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Bosnia and Herzegovina: The Need for Belonging in a State of Minorities.

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Bosnia and Herzegovina is a nation based on ethnic lines, where belonging to one of the three constituent groups, the Bosniaks, Serbs and Croats, is essential to an individual's ability to partake in political life. As a result, Bosnia and Herzegovina has been referred to as a nation of minorities, with no group forming a majority of the population¹. The other ethnic groups in the country, including but not limited to, the Roma community and the Jewish communities are for the most part excluded from political participation². The development of consociational democracy through the Dayton Peace Agreement has allowed Bosnia and Herzegovina to remain stable enough to avoid a return to war but has not allowed the country to maintain full political stability. It is argued that this model of democracy has created a discriminatory constitutional framework where belonging is seen on ethnic lines. Through analysis of the ECHR case of *Sejdić and Finci v. Bosnia and Herzegovina*³, this paper examines the wider implications of Bosnia and Herzegovina defining their peoples along ethnic lines, looking at the potential consequences of the failure to ensure all peoples are represented. The case ruling highlights the need for a shift from the Dayton understanding of belonging, towards a European accepted sense of belonging that includes all peoples. I argue that the definition of national belonging along the line of constituent peoples is detrimental to the future of Bosnia and Herzegovina and that immediate change is necessary.

Consociational Democracy

One would expect a country consisting of deep vertical cleavages, similar to those found in Bosnia and Herzegovina to suffer conflict and disorder. However, Arend Lijphart developed the model of consociational democracy or power sharing⁴ in the 1960s in an attempt to explain political stability in countries with deep vertical cleavages. Consociational democracy is "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy"⁵. To be successful, the political elites of a divided society must have the ability to accommodate the

¹ The last census was completed in 1991 prior to the conflicts and so there are at present no up to date and reliable figures on population. The results of the census which occurred in October 2013 will provide an up to date demographic understanding of the county.

² Any member of the other ethnic minority communities present in Bosnia and Herzegovina including the Roma and Jewish communities and persons who do not declare affiliation with any of the Constituent Peoples due to intermarriage, mixed parenthood or other reasons.

³ *Sejdic and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, ECtHR, Grand Chamber, 2009.

⁴ Boogard contends that these words cannot be used as a synonymy. See M. Bogaards, "The uneasy relationship between Empirical and Normative types in Consociational Theory", *Journal of Theoretical Politics*, 12(4), (2000), pp.395-423.

⁵ A. Lijphart, "Consociational Democracy", *World politics*, Volume 21, (1969) p.216.

divergent interests and demands of the other subcultures and to transcend cleavages in order to avoid political fragmentation. According to Wippman consociational democracy is the "only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of the larger societies"⁶. The model of consociational democracy respects the needs of each ethnic group, whilst providing a political framework for a functioning democracy. This model has been used to develop constitutional frameworks in a number of divided societies, including Bosnia and Herzegovina. In the development of consociational democracy there have emerged four fundamental features of a society needed to ensure that these societies remain stable; a grand coalition, segmental autonomy, proportionality and minority veto⁷.

The first feature needed in a society for consociational democracy to ensure stability is a grand coalition. A grand coalition is found when the political leaders of the significant segments of a plural (deeply divided) society (ordinarily the main political parties when the parties are based on national, religious or ethnic lines) govern the country jointly⁸. Typically, this takes the form of a coalition cabinet, with an executive that is shared between the main political parties. The constitutional framework of Bosnia and Herzegovina, as outlined in Annex 4 of the Dayton Peace Agreement, contains a number of features which support the presence of a grand coalition. The Presidency of Bosnia and Herzegovina consists of a member of each of the 'constituent people' who represent the majority ethnic group of the entity from which he/she is elected⁹. This means that that Bosniak and Croat members of the presidency shall be selected from the Federation of Bosnia and Herzegovina and the Serb Member shall be elected from the Republika Spraska. The House of Peoples is composed along similar party lines. The constitution requires that the House of Peoples comprise of a total of fifteen members, with five members from each of the constituent peoples¹⁰.

This protection of the rights of the constituent peoples in Bosnia and Herzegovina is at the detriment of those citizens who fall under the category of 'others' or those living in the 'wrong' entity. For example, Serbs living in the Federation and Bosniaks or Croats in the Republika Spraska, are not eligible to stand for these positions. In practice, 'others' are those persons who come from mixed parenthood or who are in mixed-ethnicity marriages, as well as those from the smaller national minorities such as Jews and Roma. The Constitution provides no provisions on how a person's

⁶ D. Wippman, "Practical and Legal Constraints on Internal Power Sharing", in D. Wippman (eds) *International Law and Ethnic Conflict*, (Cornell: Cornell University Press, 1998) p. 211.

⁷ Lijphart (1969) pp 211-216.

⁸ A. Lijphart, "Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories", *Publius* 15(2), (1985) p.4.

