

The Strasbourg Court on the Dayton Constitution  
 Judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*,  
 22 December 2009

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INTRODUCTION

On 22 December 2009, the Grand Chamber of the European Court of Human Rights (hereafter: the Court) issued a judgment on the applications filed by two citizens of Bosnia and Herzegovina, Mr Dervo Sejdić and Mr Jakob Finci.<sup>1</sup> It found a violation of their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> and under the Protocols to the Convention. Bosnia and Herzegovina had violated the applicants' rights under Article 14 of the Convention in conjunction with Article 3 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup> and under Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>4</sup>

The judgment is of great interest for two reasons. It is the first case before the Court in which the provisions of Protocol 12 were (successfully) invoked, giving indications as to the nature of the anti-discrimination protection mechanism under this protocol. Moreover, the findings of the Court touch upon the sensitive post-war constitutional settlement of Bosnia and Herzegovina.

The Constitution of Bosnia and Herzegovina (hereafter: the Constitution) was adopted as Annex 4 to the General Framework Agreement for Peace in Bosnia

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<sup>1</sup> ECtHR 22 Dec. 2009, Case No. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina* (hereafter also referred to as: Judgment).

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 *UNTS* p. 221 (hereafter: Convention).

<sup>3</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, 213 *UNTS* p. 262 (hereafter: Protocol 1).

<sup>4</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000, *CETS* 177, 2465 *UNTS*, *Trb.* 2001 No. 18 (hereafter: Protocol 12).

and Herzegovina.<sup>5</sup> The Agreement, concluded at Dayton Air Base in the United States, was signed by three parties: the Republic of Bosnia and Herzegovina, the Republic of Croatia and the then Federal Republic of Yugoslavia, while the two Entities (*see infra*) and the Republic of Bosnia and Herzegovina declared their approval of the Constitution.<sup>6</sup>

In this peculiar procedure of adopting the highest law of the land, demands of democratic legitimacy had to give way to the obvious priority of ending bloodshed and securing peace in the country. As this was primarily in the hands of the belligerent parties of Serbs, Bosniacs and Croats, the constitutional arrangements can be seen as a complex set of strong checks and balances between the three 'constituent peoples', as they are referred to in the Preamble to the Constitution. This was done at the expense of the so-called 'Others', namely the persons that do not belong to any of the three above-mentioned ethnic groups.<sup>7</sup> These 'Others' have been overtly discriminated against by the drafters of the Constitution with the aim of establishing and preserving a fragile cohabitation between the three main ethnic groups. Accordingly, the findings of the Court can be seen as a shift of these inequities in their favour.

## AN OUTLINE OF THE CONSTITUTIONAL SYSTEM OF BOSNIA AND HERZEGOVINA

### *Federal structure*

Pursuant to Article 3 of the Constitution, Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska (hereafter: the Entities). Bosnia and Herzegovina (hereafter also referred to as the

<sup>5</sup> General Framework Agreement for Peace in Bosnia and Herzegovina 1995, UN Doc. A/50/790-S/1995/999 (hereafter: the Peace Agreement).

<sup>6</sup> Cf. P. Szasz, 'The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia', 90 *American Journal of International Law* (1996) p. 301 at p. 304.

<sup>7</sup> As a population census has not been conducted in Bosnia and Herzegovina since 1991, and the ethnic structure has changed enormously since then, it remains difficult to ascertain the ethnic structure of the country. The Act on the Protection of Rights of Persons belonging to National Minorities [*Zakon o zaštiti prava pripadnika nacionalnih manjina*], Official Gazette of BiH 12/03, defines in Art. 3 that the national minorities in Bosnia and Herzegovina, are, among others: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks and Ukrainians. This is therefore a non-exhaustive list of the ethnicities belonging to the Others. Also, anyone who does not declare affiliation with one of the constituent peoples for any reason (for example a child of parents belonging to different constituent peoples) is considered to belong to the Others. This is a system of self-classification and no objective criteria or the condition of acceptance by other members have to be fulfilled (para. 11 of the Judgment, also partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev).

State, when necessary to distinguish it from the Entities) is a federal state, leaning towards two-dimensional federalism. The Entities function as federal units, while constituent peoples play a crucial role in the system of vertical separation of powers. Accordingly, the Preamble to the Constitution declares the Constitution to be determined by 'Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and the citizens of Bosnia and Herzegovina.' This wording is symptomatic of the institutional framework of Bosnia and Herzegovina. It emphasises the importance of belonging to a constituent people rather than that of being a citizen of Bosnia and Herzegovina. Constituent peoples exercise their influence on the decision-making in Bosnia and Herzegovina through their representatives in the Entities' or the State Parliament. As electoral rights are conferred upon members of the constituent peoples living in the Entity where they are predominant (i.e., to Serbs in the Republika Srpska and to Bosniacs and Croats in the Federation of Bosnia and Herzegovina),<sup>8</sup> members of a constituent people outside the Entity are in a comparable position to the Others with regard to political participation at the State level.<sup>9</sup>

The competences of the State are listed exhaustively; all powers not expressly assigned to the State in the Annexes to the Peace Agreement rest with the Entities. State competences are as follows: foreign policy, foreign trade policy, customs policy, monetary policy, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, common and international communications facilities, inter-Entity transportation and air traffic control.<sup>10</sup> According to the 'implied powers' clause in Article V(5)(a) of the Constitution, additional responsibilities necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina can be assumed by the State. However, this clause has not only been worded weakly, but is also unlikely to be ever invoked if one keeps in mind all the possibilities the Entities have to block decision-making (*see infra*).<sup>11</sup>

<sup>8</sup> See text to n. 14, n. 15 and n. 16 *infra*.

<sup>9</sup> In 2006, the Constitutional Court of Bosnia and Herzegovina dismissed as ill-founded the appeal by the *Party for Bosnia and Herzegovina* and its President, a declared Bosniac, who could not run for member of the Presidency in the Republika Srpska. The Constitutional Court also found that Bosniacs living in the Republika Srpska do not have the status of a national minority in the Republika Srpska. (Decision of the Constitutional Court of Bosnia and Herzegovina No. AP 2678/06 of 29 Sept. 2006, Official Gazette of BiH No. 86/07. This decision, as well as other decisions of the Constitutional Court of Bosnia and Herzegovina, are available in English at: <http://ccbh.ba/eng/odluke>).

<sup>10</sup> Art. III(1) Constitution.

<sup>11</sup> Cf. G. Nystuen, 'The Constitution of Bosnia and Herzegovina: State versus Entities', 4 *Revue des Affaires Européennes* (1997) p. 394 at p. 401.

*System of government*

The Constitution envisages five principal institutions: the Parliamentary Assembly, the Presidency, the Council of Ministers, the Standing Committee on Military Matters and the Central Bank.<sup>12</sup>

The Parliamentary Assembly consists of two chambers: the House of Representatives and the House of the Peoples. They have equal legislative powers. Pursuant to Article IV(3)(c) of the Constitution, all legislation requires the approval of both chambers.<sup>13</sup> Two thirds of the forty-two members of the House of Representatives are elected from the territory of the Federation and one third from the territory of Republika Srpska.<sup>14</sup> The fifteen delegates to the House of Peoples are indirectly elected: five of them are Serbs from the Republika Srpska, selected by the National Assembly of Republika Srpska, while five Croat and five Bosniac delegates from the Federation of Bosnia and Herzegovina are selected respectively by the Croat and Bosniac delegates to the House of Peoples of the Federation.<sup>15</sup> Ethnic affiliation with one of the constituent peoples is the prerequisite to stand for elections to the House of Peoples; within the House of Representatives, it is the prerequisite to be selected to chair the chamber: each chamber selects from its members one Serb, one Bosniac and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.<sup>16</sup>

The House of Peoples has been dubbed the ‘veto chamber’<sup>17</sup> as a majority of each of the constituent peoples’ delegates has the right to declare a proposed decision of the Parliamentary Assembly to be destructive of the vital interest of the constituent peoples they represent. Such a declaration almost inevitably trig-

<sup>12</sup> It should be noted that some other institutions of Bosnia and Herzegovina were also foreseen in the other Annexes to the Peace Agreement.

