T.C.

SELÇUK ÜNİVERSİTESİ

SOSYAL BİLİMLER ENSTİTÜSÜ

ULUSLARARASI İLİŞKİLER ANABİLİM DALI

ULUSLARARASI İLİŞKİLER BİLİM DALI

AVRUPA İNSAN HAKLARI MAHKEMESİNİN SEÇİLME HAKKI BAĞLAMINDAKİ KARARLARININ ETKİLERİ:

BOSNA-HERSEK VAKA ÇALIŞMASI

Doktora Tezi

Hazırlayan:

Senada ZATAGIĆ

Danışman:

Prof. Dr. Şaban H. ÇALIŞ

Konya-2019

T. C.
SELÇUK ÜNİVERSİTESİ
Sosyal Bilimler Enstitüsü Müdürlüğü

Öğrencinin

Adı Soyadı: Senada Zatagic

Numarası: 124129001014

Ana Bilim / Bilim Dalı: Uluslararası İlişkiler

Programı Tezli Yüksek Lisans ☐ Doktora ■

Tez Danışmanı: Prof. Dr. Şaban H. Çalış

Tezin Adı: Avrupa İnsan Hakları Mahkemesinin Seçilme Hakkı Bağlamındaki Kararlarının Etkileri - Bosna-Hersek Vaka Çalışması

ÖZET

AİHM'nin 2009 yılında verdiği Sejdić ve Finci/Bosna-Hersek kararı, Bosna-Hersek'te seçilme hakkından yararlanmada ayrımcılıkla ilgili tartışmaların başlamasını sağlamış ve karar sonrası konu büyük bir ilgi görmüştür. Ancak daha sonra alınan alakalı kararlara aynı ilgi gösterilmemiştir. Akademik literatürde de aynı şekilde sonraki kararlar ilgi görmemiş; yeterince incelenip analiz edilmemiştir. Sejdić ve Finci/Bosna-Hersek kararı bile genellikle ülkenin AB'ye üyelik sürecine bağlı olarak tartışılmış; diğer etkileri yeterince ele alınmamıştır.

Bu bağlamda bu tezde, AİHM'nin Bosna-Hersek ile ilgili seçilme hakkı bağlamında verdiği ilgili tüm kararların ve bu kararların etkilerinin analiz edilmesi amaçlanmıştır. Analiz yapılırken özellikle disiplinlerarası bir yaklaşımın kullanılması tercih edilmiştir. Zira, uluslararası insan hakları hukuku kapsamında ele alınan konunun teorik çerçevesinin çizilmesi noktasında uluslararası insan hakları rejimleri esas alınmıştır. Uluslararası insan hakları rejimleri hem uluslararası hukuk hem de uluslararası ilişkilerin kesiştiği bir konu olması dolayısıyla, bu yaklaşımın benimsenmesi elzem hale gelmiştir. Böylece tezin teorik çerçevesi olarak rejim teorisi benimsenmiş, belge analizi ve vaka çalışması yöntemleri uygulanarak analiz geliştirilmiştir.

Rejim teorisi insan hakları bağlamında ele alındığında temelde devletlerin uluslararası insan hakları rejimlerinin kurallarına uyum sağlamasının ve insan hakları

mahkemesi kararlarına riayet etmesinin aynı minvalde gerçekleşebileceğini, birbirinden ayrı düşünülemeyeceğini ileri sürmektedir. Ayrıca, uluslararası toplum nezdinde 'insan haklarına saygı duyan bir ülke' imajı kazanmanın devletler açısından bir gereklilik olduğunu vurgulamaktadır.