⁹ Article V, Constitution of Bosnia and Herzegovina.

¹⁰ Article IV, Constitution of Bosnia and Herzegovina.

ethnicity is determined; there is nothing to prevent a person from the category of 'others' selecting one of the three constituent peoples for the sake of standing for election, but most refuse to employ this tactic for political reasons on the basis that they should be entitled to these rights without discrimination on the basis of ethnicity and minority status. Those who do not fall within one of the three constituent peoples may only be involved in the Grand Coalition in either the House of Representatives or the Constitutional Court, where membership is not predetermined by ethnicity or their entity of origin. This puts restrictions on a large proportion of the population's ability to participate fully in political life and to participate fully in the grand coalition.

The second feature that is essential for stability, according to consociational democracy is segmental autonomy, the ability of each segment of society to make decisions¹¹. This is usually characterised by a decentralised and federal government, consisting of two Houses with one chamber based on proportional representation and one chamber that represents regional interests and the other national interests. In Bosnia and Herzegovina, the state system is bi-cameral, consisting of the upper House of Peoples and the lower House of Representatives. This system is reflected at entity level in the Federation of Bosnia and Herzegovina, whereas, the Republic Sprska adopts a uni-cameral parliament¹². The decision making process at entity level adopts an extreme form of segmental autonomy, with the rights of other entity largely ignored. The focus of each entity is to ensure that its own national vital interests are protected, with little to no regard for the interest of the other constituent peoples, through the use of the national interest veto. The others have very limited decision making powers at national level due to their exclusion from the House of Peoples. This position is slightly improved at entity level with seven seats reserved for others in the House of Peoples of the federation and four seats reserved for others in the Republika Spraska National Assembly, though these seats have reduced competencies compared to the seats reserved for the constituent peoples. Therefore, it is possible to suggest that Bosnia and Herzegovina partially complies with the requirement of segmental autonomy for consociational democracy.

The principle of proportionality is also essential for consociational democracy. The state is able to reduce any claims of bias towards one group of society, by distributing positions in the public sector, authority positions and public funding proportionately between the different groups. Moreover, proportional representation within the balanced executive and legislative allows the minorities to

¹¹ Lijphart,(1985) p.4.

¹² F Bieber, "Consociationalism—Prerequisite or Hurdle for Democratisation in Bosnia? The Case of Belgium as a Possible Example", *South-East Europe Review for Labour and Social Affairs*, (1999), p.86.

gain representation¹³. In Bosnia and Herzegovina, proportionality is seen in civil service appointments, allocations of public funding and political representation, dividing these positions between the constituent peoples. This form of proportional representation does not guarantee all minority groups are truly represented as 'others' are excluded from equal distribution of positions and funding. There exists proportionality for the constituent peoples, which ensures representation of these three groups, at the expense of 'others' who continue to be a minority group largely excluded from political life in Bosnia and Herzegovina.

The final feature of consociational democracy is a veto right. The purpose of this is to provide minorities with a guarantee that they will not be outvoted by a majority when their vital interests are at stake¹⁴. In the case of Bosnia and Herzegovina, Articles V and IV of the constitution provide the vital interest veto power to both the Presidency and the House of Peoples. Raulston proposes that the House of Peoples simply exists to "provide a veto power that each group of constituent people may invoke to strike down legislation deemed harmful to its interests"¹⁵. Whilst it is undeniable that the House of Peoples is a forum in which the constituent peoples may exercise this veto right, as the upper chamber of Parliament, it is ultimately an advisory body. However, the use of the national interest veto power has been used numerous times, predominantly by the Serbian members, to prevent the passage of key legislation deemed to be against their national interest. The difficulty created by the use of the veto in passing legislation supports the arguments put forward by Raulston. The veto power in Bosnia and Herzegovina demonstrates the use of consociational democracy in provide stability in the country. However, it is exploited and used to further national interests and has been formulated in such a way that it continues to exclude the category of 'others' from the protection provided by this power. Furthermore, the continued use of the veto power and its preventative effect on the development of essential legislation is having a serious impact upon the country's EU membership prospects.

The drafters of the Dayton Peace Agreement predicted that Bosnia and Herzegovina would not be able to sustain a consociational arrangement without international supervision. Therefore the roles of the Office of the High Representative (hereinafter the OHR)¹⁶ and the EU Special Representative were developed to ensure civilian implementation of the agreement. The powers of the OHR include

¹³ Lijphart, (1985) p.5.

¹⁴ Lijphart, (1985) p.5.

¹⁵ E.Raulston "(Un)Justifiable?: A Comparison of Electoral Discrimination jurisprudence at the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina", *American University International Law Review*, Issue 12, (2012), p.677.