<sup>13</sup> As a general rule with possible exceptions, legislative proposals received by the Parliamentary Assembly are first read in the House of Representatives and then in the House of Peoples. (Art. 94 Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina [*Poslovnik Doma naroda Parlamentarne skupštine Bosne i Hercegovine*], Official Gazette of BiH, 33/06, 41/06, 91/06, 41/07). Both chambers have right of amendment, and should the chambers fail to adopt a piece of legislation in identical wording, a Joint Commission is convened to find a possible compromise. Should its attempts fail, the piece of legislation is not adopted: none of the chambers has the power to adopt it on its own. (Arts. 122 and 123 Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina [*Poslovnik Predstavničkog doma Parlamentarne skupštine Bosne i Hercegovine*], Official Gazette of BiH, 33/06, 41/06, 81/06, 91/06, 91/07, 87/09).

<sup>14</sup> Art. IV(2) Constitution.

<sup>15</sup> Art. IV(1) Constitution.

<sup>16</sup> Art. IV(3)(b) Constitution.

<sup>17</sup> Partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev.

gers a reconciliation procedure and is very likely to block the adoption of the decision in question.<sup>18</sup>

The general rule for adoption of decisions in both chambers is the majority of present and voting representatives. However delegates and members have to strive for the majority to include at least one-third of the votes of delegates or members from each Entity.<sup>19</sup>

The Presidency consists of three members, each belonging to one of the constituent peoples. Members are directly elected for a four year term: the Bosniac and the Croat member from the territory of the Federation and the Serb member from the territory of Republika Srpska. The chairmanship of the Presidency rotates among its members yearly.<sup>20</sup>

The Presidency can be seen as both a (collective) head of state and head of the executive branch. It performs some of the typical tasks of a head of state, such as appointing ambassadors and international representatives. However, it also executes the decisions of the Parliamentary Assembly.<sup>21</sup> Ambiguously, the Constitution provides that each member of the Presidency has civilian command authority over armed forces. Members of the Presidency select and are by their function members of the Standing Committee on Military Matters.<sup>22</sup> The executive power, however, is shared with the Council of Ministers, that is responsible for 'carrying out the policies and decisions of Bosnia and Herzegovina' and reporting to the Parliamentary Assembly.<sup>23</sup> The Presidency appoints the Chair of the Council of Ministers; the Chair and the ministers she nominates only take office after an investiture by the House of Representatives; both chambers, on the other hand, possess the power to send the Council of Ministers home by way of a vote of no-confidence.<sup>24</sup>

The Presidency has to endeavour to adopt its decisions by consensus. Only when all efforts to reach it have failed may a decision be adopted by two of its members. The dissenting member may then trigger a Presidential 'vital interest veto'. Depending on the ethnicity of the dissenting member, it is then up to the National Assembly of the Republika Srpska, or to the Bosniac or to the Croat caucus in the House of Peoples of the Federation of Bosnia and Herzegovina to

<sup>18</sup> Art. IV(3)(e) and (f) Constitution.

<sup>19</sup> Art. IV(3)(d) Constitution. A procedure to resolve the situation in which this special requirement is not met is also foreseen.

<sup>20</sup> Art. V Constitution.

<sup>21</sup> Art. V(3)(e) Constitution.

<sup>22</sup> Art. V(5) Constitution.

<sup>23</sup> Art. V(4)(a) Constitution.

<sup>24</sup> Art. V(4)(c) Constitution.

decide whether the adopted Presidency decision is indeed destructive to the constituent people in question.<sup>25</sup>

*Limits to independent decision-making in Bosnia and Herzegovina*

A fact which was only mentioned briefly in the Judgment, but one that is however essential for the general understanding of the Dayton constitutional settlement of Bosnia and Herzegovina is that the institutions of both the State and the Entities, entrusted with decision-making powers by the Constitution, remain controlled and influenced by the international community.

The most powerful limits to independent decision-making were set with the creation and development of the office of the High Representative, foreseen by Annex 10 to the Peace Agreement (Agreement on Civilian Implementation of the Peace Settlement). His duties are to monitor the implementation of the Peace Agreement, to coordinate the efforts of various civilian organisations and agencies and also to facilitate, if necessary, the resolution of any difficulties arising in connection with civilian implementation.<sup>26</sup> The High Representative is appointed by the United Nations Security Council<sup>27</sup> and is also the Special Representative of the European Union for Bosnia and Herzegovina.<sup>28</sup> The powers of the High Representative extend to adopting binding decisions. At the moment, the two most important powers are his ability to remove civil servants and public officials from office and to impose legislation.<sup>29</sup> The former enabled the High Representative even to remove a member of the Presidency and a president of the Entity, while the latter power not only concerns the adoption or amendment of ordinary laws but extends as far as to the amendment of Entity constitutions.<sup>30</sup> The power to amend the Constitution of Bosnia and Herzegovina, however, is generally considered outside the scope of the powers of the High Representative.<sup>31</sup>

<sup>25</sup> Art. V(2)(c) and (d) Constitution.

<sup>26</sup> Art. II(1) Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina 1995, UN Doc. A/50/790-S/1995/999.

<sup>27</sup> *Ibid.*, Art. I(2).

<sup>28</sup> Council Joint Action of 11 March 2002 on the appointment of the EU Special Representative in Bosnia and Herzegovina (2002/211/CFSP), *OJ* [2002] L 70/7, 13.3.2002.

<sup>29</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005) 004), 62<sup>nd</sup> Plenary Session, Venice, 11-12 March 2005, para. 86.

<sup>30</sup> *Ibid.*, paras. 86-88; para. 17 of the Judgment.