Bu paralelde tezin merkezinde seçilme hakkının ulusal ve uluslararası düzeyde garanti edilen bir siyasi hak olup olmadığı yer almaktadır. Seçilme hakkı Bosna-Hersek mevzuatında, Dayton Anayasası'nda açık olarak ifade edilmemiş olup, Bosna-Hersek Seçim Kanunu'nda düzenlenmiştir. Bunun temel nedeni, Dayton Barış Anlaşması ve ekleri ile öncelikle savaştan zarar görmüş Bosna-Hersek'te hem barışın tesisi, hem kapsamlı bir devlet inşası amaçlanmış olmasıdır. Anlaşma'nın IV. eki olan Dayton Anayasası'nın içinde var olan kurucu halkların ayrıcalıkları da ülkeyi siyaseten alınacak manevralara karşı savunmasız bırakmış; seçilme hakları konusunda ilerleme sağlanmasına engel olmuştur. Ayrıca bu süreçte verilen konuyla ilgili AİHM kararlarının uygulanması sorunu da doğmuştur. Bosna-Hersek Avrupa Konseyi'nin üyesi olunca AİHS'i onaylayıp standartlarını kabul etmiş ve AİHM'nin kararlarını uygulamak uluslararası sorumluluklarından bir tanesi olmuştur. AİHM kararlarının uygulanması sorununun Bosna-Hersek için en önemli etkisi, ciddi bir biçimde ihtiyaç duyulan ve uzun süre müzakere edilen anayasa değişiklikleri önergesinin mecliste kabul edilmemesi şeklinde ortaya çıkmıştır.

Bu çalışma boyunca elde edilen veriler seçilme hakkı ve seçilme hakkından yararlanmada ayrımcılıkla ilgili konuların yeterince araştırılmamış ve teorize edilmemiş olduğunu göstermiştir. Halbuki seçilme hakkı literatürde daha çok incelenmeyi hak ettiği gibi, pratikte de daha tartışılır olunmayı hak eden bir kavramdır. Bu tezle hem literatürdeki bu boşluğun doldurulmasına katkı sağlanması; hem de tez kapsamında incelenen AİHM kararlarının etkisi ve verilen kararların uygulanması sonucu konu ile ilgili Bosna-Hersek'te temel bir anayasa reformu yapılması tartışmasına katkı sağlanması amaçlanmıştır.

SELÇUK ÜNİVERSİTESİ
Sosyal Bilimler Enstitüsü Müdürlüğü

Öğrencinin

Adı Soyadı: Senada Zatagic

Numarası: 124129001014

Ana Bilim / Bilim Dalı: Uluslararası İlişkiler

Programı Tezli Yüksek Lisans ☐ Doktora ■

Tez Danışmanı: Prof. Dr. Şaban H. Çalış

Tezin İngilizce Adı: The Impacts of the European Court of Human Rights Decisions Concerning the Right to be Elected – The Case Study of Bosnia and Herzegovina

SUMMARY

The 2009 ECtHR's decision in case Sejdić and Finci v. Bosnia and Herzegovina initialized the discussions concerning the discrimination in enjoyment of the right to be elected in Bosnia and Herzegovina and afterwards this topic received substantial attention. However, the related latter decisions did not receive the same attention. This was reflected in the academic literature whereas latter cases that have since then come forth, have not been sufficiently examined and analysed. Even the decision in case Sejdić and Finci v. Bosnia and Herzegovina was generally evaluated in connection to the country's prospective EU membership, while its other impacts have not been examined.

In this respect, this thesis aimed for analysing all relevant ECtHR's decisions concerning the right to be elected in Bosnia and Herzegovina and their impacts. In conducting this analysis, applying an interdisciplinary approach was opted for in particular. Likewise, the international human rights regimes were taken as a basis in constructing the theoretical framework of the discussed topic, which is in the scope of international human rights law. Adopting this approach was essential because the international human rights regimes are the topic of intersection between international law and international relations. Thereby, regime theory was used as the theoretical

framework of the thesis, and the analysis was developed through the application of document analysis and case study methods.

When regime theory is discussed in connection with human rights, it basically argues that states commitment to international legal human rights regimes' rules and theircompliance with the decisions of international human rights tribunals occurs in the same way and cannot be thought of separately. Furthermore, it stresses that obtaining the image of 'a country that respects human rights' for states in international community is a necessity.

