president is directly elected, this is done within a single electoral unit.[242] This is logical given that, as a rule, only one person is being elected. On the other hand, examples of direct election of a multi-member executive governmental body are very rare. An exception is, for instance, Switzerland, where citizens of each canton elect their cantonal government (consisting of five or seven members) in only one electoral unit (which coincides with the boundaries of the given canton). We should also note that around 2013 Swiss citizens are expected to vote in a referendum on the proposal to also have the seven-member Federal Council, i.e. the federal government, elected directly by the people, in a single electoral unit. Today, the members of the Council are elected by the Federal Parliament.

[240] E.g. in 2002, when Dragan Čović, who won 114,606 votes, was elected, and not Haris Silajdžić, who won 179,726 votes. See the website of the Central Election Commission of Bosnia and Herzegovina, available at: http://www.izbori.ba/Documents/Rezultati%20izbora%2096-2002/Rezultati2002/Puni/PredsjednistvoBiH.pdf.

[241] For an interesting expert discussion of the issue, see the series of articles in *Puls demokratije*: Zvonko Mijan, "O legitimitetu (I): Poslije izbora-nema kajanja", November 2006, available at http://www.pulsdemokratije.ba/index.php?id=121&l=bs; Ivan Vukoja, "O legitimitetu (II): Koga predstavljaju predstavnici", November 2006, available at http://www.pulsdemokratije.ba/index.php?id=138&l=bs; Svjetlana Nedimović, „O legitimitetu (III): Legitimitet kao proces", January 2007, available at http://www.pulsdemokratije.ba/index.php?id=139&l=bs.

[242] See Blais, Massicotte and Dobrzynska 1997.

Finally, the fear of the Venice Commission that the continued practice of direct election of the Presidency would reduce the possibility of transferring powers from this institution to the Council of Ministers seems exaggerated to us. In Austria, the people directly elect the President – most recently on 25 April 2010, with a voter turnout of 53.6%. Regardless of this, the President's powers within the political system are ceremonial rather than substantial. In other words, the powers of such an institution depend much more on formal constitutional provisions, as well as on the general and informal power relations, than on the modality of elections. A case in point is the President of the Republic of Croatia, whose role, both formally and informally, has been considerably reduced since the departure of Franjo Tuđman from the political scene, regardless of the fact that both in Tuđman's time and after it the President has been elected by citizens in direct elections. Something similar, but in the opposite direction, has also taken place in Serbia, where Boris Tadić, without changing the constitution, has practically transformed the country's political system from a parliamentarian into a presidential one.

Still, the fact remains that a directly-elected president or collective presidency enjoys greater legitimacy than those elected indirectly by parliament. Consequently, an important question arises as to whether it is desirable in the current Bosnian context – in which citizens show great distrust towards politicians and in which many important decisions are taken by persons who have been indirectly elected (the Council of Ministers) or externally imposed (the High Representative) – to additionally and quite consciously reduce the legitimacy of an institution such as the Presidency. Moreover, as one commentator has rightly pointed out, it is not clear how important powers such as defence and foreign policy could realistically be transferred to the Council of Ministers given that it is "practically the only State institution based on majoritarian rule",[243] or more precisely the institution with a considerably reduced possibility of using a veto.[244]

[243] Bardutzky 2010, p. 333.

[244] Following the October 2007 amendments to the Law on the Council of Ministers passed by the High Representative, the Council of Ministers can take final decisions by a majority vote of the present ministers who have voted, provided that the majority includes at least one minister from the ranks of each constituent people. See more in Steiner and Ademović 2010, pp. 610–612.

14.3. PROPOSAL 3 (P3): A THREE-MEMBER PRESIDENCY ELECTED BY THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

14.3.1. The substance and main shortcomings of the proposal

The second alternative proposal (P3) suggests having the Presidency elected indirectly by Parliament. Indirect election of the Presidency is the solution preferred by the Venice Commission (admittedly, as we have already underlined, the Venice Commission would prefer having only one president elected, with reduced powers). The Venice Commission is of the opinion that this way it is much easier to establish mechanisms to ensure "the desired pluri-ethnic composition of the Presidency".[245] Moreover, this type of election of the Presidency opens up more possibilities for "inter-ethnic cooperation and compromise", while direct elections encourage people to vote for persons considered to be the strongest advocates of 'their' own peoples "and not for the candidate best suited to defend the interests of the country as a whole." Election by the parliament would also be in line "with the overall aim of strengthening the State."[246]

Nevertheless, according to the Venice Commission, this solution suffers from several minor shortcomings:

(1) a complicated election procedure (the House of Representatives nominates candidates; the caucuses of delegates in the House of Peoples each elect one candidate, while the final election must be confirmed by both chambers);

(2) it is not clear how Vice-Presidents would be elected;

(3) the House of Peoples plays too strong a role in the election, which *de facto* reduces the realistic possibility for 'Others' to enter the Presidency.[247]

In order to remove some of the above shortcomings, the Venice Commission also suggested several changes to this proposal:

(1) Once the House of Representatives has nominated candidates, and each of the caucuses of delegates in the House of Peoples has elected one, the final election would be in the hands of the majority of the House of Representatives, which would also

[245] Venice Commission, *Opinion on Different Proposals*..., *supra* note 62, para. 18.

[246] Ibid., para. 19.

[247] Ibid., paras. 21–24.

provide a guarantee that all the three members enjoy legitimacy as "representatives of the people of Bosnia and Herzegovina as a whole."

(2) The principle of rotation should be introduced for the posts of President and Vice-Presidents.

(3) The House of Representatives could nominate any three candidates, the rule (ethnic clause) being that not more than one candidate can be from the ranks of one and the same constituent people or from the group of 'Others'.[248]

14.3.2. Analysis of Proposal 3 and the opinion issued by the Venice Commission

A positive aspect of P3 (with the changes proposed by the Venice Commission) is the fact that its application would in principle render the collective Presidency an institution open to all citizens of Bosnia and Herzegovina, regardless of Entity of residence or membership (or non-membership) of a particular constituent people. Thus, this proposal resolves the immediate issue of discrimination against 'Others'.

However, we do not find all the advantages emphasised by the Venice Commission in P3.

Firstly, one has to question for practical reasons how useful it would be to make the appointment of members to this political institution, too, conditional on the uncertain post-election negotiation towards forming the government and the Parliamentary Assembly of BiH. The overall political situation in BiH, as well as the post-election politics in Belgium, for example, certainly suggests caution in this regard. As the experience of the last several electoral cycles in BiH shows, direct election of the Presidency has an obvious advantage of providing for the formation of at least this government body directly after elections, thereby making it free of uncertainty and the unpleasantness of a long-lasting period of post-election political bargaining.

Secondly, as already noted, the reduced legitimacy of the Presidency as an institution, intended to weaken it in favour of the Council of Ministers, cannot be seen *per se* as an absolute and unquestionable advantage. On the contrary, and taking a broader perspective, in recent years many authors[249] have pointed to the 'crisis' of democracy, evident in decreasing voter turnout in the majority of democratic countries, and have

[248] Ibid., paras. 22–25.

[249] For example, see Moravcsik 2004; Norris 2010.

urged the need for democratically constituted states to take on greater legitimacy. This can be achieved by offering citizens greater opportunities to participate in democratic life, whether through elections, direct democracy, civic forums, deliberative democracy or other forms of participation. In many countries, the efforts to resolve this crisis include having citizens directly elect their representatives to the executive. As we have seen, it is symptomatic that in Switzerland after 160 years of democracy – thus in one of the world's oldest and most stable democratic states where Parliament elects the Federal Government – the collection of signatures for a civic petition for direct election of the government is ongoing.[250] And in Italy[251] there has been a debate lasting several years on introducing direct election of the President of the Republic. Thus the idea that the BiH Presidency should be elected by Parliament and not by citizens is opposed to this trend, and can only in very relative terms be described as a 'step forward', as the Venice Commission calls it. Finally, we should recall that approximately half the states worldwide, and at least 40% of those that can claim to be 'democratic', elect their presidents through direct elections.[252]

Thirdly, we must ask to what extent the election of the Presidency (or President) by Parliament would really open the doors of this institution to members of the category of 'Others'. Certainly, the legal obstacles would have been removed, but the question remains whether 'Others' would *de facto* enjoy the opportunity to be elected to the Presidency. Here it is helpful to compare the *de facto* situation under this proposal (P3) with that under proposal P2, based on territorial quotas.

Under P3, members of the Bosnian Parliament would elect the members of the Presidency. This compels us to wonder how realistic it is to expect the members of the Bosnian Parliament, who from the first post-Dayton elections in 1996 until the present day have overwhelmingly belonged to explicitly ethnic (SDS, HDZ, SDA) or implicitly ethnic (SNSD, SBiH) parties, to elect a Presidency member from the ranks of 'Others', knowing that this would be 'at the expense' of one of the three constituent peoples.

[250] See www.volkswahl.ch. Similar initiatives for the direct election of government were previously put to referendum in 1901 (65% voted against) and in 1942 (67.6% voted against).