¹⁶ Annex X of the Dayton Peace Agreement

the ability to adopt law, appoint or remove civil posts including a member of the state presidency from office and the amendment of entity constitutions, through the controversial Bonn powers¹⁷. These powers have been used extensively since the creation of this post due to the continuing inability of the political elite to compromise; for example, 7th March 2001, the High Representative removed Ante Jelavic from his position as a member of the Presidency of Bosnia and Herzegovina, after a proclamation was made claiming that the Federation of Bosnia and Herzegovina was a Bosniak entity¹⁸. The involvement of the international community in Bosnia and Herzegovina has received divided support. The Republic Srpska opposes the international presence, whereas, in the Federation, the Bosniak and Croat communities favour the international presence as it provides protection from Serb domination.

The international involvement has been linked to some of the difficulties of consociational model¹⁹ in Bosnia and Herzegovina. On the one hand, consociational democracy has developed a semi-stable political environment with ongoing ethnic tensions and battles between the three constituent groups. On the other hand, it has exacerbated the minority rights situation in Bosnia leading to the European Court of Human Rights to pass judgement, having a direct effect on the countries journey to Europe. Furthermore, it must be noted, that consociational democracy was developed as a temporary measure to aid in the development of a stable functioning nation. However, in Bosnia and Herzegovina, the constitutional framework is still based on this model nineteen years later. The continued presence of highly discriminatory constitutional framework which excludes all those who do not associate with one of the three constituent peoples has created difficulties in Bosnia and Herzegovina's path to EU membership.

Bosnia and Herzegovina and minority rights

The case of Sejdić and Finci v Bosnia and Herzegovina emerged from two separate applications to the European Court of Human Rights heard together in the Grand Chamber on 22 December 2009. The case involved applications by Mr Sejdić, a member of the Roma community, prevented from standing as a candidate for the presidency and Mr Finci, a member of the Jewish community who was prevented from being a candidate for the House of Peoples of the Parliamentary Assembly. The applicants argued that their inability to stand for these positions due to their ethnic backgrounds

¹⁷ Introduced by the Peace Implementation Council in December 1997 to allow the OHR to implement the Dayton peace agreement, effectively overruling nationalist politics causing a delaying or blocking the implementation.

¹⁸ The Office of High Representative, "Key events since Dayton", http://www.ohr.int/ohr-info/key-events/default.asp?content_id=35971 accessed 07/07/2014

¹⁹ K. Idrizovic, "Consociation as an Impediment to EU Accession". Diss. Central European University, (2013) .p19

and being placed in the category of 'others' was discriminatory and in violation of the European Convention on Human Rights, protecting their right to political participation.

Article IV of the Constitution of Bosnia and Herzegovina provides that membership of the House of Peoples is divided between the population of Bosnia and Herzegovina with two-thirds of the members from the Federation and one-third from the Republika Srpska. Members are equally distributed between the three constituent peoples and are appointed by the Parliaments of the two entities²⁰. The House of Peoples is the principal body in which the constituent peoples may exercise the vital interest veto, which Lijphart identified as essential for a successful consociational democracy. In the House of Peoples, the veto power may be used by one of the constituent peoples when legislation is seen to be against their national vital interest. If the use of the veto is approved by a two-third vote on the members 'home' Parliament within 10 days of its referral, the legislation is blocked. The lack of a clear definition of the term 'vital interest' has led to an abuse of the process and political deadlock, with limited to no guidance provided on its correct use. This procedure adds to the highly discriminatory nature of the House of Peoples as minority groups, the others, do not have a right to use veto in state and entity levels²¹. Furthermore, under Article V of the constitution, one seat of the presidency is reserved for each of the constituent groups, with each seat having the national interest veto power in a similar way to in the House of Peoples. There is no representation of those minorities who do not form the constituent peoples in this body and there is no way to protect their national interests.

There was little debate over the question as to whether Articles V and IV of the constitution were discriminatory. The court judgement confirmed that the academic opinion of Gro Nysruen in 2005, that suggested that preventing 'other's from standing as candidates form important political position was an act of discrimination²². The courts were required to consider whether Article 14 of the Convention on Human Rights in conjunction with Article 3 of Protocol no.1 were applicable to the House of Peoples. Article 14 provides "the rights and convention shall be secured without discrimination on any ground such a sex, race, colour language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"²³, prohibiting discrimination in regards to those rights explicitly articulated in the convention. It is

²⁰ Article IV of the Constitution of Bosnia and Herzegovina.

²¹ B. Brljavac. " Institutional Discrimination against the Minority Groups in Bosnia and Herzegovina: Barrier to EU Membership", *Khazar Journal of Humanities and Social Sciences*, Vol. 14 No.3,(2011)

²² G. Nystuen, *Achieving Peace Or Protecting Human Rights?: Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, (Dordrecht : Martinus Nijhoff, 2005)

²³ Article 14, European Convention on Human Rights.

necessary to provide evidence that a different convention right has been violated in the process of discrimination. However, the Belgium Linguistic Case confirmed that the prohibition of discrimination is not limited to the core convention rights, but applicable to articles that the state has voluntarily provided²⁴. Following this, the court held that by fourteen votes to three that Article 14 is applicable in conjunction with Article 3 of Protocol 1 and that there was a violation by Bosnia and Herzegovina on the basis of the restrictions imposed on candidacy for the House of Peoples.