In this sense, the core debate of this thesis is if the right to be elected is a political right guaranteed on a national and an international level. Although not explicitly guaranteed in the Dayton Constitution, the right to be elected is guaranteed in the Law on Election in Bosnia and Herzegovina. The main reason for this is in the fact that the Dayton Peace Agreement and its annexes primarely aimed on peacebuilding, but also extensive state-building and reconstruction of the society in this war-torn country. The privileges given to the constitutional peoples in Agreement's annex IV – the Dayton Constitution - left the country vulnerable to political maneuvers and have created obstacles for progress concerning the enjoyment of the right to be elected. Within this period, the problem of the implementation of the relevant ECtHR decisions had also arised. By becoming a member of the Council of Europe, Bosnia and Herzegovina has ratified ECHR and accepted its standards, and the implementation of the ECtHR's decisions became one of its international commitments. In practice, the most important effect of the implementation problem regarding the ECtHR decisions for Bosnia and Herzegovina came forward by non-acceptance of much needed and long negotiated constitutional reforms proposal in the Parliament.

The results of this research show that the right to be elected and the discrimination in enjoyment of the right to be elected have not been sufficiently researched and theorized. This concept deserves to be more examined in literature, as well as to be more discussed in practice. In this thesis, it was aimed both to contribute to filling the indicated gap in literature, and to provide a contribution to the discussions on

fundamental constitution reform in Bosnia and Herzegovina in connection with the impacts and results of implementation of the ECtHR decisions examined in this thesis.

ABBREVIATIONS:

BiH – Bosnia and Herzegovina

DPA – Dayton Peace Agreement

Dayton Constitution – Annex IV of the Dayton Peace Agreement - Constitution of Bosnia and Herzegovina

Declaration/Universal Declaration – The Universal Declaration of Human Rights

ECHR/the Convention – European Convention on Human Rights

ECtHR/the Court – European Court of Human Rights

EU – European Union

FBiH – Federation of Bosnia and Herzegovina

HRC – The Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

NGOs – non-governmental organizations

OHR – Office of High Representative

PIC – Peace Implementation Council

SAA - Stabilization and Association Agreement

TABLE OF FIGURES:

Figure 1 – provisions concerning right to be elected in the constitutions

Figure 2 – the allocation of seats in the House of Peoples in federal Parliament applied until 2018

Figure 3 – the allocation of seats in the House of Peoples in Federal Parliament applied in 2018

Figure 4 – the comparative view of allocation of seats in the House of Peoples in Federal Parliament in 2014, according to HDZ's proposal, ESI's proposal and the one applied after the elections in 2018

Figure 5 – the procedure for the execution of the ECtHR decisions

Figure 6 – prohibition of discrimination in conjunction with the right to be elected in Bosnia and Herzegovina – cases analysis

ACKNOWLEDGEMENTS

Firstly, I would like to thank to the Presidency for Turks Abroad and Related Communities (YTB), whose scholar I had been in period October 2012 - February 2019. The generous support they provided enabled me to come to this wonderful country, learn Turkish language, meet warm hearted people of this country and gain new experiences, skills, and knowledge. Thanks to Türkiye Scholarship programme I was able to make my dream of living and studying in Turkey come true, and now when I have two homelands, I will be more than happy to carry both of them in my heart and give my best to serve to both of them as good as I can.

I am exceptionally grateful to my advisor Professor Dr. Şaban H. Çalış for his valuable contributions to my research, his patience and support in all phases of my studies, and for his help and understanding in some difficult phases of this process. Special mention and gratitude deserve my thesis committee members Dr. Zerrin Savaşan and Dr. Selcen Erdal, whose advises, suggestions and help in drafting my thesis were of unmeasurable worth. I would also like to mention and express my gratitude to Dr. Selman Karakul for his valuable advises.

Process of attaining PhD degree is being known as all but not easy and it indeed requests a lot of perseverance and support of the environment. I have been lucky to have people around me who were always believing in me and supporting me through difficult times. Thanks to Orhan, for everything, for always being there for me. I am thankful to my family members for their unreserved support. My biggest support, my guide and my inspiration has always been my mother. I am happy to have you in my life.