<sup>31</sup> Para. 17 of the Judgment. Pursuant to Art. X(1) Constitution, the power to amend the Constitution is in the hands of the Parliamentary Assembly. For the amendments to be adopted, a two-thirds majority of those present and voting in the House of Representatives must vote in favour. The adoption in the House of Peoples follows the general rules for adoption of decisions (Art. 128(1) Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and

In the first period after the entry into force of the Constitution, the influence of the international community was also ensured by filling several positions in the institutions of Bosnia and Herzegovina (e.g., Governing Board of the Central Bank) with foreign citizens appointed by international institutions.<sup>32</sup> Currently, three out of nine members of the Constitutional Court are still appointed by the President of the European Court of Human Rights.<sup>33</sup> These three members cannot be citizens of Bosnia and Herzegovina or its neighbouring countries.<sup>34</sup> The remaining six members are appointed by the Entity parliaments; four come from the Federation and two from the Republika Srpska. Considering the importance of these positions and the relationship between the constituent people, this in practice entails that even though affiliation with a constituent people is not a legal prerequisite to become a judge of the Constitutional Court, two judges will always belong to each of the constituent peoples. Indeed, Judge Mijović speaks of the Constitutional Court consisting of ‘two Bosniacs, two Croats, two Serbs and three foreign judges’.<sup>35</sup> The jurisdiction of the Constitutional Court covers any dispute between the Entities and between the State and the Entities; the Constitutional Court adjudicates on the compatibility of any Entity law or constitution with the State Constitution; it also exercises ‘appellate jurisdiction over issues under [the State] Constitution arising out of a judgment of any other court in Bosnia and Herzegovina’ and rules on the compatibility of Entity laws with federal law. The combination of provisions on the composition of the Court and on its jurisdiction means that judges belonging to one constituent people can block decisions adopted by an Entity with the support of the foreign judges. In 2000, the two Bosniac and the three foreign judges formed a majority which declared parts of the Entity constitutions unconstitutional, with the Croat and Serbian judges all stating dissenting opinions.<sup>36</sup>

Both of the above-mentioned mechanisms are therefore more than forms of the international community’s control over decision-making in Bosnia and Herzegovina. They also influence the power play between the ethnic groups in Bosnia and Herzegovina. At the Constitutional Court, the judges belonging to

Herzegovina [*Poslovnik Doma naroda Parlamentarne skupštine Bosne i Hercegovine*]; see text to n. 20 *supra*). The Constitution has so far only been amended in order to regulate the status of the Brčko District, a territorial unit under the responsibility of the State, with its territory jointly owned by the two Entities (Amendment I to the Constitution of Bosnia and Herzegovina [*Amandman I. na Ustav Bosne i Hercegovine*], Official Gazette of BiH No. 25/09; Art. VI(4) Constitution).

<sup>32</sup> Art. VII(2) Constitution.

<sup>33</sup> Art. VI(1)(a) Constitution.

<sup>34</sup> Art. VI(1)(b) Constitution.

<sup>35</sup> Partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev.

<sup>36</sup> Partial decision of the Constitutional Court of Bosnia and Herzegovina No. 5/1998-III of 1 July 2000, Official Gazette of BiH No. 23/00.

one of the constituent groups will never be trumped by the judges belonging to the other two peoples if they convince all of the foreign judges to side with them. In this way, legislation endangering one of the constituent peoples (especially legislation at the Entity level) will be quashed if the arguments convince the three foreign judges. On the other hand, adoption of legislation by the High Representative can take the place of legislative action by the State legislature when the latter proves to be inefficient on account of mechanisms protecting the interests of the constituent peoples.<sup>37</sup>

### *Electoral law*

The Constitution contains very few provisions in relation to elections to State institutions, delegating the regulation of elections to a statute passed by the Parliamentary Assembly.<sup>38</sup> The Election Act was adopted by the Parliamentary Assembly in 2001 and has been amended several times since.<sup>39</sup> It provides for a general right of every citizen of Bosnia and Herzegovina who has attained the age of eighteen years to vote and to be elected pursuant to the Election Act.<sup>40</sup> It further lays out the conditions for a citizen to stand for election. As regards the election to the Presidency and the House of Peoples, one of the demands is that a declared affiliation with a particular ‘constituent people’ or the group of ‘others’ be put forward by the candidate.<sup>41</sup> A declaration of affiliation with a ‘constituent people’ is a prerequisite for the exercise of the right to be elected or appointed into the House of Peoples and the Presidency.<sup>42</sup> Expressly, the right not to declare such affiliation is granted to every candidate, but the failure to declare it is considered a waiver of the right to hold an elected or appointment position in question.<sup>43</sup>

<sup>37</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005) 004), 62<sup>nd</sup> Plenary Session, Venice, 11-12 March 2005, para. 29. See also Z. Seizovic, ‘Constitutional Reform in Bosnia and Herzegovina: “Civil State” of Constituent Peoples’, p. 2-3, <[http://www.etc-graz.at/cms/fileadmin/user\\_upload/humsec/Workin\\_Paper\\_Series/WP\\_Seizovic.pdf](http://www.etc-graz.at/cms/fileadmin/user_upload/humsec/Workin_Paper_Series/WP_Seizovic.pdf)>, visited 20 April 2010.

<sup>38</sup> Arts. IV(II)(a) and V(I)(a) Constitution. The application of basic electoral principles laid out in Annex 3 to the Peace Agreement (Agreement on Elections) was limited to the first election of the House of Representatives and the Presidency (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina 1995, UN Doc. A/50/790-S/1995/999).

<sup>39</sup> Election Act of Bosnia and Herzegovina [*Izborni zakon Bosne i Hercegovine*], Official Gazette of BiH, 23/01, 7/02, 9/02, 20/02, 25/02 (Correction), 25/02, 4/04, 20/04, 25/05, 77/05, 11/06, 24/06, 33/08, 37/08.

<sup>40</sup> S. 1.4 §1 Election Act of Bosnia and Herzegovina [*Izborni zakon Bosne i Hercegovine*].

<sup>41</sup> *Ibid.*, S. 4.19 §5.

<sup>42</sup> *Ibid.*, S. 4.19 §6.

<sup>43</sup> *Ibid.*, S. 4.19 §7. With regard to the elections to the House of Peoples of Bosnia and Herzegovina and to the Presidency this appears to be a ‘Catch 22’ clause: persons affiliated with the



## THE CASE BEFORE THE COURT

The case originated from two applications against Bosnia and Herzegovina lodged by two citizens of Bosnia and Herzegovina, Mr Dervo Sejdić and Mr Jakob Finci. The case was originally allocated to the Fourth Section of the Court, which on 10 February 2009 relinquished its jurisdiction in favour of the Grand Chamber without any objections by the parties. Apart from written observations by the parties, the Court also received third-party comments from the Venice Commission, the AIRE Centre and the Open Society Justice Initiative. On 3 June 2009, a public hearing took place.<sup>44</sup>

The applicants complained of their ineligibility to stand for election for the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish ethnic origin. With regard to the ineligibility to stand for election to the House of Peoples, the applicants invoked Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone and Article 1 of Protocol No. 12.<sup>45</sup> With regard to the ineligibility to stand for election to the Presidency, they invoked only Article 1 of Protocol No. 12.<sup>46</sup>

In addition, Mr Sejdić also invoked Article 3 of the Convention with regard to his ineligibility to stand for election to both bodies, claiming that it amounted to a special affront to his human dignity. Both applicants also complained under Article 13 of the Convention that they had not had an effective domestic remedy. The complaints under both Article 3 and Article 13 of the Convention were found manifestly unfounded and therefore rejected.<sup>47</sup>

Mr Sejdić and Mr Finci describe themselves to be of Roma and Jewish origin respectively. They have not declared affiliation with any of the ‘constituent peoples’ and are therefore ineligible to stand for election to the House of Peoples and the Presidency. The ineligibility was officially confirmed to Mr Finci.<sup>48</sup>

‘Others’ or, e.g., Serbs living in the Federation of Bosnia and Herzegovina will be barred from election in any case – should they fail to declare affiliation or should they declare affiliation to their ethnic group and thereby provide the authorities with evidence that they are ineligible. However, pursuant to Amendment XXXIII to the Constitution of the Federation of Bosnia and Herzegovina [*Ustav Federacije Bosne i Hercegovine, Amandman XXXIII*] (Official Gazette of the Federation of Bosnia and Herzegovina, 16/02) seven delegates from the ranks of Others are elected to the House of Peoples (upper chamber) of the Parliament of the Federation of Bosnia and Herzegovina (out of total fifty-eight). In this case the effect of the obligation to declare affiliation is less discriminatory.