A wide margin of appreciation is provided for states to design their own electoral systems. In the case of *Ždandoka v Latvia* it was confirmed that states enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election²⁵. In *Sejdić and Finci* the courts were required to determine whether the electoral and constitutional framework, based on ethnic discrimination could be justified. It was necessary to prove that the constitutional framework served a legitimate aim, was necessary for a democratic society and was proportionate to the aim it pursued. The courts confirmed that Articles IV and V of the Bosnian constitution had been legitimate at the time that they were drafted. The concept of constituent peoples and power-sharing was a precondition for the Dayton Agreement through consociational democracy and the restoration of peace to the region. The court chose to focus on the issue of proportionality. The court found that there had been a number of positive developments in Bosnia and Herzegovina following on from the creation of the Dayton Agreement. In particular, the NATO Partnership for Peace, Stabilisation and Association Agreement and constitutional amendments were seen as significant steps of political progression. These steps show development in Bosnia and Herzegovina, leading the courts to find a lack of proportionality with regards the restrictions placed on membership of the House of Peoples. Bosnia and Herzegovina was found to be in breach of Article 14 in conjunction with Article 3 of Protocol No. 1.

The court also held by sixteen votes to one that Bosnia and Herzegovina had violated Article 1 of Protocol no. 12 with regards to the applicant's ineligibility to stand for the presidency. Article 1 of Protocol no. 12 provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"²⁶. The court suggested that there were alternative methods available to ensure power-sharing in such a

²⁴ Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium Application Nos 1474/62; 1691/63; 1769/63; 1994/63; 2126/64.

²⁵ *Ždandoka v Latvia*, Application no. [58278/00](#).

²⁶ Article 1 of Protocol 12, European Convention on Human Rights.

way that avoided discrimination against the category of 'others' and therefore the restrictions on the presidency were not proportionate to the aim of peace. This finding has a two-fold effect, it highlighted the pressing need for constitutional change in Bosnia and Herzegovina and it was the first time the European Court of Human Rights ruled on Protocol 12.

Despite a clear majority finding for the violation, three judges provided partly or fully dissenting judgements. These judges criticised the court for failing to take into full account of the historical background and extraordinary circumstances under which the constitution of Bosnia and Herzegovina was created. Judges Mijovic and Hajiyev observed that Bosnia and Herzegovina has not made significant progress and that the government remains highly unstable. Both judges argued that the provisions were both reasonable and proportional and that it would be both ill-advised and inappropriate to strike down provisions that may be unjust from a Human Rights perspective, but are necessary for peace and stability²⁷. Judges Mijovic and Hajiyev agreed that the provisions of the constitution on the presidency breached Article 1 of Protocol 12. However, they did not find that the provisions concerning the House of Peoples violated Article 14 in conjunction with Article 3 of Protocol 1. On the other hand, Judge Bonello dissented on both issues, claiming that no state "should be placed under a legal or ethical obligation to sabotage the very system that saved its democratic existence"²⁸. Judge Bonello could not support externally imposed reforms to a domestic constitution that could have the potential of damaging the stability and security of a fragile country.

On finding Bosnia and Herzegovina in violation of both Article 14 in conjunction with Article 3 of Protocol no. 1 and Article 1 of Protocol no 12, the court ordered Bosnia and Herzegovina to pay costs and damages. The court also required amendments are made to the constitution to prevent further cases being brought under this same claim. The court did not offer any guidance or provide any suggestions as to the reforms it envisaged; it was not seen appropriate to dictate to a state how to reform its constitution for fear that it would be interpreted as institutional interference. However, to date²⁹, no amendments have been made. The case ruling confirmed that the understanding of belonging in Bosnia and Herzegovina is not suitable for a potential member state and indicate that change to the minority right situation is essential to the political future of Bosnia and Herzegovina. The requirement that Bosnia and Herzegovina implement the case ruling represents an increase in the minority right standards expected of a potential member.

²⁷ Sejdic and Finci v. Bosnia and Herzegovina, partly concurring and partly dissenting judgements.

²⁸ Sejdic and Finci v. Bosnia and Herzegovina, dissenting judgment.

²⁹ August 2014.

The reform options for Bosnia and Herzegovina

The implementation of the ruling has been included into Bosnia and Herzegovina's Stabilisation and Association Agreement, creating additional minority rights for Bosnian EU candidacy. In September 2012, a joint statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of Sejdić and Finci judgment, noted;

“with great disappointment that the institutional and political leaders of Bosnia and Herzegovina missed the first timeline for implementing the Road Map and did not submit their joint proposal on the basis of political agreement to the Parliamentary Assembly for making the Constitution of Bosnia and Herzegovina compliant with the European Convention on Human Rights and Fundamental Freedoms by 31 August”³⁰.