TABLE OF CONTENTS

ÖZET iii

SUMMARY v

ABBREVIATIONS viii

TABLE OF FIGURES ix

ACKNOWLEDGEMENTS x

TABLE OF CONTENTS xi

Chapter One: Introduction 1

1.1. Background 1

1.2. Problem Statement and Purpose Statement 2

1.3. Research Design and Context 4

1.4. Significance of Research, Scope and Limitations 6

1.5. Literature Review 9

1.6. Overview of Chapters 16

Chapter Two: Conceptual and Theoretical Framework of the Right to be Elected 19

2.1. Introduction 19

2.2. Establishment of Conceptual Framework 20

2.2.1. Right to be Elected as a (Basic) Human Right? 23

2.2.2. Conceptual Development of Right to be elected 26

2.2.3. Right to be elected in Constitutions: Assessment over Examples from Practice 30

2.3. Establishment of Theoretical Framework 37

2.3.1. International Law and International Relations 38

2.3.2. Institutionalism and Regime Theory 42

2.3.3. Human Rights Regimes 53

2.4. Conclusion..... 58

Chapter III – The Constitutional System of Bosnia and Herzegovina and the Right to be Elected..... 60

3.1. Introduction..... 60

3.2. Dayton Peace Agreement..... 61

3.2.1. The Dayton Constitution – General Remarks..... 67

3.2.2. Debates on the Dayton Constitution: Efforts for the Change..... 81

3.2.3. Right to be elected in the Dayton Constitution..... 82

3.3. Initiatives for Change of the Annex IV of the Dayton Peace Agreement..... 90

3.3.1. Venice Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative..... 94

3.3.2. "April package"..... 99

3.3.3. Prud Process..... 101

3.3.4. Butmir process..... 101

3.3.5. Efforts for changes of the Law on Elections..... 103

3.3.6. EU Membership Requirements and Initiatives for changes of Election Law..... 112

3.4. Conclusion..... 117

Chapter Four: Case study of Bosnia and Herzegovina - European Court of Human Rights and Decisions concerning Right to be Elected..... 119

4.1. Introduction..... 119

4.2. Decisions of the ECtHR concerning the Right to be Elected and its Impacts..... 120

4.3. Protocol No. 12 to the ECHR and Bosnia and Herzegovina's Accession..... 125

4.4. Sejdić and Finci, Zornić, Šlaku, and Pilav ECtHR Decisions..... 133

4.4.1. Background..... 134

4.4.2. Relevant Legislation and Applicants' Complaints..... 135

4.4.3. Court's Decision..... 139

4.4.4. Dissenting Opinions 146

4.5. Execution of Judgments in Accordance with the Article 46 of the ECHR... 148

4.5.1. The Execution of Judgements in Sejdić and Finci Group of Cases 155

4.6. Conclusion..... 167

Chapter Five: Conclusions and Suggestions 169

5.1. Introduction 169

5.2. Summary of Research 170

5.3. Discussion and Interpretation of Findings 173

5.3.1. Political Impacts of the ECtHR Decisions concerning Right to be elected in Bosnia and Herzegovina..... 177

5.3.2. Legal Impacts of the ECtHR Decisions concerning Right to be elected in Bosnia and Herzegovina..... 179

5.4. Significance of the Study 185

5.5. Recommendations for Further Research..... 186

REFERENCES..... 188

Chapter One: Introduction

1.1. Background

When Mr. Sejdić and Mr. Finci applied to the European Court of Human Rights (hereinafter: ECtHR or the Court), little did they know it would become an important milestone in both Bosnia and Herzegovina's constitutional reform process and human rights protection in general. This case, and later Ms. Zornić and Mr. Pilav's case, raised many questions concerning the discriminative provisions of the state's constitution. It also caused serious academic discussions regarding issues of the peace agreements' importance, consociation power-sharing arrangements, and the constitutional texts adopted in the peace negotiation processes, and the primacy it gives to human rights. The legal impact from these decisions have not only been important for the country and the region, but for whole world, and set the precedent for future conflict resolution cases all over the world. Although the cases analysed and discussed in this thesis focus on the internal structure of Bosnia and Herzegovina, constitutional reform process and human rights protection, I argue here that its impact has been much wider, effecting the fields of international law, international relations, human rights, conflict resolution and peace building.

The cases decided by the European Court of Human Rights in 2009, 2014 and 2016 concerned racial discrimination in the election process based on ethnic origin. Rights of citizens of Bosnia and Herzegovina were violated because they did not declare any affiliation with the country's three constitutional peoples who make up the majority of the country's population. Those who are Jewish, Roma, Albanian, undeclared of any affiliation with one of the three constitutional peoples, or affiliated, but residing in a part of the country where its ethnic group is not majority, is deprived of the right to be elected to the state presidency or second chamber of the parliament in Bosnia and Herzegovina. The Court's rulings confirmed the constitutive provisions prescribing this as discriminative.