<sup>44</sup> Paras. 3-5 of the Judgment.

<sup>45</sup> Para. 38 of the Judgment.

<sup>46</sup> Para. 52 of the Judgment.

<sup>47</sup> Paras. 57-60 of the Judgment.

<sup>48</sup> Paras. 8-9 of the Judgment.

*International law and practice taken into consideration by the Court*

The Court took into consideration several international and regional systems of protection of human rights as well as some soft law documents. Both independent expert bodies established under the two United Nations human rights treaties, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>49</sup> and the International Covenant on Civil and Political Rights,<sup>50</sup> expressed concern about legal distinctions favouring members of certain ethnic groups with regard to the composition of the Presidency and the House of Peoples.<sup>51</sup> The Court further considered the position of the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (hereafter: OSCE) that the elections in Bosnia and Herzegovina in 2006 were in violation of, among others, Protocol No. 12 due to ‘constitutional ethnicity-based limitations to the right to stand for office.’<sup>52</sup> The Court also took into account a general definition of racism, adopted by the European Commission against Racism and Intolerance that racism as ‘the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.’<sup>53</sup>

*Admissibility*

The Court considered it necessary to scrutinise its competence *ratione personae* regardless of the fact that the respondent State did not deny it.<sup>54</sup> Two issues were addressed: whether the applicant can be considered a victim and whether the respondent state can be deemed responsible.

The applicants had not run for elections to the House of Peoples and the Presidency. Therefore the question was whether they were able to claim to be the

<sup>49</sup> Para. 19 of the Judgment; International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 *UNTS* p. 195.

<sup>50</sup> Para. 20 of the Judgment; International Covenant on Civil and Political Rights 1966, 999 *UNTS* p. 171 and 1057 *UNTS* p. 407.

<sup>51</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination of 11 April 2006 (CERD/C/BIH/CO/6), para. 11; Concluding observations of the Human Rights Committee – Bosnia and Herzegovina of 22 Nov. 2006 (CCPR/C/BIH/CO/1), para. 8.

<sup>52</sup> Para. 24 of the Judgment; Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, Bosnia and Herzegovina – General elections of 1 Oct. 2006, Election Observation Mission Final Report, Warsaw, 6 Feb. 2007, p. 1, <[http://www.osce.org/documents/odihr/2007/02/23206\\_en.pdf](http://www.osce.org/documents/odihr/2007/02/23206_en.pdf)>, visited 12 Feb. 2010.

<sup>53</sup> Para. 23 of the Judgment; European Commission against Racism and Intolerance, General Policy Recommendation N° 7: National legislation to combat racism and racial discrimination, 13 Dec. 2002, CRI (2003) 8.

<sup>54</sup> Para. 27 of the Judgment.

victim of a violation of Convention rights in the sense of Article 34 of the Convention. The Court reiterated its position from *Burden v. United Kingdom*<sup>55</sup> that in the absence of an individual measure of implementation, it suffices that the applicants belong to a class of people who risk being directly affected by the legislation.<sup>56</sup> The connection to such a class of people, namely people likely to stand for election to the House of Peoples or the Presidency, was established by the applicants' active participation in public life,<sup>57</sup> both having held and still holding prominent public positions.<sup>58</sup> It would therefore be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency.<sup>59</sup> The Court expressly stressed the irrelevance of the fact that the case raises issues of compatibility of constitutional provisions with the Convention, resting on an analogy with *Rekvenyi v. Hungary*.<sup>60</sup>

With regard to the responsibility of the respondent State, the Court left aside whether it could be held responsible for putting in place the contested provisions. The Court noted that the Constitution was annexed to an international treaty, but the power to amend the constitutional provisions is vested in a domestic body, the Parliamentary Assembly.<sup>61</sup> This is sufficient to hold the respondent State responsible for maintaining those provisions.<sup>62</sup>

*Election to the House of Peoples as a violation of Article 14 in conjunction with Article 3 of Protocol 1*

The key question for the applicability of Article 14, having no independent existence, i.e., being of complementary (or even 'parasitic')<sup>63</sup> quality, is whether the facts at issue fall within the ambit of other substantive provisions of the Convention.

<sup>55</sup> ECtHR 29 April 2008, Case No. 13378/05, *Burden v. the United Kingdom*, paras. 33-34.

<sup>56</sup> Para. 28 of the Judgment.

<sup>57</sup> Para. 29 of the Judgment.

<sup>58</sup> Mr Sejdić is the Roma Monitor of the Organisation for Security and Co-operation in Europe Mission to Bosnia and Herzegovina, having previously served as a member of the Roma Council of Bosnia and Herzegovina, which is the highest representative body of the local Roma community, and a member of the Advisory Committee for Roma. Mr Finci is presently the Ambassador of Bosnia and Herzegovina to Switzerland. Previously, he was President of the Inter-Religious Council of Bosnia and Herzegovina and the Head of the State Civil Service Agency (para. 8 of the Judgment).

<sup>59</sup> Para. 29 of the Judgment.

<sup>60</sup> Para. 29 of the Judgment; ECtHR 20 May 1999, Case No. 25390/94, *Rekvenyi v. Hungary*.

<sup>61</sup> See n. 31 *supra*.

<sup>62</sup> Para. 30 of the Judgment.

<sup>63</sup> M. Janis et al., *European Human Rights Law: Text and Materials*, 3<sup>rd</sup> edn. (New York, Oxford University Press 2008) p. 457.

It must first be noted that regardless of the ‘inter-State colouring’ of the wording of Article 3 of Protocol 1, claims that it does not imply a right of the individual citizens to vote and to stand for election have been refused by the Court. Already in *Mathieu-Mobin and Clerfayt v. Belgium* it held that that the provision ‘does not reflect any difference of substance from the other substantive clauses of the Convention and Protocols.’<sup>64</sup> The Court acknowledged, however, that the States are left with a wide margin of appreciation in making the rights to vote and to stand for the election subject to certain conditions.<sup>65</sup>

In this case, the Court begins the analysis by invoking, *inter alia*, the Belgium linguistics case.<sup>66</sup> In that case it had stated for the first time the principle that the prohibition of discrimination in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols require each state to guarantee. It applies also to the additional rights within the general scope of any Convention article that the State has voluntarily decided to provide.<sup>67</sup> Therefore, the Court continues, it had to discuss whether elections to the House of Peoples fall within the scope of Article 3 of Protocol 1 and accordingly, whether these elections are ‘elections of a legislature’:

40. (...) In this connection, it is reiterated that this provision applies only to elections of a ‘legislature’, or at least of one of its chambers if it has two or more. However, the word ‘legislature’ has to be interpreted in the light of each State’s constitutional structure (see *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, § 40) and, in particular, its constitutional traditions and the scope of the legislative powers of the chamber in question. Furthermore, the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers. Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system (see *Mathieu-Mobin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113). At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament’s chambers to be filled through direct elections.

41. As regards the House of Peoples of Bosnia and Herzegovina, the Court notes that its composition is the result of indirect elections, its members being ap-

<sup>64</sup> ECtHR 2 March 1987, Case No. 9267/81, *Mathieu-Mobin and Clerfayt v. Belgium*, para. 50; see also P. van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> edn. (Antwerpen, Oxford, Intersentia 2006) p. 917.