Despite missing the deadline of the 31st August 2012, Füle and Jagland made it clear that “the EU Road Map remains valid”³¹ for Bosnia and Herzegovina. The judgment “has to be executed”³², if Bosnia hopes to be considered for EU membership. European Commission President Barroso has confirmed that “while the constitutional reform was not a strict condition for signing the Stabilisation and Association Agreement there is (a) link between these two processes”³³. The disappointment in the continued failure to implement the ruling was further expressed in February 2014³⁴. However, the lack of guidance from either the Europe or the Court has resulted in a number of proposals for reform to be put forward, though none have yet been agreed and implemented. One thing that is clear is that in order for Bosnia and Herzegovina to have any chance of political advancement, with the end sight being EU membership, reform to the constitution and a change in the minority right situation is essential. It has been made clear, that reforms to both the presidency and the House of Peoples are required, to develop fully participation and belonging of all peoples.

³⁰ Council of Europe, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of the European Court of Human Rights' "Sejdić and Finci" - judgment”, 03/09/2012, http://europa.eu/rapid/press-release_MEMO-12-641_en.htm?locale=en accessed 03/08/2013.

³¹ Ibid 31.

³² Ibid 31.

³³ Jose Barroso, “Discourse at the European Parliament”, *European Commission*, 14/06/06.

³⁴ Europa, “EU disappointment on lack of progress on Sejdic-Finci implementation”, 17/02/2014, <http://europa.ba/News.aspx?newsid=6181&lang=EN>, accessed 04/08/2014.

Reform proposals of the presidency

One proposal suggests that Bosnia and Herzegovina retain the three member presidency and reform the membership process. It is suggested, that by having the members be elected by the Parliamentary Assembly of Bosnia and Herzegovina would provide more possibilities for inter-ethnic cooperation and compromise³⁵ as it would reduce the occurrence of the current position, which prevents a Serb from the Federation or a Bosniak or Croat from the Republic from being able to stand or vote for a position on the presidency. Direct elections encourage people to vote for the persons considered to be the strongest advocates of their own peoples and not the person best for the job. Furthermore, direct elections create greater legitimacy to the role of the Presidency and make it more difficult to reduce its powers to other bodies.

Bosnian citizens display distrust towards politicians, as seen in the February 2014 riots across the country making it unclear if this framework is desirable in the Bosnia context. The political decisions are often made by indirectly elected persons (Council of ministers) or external imposed (the OHR), reducing the legitimacy of an institution such as the presidency³⁶. Shifting to direct elections may increase the Presidency's legitimacy, but may not be sufficient to shift the decision making away from indirectly elected bodies and increase citizens trust with the politicians in power³⁷. Moreover, there is uncertainty that this reform would actually provide for representation of others. Whilst this reform would eliminate the territorial discrimination found in the current constitution of Bosnia and Herzegovina, there is no guarantee for the representation of others, thus, one would argue that it fails to fully deal with ethnic discrimination.

There is support for maintaining the current situation with one member of the presidency and two from the Federation in order to maintain the Status quo but to remove the ethnic determinant in order to avoid discrimination³⁸. The impact of this reform would be minimal as Bosniaks and Croats from the Republika Spraska and Serbs from the Federation would not have a realistic possibility to elect a candidate of their preference as elections would still be based on entity level ethnicity and so it is unlikely to comply with the ECHR ruling. An alternative proposition is to introduce an individual President who would be elected indirectly by the parliamentary assembly of Bosnia and Herzegovina, to reduce the powers of the presidency and shift the power to the Council of

³⁵ Venice Commission, "Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina", CDL-AD(2006)019, 12 June 2006, para 18. Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)019-e), accessed 27/06/2014.

³⁶ Hodžić, and Stojanović, (2011) p.95.

³⁷ Hodžić, and Stojanović, (2011) p.93.

³⁸ Hodžić, and Stojanović, (2011) p.95.

Ministers³⁹. A rotation rule would guarantee all constituent peoples are represented and it should be possible to ensure that the president enjoys wide support among all peoples. However, proposal this only provides a rotation system for the constituent peoples. In order to implement the ruling, it would be necessary to create a rotation system which included the category of 'others'. It is evident that difficulties would arise in how to select the representative of 'others' as it is not an easily identified category of individuals. It would be necessary to create a more rigid classification system that determined which group individuals fall under, compared to the current self-identification process. Furthermore, shifting the powers of the presidency to the Council of Ministers would transform the presidency into a mere figurehead and would not deal with the need to include others in the presidency itself.