Once the first Court's decision became final, and the process of its execution was about to start, it became clear that its implementation would inevitably have wider consequences for the state's constitutional and political system. Because the

ECtHR is a regional human rights tribunal and the body of the Council of Europe, it meant the implementation process would have a political dimension which effected the execution process. Three following ECtHR rulings deepened the problem, while at the same time there were no significant improvement in the execution process.

The EU intervened in the execution process by setting the implementation of the ECtHR's ruling as a precondition for the negotiation of Bosnia and Herzegovina's membership. However, the lack of political will caused a postponement of any agreement on the implementation of the ECtHR's ruling, and therefore it was decided to deal with the ruling at a later phase of the country's association process. Consequently, the ECtHR decision was removed from the agenda of meetings between EU high officials and politicians from Bosnia and Herzegovina. Still, the failure to implement the ECtHR's reforms continued to show up in EU country progress reports concerning Bosnia and Herzegovina's potential membership. By failing to place greater pressure on Bosnian politicians, it both undermined the EU's authority in the country and rewarded Bosnian politicians behaviour for doing nothing but spread nationalistic rhetoric instead of working on enhancing the reconciliation process among its peoples.

Meanwhile, the Council of Europe's Committee of Ministers continued to place pressure on Bosnian politicians to implement the ECtHR's ruling. Some NGOs went further by suggesting and insisting Bosnia and Herzegovina be expelled from the Council of Europe for the failure of implementing ECtHR's ruling.

1.2. Problem Statement and Purpose Statement

The verdict of the Sejdić and Finci case concerning the country's constitutional system, represented the first in which the violation of Article 1 of Protocol No. 12 was declared, drawing international attention and gaining popularity in academic literature. Since then, two other cases came forth that have received little if any attention. This negligence is shocking, considering their significance and far-reaching legal consequences if implemented. Possibly the negligence originates from disappointment of the unsuccessful implementation of the Sejdić and Finci verdict.

Perhaps it was assumed that the same thing would happen with the other two cases. However as I argue here, the negligence to pay attention to the latter cases considering the potential consequences of the decisions implementation is evident. At the same time, the existing academic literature, beside neglecting two other cases, also merely neglected the legal impacts of the decisions and gave a high importance to the political dimension of the ECtHR ruling in Sejdić and Finci case, especially considering Bosnia and Herzegovina's EU membership process. Theoretical explanation of the research problem is another important literature gap – no analysis of Sejdić and Finci decision or its impact offered theoretical explanation of the problem. As a result, the impacts of the ECtHR's decisions concerning the right to be elected in Bosnia and Herzegovina were not analysed sufficiently.

The country's poor record on the implementation of the ECtHR's decisions concerning the right to be elected cannot be explained solely by reference to political processes (mainly EU accession process), but is also due to the very nature of Bosnia and Herzegovina's complicated political and legal system. Bosna and Herzegovina is a country still marred from the Bosnian War in 1992, now being governed by a flawed constitution that arose out of the peace agreement – Dayton Accords, which guarantees high human rights standards on the one hand while protecting interests of the three main ethnic groups in the country on the other, thereby systematically discriminating minorities and citizens. Analysis of the ECtHR's decision has been examined in terms of its political and legal impacts. Other potential impacts (such as sociological, psychological etc.), while also important, are not subjects explored in this thesis. This thesis instead analyses the ECtHR's decision's impact from an international law and international relations perspective.

In this thesis, while putting emphasize on the right to be elected as an important human right, it argues that the importance of all three decisions is higher than it is perceived and that especially legal and political impacts of these decisions are significant as they, beside affecting the country's potential EU membership process, are also impacting the core of the country's system, establishing the basis of anti-discrimination law in Europe concerning general prohibition of discrimination and also contribute on understanding the relation between consociational power-

sharing arrangements in peace agreements and the constitutions being agreed as the part of peace agreements and human rights. At the same time, judges' dissenting opinion and some of the existing literature on Sejdić and Finci case touched upon the Court's legitimacy to decide in cases concerning states' constitution and post-conflict states whose close war past is still being a serious threat for peace and stability. The Court's potential role of the "constitutional court" of Europe concerning human rights protection was discussed. Hence, Bosnia and Herzegovina accepted the Court's decisions and is showing will for their implementation (although sometimes only declarative).