[251] For example, see the article "Berlusconi: elezione diretta del presidente della Republica" *La stampa* (10 March 2010), available at: http://www.lastampa.it/redazione/cmsSezioni/politica/201003articoli/53306girata.asp.

[252] These figures refer to 1995 (Blais, Massicotte and Dobrzynska 1997). Of 191 sovereign states in that year, 21, including Bosnia and Herzegovina, were not included in the research since they "did not have an active, directly elected parliament" (Blais, Massicotte and Dobrzynska 1997, p. 450, fn. 7).

Nor, we repeat, has there ever been a single member of the 'Others' in the House of Representatives of the Bosnian Parliament.[253] We note that the procedure for the election of the Presidency proposed under P3, even if made a little more straightforward by the above 'amendments' of the Venice Commission, in any case requires the caucus of each people in the House of Peoples to declare its position on the candidates, in order to "ensure that the interests of all three constituent peoples are respected."[254] In other words, how likely are the representatives of ethnic parties and ethnic caucuses in the House of Peoples, whose purpose is *par excellence* representing the interests of their *own* people, to voluntarily agree that one of the 'Others' should be elected instead of their *own*? This would be somewhat like expecting the Green party to agree of its own accord to the nomination of an advocate of increased oil resource exploitation and nuclear power for president. For the Green party, of course, such a nomination would be clear political suicide. Similarly, this option would conflict directly with the inherent logic of an ethno-political party. The ECtHR also confirms this view, noting that it is "hardly conceivable that a party standing for the furtherance of the interests of one ethnic group or religious denomination would be able to ensure the fair and proper representation of members of other ethnic groups or adherents of other faiths."[255]

In this context we would stress that, given the current structure of the House of Representatives of the Bosnian Parliament, the deliberate inclusion of a certain number of delegates who are 'Others' in the House of Peoples would be the only way to ensure the presence of at least some members of Parliament who do not belong to the constituent peoples. However, the question then arises as to whether the delegates who are 'Others' should have their own caucus in the House of Peoples, and whether they would have the right to put forward their own candidate for the Presidency.[256] It appears that the Venice Commission – rather surprisingly – did not consider this option.[257]

According to proposal P2, citizens would elect the members of the Presidency directly. Would this model mean that 'Others' would have a greater *de facto* chance of being elected to the Presidency? In the current political climate this would most likely not be the case. However, there is reason to suppose that the likelihood of such a development

[253] See *supra* note 222.

[254] See the Venice Commission, *Opinion on Different Proposals... supra* note 62, para. 22.

[255] *Artyomov v. Russia*, Application No. 17582/05, Decision on Admissibility, 7 December 2006.

[256] For various options and dilemmas surrounding reform of the House of Peoples, see the following section of this study.

[257] See the Venice Commission, *Opinion on Different Proposals...supra* note 62, para. 24.

of the political situation would be greater under P2 than under P3. For one thing, the ballot is secret, meaning that citizens are not exposed to the same type of political or media pressure as members of Parliament. It can even be assumed that a citizen of nationality X could be more readily convinced that candidate Y, though not of the same nationality, is the most experienced and would represent citizen X's ideas and interests better than the candidates of X's own nationality.

It is also worth noting that a candidate who is an 'Other', aware of needing the support of voters from different peoples, would have a genuine interest in campaigning in a way that appeals to all citizens, regardless of ethnic background. This potential interest in *interethnic votes* is not shared by those 'Others' who would be standing for election *within* Parliament. On the contrary, and for these reasons, it can be safely assumed that the number of candidates from the category of 'Others' would be far smaller if the Parliament, and not the people, were to choose the members of the Presidency.

Bearing these arguments in mind, and contrary to the opinion of the Venice Commission, the election of the Presidency (or President) by the Bosnian Parliament would by no means represent an 'important step forward'. On the contrary, this would in fact be a considerable step backwards, since it would cement Bosnian ethnopolitics more solidly within the Parliament, while actively reducing the influence of citizens within the political system. The 'Others' would thus in a formal sense only (*de jure*) rather than in an actual (*de facto*), be relieved of discriminatory barriers to participation in the Presidency. At the same time, we should not forget one of the essential postulates of modern democracy, referred to before, that nobody has a right to be elected (rather, one has a right to run for election) to any political function. However, in our opinion, the proposed option would solidify ethnopolics in the Bosnian Parliament, producing a more or less *implicit guarantee* to MPs (if any) who are 'Others' *that they would not be elected* to the Presidency of Bosnia and Herzegovina.

Taking this point into consideration, we should return to proposal P2, under which citizens would continue to elect the Presidency of Bosnia and Herzegovina, while a territorial quota would enable a certain balance with regard to the ethnic structure of the Presidency. Meanwhile, persons from the constitutional category of 'Others' would gain greater chance and a more realistic hope of being themselves elected to this body one day.

As we have seen, according to the opinion of the Venice Commission, proposal P2 has several difficulties that are impossible to disregard. Even if we bypass those aspects which, according to the previous analysis, are not in themselves unacceptable and/or

negative (the election of candidates who have received fewer votes than their rivals, for example, and the election of the Presidency by the citizens), we are still confronted by the following problems:

(a) It is unclear how the multinational structure of the Presidency would be preserved if the Republika Srpska and the Federation of Bosnia and Herzegovina remain two separate electoral units, since it is obvious that in such case two Bosniaks from the Federation of Bosnia and Herzegovina could potentially be elected to the Presidency.

(b) People from the Republika Srpska, like those of the Federation of Bosnia and Herzegovina, would still not be able to "vote for their candidate of preference", since their candidate of preference might in fact reside in the other Entity.

(c) The elections would still be held at the Entity level, whereas it would be more desirable to hold them at the level of the state, thus strengthening Bosnia and Herzegovina as a state in accordance with the recommendation of the Venice Commission.

14.4. ALTERNATIVE PROPOSAL – PROPOSAL 4 (P4): GEOMETRIC MEAN

The following model would neatly resolve all three problems listed above:

Item 1: Only one electoral unit comprising the entire state. This would enable citizens of both Entities to vote for any candidate of their choice. (This would resolve identified problem (c)).

Item 2. Each citizen has a single vote, giving them a real chance of genuinely influencing the election of their preferred candidate. (This would resolve problem (b)).

Item 3. Only one candidate would be elected to the Presidency from each of the following three regions:

(A) five cantons from the Federation of Bosnia and Herzegovina - Canton 1 (Una-Sana), Canton 3 (Tuzla), Canton 4 (Zenica-Doboj), Canton 5 (Bosnian-Podrinje) and Canton 9 (Sarajevo)

(B) the remaining five cantons of the Federation of Bosnia and Herzegovina – Canton 2 (Posavina), Canton 6 (Central Bosnia), Canton 7 (Herzegovina-Neretva), Canton 8 (West Herzegovina) and Canton 10 (Livno)

(C) Republika Srpska.

Candidates from the District of Brčko would be free to stand for any of these regions.

This item would at least partially resolve problem (a) above – how to ensure the multiethnic structure of the Presidency, since Croats largely reside in region B.

If we were to stop at these three items, this proposal would predictably be criticised as typically 'unitary', given that it would, for example, enable the citizens of the Federation of Bosnia and Herzegovina to elect a candidate from the Republika Srpska, and vice versa, and so would enable the most numerous people (the Bosniaks) to elect a president from region B, et cetera. These objections would, however, be met by the following:

Item 4. Candidates would be chosen according to whether they had scored the highest rate of geometric mean, in accordance with the following formula:

A: number of votes from region A

B: number of votes from region B

C: number of votes from region C

D: number of votes received from the entire state (=A+B+C)

For a member of the Presidency to be elected from region A, the following formula for geometric mean would apply:

$\sqrt{A*D}$

For a member of the Presidency to be elected from region B, the following formula for geometric mean would apply:

$\sqrt{B*D}$

For the election of a member of the Presidency from region C, the following formula for geometric mean would apply:

$\sqrt{C*D}$

The advantages of this model can be summed up as follows:

– The three constituent peoples, given their relative concentration in region A (Bosniaks), region B (Croats) and region C (Serbs), would have, *de facto*, a great chance of being represented in the Presidency, similarly to the current situation;

– Nevertheless, the system would also be equally open to 'Others', in accordance with the ECtHR judgment in the *Sejdić-Finci* case.

– All citizens, regardless of the Entity in which they live, would be able to vote for the candidate of their choice (an issue particularly relevant for Serbs from the Federation of Bosnia and Herzegovina and Bosniaks or Croats from the Republika Srpska, who could vote for candidates of their own nationality residing anywhere in the country). It is true that a vote for a candidate from the other two regions, in accordance with the proposed formula for calculating geometric mean, would have less weight than a vote for the candidate for the region in which the voter resides. But this would in any case offer a considerable improvement on the current situation.