<sup>65</sup> ECtHR 2 March 1987, Case No. 9267/81, *Mathieu-Mobin and Clerfayt v. Belgium*, para. 52.

<sup>66</sup> ECtHR 23 July 1968, Case No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* (Merits), hereafter: the Belgium Linguistics Case.

<sup>67</sup> Para. 39 of the Judgment.

pointed by the Entities' legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of Bosnia and Herzegovina and approves a budget of the State institutions (see Article IV § 4 (b)-(c) of the Constitution). Lastly, its consent is necessary before a treaty can be ratified (see Articles IV § 4 (d) and V § 3 (d) of the Constitution). Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1.

Accordingly, Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

In light of the Court's well entrenched view that discrimination means treating persons in similar situations differently without an objective and reasonable justification,<sup>68</sup> the Court begins its analysis of compliance with Article 3 of Protocol No. 1 by laying out the following observations. First, discrimination on account of a person's ethnic origin is a form of racial discrimination, which follows from established definitions in international law. Secondly, racial discrimination is a particularly egregious kind of discrimination, requiring from the authorities special vigilance and a vigorous reaction.<sup>69</sup> Therefore, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.<sup>70</sup> In laying out the requirement for a strict interpretation of an objective and reasonable justification, the Court turns to its judgment in *D.H. and others v. the Czech Republic*<sup>71</sup> and continues:

45. Turning to the present case, the Court observes that in order to be eligible to stand for election to the House of Peoples of Bosnia and Herzegovina, one has to declare affiliation with a 'constituent people'. The applicants, who describe themselves to be of Roma and Jewish origin respectively and who do not wish to declare affiliation with a 'constituent people', are, as a result, excluded (...). The Court notes that this exclusion rule pursued at least one aim which is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place a very fragile cease-fire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The nature of the conflict was such that the ap-

<sup>68</sup> Para. 42 of the Judgment.

<sup>69</sup> Para. 43 of the Judgment.

<sup>70</sup> Para. 44 of the Judgment.

<sup>71</sup> ECtHR 13 Nov. 2007, Case No. 57325/00, *D.H. and others v. the Czech Republic*, para. 176.

proval of the 'constituent peoples' (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the 'constituent peoples' in the post-conflict society.

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

47. To begin with, the Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement. It is true that progress might not always have been consistent and challenges remain (see, for example, the latest progress report on Bosnia and Herzegovina as a potential candidate for EU membership prepared by the European Commission and published on 14 October 2009, SEC/2009/1338).

The Court lists the successes in Bosnia and Herzegovina's European integration and activity in the international community, the consolidation of its armed forces and the ongoing preparations for the closure of the international administration as examples of this progress and continues:

48. In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (...) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is recalled that the possibility of alternative means achieving the same end is an important factor in this sphere (*see Glor v. Switzerland*, no. 13444/04, § 94, 30 April 2009).

An additional factor which the Court considered when assessing whether the applicants' ineligibility to stand for election for the House of Peoples lacks objective and reasonable justification was Bosnia and Herzegovina's undertaking to review and revision of its electoral legislation in light of the Council of Europe's standards upon becoming a member in 2002. Similar commitments on the side of the respondent State were made by ratifying the Stabilisation and Association Agreement with the European Union in 2008.<sup>72</sup>

<sup>72</sup> Para. 49 of the Judgment.

*Inability to stand for elections for Presidency as violation of Article 1 of Protocol 12*

The Court, adjudicating for the first time on the applicability of Protocol No. 12, distinguishes between the prohibition of discrimination by Article 14 to the Convention and the prohibition of discrimination by Protocol 12: the difference between the two mechanisms lies in the scope of the protection. While Article 14 only covers situations within the ambit of rights and freedoms set forth in the Convention, Protocol 12 covers any right set forth by law, thus introducing a general prohibition of discrimination. Such a right set forth by law was said to be found in the 2001 Election Law (s. 1.4 and s. 4.19).<sup>73</sup>

Notwithstanding the above-mentioned difference in the scope between the provisions of Article 14 of the Convention and Article 1 of Protocol 12, the Court's interpretation of the latter will rely on the established case-law concerning Article 14. In particular, the Court will not depart from the interpretation of 'discrimination', as settled with regard to Article 14. The reason is, firstly, that the text of Protocol 12 uses the same term: discrimination. The Court concludes that the intention of the drafters was for the meaning of this term to be identical in both texts.<sup>74</sup> In support of this position, the Court refers to the Explanatory Report to Protocol 12.<sup>75</sup> The Court also mentions (and nothing more) 'a provision similar – although not identical – to Protocol No. 12', namely Article 26 of the International Covenant on Civil and Political Rights and refers to Nowak's commentary of the Covenant for case-law on this provision.<sup>76</sup> The Court's discussion on the compliance of the rules that barred the applicants from standing for election for Presidency with Protocol 12 is, accordingly, sparse:

56. The lack of a declaration of affiliation by the present applicants with a 'constituent people' also rendered them ineligible to stand for election to the Presidency. An identical constitutional pre-condition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples (...) and, moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (...). It follows that the constitutional provisions which render the applicants ineligible for election to the Presidency must also be considered discrimina-

<sup>73</sup> Para. 54 of the Judgment.

<sup>74</sup> Para. 55 of the Judgment. A similar position was also expressed in the Opinion of the European Court of Human Rights on draft Protocol No. 12, adopted at the plenary administrative session of the Court on 6 Dec. 1999, in *Non-discrimination: a human right, Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights – Proceedings* (Strasbourg, Council of Europe Publishing 2006) p. 134 at p. 135.

<sup>75</sup> Explanatory Report to Protocol No. 12.

<sup>76</sup> M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (Kehl am Rhein, Engel 2005) p. 597-634.

tory 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.

The Court has already found that the illegibility of the applicants for the House of Peoples because they are not affiliated with any of the constituent peoples amounts to discriminatory difference in the sense of Article 14. As the notions of discrimination in both provisions are to be interpreted in the same manner, the rule which bars the applicants from standing for election for Presidency is therefore in breach of Protocol 12. Similarly, the reasons why the Court finds that the composition of the House of Peoples is not proportional, as laid out in paragraphs 47-49, also support the Court's finding of non-compliance with regard to the election of Presidency. The Court also considers that there is no 'pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of Bosnia and Herzegovina.'<sup>77</sup>

## COMMENT

### *Admissibility*

The position of the Court with regard to the admissibility of the applicants' claim is interesting. In dealing with the question of whether the applicants are victims in the sense of Article 34 of the Convention, the Court rests on an analogy with *Burden v. United Kingdom*, a case initiated by two unmarried sisters who would, unlike married persons or persons in a civil union, have to pay a substantial inheritance tax once one of them had died and left its share of the house in which they had lived together to the other sister. Considering 'the applicants' age, the wills they have made and the value of the property each owns', the Court held that they have established a real risk that one of them would be affected by this tax duty 'in the not too distant future'.<sup>78</sup> Analogously, the Court only declared Mr Sejdić and Mr Finci's application admissible after it had ascertained that it was possible that they would in fact consider running in the elections. The difference between the situations is that the provision in *Burden v. United Kingdom* lays a certain duty upon individuals if certain conditions are fulfilled (death of the testator, certain value of property). The constitutional provisions contested by Mr Sejdić and Mr Finci however prohibit participation in election to all persons not having declared their affiliation to one of the constituent peoples on grounds of their ethnicity. It is absolutely clear that it cannot be expected of persons of Roma or Jewish origin to

<sup>77</sup> Para. 56 of the Judgment.