The main purpose of this thesis is to analyse the impacts of the ECtHR decisions concerning the right to be elected in Bosnia and Herzegovina, for the country specifically, and its wider implications more generally. To achieve this aim, this thesis critically analyses and criticises the discriminative provisions of the Dayton Constitution as explicated in the Dayton Peace Agreement (DPA) and the founding agreement of Bosnia and Herzegovina. This thesis also aims to provide a conceptual framework for the right to be elected and analyses this right in connection to constitutional law, drawing from examples in practice – including the provisions of the constitution which guarantee the right to be elected. Finally, this thesis seeks to draw attention to and emphasize the interrelatedness and interconnection between fields of international law and international relations and the importance of regime theory in explaining the compliance with the ECtHR decisions.

This research aims to contribute to the debate on harmonization of the discriminative provisions of the Dayton Constitution with the European Convention on Human Rights and be of use to both practitioners and researchers in their future work.

1.3. Research Design and Context

The theoretical framework this thesis is based on is the institutionalism and regime theory. It follows the traditional view of human rights as having their origin in natural rights and natural law, and corroborates on the idea of human dignity as a central concept in the contemporary human rights area. The human rights area is the

object of research for both international law and international relations. To introduce and justify the choice of institutionalism and regime theory as the theoretical framework of this thesis, it examines and reflects on the intersection of international law, international relations and human rights area and the interference, interchange and interconnection between them. Institutionalism and regime theory are the most suitable to explain the human rights regimes and compliance with their rules, as well as the international human rights tribunals and compliance with tribunals' decisions because of the importance they give to international law, international institutions, and rules. Although developed under liberalism, regime theory is a reconciliative theory between liberalist and realist traditions in international relations and explains regimes (including human rights regimes) as the reflection of states' interests but the participation is voluntary and a reflection of citizens' interests and preferences.

To address the main research problem of this thesis – the ECtHR decision concerning the right to be elected, this thesis employs qualitative methods. Qualitative methods are generally used by groups or individuals to research the meaning ascribed to social or human problem. Research techniques most commonly used include observation, interview or document analysis. While using these methods an interpretative approach is often used in analysis.

In the context of this thesis, the qualitative research techniques used include document analysis method, and case study. Interpretation and systematization of valid law sources, aiming to attain knowledge of applicable law in force; the examination of relevant legal documents (e.g. international agreements/conventions/protocols, constitutions, laws, court decisions), and different acts of political bodies are examples of the application of the document analysis method. As a case study, Bosnia and Herzegovina's current constitutional system is examined, specifically its emergence as a part of the peace agreement and the function of its controversial provisions. The thesis then proceeds by analysing the decisions of the Constitutional Court of Bosnia and Herzegovina and their effects, as well as the efforts and draft documents relevant for the constitutional and electoral legislation reform process in Bosnia and Herzegovina, namely the Law on Elections and other relevant regulations. However, the central analysis is concerned with the

ECtHR's decision concerning the right to be elected and the process of its implementation, including the communication between the government of Bosnia and Herzegovina and the Department for the Execution of Judgments of the ECtHR. Additionally, the Committee of Ministers' interim resolutions, the resolutions of the Parliamentary Assembly of Council of Europe, as well as other communication concerning the decision of implementation, are of high importance in this analysis.

To understand the importance of the analysed decision, it is essential to have a clear view of the concept of human rights, their importance and protection. First, the concepts of natural law and natural rights shall be explained briefly, including their emergence and development and relation with the concept of human rights as it is used nowadays. After emphasizing the importance of the concept of human dignity as a central term in defining contemporary human rights, the development of the international human rights law as a legal discipline, will be outlined. The theoretical and conceptual development of the right to be elected is understood as a right essential for any democratic system. Being interconnected and mutually dependent on the right to vote, the constitutive part of the concept e.g. universal suffrage and political participation, is a crucial concept of democratic countries, whose enjoyment can only be restricted in exceptional circumstances.