– Thanks to the single electoral unit and the rule of geometric mean, all candidates would be motivated to campaign throughout the *whole* country, and not only within their particular Entity, as is currently the case. This would have a strong integrative effect, which would in turn promote inter-ethnic cooperation, compromise and reconciliation.[258]

– Since every voter would only have a single vote, this would considerably reduce fears of 'outvoting'. At the same time, the rule of geometric mean would give greater weight to the votes of citizens from regions A, B and C for Presidency members from their respective ('own') regions. This rule would ensure the significant (though not exclusive) support of the Croat people for the proposal. As a factor, this should in turn be kept particularly in mind, since almost all current proposals for implementing the *Sejdić-Finci* judgment with regard to the Presidency of BiH have to date been shipwrecked on the 'Croat question' – i.e. the possibility that 'Others' would be elected at the expense of the Croats as the least numerous of the constituent peoples. Moreover, the current election system is most vocally criticised (besides the complaints of 'Others') by the political representatives of Croats in Bosnia and Herzegovina.

– It is true that distinguishing between regions A and B within the Federation of Bosnia and Herzegovina would indirectly confirm that Croats are more present in certain cantons, and Bosniaks in others. However, this was already the case when the boundaries of the ten cantons were drawn. In any case, this solution would not lead to the formation of the 'third entity' advocated by many Croat politicians, which

[258] This would be similar to the presidential election system in Nigeria, which requires candidates to have a specific level of support in the various regions of the country, and not only one or two. Donald Horowitz openly supports such a system for divided societies (see Horowitz 2003). Similar proposals have been put forward in Lebanon, Sri Lanka and Indonesia. It is also worth citing proposals of the Belgian 'Pavia' group for a single federal electoral unit: although this is an initiative for electing part of the parliament, the desired result – integration of linguistic groups and a milder political discourse – is the same (see www.paviagroup.ch).

would most probably lead to additional fragmentation of the country and seriously jeopardise its sustainability. As evidence for this claim we can cite the example of the civic petition for direct election of the seven members of the Swiss federal government.[259] In order to prevent the 'outvoting' of candidates from the least numerous linguistic groups, the French and the Italians, this petition has proposed the introduction of the rule of geometric mean, dividing Switzerland into two parts: the German-speaking area and the French/Italian speaking area. This distribution does not coincide solely with cantons in which only one of these languages is official, but also takes into account and divides those cantons which are officially bi- or tri-lingual. None of this impacts on the territorial and federal organisation of a country with 26 cantons, nor will it in any way endanger the autonomy of the cantons themselves.

Although this electoral system appears complicated, from the viewpoint of voters it is remarkably simple: any voter can vote for any candidate, bearing in mind that a vote for a candidate from their own region has a greater weight than that for a candidate from the other two regions. However, we will try to additionally clarify the functioning of the rule of geometric mean with the help of a fictitious example (albeit inspired by reality).

[259] See http://www.admin.ch/ch/f/pore/vi/vis380t.html.

Table 1: Election results for the Presidency of Bosnia and Herzegovina according to proposal P4 (geometric mean).

Candidate no.	Candidate from region	Group	Number of votes (measured by thousands) within the region...			Total number of votes by thousands	Geometric mean	Elected
			A	B	C			
1	A	Bosniak	120	60	60	**240**	169.7	No
2	A	Bosniak	160	30	40	230	**191.8**	Yes
3	A	Bosniak	**180**	5	5	190	184.9	No
4	A	Other	80	40	50	170	116.6	No
5	B	Croat	20	**110**	10	140	**124.1**	Yes
6	B	Croat	30	60	20	110	81.2	No
7	B	Croat	200	10	10	**220**	46.9	No
8	B	Bosniak	40	70	10	120	91.7	No
9	C	Serb	5	5	290	300	295.0	No
10	C	Serb	40	20	270	330	**298.5**	Yes
11	C	Serb	50	50	20	120	49.0	No
12	C	Other	20	20	50	90	67.1	No

– The outcome of these elections is as follows: candidates 2, 5 and 10 would be elected, since their geometric mean is higher than that of the other candidates from the same region. The Presidency therefore comprises one representative from each of the constituent peoples.

– What would happen if there was no territorial quota (one candidate from each of the three regions)? The answer is that candidates 1, 9 and 10 would be elected; that is, one Bosniak and two Serbs. No Croat would be elected, and nobody from region B.

– What would happen if the territorial quota existed, but without the rule of geometric mean? This would result in the election of candidates 1, 7 and 10, that is, the candidates who received the greatest number of votes throughout the state. This would also be problematic, since candidate 1 received far fewer votes within region A than did candidates 2 and 3. The same can be said of

candidate 7, who received far fewer votes within region B than did candidates 6 and 8. In other words, it would be hard to claim that candidates 1 and 7 are, in sufficient measure, 'representatives' of the regions for which they stand.

– What would happen if there was a territorial quota, but the election of the representative from each of the three regions was decided only by the votes received inside the candidate's region (that is, if the elections were held within three completely separate electoral units)? The answer is that candidates 3, 5 and 9 would be elected. This would also be an undesirable outcome, since candidates 3 and 9 enjoy an exceptionally low level of support outside their own regions, and also at the level of the state as a whole. This would particularly apply to more radical candidates who are able to form a support base only within their own ethnic group.

We will now focus on the specifics within each of the three regions, in accordance with alternative proposal P4 – geometric mean:

– In region A, candidate 2 would win, although she received fewer votes at the state level than candidate 1, and both received fewer votes than candidate 3 in region A. How can this be explained? Candidate 1 cannot win since he obtained too few votes from his region. Candidate 3 cannot win since he received too few votes from the other regions. Candidate 2 is therefore selected, as being sufficiently popular with the voters of regions B and C (though less so than candidate 1) and also because she has sufficient support in her own region A (though less so than candidate 3).

– In region B candidate 5 would win. She leads inside her own region B and would win even if there were more than one electoral unit. Candidate 7 cannot pass the post even though he has considerably more votes than candidate 5 at the level of the state. Why? Because his votes come largely from region A.

– In region C candidate 10 would win. He has 20,000 votes fewer inside his own region than does candidate 9, but has far greater support in the other two regions. This suggests that he is probably a relatively moderate politician.

14.5. ALTERNATIVE PROPOSAL – PROPOSAL 5 (P5): GEOMETRIC MEAN PLUS 7

We mentioned previously that proposals envisaging the expansion of the Presidency to four or even five members have come before the public. Their greatest flaw lies in the fact that in the Bosnian context, with three constituent peoples and three ethno-political elites, such proposals are felt to be unrealistic and raise fears (real or imaginary) of 'domination', manipulation of identity, and 'outvoting'. However, it is worth asking why Bosnia and Herzegovina cannot have a Presidency with seven members for example – the same number it had prior to Dayton, and the same as the Swiss Federal Council.

We would suggest that any future expansion of the Presidency should be proportional: for example six members instead of three. This expansion could be readily harmonised with our alternative model P4: each of the three regions would have two guaranteed places, and every citizen would have two votes instead of one. All other elements of the proposal would be unchanged (the single electoral unit and the rule of geometric mean). However, given the requirements of decision-making, an even number of members is not a satisfactory solution for an executive body. We should therefore expand proposal P5 to include an additional member who could be elected from the Brčko District, which is one of the very few truly multiethnic areas of Bosnia and Herzegovina. The election of a candidate from this region would again follow the rule of geometric mean. The advantage of a seven-member Presidency is that the entire electoral process would be more accessible and dynamic, while giving no room for fears of outvoting or 'majorization'.

However, P5 gives rise to the following dilemma: what would the powers of the seven-member Presidency be? They could hardly be less than at present, nor hardly the same. Otherwise the election of such a Presidency would lose all significance, and all its advantages (a more dynamic system, open to all) would be lost.

If we return to the Swiss model, the seven-member Federal Council is simultaneously the Presidency and the Government. In other words, the expansion of the Presidency of Bosnia and Herzegovina to seven members could help it evolve into a government. Each of the seven members of the Presidency would also be a

minister with considerable competencies, supported by two or three secretaries of state. This would, of course, lead to the eventual termination of the Council of Ministers. Such a comprehensive reform goes beyond the scope of this analysis, but demonstrates how the process of resolving the issue of discrimination against 'Others' can lead to unforeseen, but not necessarily undesirable, alternative models of organisation of the executive at the state level.

In the following table we have summed up the current proposals for reform of the Presidency of Bosnia and Herzegovina:

Table 2: Proposals for reforming the Presidency of Bosnia and Herzegovina

			Number of members				
			1	3	4	5	7
Mode of election	Indirect	House of Representatives	P1				
		House of Peoples					
		Both Houses		P3			
	Direct	1 electoral unit			P6	P8	
		2 electoral units		P2			
		1 electoral unit with territorial quotas and the rule of geometric mean		P4		P7	P5

P1: Venice Commission

P2: SNSD, SDS (*inter alia*)

P3: April and Butmir Packages of constitutional amendments

P4: Alternative proposal with the rule of geometric mean

P5: Alternative proposal plus a seven member Presidency

P6: Proposal of the advisory bodies of the national minorities and SBiH

P7: Proposal (a) of Daniel Bochsler (which, though not necessarily, can include a five member Presidency)

P8: Proposal (b) of Daniel Bochsler

15. THE HOUSE OF PEOPLES OF THE BOSNIAN PARLIAMENT

15.1. THE POLITICAL PARTICIPATION OF 'OTHERS' IN THE HOUSE OF PEOPLES OF THE PARLIAMENT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA AND IN THE COUNCIL OF PEOPLES OF THE REPUBLIKA SRPSKA

In reviewing modalities for implementing the *Sejdić-Finci* judgment with regard to the House of Peoples of the Bosnian Parliament, it should be borne in mind that the practice of the Entity legislative bodies protecting 'vital national interests' of constituent peoples could serve as a useful model and a source of inspiration. This instructive experience at the Entity level also serves to highlight the issues and doubts that any constitutional reformer will confront in the run-up to actual reform.