In order to deal with the difficulty of ensuring ethnic representation of the three constituent groups and the category of others, there is the possibility of creating a single president who is assisted by two or three Vice-Presidents, on a rotation cycle⁴⁰. The Venice Commission proposes that the House of Representatives would nominate candidates; on the basis that not more than one candidate can be from the ranks of one and the same people or 'others'. Once the House of Representatives has nominated candidates and each of the caucuses of the House of Peoples has elected one, the final election would be in the hands of the House of Representative which would provide a guarantee all three members enjoy legitimacy as 'representatives of the people of Bosnia and Herzegovina as a whole'⁴¹. This proposal for reform has received the greatest support from both the international community and domestic political parties; the HDZ (Croatian Democratic Union) suggest it could eliminate the existing flaws owing to the fact that the ethnic determinants of election of the presidency could be eliminated and adequate ethnic representation⁴². Furthermore, the SBiH (Party of Bosnia and Herzegovina) proposes the creation of a fourth member of the state presidency elected by 'others' which is supported by the SBB (Union for a better future of Bosnia and Herzegovina) who advocate a presidency with three Vice-Presidents. This proposal for reform would successfully implement the ruling of Sejdić and Finci as it would provide for the representation of

³⁹ Venice Commission, "Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina", CDL-AD(2006)019, 12 June 2006, para 40. Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)019-e), accessed 27/06/2014

⁴⁰ Mujakić M. et al., "Nove ideje, bolji ustav, Udruženje/udruga mladih pravnika u BiH, Sarajevo", 2010, p.20 available at: [hp://www.ump.ba/storage/boljiustavba/Zavrsni%20dokument%20radne%20grupe%20Udruzenja%20mladih%20pravnika%20u%20BiH.pdf](http://www.ump.ba/storage/boljiustavba/Zavrsni%20dokument%20radne%20grupe%20Udruzenja%20mladih%20pravnika%20u%20BiH.pdf) (accessed in September 2010)

⁴¹ Venice Commission (2006), para. 22-25.

⁴² Hodžić, and Stojanović, (2011) P.38.

others⁴³, on the assumption that one of the positions was reserved for the 'others'. There is, however, little evidence that this framework would effectively deal with the discrimination of those constituent people, residing in the 'wrong' entity being ineligible to stand as raised in the Pilav case. In order to ensure that the system for selecting the presidency is free from both ethnic and territorial discrimination, it is necessary to remove the current territorial requirements to ensure that all persons are both eligible to stand for election and are able to vote how they choose regardless of their place of residence.

According to Daniel Bochsler, the elimination of the quota for the three constituent people is not a viable solution⁴⁴. Bochsler proposes a five-seat presidency to be elected by single non-transferable vote in a single national electoral district that could be combined with a seat guarantee for each of the 3 constituent peoples⁴⁵. In the case of Bosnia and Herzegovina the three guaranteed seats for the constituent peoples would leave the two remaining seats open to electoral competition. Whilst this framework does provide for the possibility of others to be elected, as it is open to all individuals, the real impact of this reform proposal is questionable. This form of election would most likely result in two seats each for the Serb and Bosniak representatives and one seat to be won by a Croat representative and the continued exclusion of 'others'. In order to ensure representation of 'others' it would be necessary to have the fourth seat guaranteed for others and the fifth seat be open to electoral competition. Furthermore, in order for this framework to be successful and provide equal rights for 'others', it would be necessary to create a veto power, comparable to that of the constituent peoples. Without the same veto power, a seat in the presidency would provide the group of others with less power than the constituent peoples and so would continue to be discriminatory and a failure to comply with the ECHR ruling.

The most complicated framework proposed for the reform of the selection process for the presidency is the Geometric means proposal. Under this system, a single candidate would be elected from 3 regions of Bosnia and Herzegovina. The final candidates would be chosen according to whether they had scored the highest rate of geometric means. This would radically change the structure of politics, with the creation of a single electoral unit which would allow citizens to vote for any candidate of their choice on the basis that every citizen has a single vote. This would deal with the issues of territorial discrimination and encourage all persons to vote, as voters would feel that

⁴³ Hodžić, and Stojanović, (2011) P.95.

⁴⁴ D. Bochsler. "Non-discriminatory rules and ethnic representation: the election of the Bosnian state presidency." *Ethnopolitics* 11(1), (2012): 66-84.

⁴⁵ Bochsler (2012), p. 79.

they had an opportunity influence the election encouraging state wide campaigning, positively influencing inter-ethnic relations⁴⁶. This system would be open to 'others' in accordance with the European court judgement as there is no ethnic element to eligibility to stand⁴⁷. Furthermore, the division of the Federation, creating one Croat dominated region and one Bosniak dominated region would help deal with the feeling across many Croat dominant parties that they are not proportionally represented. However, it is the author's contention that the creation of regions through the Geometric means fails to fully eliminate the territorial discrimination element, as this is simply shifted away from the entities into these regions.