1.4. Significance of Research, Scope and Limitations

Beginning with the assumption that human rights and fundamental freedoms take place in constitutions, and that constitutions' guarantee human rights protection, it is assumed that constitutions and human rights interfere with each other. Furthermore, human rights conventions are signed by states, and once they are ratified according to the law of the state, they can have the same legal effects as the state's internal law. This thesis discusses whether states are under the authority of courts founded by the states' agreement, and if so whether the decisions of courts are superior to the country's constitution and law.

Discussions on the efficiency and success of the Dayton Peace Agreement have been going on since its inception. And despite the criticism it has received in many studies and in political circles, the current constitution has continued to be enforced

for more than twenty years. This is part due to the international community's lack of political will to change the constitutional provisions which proved from the onset difficult to implement – first under the leadership of the United States of America and later the responsibility for resolution of the country's problems transferred to the European Union.

The ECtHR's Sejdić and Finci decision openly suggested that the Constitution of Bosnia and Herzegovina, part of the Dayton Peace Agreement, is a constitution which protects interests of ethnic groups, yet neglects rights of minorities and citizens. Despite endeavours for finding a solution to this problem, no consensus on any solution was reached and no constitutional reforms were made. The political pressure regarding the EU membership was also not effective. Following this period, two more cases were brought forth by the ECtHR – Zornić and Pilav, confirming the effects of previous decision.

The DPA was an attempt to provide a balance between the ethnic groups' interests and to establish a new system from scratch. Bosnia and Herzegovina emerged as a new state, having gone through the transformation from a communist and socialist tradition to a democracy. The architects of the new system struggled to design a constitution that guaranteed democracy and the protection of human rights, while also satisfying the warring parties and forcing them to cooperate in the new state. Nevertheless, in practice many problems regarding human rights did not end and the newly established system deepened them. For example, a person who does not identify themselves as a member of one of the constitutive nations, is considered as non-eligible to stand for office of the state presidency and second chamber of the parliament. According to the constitution, only members of constitutive nations (Bosniacs, Croats and Serbs) and from certain part of the country can be elected to the presidency. Because of this, Sejdić and Finci, Zornić, and Pilav, who sought to become candidates for the presidency in the elections, filed a claim against the state of Bosnia and Herzegovina in Strasbourg and won.

While analysing the general problem of the implementation of the ECtHR's decision and solving the existing discordance, this thesis focuses specifically on the

high importance of its constitutional dimension. It then attempts to find a solution for the discrepancy between finding practical solutions of the peace agreement and appeasing of human rights protection. Despite the limited number of cases analysed, the multidisciplinary character of this study should prove useful for politicians, employees in public administration, and students taking human rights classes in law, political sciences and international relations departments, as it incorporates findings from each of the aforementioned disciplines. This study should also attract not only the attention of students of Bosnia and Herzegovina origins who are familiar with the topic, but also those interested in post-conflict societies human rights' developments.

This thesis acknowledges some of its limitations such as in its research methods, confined to documents analysis, existing literature and case-study, as well as a focus on the legal dimension of the analysed issue. The analysis of legal documents is used as a basic data collection method. Due to the nature and sensitivity of the topic, this thesis did not use any questionnaires or in-depth interview methods. To overcome this weakness, interviews made available online were consulted with, along with the attitudes and opinions from a limited number of relevant professionals and experts in the field. Concerning the case-study method, the focus is on a limited number of ECtHR's decisions might at first seem limiting. However, the in-depth qualitative analysis on these three cases, provides rich data and insight concerning the circumstances that led to the ECtHR's decisions and the solutions put forth, as well as their potential effects.

The main aim of this research is to provide a clear picture on the importance and legal impact of changing the constitution of Bosnia and Herzegovina in relation to the implementation of the ECtHR's decisions. Previous research and analyses concerning the first of ECtHR decision neither paid attention to the legal implications, nor did they provide concrete results. Also, as this thesis points out, ECtHR's decisions over later cases, have been completely neglected in research. Although the thesis is focused on the legal dimension of the problem, the political dimension will also be considered in relation to the fields of international law, international relations, and human rights.