Delegates from the ranks of 'Others' have participated in the House of Peoples of the Federation of Bosnia and Herzegovina Parliament and in the Republika Srpska's Council of Peoples for years now. According to the Constitution of the Federation of Bosnia and Herzegovina, seventeen delegates from each constituent people, and seven who are 'Others' are put forward by the ten cantonal assemblies for the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina. The number of delegates per canton corresponds with the population size of the canton, while the ethnic structure of the delegation should also be proportional to the cantonal population structure. As envisaged by the Constitution, delegates who are 'Others' have the right to participate on an equal basis in voting in the majoritarian procedures.[260]

The Rules of Procedure of the House of Peoples of the Federation of Bosnia and Herzegovina establishes that the delegates who are constituent peoples be organised

[260] Article 4.A.2.6. of the Constitution of the Federation of Bosnia and Herzegovina (in accordance with amendments XXXIII and XXXIV).

into caucuses, while 'Others' have no equivalent caucus. The role of caucuses in the work of the House of Peoples is of great importance. For example, caucuses play a key role in preparing sessions, confirming the agenda for each session, resolving disagreements that have arisen over the passage of acts by the Parliament of the Federation of Bosnia and Herzegovina and the House of Peoples itself,[261] selecting a speaker and deputy speaker[262] and also a Secretary of the House.[263] Their chairs constitute the principal Collegium of the House of Peoples as a key coordination body in this legislative institution of the Federation of Bosnia and Herzegovina.[264] Additionally, under the Rules of Procedure, the institution of 'vital national interests' is reserved solely for the constituent peoples, and the role of delegates who are 'Others' in the procedure of safeguarding vital national interests is marginal, since such decision-making takes place via caucuses.[265]

Consequently, delegates who are 'Others' have considerable justification for feeling like second-class delegates.[266] Their role in debating questions of vital national interest is marginal, and they participate in actual decision-making only if the discussion among the caucuses of delegates results in a decision by means of majority voting.[267] Due to this, and to the fact that they stand as individuals without the support of a caucus, and generally due to their position in the House of Peoples, they have no real opportunities to promote or protect the interests of 'Others'.[268]

In the Council of Peoples of the Republika Srpska, delegates belonging to 'Others' do have their own caucus. But, in spite of this, their position in this institution appears to be even more paradoxical than that of their counterparts in the House of Peoples of the Federation Parliament. Unlike its counterpart body in the other Entity, the Council of Peoples of the Republika Srpska, though it shares with the People's Assembly the

[261] Articles 24, 87 and 88 of the Rules of Procedure of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, which can be found at:
http://www.parlamentfBosnia and Herzegovina.gov.ba/hrv/dom_naroda/poslovnik/index.html.

[262] Ibid., Art. 35.

[263] Ibid., Art. 36.

[264] Ibid., Art. 76.

[265] Ibid., Art. 115–118.

[266] Personal interview with two delegates from the ranks of 'Others' in the House of Peoples, Parliament of the Federation of Bosnia and Herzegovina, July-August 2010.

[267] Personal interview with two delegates in the House of Peoples, Parliament of the Federation of Bosnia and Herzegovina, August 2010.

[268] Personal interview with a delegate from the ranks of 'Others' in the House of Peoples, Parliament of the Federation of Bosnia and Herzegovina, August 2010.

legislative function within the Entity,[269] does not have a constitutional position equivalent to that usually held by an upper house. This institution does not have the same powers as the People's Assembly in passing laws and other acts, but only reviews the acts passed by the latter with regard to vital national interests of the constituent peoples.[270]

The Council of Peoples also consists of caucuses of delegates – eight delegates from each constituent people, and four who are from the group of 'Others'. The paradox lies in the fact that while the delegates from the ranks of 'Others' have their own caucus and therefore a more significant role in the functioning of the Council and the issuance of decisions, they can help decide only on vital interests of the constituent peoples.[271]

Although according to some interpretations, the interests of 'Others' are often the opposite side of the coin from vital national interests of the constituent peoples,[272] the situation of the delegates who are 'Others' and the fact that their caucus is only half the size of the caucuses of the constituent peoples, gives them a thoroughly unequal position when it comes to the functioning of the Council.[273] Although Judge Mijović emphasised in her partly dissenting opinion in the *Sejdić-Finci* judgment that the representatives of non-constituent peoples participate appropriately in power-sharing mechanisms within the Entities,[274] a more detailed analysis makes it clear that the 'Others', even at the level of the Entities, should be seen rather as mere observers than as genuinely involved participants in the profoundly ethnicised political process.

We are therefore left to ask which model of reform could be applied to the House of Peoples of the Parliament of Bosnia and Herzegovina, in accordance with the *Sejdić-Finci* judgment. How can one configure the position of delegates who are 'Others' in this body? Should this be in line with the model of the House of Peoples of the Federation of Bosnia and Herzegovina Parliament, where delegates from this

[269] Article 69 of the Constitution of the Republika Srpska.

[270] See 'On the Council of Peoples', available at: http://www.vijecenarodars.net/index.php?option=com_content&view=article&id=1&Itemid=2&lang=sr.

[271] See the Rules of Procedure of the Council of Peoples of the Republika Srpska, available at: http://www.vijecenarodars.net/materijali/poslovnik-bos.pdf.

[272] Personal interview with one delegate from the ranks of 'Others' in the House of Peoples, Parliament of the Federation of Bosnia and Herzegovina, August 2010.

[273] E-mail communication with a delegate from the Council of Peoples of the RS, from the ranks of 'Others', August 2010.

[274] The *Sejdić-Finci* judgment, *supra* note 1, the dissenting opinion of Judge Mijović. See also the Venice Commission, Amicus Curiae Brief in the Case of *Sejdić and Finci v. Bosnia and Herzegovina*, CDL-AD(2008)027, 22 October 2008, par. 37.

heterogeneous category function as individuals and are completely marginalised as regards the collectivist mechanisms for the operation and decision-making of this body? Or should it follow the model of the Council of Peoples of the Republika Srpska, where delegates who are 'Others', thanks to the fact that they have their own caucus, have a somewhat better status? Or would it be prudent to take an additional step and introduce a third principle, according to which delegates from the ranks of 'Others', or at least minorities, in the House of Peoples of the Bosnian Parliament, would not only have their own caucus but also the opportunity of actively protecting their specific vital interests?[275]

This latter proposal is not new,[276] and is worth considering in future constitutional reform. The objections most frequently made to it consist of the thoroughgoing heterogeneity of the 'Others' and the inevitable difficulties that would arise during efforts to agree on questions of vital national interests made by delegates from this constitutional category.[277] Or else it is urged that such a solution would hamper the functionality of the legislative bodies and open the way for additional blockading and abuse of the decision-making process. However, it should be borne in mind that the vital interests of the constitutional peoples are themselves not a given absolute, but merely a topic for debate and resolution among the respective caucuses of delegates. As one of our interlocutors points out, negotiations on confirming the presence of vital national interests are in concrete cases often extremely complex, since the delegates in the caucus of a constituent people commonly have different party allegiances.[278]

[275] For example, see Vehabović and Zaimović-Kurtović (2010, p. 14), who advocate for the introduction of mechanisms with the potential to protect the collective rights of 'Others', including the possibility of a veto: "Without the potential for a caucus of 'Others' to participate on an equal basis in the decision-making processes, including the right of veto, until the Constitutional Court of Bosnia and Herzegovina decides the issue, there will be no possibility of enabling equal participation by this group in the government of the state, and thus none in the protection of their rights, but instead they will serve in practice merely as 'additional votes' in the House of Peoples." Moreover, our interviews with national minority representatives (August-September 2010) show that a similar solution has its advocates also among the leaders of national minority organisations and advisory bodies.

[276] In favour of this solution see also Dino Abazović, in the article titled 'On Consociation (1): By Consociation against Consociationalism.' *Puls demokratije* (January/February 2007), available at: http://www.pulsdemokratije.net/index.php?a=detail&l=bs&id=170.

[277] A representative of national minorities in Bosnia and Herzegovina, for example, has also, in an interview held in August 2010, noted specific reservations with regard to this proposal.

[278] Personal interview with two delegates of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, August 2010.

If moreover, in theory at least, the bare *possibility* of a veto (but not its already extensive constitutional definition and over frequent use), would have a constructive, moderating influence on the political process,[279] then placing this tool in the hands of delegates from the ranks of 'Others' could have additional impact in reducing inter-ethnic tensions.