<sup>78</sup> ECtHR 29 April 2008, Case No. 13378/05, *Burden v. the United Kingdom*, para. 35.



declare their affiliation with one of the constituent peoples and that no individual action on behalf of the authorities of the respondent State is necessary to confirm the exclusion.<sup>79</sup> In my view, when a prohibitive legislative provision such as this one is impugned, there is no need to individualise the affected person in order to establish his status as a victim: all persons that belong to the Others can be considered victims of these provisions. In my view, the argument of the Court that the applicants had already been active in public life and therefore were likely to consider running for elections, is dubious.

Judge Bonello in his dissenting opinion questions the jurisdiction of the Court to ‘undo an international treaty, all the more so if the treaty was engineered by States and international bodies, some of which are neither signatories of the Convention nor defendants before the Court in this case [...] of which the Bosnia and Herzegovina Constitution [...] is a mere annex.’<sup>80</sup> He also resents the reluctance of the Court to deal more thoroughly with this issue: for the majority, the powers to revise the Constitution, vested in the Parliamentary assembly, suffice. Nevertheless, this position of the Court can be defended. Denying Bosnia and Herzegovina and its elected legislature the responsibility for the designing the system of government, and instead attributing this responsibility to the international community once again would be incompatible with the Preamble value of effective political democracy as embraced by the provisions of the Convention and the jurisprudence of the Court.

#### *Election of the House of Peoples*

According to dissenting Judge Mijović, Article 3 of Protocol 1 is not applicable to the issue of the election of the House of Peoples as ‘the concept of the right to free elections in Bosnia and Herzegovina simply does not include *per se* the right to stand for election to the House of Peoples.’ Since delegates to the House of Peoples are indirectly elected, Judge Mijović moreover doubts as to the applicability of Article 3 of Protocol 1, as ‘there is no definite and commonly accepted answer as to the question whether this [right to free elections as protected by Article 3 of Protocol 1] covers both direct and indirect elections.’<sup>81</sup>

From the wording of Paragraph 40 it seems that the Court is reluctant to proclaim in clear terms whether the provision of Article 3 of Protocol 1 applies to non-elective chambers. Instead, the Court relies on the principle from the *Belgian Linguistics Case*. However, to be able to invoke it, it had to find that there was an

<sup>79</sup> Which was implicitly confirmed by the Court as it was only Mr Finci that had obtained official confirmation of illegibility, yet both applications were admitted (para. 9 of the Judgment).

<sup>80</sup> Dissenting opinion of Judge Bonello.

<sup>81</sup> Partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev.

additional right, provided voluntarily by the State, and which fell within the general scope of a Convention article. In my opinion, the only possible provision to fall back on in this case is the general right to vote and to be elected pursuant to the Election Law.<sup>82</sup> This general right to be elected is, under Bosnia and Herzegovina law, in the case of the House of Peoples conferred only upon members of the constituent peoples from the indicated Entities, and therefore discriminatory. In light of the criticism coming from the judge from Bosnia and Herzegovina, it would however have been very helpful if the Court had considered whether there's an autonomous right to stand for election for the House of the Peoples.

What may be viewed as the Court's relatively brief dismissal of the possibility of objective and reasonable justification of differential treatment is better understood when comparing the situations in this case and in *D.H. and others v. the Czech Republic*. Both cases deal with discrimination on ground of race (ethnicity). In the latter case, however, a violation of Article 14 was found in conjunction to Article 2 of Protocol 1 (right to education). Objective and reasonable justification for a disproportionately high percentage of Roma children in special schools for children with 'mental deficiencies'<sup>83</sup> was denied regardless of the fact that the placement of children in special schools followed both a psychological examination and consent of parents.<sup>84</sup> It sufficed that there was danger for the tests to be biased and that the Court suspected that the parents were incapable of sufficiently and entirely weighing all the consequences of their consent.<sup>85</sup> In contrast to the situation in *D.H. and others v. the Czech Republic*, objective and reasonable justification in *Sejdić and Finci v. Bosnia and Herzegovina* appears to be almost impossible to establish.

Judge Bonello very critically dissents with the Court on the issue of objective and reasonable justification for the differential treatment. He accuses the Court of detaching itself from reality in its evaluation of the situation in Bosnia and Herzegovina, of overlooking the fragility of peaceful cohabitation and discarding the filigree solutions of Dayton without offering alternatives. Judge Bonello also points out how Strasbourg in its earlier case-law has 'effortlessly approved the restriction of electoral rights based on the widest imaginable spectrum of justifications.'<sup>86</sup> Amongst the restrictions of electoral rights that have been accepted by the court are, to list but a few: age requirements, restrictions by reason of previous

<sup>82</sup> See text to n. 40 *supra*.

<sup>83</sup> ECtHR 13 Nov. 2007, Case No. 57325/00, *D.H. and others v. the Czech Republic*, paras. 30, 34 and 49.

<sup>84</sup> *Ibid.*, para. 201.

<sup>85</sup> *Ibid.*, para. 203.

<sup>86</sup> Dissenting opinion of Judge Bonello.

conviction, membership of parliament in another State or double nationality, demand for continuous residence and oath to the monarch.<sup>87</sup> Judge Bonello compares this to the ‘clear and present danger of destabilising the national equilibrium’, or ‘civil war, the avoidance of carnage or the safeguard of territorial cohesion’<sup>88</sup> which the Court found to ‘explain, without necessarily justifying’<sup>89</sup> the restrictions in the case before it. Among the justifications on Judge Bonello’s list is also a threat to the stability of democratic order, which was the reason for restricting the applicant’s right to stand for elections in *Ždanoka v. Latvia*, a case which seems to have been heavily relied upon by the respondent in *Sejdić and Finci v. Bosnia and Herzegovina*.<sup>90</sup>

It is also in light of the Grand Chamber judgment in *Ždanoka v. Latvia* that the Court’s view of the restrictions to the applicants’ rights as ‘explained, but not necessarily justified’ should be read. In *Ždanoka v. Latvia*, the Grand Chamber found no violation of Article 3 of Protocol 1 by the provision of Latvian law that prohibited the applicant to stand as a candidate for the election in the Latvian Parliament and for election to regional representative bodies. The applicant was barred from elections for actively participating in the Communist Party of Latvia, one of the organisations that tried to overthrow Latvia’s democratic government, in 1991.<sup>91</sup> The Court in *Ždanoka v. Latvia* acknowledged a ‘considerable latitude’ that the States enjoy in ‘establishing constitutional rules on the [...] criteria governing eligibility to stand for election’, and any electoral legislation must be assessed in light of the political evolution of the country.<sup>92</sup> In the context of the case-law of the Court and of the European Commission of Human Rights, where restrictions to eligibility were found to be acceptable, such as *Podkolzina v. Latvia*, *Mehnychenko v. Ukraine*, *Van Wambeke v. Belgium*, *Rekvényi v. Hungary*, etc., which are cases where the Court generally accepted restrictions to electoral rights in the name of ‘democracy, capable of defending itself’,<sup>93</sup> the Court concludes that the latitude enjoyed by the States under the guidelines from *Ždanoka v. Latvia* stretches far enough to allow for categories or groups of individuals to be treated differently from others by way of legislative measures.<sup>94</sup> In this way, it seems that the criteria developed by the Court suit Bosnia and Herzegovina’s situation perfectly: is there a clearer example of an unusual constitutional order in today’s Europe, with all the peculiarities easily linked to historical events a decade or two ago?