As an alternative, Hodžić, and Stojanović have proposed a Geometric mean plus seven. In this proposal the state would become a single electoral unit divided into the three regions as outlined above. Every citizen would have two votes instead of one, with an additional member to be elected from Brčko district⁴⁸. It is envisaged that this system would lead to the presidency evolving into the government similar to the Swiss Model, whereby each of the seven members would also be a minister with considerable competencies supported by several secretaries of state. The Geometric systems are complicated and run to risk of alienating the voting public from the process of electing the President. If citizens are unable to understand the effect of their own vote to the election of the presidency it is possible that they will not vote at all. A low voter turnout raises questions about the validity of the results and so the author would suggest that in an effort to preserve the democratic nature of the election process, these reform proposals are not suitable for Bosnia and Herzegovina.

Each of these proposed reforms of the presidency have been unable to gain sufficient domestic political support to progress any further than being a mere proposal. The constituent persons fear that any restructuring of the current tri-party presidency will result in a loss of power and control for their peoples. At present the Bosniaks, Croats and Serbs each have equal political power in the presidency whilst 'the others' are excluded from this group. On the one hand, the implementation of the Sejdić and Finci ruling to include 'others' within the presidency would comply with the ECHR. However, it is the author's contention that these reform proposals interfere too far with domestic policy in the pursuit of minority right standards. The European Union has never before expected a potential member state to significantly alter its constitutional framework in pursuit of membership. However, a balance must be sought between the reforms that are required by the EU and acceptance by Bosnia and Herzegovina that there is a pressing need to develop the constitution to

⁴⁶ Hodžić, and Stojanović,(2011) p.98.

⁴⁷ Bochsler (2012), p. 82.

⁴⁸ Hodžić, and Stojanović,(2011) p.104.

provide an EU accepted political framework and understanding of the needs of the minority groups who do not form one of the three constituent peoples.

House of Peoples reform proposals

The House of Peoples has seen fewer reform proposals on how to comply with the court judgement and remove the discriminatory nature of membership of this body. Whilst reforming the presidency would lead to constitutional changes, the complexity of the process of reforming a large institution, such as the House of Peoples, may explain the cautious approach that has been taken to reform proposals of the House of Peoples. The proposed reforms have not focused on the eligibility to stand for the House of Peoples, but been based on reforming the veto power. It is unclear if any of these proposals are sufficient to implement the ECHR ruling on the basis of the limited advice provided.

In February 2008, the Venice Commission “received a request from the Central Electoral Commission of Bosnia and Herzegovina to prepare opinions on the amendments to the Election Code”⁴⁹. In its opinions on the House of Peoples, the Commission notes, that the best reform strategy, would be to move the vital veto power to be exercised in the House of Representatives and abolish the House of Peoples⁵⁰. The Venice Commission proposes this streamlining procedure would solve the issue of the discriminatory composition of the House of Peoples. In theory, this model of reform would deal with the discrimination problem in the current set up of the House of Peoples as there is minority representation provided for in the House of Representatives. However, from a constitutional perspective, it may not be the most suitable option. A bi-cameral system ensures a certain level of checks and balances on the basis that the Houses can monitor the actions of each other. For this reason it is found in most democracies, including the UK, with the House of Lords and House of Commons. The removal of the House of Peoples would transform the constitutional set up of Bosnia and Herzegovina into a single chamber system, reducing parliamentary accountability. With trust in the political system low in Bosnia and Herzegovina under the current bicameral system, it is the authors contention that a shift to a single chamber would lead to further political distrust in Bosnia and Herzegovina, causing more harm than good.

In their study on the challenges and implications of the ruling, Hodžić, and Stojanović state that it should be possible to implement the judgement by reducing the competencies of the House of

⁴⁹ Council of Europe, “Bosnia and Herzegovina”, <http://www.venice.coe.int/webforms/events/?id=816>, accessed 02/06/2014.

⁵⁰ Venice Commission.

Peoples without having to incorporate the category of 'others' into its structure⁵¹. The House would continue to serve as a safeguard for the constituent peoples, as a body for the protection of vital national interest on issues involving minority rights protection, but no longer act as a legislative body. The legislative powers would be transferred to the Council of National Minorities, which would act as a separate body with similar powers minus the veto. The absence of clear guidelines from the relevant EU bodies that monitor and oversee the execution of the judgement raises questions as to whether this proposal is sufficient to fully implement the ruling⁵². In the absence of any explicit inclusion of 'others' into this reformed version of the House of Peoples, there remains the risk of Bosnia and Herzegovina being in violation of the ECHR. A similar framework to this was proposed in both the April and Butmir packages⁵³, but failed to gain the necessary support; one must question why it would be successful now. It therefore does not seem a realistic option given the current Bosnian political situation. For the House of Peoples to become a body reserved for the protection of minority rights, it is essential that those citizens who do not fall under one of the constituent peoples are given a voice, above all other reforms.