15.2. THE KEY QUESTION: THE POWERS OF THE HOUSE OF PEOPLES OF THE BOSNIAN PARLIAMENT

At this point we should remind ourselves that the problem noted above is only a problem if delegates who are 'Others' actually have a role in the functioning of the House of Peoples. We should recall the position of certain HDZ officials (but not of the party itself): This is one of the rare stances, if not the only one, to emerge on the Bosnian political scene since the *Sejdić-Finci* judgment which does *not* envision the introduction of 'Others' to the House of Peoples of the Bosnian Parliament.

According to an HDZ official whom we interviewed, the structure and powers of the House of Peoples should be maintained at the current level, while the question of 'Others' should be resolved by increasing the competences and role of the Council of National Minorities of BiH.[280] If we review the ECtHR's judgment in the *Sejdić-Finci* case, this proposal would, at first sight, appear unacceptable, since condemnation of the exclusivist practices surrounding the election of delegates to the House of Peoples is among the most important features of the decision.

As for that part of the *Sejdić-Finci* judgment which deals with the House of Peoples, the ECtHR takes into account the significant powers that this House enjoys under the Bosnian Constitution. The court reiterated its earlier stance, that a 'legislature' from Article 3 of Protocol No.1 of the Convention, should be understood in accordance with the constitutional structure, tradition and specific features of each state, and that the Article referred to, without exception, applies to all chambers of parliament whose MPs are chosen via direct election.[281]

The system of delegation (i.e. indirect elections) could, accordingly be subjected to a different legal regime, and states could have greater freedom in deciding on the

[279] See Lijphart 1977, p. 37.

[280] Personal interview, August 2010.

[281] Judgment in the *Sejdić-Finci* case, *supra* note 1, para. 40.

modalities of implementation of such a system.[282] However – and this is of particular importance in our perspective – by confirming the existence of discrimination in the process of electing delegates to the House of Peoples of the Bosnian Parliament, the ECtHR draws attention to the fact that, though the case deals with a parliamentary chamber whose structure is not constituted by direct election, 'the distribution of its legislative powers is a key factor in this issue' - that is, the existence of discrimination with regard to access to the House of Peoples.[283]

Judge Mijović based her dissent with this part of the decision on the following arguments: the House of Peoples of the BiH Parliament is not covered by the Convention since it is an indirectly elected body whose powers are precisely the same as those of the House of Representatives. Thus, to speak of discrimination in this particular case is only justified if the same standards also apply in cases of inherited functions in the parliamentary chambers (exemplified by the House of Lords in the Parliament of Great Britain[284]), or to those where MPs act on the basis of holding a public post (for example, the German Bundesrat).

On the other hand, as Judge Mijović pointed out, since the House of Peoples has exactly the same powers as the House of Representatives, political representatives from the ranks of 'Others' can exercise their right to participation in the legislative process via the lower chamber, which has equal weight when it comes to passing decisions. The argument of Judge Mijović may not seem particularly convincing, but it should also be noted that the ECtHR's explanation relating to this part of the decision is not detailed enough either.

In states with a bicameral parliament, the upper houses tend to vary considerably when it comes to their competencies as compared to those of the lower houses. A great number of these legislative bodies (for example in Italy, Romania, Switzerland) have the same or similar powers as the lower houses, while in other countries (for example Canada, France or Spain) the upper chamber has far fewer powers than the lower house.[285] Special mention in this context should be made of the House of Lords

[282] See the interpretation of Judge Mijović in her partly dissenting opinion in the *Sejdić-Finci* case, *supra* note 1.

[283] Judgment in the case of *Sejdić and Finci, supra* note 1, para. 41.

[284] Interestingly, one of our interlocutors from the Bosnian political scene (interview conducted in August 2010) referred to the House of Lords as an argument for proving that the current structure of the House of Peoples of the Bosnian Parliament does not need to be changed.

[285] See for example Swenden (2004).

in Great Britain, referred to by Judge Mijović, which is one of the weakest upper chambers in the world, being entirely subordinate to the lower house.[286]

By contrast, the House of Peoples of the Bosnian Parliament is an upper chamber with very considerable powers. Moreover, according to a large-scale comparative analysis made in 1997, apart from the US Senate, the House of Peoples of the Bosnian Parliament is the only upper house in the world that has greater powers than even the lower house.[287] According to Article IV, paragraph 3(c) of the Bosnian Constitution, the House of Representatives and House of Peoples of the BiH Parliament play an equal part in the passage of *all* legislation, but the House of Peoples has, in addition, exclusive competency when it comes to procedures for protecting the vital national interests of the constituent peoples.[288]

If the unusually significant role of the House of Peoples of the Bosnian Parliament is a key factor in the discrimination against 'Others', then it should be possible to implement the *Sejdić-Finci* judgment simply by reducing the competencies of the House of Peoples without having to incorporate the category of 'Others' into its structure.[289] In this way the powers of this house would be reduced to standard areas of minority rights protection – for example issues of identity, language, culture, and equal political participation for all the constituent peoples.[290] Additionally, in such a scenario the Council of National Minorities of BiH would act as a separate body with similar powers, but without the right to veto when it comes to decision-making. This would result in a more consistent treatment of ethno-cultural groups in the constitutional and political system of Bosnia and Herzegovina.

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[286] According to Parliament Acts of 1911 and 1949, respectively, the House of Lords can only act as a delaying factor in the passage of legislation. According to some interpretations, this role can be very significant, since the House of Lords is not necessarily subject to control by the party in power. Thus, the House of Lords in October 2008 successfully defeated a proposal of the government to prolong the period of detention without trial for suspected terrorists, which had passed through the House of Commons (See Nicholas Watt, "Brown abandons 42-day detention after Lords defeat", *Guardian*, 13 October 2008, available at: http://www.guardian.co.uk/politics/2008/oct/13/terrorism-uksecurity1). However, these powers of the House of Lords cannot be compared to the powers currently enjoyed by the upper house of the Bosnian Parliament. For a useful typology of upper houses worldwide, see Patterson and Mughan 2001.

[287] Cited by Nystuen 2005, p. 165.

[288] Article IV.3(e) and IV.3(f) Constitution of Bosnia and Herzegovina.

[289] Compare the Venice Commission, *Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina*, CDL-AD(2006)019, 12. June 2006, paras. 26–27.

[290] Cf. Bieber 2004, pp. 21–22. See also the Venice Commission, *Opinion on the Constitutional Situation, supra* note 5, para. 33.

Bearing in mind the case of Belgium, as already discussed, where the so-called 'alarm bell' procedure is reserved only for members of the Flemish and French linguistic groups, and also the explanation provided in the *Sejdić-Finci* judgment, no matter how scanty, a constitutional intervention of this type might be acceptable to the Committee of Ministers of the Council of Europe, which oversees execution of the judgment.

However, the first problem that then meets us is the absence of clear guidelines from the relevant European bodies that monitor and oversee the execution of the judgment in this particular case. The Venice Commission, for example, has reviewed possible reform alternatives for the Bosnian Parliament in the light of their potential to bring about what the Venice Commission considers the ideal outcome: complete dissolution of the House of Peoples and the transfer of its veto procedure to the House of Representatives.[291] In the view of two representatives of the international community in Bosnia and Herzegovina with whom we spoke, it is difficult to speak of the substance of constitutional changes at this moment since the Committee of Ministers of the Council of Europe has the final word on whether a particular solution for executing the judgment is satisfactory.[292] This also highlights the additional problem of the *ex post facto* approach, and the absence of the more clear *ex ante* criteria for executing the judgment.

Another problem arises, moreover, in the realm of *realpolitik*: Weakening a government body which is one of the most important – if not key – points of post-conflict balance of powers between the entities and the constituent peoples, does not seem as a particularly realistic option, given the current Bosnian political situation. However, this is rather surprising, as the so-called 'April Package' and *de facto* the Butmir package of constitutional changes[293] did in fact envisage precisely this solution – preserving the BiH Parliament's House of Peoples as a chamber of the constituent peoples, but reducing it to a body for the protection of vital national interests of the three dominant ethno-cultural groups in Bosnia and Herzegovina.[294] In accordance with such an intervention, this chamber would cease to be a legislative body in terms of the

[291] The Venice Commission (*Opinion on the Draft Amendments, supra* note 289, para. 22) also hailed the option of maintaining the current structure but reducing the powers of the House of Peoples as an important step towards this goal.

[292] Personal interviews, held in the period August-October 2010.

[293] See the explanation given in the text under *supra* note 80.

[294] According to Amendment II, Item 8 of the April Package, the House of Peoples would additionally take part in adopting constitutional amendments and in the procedure of (indirectly) electing members of the Presidency of Bosnia and Herzegovina.