<sup>87</sup> *Idem*.

<sup>88</sup> *Idem*.

<sup>89</sup> Para. 45 of the Judgment.

<sup>90</sup> Para. 34 of the Judgment.

<sup>91</sup> ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia*, paras. 33–49. See also H.G. Hoogers, ‘*Ždanoka v. Latvia*’, 3 *European Constitutional Law Review* (2007) p. 307 at p. 308–311.

<sup>92</sup> ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia*, para. 106.

<sup>93</sup> Hoogers, *supra* n. 91, at p. 321.

<sup>94</sup> ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia*, paras. 112 and 113.

However, the essential point of the *Ždanoka* guidelines are the only two limitations to the latitude laid out by the Court: proportionality and non-discrimination<sup>95</sup> – limitations within which the respondent State remained in *Ždanoka v. Latvia* and that were exceeded by Bosnia and Herzegovina in *Sejdić and Finci*. It can be concluded that the considerable room for manoeuvre that the States enjoy has not shrunk with the judgment in *Sejdić and Finci*; it simply bumped into limits that have been set to it earlier.

In absence of the Court's express response to the stand taken by the applicants that 'the length of time during which the exclusion had continued increased even more the burden on the respondent Government to [establish an objective and reasonable justification]',<sup>96</sup> it is difficult to assess the relevance of the fact that the Court deals with a transitional constitutional order. The 'length of time' argument and the issue of a transitional constitutional order, however, are connected – they are two sides of the same coin. As Judge Rozakis in his dissenting opinion in *Ždanoka v. Latvia* stated, a harsh restriction on the right to stand for election might be more easily justified 'during the first difficult years of adapting to the new regime and for the sake of democratic consolidation.' In both *Ždanoka* and *Sejdić and Finci*, the majority was, unfortunately, reluctant to answer whether the period of time that had elapsed from the establishment of the new constitutional order to the time of the judgment can indeed be seen from two different angles. May restrictions be more easily justified shortly after the establishment of the new constitutional order, whereas the burden of the respondent may also be higher when enough time has passed? The length of time attributable to both of these notions is undoubtedly difficult to ascertain. Nevertheless, it seems logical that this 'time factor' be taken in account in cases such as *Ždanoka v. Latvia* and *Sejdić and Finci v. Bosnia and Herzegovina*.<sup>97</sup>

#### *Protocol 12 and the election of the Presidency*

The scope of protection is the only element of the antidiscrimination mechanism under Protocol 12 that substantially differs from the mechanism established under Article 14.<sup>98</sup> This scope is to a large extent determined by the interpretation of the terms 'right set forth by law', a matter with which the Court dealt in this case for the first time. The Court simply assumed that the right to be elected member of Presidency constituted a 'right set forth by law' – and the respondent State had not objected to claims of the applicants that it was. Of course, it is not

<sup>95</sup> Ibid., para. 114.

<sup>96</sup> Para. 33 of the Judgment.

<sup>97</sup> See also Partly dissenting and partly concurring opinion of Judge Mijović, joined by Judge Hajiyeu, and Hoogers, *supra* n. 91, at p. 322.

<sup>98</sup> Explanatory Report to Protocol No. 12, paras. 18-21.

for us to speculate whether the respondent would be able to argue successfully that there is no 'right set forth by law' with regard to the election to the Presidency.<sup>99</sup> From a point of view of general academic interest, it is nevertheless regrettable that the Court has not offered a stronger indication as to the future interpretation of the term '(right set forth by) law', especially, for example, since the question as to whether the word 'law' covers only domestic law or also extends to international law had already been posited.<sup>100</sup> If we take into account varying translations of the phrase 'set forth by law' (such as the German translation, '*gesetzlich*'), this is indeed an unresolved issue, which remains to be answered in future case-law.

Another aspect which makes this question of interpretation interesting is the ethnic composition of other institutions of Bosnia and Herzegovina which do not necessarily fall within the ambit of one of the Convention rights. If the words 'right set forth by law' are interpreted so that they include rights set forth by international law, then the composition of the Constitutional Court of Bosnia and Herzegovina<sup>101</sup> could be seen as questionable from the aspect of the right to hold public service pursuant to Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and pursuant to Article 25 of the International Covenant on Civil and Political Rights.<sup>102</sup>

Another pertinent issue concerning Protocol 12 has not been touched upon by the Court's reasoning in this case. This is the question whether there will be different levels of latitude enjoyed by the States when it comes to rights set forth by law of a different nature or character. To be more specific, it is currently unclear whether the case-law on Protocol 12 will distinguish rights set forth by (domestic) law in the same way as the case-law regarding Article 14 Convention distinguishes different Convention rights when it comes to recognising a legitimate aim. For example, considering the general guidelines from *Ždanoka v. Latvia* on establishing constitutional rules in determining the right to stand for election, the election of head of state would appear as an area where a State might be granted considerably greater latitude.

However, we can also conclude that the stricter treatment of some 'badges' or prohibited grounds for discrimination will also apply to cases under Protocol 12. The Court's explicit cross-reference in paragraph 55 to paragraphs 42-44, where

<sup>99</sup> Let us recall that Judge Mijović, in her dissenting opinion, only expressly criticised the notion that there was a right to stand for election for the House of Peoples. The situation is significantly different with regard to the Presidency, which is elected directly by the people.

<sup>100</sup> D. Harris et al., *Law of the European Convention on Human Rights*, 2<sup>nd</sup> edn. (New York, Oxford University Press 2009) p. 612.

<sup>101</sup> See text between n. 32 and n. 35 *supra*.

<sup>102</sup> Both provisions were quoted by the Court in this case, in paras. 19 and 20 of the Judgment.

the stringent approach to racial and ethnic discrimination is laid out, could support this conclusion.

Regarding the election of the Presidency, the applicants relied solely on Article 1 of Protocol 12. The Court nevertheless mentions and leaves unresolved the issue of whether or not elections to the Presidency fall within the scope of Article 3 of Protocol 1. The Court cites *Boškovski v. 'the former Yugoslav Republic of Macedonia'*, a case where it declared inadmissible the complaint of a candidate for president of Macedonia whose candidacy was rejected on grounds that he did not reside continuously in Macedonia. The reason why the Court found that Article 3 of Protocol 1 did not apply to the presidential elections in *Boškovski* was the weak role of the President in the legislative process pursuant to the Constitution of Macedonia. To leave the door open to the possibility of applying Article 3 of Protocol 1 to the elections of heads of state, the Court in *Boškovski v. 'the former Yugoslav Republic of Macedonia'* referred to its position in *Matthews v. the United Kingdom*.<sup>103</sup> It reiterated that in light of the Preamble value of 'effective political democracy', not only the legislative powers of the body in question, but also that body's role in the overall legislative powers must be taken into account. It further observed that:

should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a 'legislature' within the meaning of Article 3 of Protocol No 1.<sup>104</sup>

The possibility of applying Article 3 of Protocol 1 to the election of heads of state has been criticised primarily because of the allegedly low precedential value of the judgment in *Matthews v. the United Kingdom* for the *Boškovski* case. *Matthews v. the United Kingdom* deals with the right to vote in the elections to the European Parliament, and because of the *sui generis* nature of the European Union, the position of the Court on the importance of the body's role in the overall legislative process is less relevant when it comes to the constitutional orders of the states parties to the Convention.<sup>105</sup>

<sup>103</sup> ECtHR 18 Feb. 1999, Case No. 24833/94, *Matthews v. the United Kingdom*.