An alternative reform of the House of Peoples is to replicate the setup of the entities and to include delegates from the ranks of 'others' in the House of Peoples⁵⁴. According to the Constitution of the Federation of Bosnia and Herzegovina, seventeen delegates from each of the constituent people and seven who are 'others' are put forward by the ten cantonal assemblies for the House of Peoples of the Federation Parliament⁵⁵. The number of delegates per canton corresponds to its population, while the ethnic structure should also be proportional. The seats reserved for 'others' do not have to provide for full representation or safeguarding of vital national interests as they are not organised into a caucus and so have no involvement in the decision-making process. The Council of Peoples in the Republika Spraska, on the other hand, does contain a caucus for the delegates of 'others' with limited powers; They can help decide on vital interests of the constituent peoples but not on their own national interests and so have an unequal position when it comes to the functioning of the council. In both the Federation and Republika, 'others' are included as delegates of the bodies but do not have equal membership with the constituent peoples; they are mere observers rather than active participants, which does not provide full political participation rights. The reforming of the House of Peoples to replicate the entity levels would fail to provide for equal rights of 'others';

⁵¹ Hodžić, and Stojanović,(2011) p.112.

⁵² Hodžić, and Stojanović,(2011) p.113.

⁵³ 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.

⁵⁴ Hodžić, and Stojanović,(2011) p.106.

⁵⁵ Hodžić, and Stojanović,(2011) p.106.

membership to a constitutional body with unequal powers, cannot be interpreted as full political participation in an institutional body. This proposal does not remove the discrimination found in the current constitutional framework, rendering it void in the implementation of the ECHR ruling.

The creation of others delegates in the House of Peoples, in cooperation with the Council of National ministers could lay foundations for a more active role of 'others' in the state legislative processes.. By placing the veto power in the hands of delegates from the ranks of 'others', it could have the additional impact of reducing inter-ethnic tension⁵⁶. However, the addition of an 'others' veto would require a change to the current veto power and has been faced with a number of objections. The only thing uniting members of the category of others is that they are not a member of the constituent peoples. The group itself comprises of citizens from a wide range of ethnic backgrounds with diverging needs and requirements. As a result, the lack of unity and cohesion would cause difficulties on questions of vital national interest. Furthermore, the current framework with veto powers is already faced with deadlock situations and the associate difficulties this creates in passing legislation. The addition of another veto power could further hamper the functioning of the legislative bodies and lead to additional blockading and abuse of decision-making process⁵⁷. The deadlock problem could be dealt with by increased direct representation in parliament by replacing the existing House of Peoples with an entity based upper house. However, as discussed above, others in these bodies are currently limited to passive roles. Further reform of the entity constitutions would be necessary to create a fully representative entity based upper house. This is not a practical solution; the existing difficulties of reaching an agreement on the mode of reform would merely be further exacerbated by the need for more reform.

The reforms that have been proposed for the House of Peoples all raise one fundamental question; Do they comply with the case ruling? The focus on reforming the veto power, fails to take into full consideration the need to remove all elements of discrimination from the House of Peoples, including membership as well as the rights of each group pf peoples within the institution. In order for any reform proposal to be successful in complying with the case ruling it must reform both membership and power within the House of Peoples.

⁵⁶ Hodžić, and Stojanović,(2011) p.110.

⁵⁷ Hodžić, and Stojanović,(2011) p.109.

Conclusion

On the 15th July 2014, the European Court of Human Rights confirmed the judgement of the case of Sejdić and Finci v. Bosnia and Herzegovina in the case of Zornić v. Bosnia and Herzegovina⁵⁸. The case involved Ms. Azra Zornić, an individual who, on refusal to identify with one of the three constituent peoples but as a Bosnian Citizen was ineligible to stand for either the House of Peoples or the Presidency. The ruling reaffirmed the violation of Article 14 of the convention in conjunction with Article 3 of Protocol No.1 and Article 2 of Protocol No.12. In the judgement, the court advised that:

“the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for election....without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina”⁵⁹

The upcoming October 2014 Bosnian general elections highlight that the need to better integrate the others into the political framework of Bosnia and Herzegovina is imperative. The international community, including the EU, has indicated that it will not recognise the election results if the legislative framework continues to discriminate against those who do not associate with the constituent peoples. The reform proposals discussed in this paper fail to create a political system that moves away from belonging to constituent peoples as central to political participation. It is essential that the political elite of Bosnia and Herzegovina put aside their ethnic feuds and work with the others and the others, whilst taking the advice and support offered by the EU, to make the required reforms, as soon as possible. The definition of national belonging along the line of constituent peoples is detrimental to the future of Bosnia and Herzegovina in the EU and immediate change is necessary.

⁵⁸ Zornić v. Bosnia and Herzegovina (application no. 3681/06)

⁵⁹ Zornić v. Bosnia and Herzegovina (application no. 3681/06), page 12.

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