ECHR , but it would, very importantly, continue to serve as a safeguard for the balance of collective political interests among the constituent peoples.[295]

Given the ever louder statements heard particularly from the Republika Srpska that the April Package of constitutional changes is an irrevocably lost opportunity, the alternative is to replicate the experience of the Entities. This would involve including delegates from the ranks of 'Others' in the House of Peoples of the Bosnian Parliament, and possibly giving them a better position than their colleagues in the Entity House or Council of Peoples. In a constructive cooperation with a strengthened Council of National Minorities of BiH,[296] this caucus of delegates of the Bosnian Parliament House of Peoples could lay the foundations for a more active role in the state legislative process. In the opinion of one delegate from the category of 'Others', such a synergy already exists in the legislative organs of the RS, where it can be said that the activities of the Council of National Minorities of Republika Srpska have to some extent also reinforced the position and functioning of the caucus of delegates from the ranks of 'Others' in the RS Council of Peoples itself.[297]

15.3. MECHANISMS FOR ELECTING DELEGATES TO THE HOUSE OF PEOPLES IN THE BOSNIAN PARLIAMENT

The latest aspect of the complex issues surrounding reform of the House of Peoples of the Bosnian Parliament which we will now consider here concerns the election of delegates. It should be noted that by far the least attention has been paid to this issue in the various public positions and proposals put forward for implementation of the *Sejdić-Finci* judgment.

The current system of electing delegates from the Republika Srpska (five Serbs) to the House of Peoples is indirect: they are put forward by the People's Assembly of the RS.

[295] The Venice Commission, for example, thinks that democratic principles in this domain should be applied in a way that does not disturb the balance between the three constituent peoples, which is still a necessity in Bosnia and Herzegovina. See the *Opinion on the Draft Amendments*, *supra* note 289, paras. 22 and 27.

[296] Naturally, we do not presume that all delegates who are 'Others' will necessarily be minorities, but this method of coordinated action will in any case be of use to both actors, regardless of the actual structure of the possible caucus of 'Others'.

[297] E-mail communication with a delegate in the Council of Peoples of the Republika Srpska, and with representatives of the Council of National Minorities of the People's Assembly of the Republika Srpska, August-September 2010.

Meanwhile, the process of delegating members from the Federation of Bosnia and Herzegovina (five Bosniaks and five Croats) is doubly indirect:[298] from the cantonal assemblies, via the House of Peoples of the Federation of Bosnia and Herzegovina Parliament, to the House of Peoples of the Bosnian Parliament. As we pointed out earlier in this analysis, the State and both Entity advisory bodies for national minorities in BiH, motivated by the unsatisfactory practice within the Entity parliaments (since delegates who are 'Others' do not in fact represent 'Others', nor do they cooperate with them; rather they are officials of their own parties, which often exploit and manipulate their identity for their own purposes) have put together a joint package of constitutional amendments. According to this document, four delegates belonging to 'Others' in the House of Peoples should be put forward by the advisory bodies themselves, and not by the Entity parliaments – that is, the political parties.[299] This approach is not unknown in contemporary practice.[300] A completely identical formula is stressed by the various representatives of advisory bodies for the protection of minorities: "We want representatives, not members of national minorities."[301] This also eloquently illustrates the distinction between descriptive and substantive representation in the BiH context.

As a solution this approach can of course be criticised. Firstly, it is a fact that advisory bodies which are not elected by citizens cannot bestow the necessary legitimacy upon their delegates in the House of Peoples of the BiH Parliament as the Entity parliaments can. Additionally, this would mean that 'Others' would have double representation in the House of Peoples: via the individuals put forward by advisory bodies, and also via the delegates chosen from the Federation of Bosnia and Herzegovina and the Republika Srpska, since 'Others' are also able to cast their vote for MPs in the Entity and cantonal assemblies.[302] However, this proposal has the merit of being innovative and also strongly indicative of the Bosnian context, since it demonstrates the strong political stance of minority organisations and advisory bodies. Moreover, it outlines the implicit monopoly of the category 'Others' by national minorities when it comes to future participation in the work of the House of Peoples of the Bosnian Parliament. This is not surprising when

[298] See Pobrić 2000, pp. 261–263.

[299] Council of National Minorities of Bosnia and Herzegovina, Proposed Amendments to the Constitution of Bosnia and Herzegovina, *supra* note 68.

[300] As we have already noted, in Belgium, for example, members of the Senate from the German community are appointed by the parliament of this community.

[301] Personal interviews and e-mail communication, August 2010.

[302] Cf. the Venice Commission, *Report on Dual Voting for Persons Belonging to National Minorities*, CDL-AD (2008)013, 16 June 2008.

we remember the already discussed international minority rights standards and the experience of other countries in the realm of political participation of minorities. For example, during the former term of the House of Peoples of the Federation of Bosnia and Herzegovina Parliament, some delegates from the ranks of 'Others', according to their own perceptions, represented either 'Bosnians and Herzegovinians', "all those who do not define themselves ethnically", or "people from mixed marriages."[303] However, according to the above mentioned proposal of the advisory bodies for national minorities, the House of Peoples of the Bosnian Parliament would have to represent and protect only the interests of the constituent peoples and national minorities.[304]

It should of course be recalled that the proposal of the Council of National Minorities of BiH departs in a number of ways from dominant European views and practices, which envisage the integration of minorities into political life taking place via mainstream political parties.[305] One of our interlocutors from the Council of National Minorities of the Federation of Bosnia and Herzegovina noted that advocating for the positions and interests of parties is a completely legitimate option for delegates belonging to 'Others'. Moreover, it is a fact that members of the category of 'Others' in government structures who are active in political parties can also be of assistance to the 'non-constituent groups'.[306]

However, this method of integration is handicapped in the Bosnian context since most parties have either a specifically ethnic label, or at least an exclusionary orientation towards one of the constituent peoples. Thus it seems that the general ethnicisation of Bosnian politics offers a sufficiently forceful argument for national minorities to insist on further, more consistent ethnicisation and 'essentialisation' of Bosnian politics, which would imply that the descriptive and substantive representation of collective identities should coincide with each other.

Nevertheless, international standards and comparative experience should always be considered in the specific context of BiH as a multinational state. In this regard, along with a series of potential practical problems regarding the establishment and functioning of the future reformed House of Peoples of the Bosnian Parliament in

[303] Personal interviews with delegates from the ranks of 'Others' in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, August – September 2010.

[304] Personal interview with a representative of minorities, August 2010. Statement of Vehid Šehić, supra note 77, and accompanying text.

[305] See the Venice Commission, *Report on Electoral Rules and Affirmative Action…, supra* note 169.

[306] Personal interview, August 2010.

accordance with the above rights, an additional legal problem is raised concerning the following: the issue of discrimination in the context of the House of Peoples of the Parliamentary Assembly of BiH cannot be reduced merely to the issue of national minorities – it is, rather, the problem of 'Others'. Suppose that candidacy for the House of Peoples of the Bosnian Parliament is, in a modified system, conditional not on membership to one of the three constituent peoples, as is currently the case, but on membership to one of the twenty ethno-cultural identities defined by the Constitution of Bosnia and Herzegovina and the Law on the Protection of the Rights of Members of National Minorities in Bosnia and Herzegovina,[307] as the recognised collectivities of this country. What would then prevent any person of Bosnian, Chinese or Malaysian identity who is also a citizen of Bosnia and Herzegovina from following the example of Sejdić and Finci and filing a complaint to the ECtHR alleging discrimination in accessing the House of Peoples of the Bosnian Parliament? The outcome, as far as can be seen, would be the same – that is, if the powers of the House of Peoples were not reduced.

Thus we are forced to the conclusion that the future House of Peoples of the Bosnian Parliament, if the imperative is to maintain a selective principle regarding the categories of ethno-cultural identity represented in this House, should resemble the Council of Peoples of the Republika Srpska rather than the House of Peoples of the Federation of BiH Parliament. But if the imperative of preserving the current powers of the House of Peoples of the Bosnian Parliament is adhered to, then it is vital to ensure mechanisms for the participation of 'Others' as a heterogeneous category covering all collective and individual identities beyond the three constituent peoples. In other words, the model of the House of Peoples of the Federation of BiH Parliament should be replicated, with all its contradictions, inequalities and paradoxes, but at least without obvious legal problems related to its structure and formation.

Of course, if we look at the RS Council of Peoples, a combined approach is possible, which would involve reducing the powers of the House of Peoples of the Parliamentary Assembly of BiH and also incorporating delegates from the ranks of 'Others' into its structure. But, judging by the *Sejdić-Finci* judgment and also the stance of the Venice Commission, this solution, legally speaking, is not absolutely necessary.[308] Moreover, if a group of delegates who belong to 'Others' in the House of Peoples of the Bosnian Parliament would not be able to protect vital interests,

[307] See *supra* note 97.

[308] Venice Commission, *Opinion on Different Proposals …, supra* note 62, paras. 26 and 27.

then the question would arise as to what kind of role they can play at all in a body dedicated exclusively to protecting the collective interests of the constituent peoples.

But, apart from reproducing the model of the Parliament of the Federation of Bosnia and Herzegovina, even a paradoxical solution such as this cannot be a priori excluded from consideration. These two possible models should be kept in mind, since the *Sejdić-Finci* judgment offers specific guidance only on Article 14 taken in conjunction with Article 3 of Protocol No. 1 of the Convention (that is, on discrimination with regard to participation in direct parliamentary elections).