<sup>104</sup> ECtHR 2 Sept. 2004, Case No. 11676/04, *Boškovski v. 'the former Yugoslav Republic of Macedonia'*, para. 1.

<sup>105</sup> *Sui generis* nature of the European Union refers mostly to the legislative process involving the participation of the European Parliament, the Council and the Commission, rather than a system of division of powers between the executive and the legislature which is found (in a more or less strict form) in States. Van Dijk et al., *supra* n. 64, at p. 930.

However, should the Presidency of Bosnia and Herzegovina be assessed from the viewpoint of its 'role in the overall legislative process' (*Matthews v. United Kingdom*), the unusually weak position of the Parliamentary Assembly must necessarily be taken into account. In addition to a narrow field of competence within which it legislates, most of the Assembly's prerogatives are to be exercised on impulse from the Presidency, including the peculiar responsibility of the Parliamentary Assembly to enact 'legislation as necessary to implement decisions of the Presidency'.<sup>106</sup>

The Court was criticised for leaving the door open to applying Article 3 of Protocol 1 to elections of head of state in *Boškovski v. 'the former Yugoslav Republic of Macedonia'* for an additional reason. It has been submitted that 'accepting that a single (elected) official may constitute a legislature within the meaning of Article 3 [of Protocol 1] would seem to sit ill with the concepts of pluralism and representative democracy embraced by the Convention'.<sup>107</sup> However, the Presidency belongs to one of the few collective heads of state in Europe and this objection is much less pertinent in the given case. In short, due to the peculiarity of the constitutional system of Bosnia and Herzegovina, its Presidency offers a very attractive opportunity to extend the notion of 'legislature' to this head of state. However, even if the Court had opted for this opportunity, the applicability of Article 3 of Protocol 1 to the election of other Heads of States would remain questionable.

## CONCLUSION

With regard to the first application of the provisions of Protocol 12, the judgment in *Sejdić and Finci* can be assessed as a very promising one. It definitely leaves several crucial questions to be answered in future case-law. Nevertheless, the implications of this judgment create a legitimate expectation that the anti-discrimination mechanism will develop into an independent legal instrument rather than a 'safety net' for cases that could not be applied to Article 14 of the Convention in conjunction with one of the Convention rights. This is supported, for example, by the fact that the Court chose to assess the allegations with regard to the election to the House of Peoples under the provision of Article 3 to Protocol 1 even though the applicants relied on Protocol 12. Read in connection with the above-mentioned concerns expressed by Judge Mijović regarding the construction of the right violated, this could lead to a conclusion that the crucial factor to the development of the antidiscrimination mechanism under Protocol 12 will be the interpretation of the term 'right set forth by law'.

<sup>106</sup> Art. IV(4)(a) Constitution.

<sup>107</sup> Van Dijk et al., *supra* n. 64, at p. 930.

The implications of this judgment for the future constitutional development of Bosnia and Herzegovina are perhaps as vast as they are unpredictable. Accepting the majority's assessment of Bosnia and Herzegovina's progress as reassuring, and disregarding the warnings from Judge Bonello's dissenting opinion, let us believe that the judgment will serve as an impulse for constitutional reform rather than dissolution or diminished functionality of the State.

The Judgment urges Bosnia and Herzegovina to amend the constitutional provisions regarding the election of the members of the House of Peoples and the Presidency. On this point, the Court referred quite extensively to the opinions of the European Commission for Democracy through Law (hereafter: the Venice Commission).<sup>108</sup>

Concerning the Parliamentary Assembly, the Venice Commission considered three possible paths: first, the abolition of the House of Peoples and moving the vital interest veto to the House of Representatives;<sup>109</sup> second, changing the composition of the House of Peoples by including representatives of the 'Others'; and finally, third, retaining the present composition of the House of Peoples and restricting its powers solely to the exercise of the vital interest veto. The Venice Commission justified the discriminatory element of the latter option, stating that the need for a mechanism that would ensure 'that the application of the democratic principle reflected in the composition of the House of Representatives does not disturb the balance among the three constituent peoples' seems to remain present in Bosnia and Herzegovina.<sup>110</sup> This means that the vital interest veto would in any case stay in the hands of the representatives of constituent peoples.

The question of whether the first two proposals would constitute a violation of the Convention is a question of whether there is objective and reasonable justification for different treatment of representatives of some of the citizens of Bosnia and Herzegovina – as some of the representatives would hold the power to veto legislation and some would not. With regard to the third proposal, we must recall the discussion on the applicability of the two Convention provisions invoked in this case. The 'extent of the legislative powers' test applied by the Court could be interpreted as a signal that a weaker House of Peoples might no longer fall within the scope of Article 3 of Protocol 1. With a more explicit guidance not only as to what constitutes a 'right set forth by law' in the sense of Protocol 12,

<sup>108</sup> Paras. 21-22 of the Judgment.

<sup>109</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005) 004), 62<sup>nd</sup> Plenary Session, Venice, 11-12 March 2005, para. 80.

<sup>110</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina* (CDL-AD (2006)019), 67<sup>th</sup> plenary session, Venice, 10 June 2006, paras. 22 and 27.



but also as to what constitutes an 'additional right provided voluntarily by the State' in the context of electoral law of Bosnia and Herzegovina, a Strasbourg-proof system would be even easier to envisage.

With regard to the Presidency, the Venice Commission commented on several proposals. Firstly, an individual president with important powers seems difficult to envisage.<sup>111</sup> Secondly, it would be possible to remove the ethnic discrimination with regard to the right to stand for election for a three-member Presidency. The Commission notes that this could easily disturb the pluri-ethnic composition of the Presidency and further, that it would be *de facto* impossible, for example, for a Serb from the Federation to be elected. The third proposal of the installation of an individual president, elected indirectly (by the Parliamentary Assembly, possibly with a greater majority) and the simultaneous transfer of most powers now conferred upon the Presidency to the Council of Ministers, seems to be endorsed by the Venice Commission, as this would increase the efficiency of the State institutions.<sup>112</sup> It is submitted that it is indeed difficult to have efficient executive power if two collegiate bodies have to share it. However, it is just as difficult to expect that any of the constituent peoples would agree to have the civilian command over the armed forces vested either in one person or in the Council of Ministers, practically the only State institution based on majoritarian rule.

If this judgment would only lead to reform of the constitutional organs of Bosnia and Herzegovina, it would at the same time strengthen the firm paternalistic grip of the international community on the nation's politics. Strasbourg case-law with regard to electoral rights was coined in the name of effective political democracy. In order to ensure the citizens of Bosnia and Herzegovina, regardless of their ethnicity, an effective political democracy, the refurbishment of the constitutional order of Bosnia and Herzegovina should also involve a re-evaluation of position of the High Representative, who can override decisions adopted by the legislature (law-making) and the people (election) while, at the same time, having no democratic legitimacy in the traditional sense.



<sup>111</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005) 004), 62<sup>nd</sup> Plenary Session, Venice, 11-12 March 2005, para. 29 and para. 39.

<sup>112</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina* (CDL-AD (2006)004), 66<sup>th</sup> plenary session, Venice, 16-17 March 2006, paras. 9 and 17-19. But see: Nystuen, *supra* n. 11, at p. 404-405, for a discussion of the constituent peoples' diverging positions on the structure of the executive power.