Since the ECtHR confirmed the existence of discrimination under those particular articles of the Convention in the *Sejdić-Finci* judgment, the Court did not find it necessary to examine the allegations of the applicants that their rights under Article 1 of Protocol No. 12 of the Convention, which introduces a general prohibition of discrimination, were also violated (as it did not examine allegations of a violation of Article 3 of Protocol No. 1 taken alone either). Given the lack of relevant jurisprudence, the content and reach of this Protocol is not sufficiently clear.[309] In other words, we are forced to ask whether reform of the upper chamber of the Bosnian Parliament that would ensure the maintenance of its structure and role as the 'house of constituent peoples', or which would provide for equal rights of access to this House to all, while reserving the right of veto only to those delegates belonging to the constituent peoples, could actually be said to be based on an objective and reasonable justification.[310] The constitutional tradition of Bosnia and Herzegovina, the complex post-conflict situation, and the need to safeguard the balance of power between the constituent peoples, are certainly some of the possible elements to justify such a differential treatment of various ethno-cultural collectivities in the House of Peoples of the Bosnian Parliament.[311] But, at least in this phase, and in the absence of clear guidelines either from the ECtHR or from the Committee of Ministers of the Council of Europe, only speculation is possible.

[309] Judgment in the case of *Sejdić and Finci, supra* note 1, para. 51.

[310] This relates to additional rights not envisaged by the Convention, but by state laws and regulations, and thus covered not by Article 14, but by Article 1 of Protocol No. 12 to the Convention.

[311] Cf. the Venice Commission, *Opinion on Different Proposals … supra* note 62.

16. BETWEEN ETHNIC AND TERRITORIAL FEDERALISM

During this analysis we have on several occasions observed that one of the greatest problems of Bosnian society and politics is that the politically relevant and socially dominant identity is primarily ethnic in character. If citizen A 'belongs' to one of the three constituent peoples, this gives him or her specific rights throughout the *whole territory* of Bosnia and Herzegovina. This is, of course, the core value from which the notion of 'constituent peoples' throughout the territory of Bosnia and Herzegovina springs.[312]

This particular approach to the *politicisation of identity* contrasts profoundly with multicultural nations such as Switzerland and Canada, which apply a *territorial*, rather than ethnic principle.[313] The territorial principle is often linked with theories of citizenship and liberal democracy, whose basic principle is the *equality of all citizens* regardless of their personal characteristics. In the political context, and particularly in the scope of the electoral system and representation in parliament, this principle is summed up in the rule 'one person, one vote.'

But even in 'old' liberal democracies this principle is not absolute. In federal states we see the rule 'one federal unit, one vote', but this is primarily reflected in the structure of the second chamber of the parliament (in Switzerland and the United States, for example, and to some extent in Germany). Thus in the Swiss Council of Cantons the vote of one citizen from Canton Uri (with a population of around 35,000) has the same weight as the vote of 36 citizens from Canton Zurich (with a population of 1.26 million).

[312] "However instinctive it may be to sympathise with the judgment of the Constitutional Court of Bosnia and Herzegovina of 2000 (case U 5/98) on all three peoples being constituent on the entire territory of Bosnia and Herzegovina, this judgment incontestably supports an essentialist vision of group identities, since it gives priority to the collective rights of peoples. These are, moreover, highly problematic from the point of view of liberal democracy, which is of course based primarily on the rights of the citizen as an individual." (Nenad Stojanović, "Road to the Integration of Disintegration of Society: State Symbols in Bosnia and Herzegovina," *Puls demokratije*, December 2007, available at: http://www.pulsdemokratije.ba/index.php?id=640&l=bs).

[313] Karl Renner advocated for federal organisation on an ethnic (or 'personal') principle at the turn of the last century. See Renner 1995 [1899]. Today most authors, including those who specifically advocate for multiculturalism, such as Rainer Bauböck (2001) and Will Kymlicka (1995), challenge this approach (see the quote from Bauböck that follows).

A similar situation can be found in the US Senate: the vote of one citizen of Wyoming (with a population of 453,000) has the same weight as that of 66 citizens of California (which has 30 million inhabitants according to figures from 1990).[314] It should be noted that the US Senate and the Swiss Council of Cantons have more or less the same (or, in the case of the Senate, greater) powers in relation to their lower houses, in which (with minor departures) the principle of 'one person, one vote' is respected. Thus here we have a clear case of a considerable violation of this liberal rule. Some federal states try to reduce the degree to which the principle is violated in this context, including 'ponderation' of federal units, meaning that greater units have a greater number of seats than smaller units in this chamber. This is the case in Germany, in whose upper chamber (the Bundesrat) the larger states (Länder) have six votes, medium sized ones have four, and the smaller three votes.[315]

In other words, in federal states like Switzerland and the United States, the territorial principle is applied as a combination of liberal (equality of all citizens) and federal (equality of all federal units) principles. In states which are not federally structured, such as France or Portugal, only the liberal principle applies. This is one of the reasons why in these states we find only one chamber of parliament (Portugal) or if there is a second chamber (as in France), it does not reflect the territorial organisation of the state, and its powers are explicitly less extensive than those of the lower house.

Let us return, however, to the case of Bosnia and Herzegovina. We shall see that analysis of the structure of both parliamentary chambers at the state level shows that neither chamber fully respects either the liberal or the territorial principle.

The liberal principle should be reflected in the lower chamber of the Bosnian Parliament, the House of Representatives. This is, however, only partly the case. On one hand, a *territorial quota*, without regard to ethnicity – thus theoretically closer to the liberal than to the ethnic principle – applies as 33% of the delegates of this House come from the Republika Srpska, and 66% from the Federation of Bosnia and Herzegovina. This division reflects, to some extent, but not fully – from the perspective of the principle of 'one person, one vote', the demographic situation of Bosnia and Herzegovina (where approximately 63% of inhabitants are located in the

[314] Stepan 1999.

[315] See also the difference between the *demos-constraining* federations (those having a negative effect on the *demos*) and those that are more *demos-enabling* (that is, have a more positive effect on the *demos*), in A. Stepan (Ibid.). A. Stepan insists that the German federal system is more *demos-enabling* than that of the United States (Ibid., p. 24).

Federation, and around 37% in the Republika Srpska). Thus this model is closer to the federal principle with ponderation of federal units.

If it were not for this ponderation, each federal unit ('Entity') would have the same number of representatives. This would mean, of course, that the vote of a citizen from Republika Srpska would have greater weight than that of a citizen from the Federation of Bosnia and Herzegovina. Accordingly, the current situation in Bosnia and Herzegovina is closer to that of the German Bundesrat. The reason, however, why we maintain that the lower chamber of the Bosnian Parliament does not respect the principle 'one person, one vote' is because the federal quota is fixed once and for all by the Constitution, and is not flexible. If, for example, the number of citizens in the RS were to rise in relation to the number of inhabitants of the FBiH, then the citizens of the RS would not be proportionally represented in the House of Representatives of the Bosnian Parliament.[316]

Full respect for the liberal rule of 'one person, one vote' is obvious, for example, in the lower chambers of parliament in Switzerland and the United States. In the lower chamber of the Swiss parliament every electoral unit (which coincides territorially with the cantons) receives a defined number of seats according to the number of inhabitants. Every ten years after a census, a new calculation is made regarding the allocation of seats in order to take demographic fluctuations into account. Thus after the 2000 census , the number of delegates from Canton Bern fell from 27 to 26, with the difference allocated to Canton Vaud, whose number of delegates rose from 12 to 13. The only exception to this principle is that every electoral unit (or canton) must have at least one seat in the lower house, regardless of the number of inhabitants.

That states like Switzerland and the United States are based on territorial rather than ethnic federalism is also proven by the structure of the upper houses of parliament. Each federal unit (canton or state) has two votes in this legislative body. We do not necessarily want to call this system 'good' or desirable; on the contrary, the lack of balance between large and small cantons or states in this context is probably too great, and should be modified. But what we would point to in these models is the

[316] The case of Lebanon shows that it is both wrong and dangerous to set a 'once and for all' quota in a Constitution without taking demographic fluctuations into account. The quota of 6:5 defined by the National Pact of 1943 (six Christians in parliament for every five Muslims) helped to cause the civil war of 1975–1990, since Christian Lebanese in the 1960s refused to allow changes to this quota that would have acknowledged the rising number of Muslims in Lebanon. See Kerr 2005.

profound difference between this type of liberal federalism and federalism based on ethnic differences, as is the present case in Bosnia and Herzegovina.

For when we survey the structure of the second chamber of the Bosnian Parliament, the House of Peoples, it is clear that it involves direct implementation of the ethnic principle (one people, one vote), accompanied also by the territorial principle (ten delegates from the FBiH, five from the RS), but overwhelmingly the principle of *ethnic quotas*: each constituent people, regardless of population size, has five delegates in the House of Peoples. A similar approach is adopted when it comes to the structure of the Presidency of Bosnia and Herzegovina, which includes the federal principle (with ponderation of the federal units or Entities) - while the Republika Srpska has one seat in the Presidency, the Federation has two. The combination of these two principles brings about the situation that Serbs from the Federation, just like Croats and Bosniaks from the Republika Srpska, cannot stand for election either to the Presidency or to the House of Peoples of Parliamentary Assembly of BiH. This is illogical in the eyes of many, but is not incomprehensible, since Bosnia and Herzegovina is a model of *ethnic federalism*, combining both the ethnic and the federal approaches,[317] and often losing sight of the liberal principle (as the ECtHR judgment in the *Sejdić-Finci* case has shown). In countries like the United States and Switzerland, on the other hand, we see a combination of the liberal and federal principle, and so for the purposes of this study we can call them *liberal federations*.

Although the literature surrounding the topic often claims that the ethnic federalism of Bosnia and Herzegovina follows the tradition of ethnic federalism of former Yugoslavia,[318] we do not share this opinion.[319] For example, the Constitution of the former Yugoslavia

[317] See Pobrić 2000, pp. 320–324. Roeder (2009) also counts Dayton Bosnia and Herzegovina among the ethno-federations, along with Belgium, Canada, Spain and others.

[318] See for example Woelk 2008, p. 91.

[319] Henry E. Hale offers a similar definition of 'ethno-federalism': "Ethnofederalism is a federal system of government in which federal regions are invested with ethnic content. Yugoslavia was an obvious example, with Slovenia being designated as a homeland for ethnic Slovenes, Croatia for Croatians, and so on." (Hale 2008, p. 64). Other authors, Alain G. Gagnon for example, speak of 'multinational federalism', "which provides for equitable measures that ensure the same possibilities for achievement to the members of every national community in the federations." (Gagnon 2010, p. 5). Norman similarly notes that "[m]ultinational federations are intended to 'accommodate the desire of national minorities for self-government', principally by creating a province (or provinces) in which one or more minority groups can constitute a clear majority of the citizens and in which they can exercise a number of sovereign powers. By contrast, a territorial federation is conceived of as a 'means by which a single national community can divide and diffuse power', perhaps accommodating a certain amount of socio-economic diversity at the same time." See Norman 2006, pp. 87–88.

dating from 1946 requires that the upper house of the federal parliament is constituted by thirty representatives from each republic, twenty from Vojvodina and fifteen from Kosovo.[320] This is far closer to the classic model of territorial federalism, no matter whether this or that republic or autonomous region served *de facto* as a proxy for this or that people (an example would be Slovenia for the Slovenian people). If Bosnia and Herzegovina were to follow this principle, then its upper chamber should be composed of, for example, ten delegates from the Republika Srpska and ten from the Federation of Bosnia and Herzegovina (one from each canton), without any explicit reference to ethnic structure of the chamber. Of course, this system would also allow for an adequate ponderation of the federal units in order to fully reflect the number of citizens in each.

The combination of the federal and ethnic principle can be found in the structure of the second chamber of the Belgian parliament, the Senate. But the point should be made that, unlike Bosnia and Herzegovina, the United States and Switzerland, the Belgian Senate does not have the same powers as the first chamber.

The following table provides a schematic overview of the different federal options that we have just reviewed:

Table 3: Examples of different types of federalism

Equality of every citizen (liberal approach)	Equality of federal units (federal approach)	Equality of ethnic groups (ethnic approach)
Switzerland, United States (lower house)	*Total equality of federal units:* Switzerland, United States, Brazil (upper house) *Ponderation of federal units:* Bosnia and Herzegovina (lower house), Germany, India (upper house)	Bosnia and Herzegovina (upper house)
	Belgium (upper house) Bosnia and Herzegovina (Presidency)	

The negative consequences of a federal system not based exclusively on the liberal-federal principle (involving only territorial, not ethnic, quotas) are best expressed by Bauböck:

> *Prima facie* it appears that non-territorial conceptions of federalism should be preferable because they seem to allow for more flexibility. Associations of persons can be both nested and overlapping. A Brussels citizen of mixed origin may have a triple identity as a member of

[320] See for example Woelk 2008, p. 32.

both the Flemish and Francophone language community and the Belgian federal polity. However, this is once more a superficial view if it is taken as an answer to conflicts over self-government. Voluntary associations in civil society can indeed be self-governing even when they are nested and overlapping. Yet this compatibility ends once associations assume vital functions of government. In a regime of warlords people are taxed and drafted by rival 'authorities', who all consider these persons to belong to their respective overlapping 'constituencies'. A system of legitimate government under the rule of law cannot operate unless there is a clear demarcation of jurisdictions. Non-territorial federalism would therefore have to avoid any overlapping between constitutive groups. This requirement of non-overlapping jurisdictions has much more intrusive consequences for individual liberty if self-government is based on membership rather than territory. Within a liberal democratic federation territorial borders are no barriers for freedom of movement or communication. By contrast, even the most liberal non-territorial federation would have to limit the freedom of individuals who do not fit into one of the constitutive identity groups. As the examples of religious devolution in Israel and of ethnic proportionality in South Tyrol illustrate this is not merely a theoretical speculation.[321]

[321] Bauböck 2001, p. 54.

17. INSTEAD OF A CONCLUSION

Taking into account the problems of ethnic federalism discussed, and bearing in mind the development of international standards of human rights from Renner until today, it is both *desirable* and *possible* to identify a way for Bosnia and Herzegovina to gradually move from ethnic to liberal federation – a federation whose quota system would be of a territorial rather than an ethnic nature. This is desirable particularly since the case of 'Others' shows that the current system is not sustainable, and that any change that fails to address the ethnic principle (for example, if the BiH Parliament's House of Peoples and/or the BiH Presidency expanded by incorporating a quota for 'Others') would fail to address the root cause of the problem. Instead it would represent yet a more substantial step towards sinking into the quicksand of Bosnian 'ethnopolis',[322] from which it would be yet harder for the country to extricate itself.

"Even if the war led to the formation of nigh to ethnically homogeneous areas, the Dayton Agreement can be criticised because it leans too heavily on territorial solutions", wrote Bauböck a decade ago.[323] Today, and particularly after the decision of the Constitutional Court on the constituent peoples being constituent throughout Bosnia and Herzegovina, this claim can be paraphrased as follows: Post-Dayton BiH can be plausibly criticised because it leans too heavily on ethnic, and not on territorial solutions.

Of course, political consensus on the transformation of Bosnia and Herzegovina into a classic territorial federation will not come easily. Moreover, to put forward the issue of transforming Bosnia and Herzegovina into a liberal-territorial federation means opening a true Pandora's box. The moral questions relating to the past war, ethnic cleansing and war crimes as unacceptable mechanisms for creating homogeneous territories for ethnic collectivities are almost inextricably linked to the questions of refugee return, post-conflict reconstruction of the state and society, and the 'technical' considerations relating to criteria and methodology for demarcating the federal units.

[322] See Mujkić 2007.

[323] Bauböck 2001, p. 43.

But we believe that a compromise is possible and that the consistent federalisation of Bosnia and Herzegovina, which would above all be reflected in the upper house of the Bosnian Parliament, is one of the important steps forward in seeking an exit from permanent constitutional crisis in the country. Territorial federalism, as we have already shown in this study, has many faces and potential variants in terms of implementation, while the face of ethnic federalism, according to modern political science, political practice and international human rights law, is almost always and inevitably exclusive and discriminatory.

Thus we come to the heart of the transitional constitutional conundrum in which BiH currently finds itself: Ethnic federalism (with ethnic quotas) in Bosnia and Herzegovina as the ECtHR among others has eloquently pointed out in its *Sejdić-Finci* judgment, is legally problematic while classic territorial federalism (with exclusively territorial quotas) as a current constitutional option is not only morally suspect and politically unrealistic, but is also *de facto* discriminatory and bears the stamp of ethnic domination.

In pursuit of these problems, we cannot lose sight of the ultimate question: How can the current territorial units of Bosnia and Herzegovina gradually become home to overlapping identities, a space for openness and inclusion (as is currently the rule in liberal federations), and not an arena for ethno-cultural domination, as is currently and overwhelmingly the case in Bosnia and Herzegovina? This is a complex and separate question, directly linked to prospects for the implementation of territorial federalism in Bosnia and Herzegovina, and its manifold dimensions should be explored without delays.

Proposals P4 (geometric mean) and P5 (geometric mean plus 7) for reforming the election of the Presidency of Bosnia and Herzegovina demonstrated in the context of this study, and our thoughts on reforming the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina , are in their essence attempts to show that Bosnia and Herzegovina has the potential to move from an ethnic to a liberal federation - taking into account its current transitional status and the socio-political situation of the country. The Constitutional Court of Bosnia and Herzegovina's judgment from 2000 on constituent peoples stands as an important and impressive legal attempt to moderate and eventually annul, by means of institutional multiculturalism, the war-induced ethnic cleansing and the territorial homogenisation of ethnic communities of BiH. This solution might have been the answer to one phase of the post-conflict evolution of the constitutional system of the country. But the judgment of the ECtHR in the *Sejdić-Finci* case, by its complexity and its multiple constitutional and legal implications, shows that

it is already time to seek new and innovative constitutional models for Bosnia and Herzegovina.

This study certainly does not in any way prejudice future constitutional solutions - nor can they be covered by a single analysis - but at least it serves to deepen and expand the existing questions related to the issue of constitutional reform in BiH and possibly raise some novel ones. In doing so, this study above all calls for structured dialogue both in expert circles and among the wider public regarding the multiple aspects of constitutional reform in Bosnia and Herzegovina.

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