1.5. Literature Review

The 2006 ruling of the European Court of Human Rights in the case Sejdić-Finci v. Bosnia and Herzegovina was euphorically welcomed both in Europe and in Bosnia and Herzegovina. This exceptional verdict not only served as the court's first decision based on a newly adopted Protocol No. 12, but also represented a formal confirmation of the constitutional and institutional discrimination Bosnia and Herzegovina citizens had suffered from for more than ten years. Although the basis of the case was on racial discrimination, the area in which discrimination was conducted was in political participation, more precisely the right to be elected.

To understand the significance of the above mentioned decision and the three other cases that followed, it is important to consider the situation in Bosnia and Herzegovina both then and now. Debates ensue about the state's political nature and complex conditions of its consociational internal organization and present political, cultural, and social dynamics are inevitable part of the analysis of this issue. Although existing literature acknowledges these complexities, they fail to take into consideration the legal aspects of the ECtHR's decisions and their impacts. Furthermore literature overlooks the potential transformation of the ECtHR into a constitutional court of Europe in cases regarding human rights.

Another gap in the literature, included the conceptualization of the concept of the right to be elected. After conducting a critical review of literature, surprisingly little was found concerning the conceptualisation of this right[1]. To date, only one relevant article[2] was identified, which emphasises the need to establish a theoretical and conceptual framework for the "under recognized" and "under theorized" right to candidacy. The author argues that the right to candidacy is a basic right guaranteed in different international human rights documents but underrepresented in domestic constitutional texts, shedding light on the importance of this topic. A right to a

[1]Alecia Johns also states in her article that it is almost impossible to find an academic literature concerning solely right to candidacy while the same is not case for related right to vote and broader close concepts such as a political participation.

[2] Alecia Johns, "The Case for Political Candidacy as a Fundamental Human Right", *Human Rights Law Review*, No. 16, 2016, pp. 29-54.

candidacy can be perceived on three levels – under the general scope of the moral right (what is described as a "robust" right to candidacy), under the normative context within which it is positioned and an empirical context to which it is directed (idea of liberal democracy), and under the justificatory framework. This complex frame enables us to realize the duties this right imposes on a state, the claims it entitles its holders to, and its relations to political participation and expression, self-development, autonomy and human dignity. It is conceptualized not as a right of those qualified, but a foundational right to be qualified, a right to which everyone is entitled and the restrictions to which ought to require a strong justification by the state. Conceptualized in this way, a right to candidacy imposes certain duties on the state – a negative duty to refrain from imposing unjustifiable eligibility requirements for elective office, and a positive duty to provide a fair electoral framework within which the right may be exercised, with general equality of opportunity among potential candidates. A liberal democracy is regarded as the only type of governance that has substantive features to provide minimum conditions necessary for the protection of the right to candidacy. Furthermore, the right to candidacy is considered a basic human right. The author draws to the readers attention the relationship between the right to candidacy and right to vote, noting the importance of this right for the preservation of all other human rights and contribution to a common liberal culture. The relation between these two electoral rights is represented in the voter's interest in freely choosing his/her representatives, meaning they have wider options of different candidates and in making informed choices.

As the author highlights, and as this thesis confirms, the concept remains under theorized and researched. Given the limited literature that exists, this thesis adopts the author's conceptualization, not as definitive, but rather as a foundation to build from.

The complex issues that led to the conflict, shaped its resolution, and the Dayton Peace Agreement that created a system brought to the newly established

country has been extensively covered by authors such as Sumantra Bose[3] and David Chandler[4] who have significantly contributed to our understanding about the Bosnian War, the peacebuilding efforts, and other research areas. More contemporary literature has highlighted the challenges of implementing the agreement, the new problems that have arisen, the changed circumstances, and current trends in Bosnia and Herzegovina's society. In Christopher Bennett's book[5] for example, he introduces us to what he calls the 'Bosnian Question', referring to the country's three ethno-national groups that have shared the territory of Bosnia and Herzegovina for centuries. The nature of this relationship has undergone changes over time, depending on the political system in which they lived. He underlines how each group at some point in time was privileged over the other two ethno-national groups, contingent on which external power was governing the country or region in that period. The question he raises has varied over time. In the beginning of the nineties Bosniac people found themselves in a dilemma regarding their future as an ethnic minority in a dissolute Yugoslavia. Following the Bosnian War however, Bosniacs found themselves as the relative majority in an independent country, with two other ethnic groups that also have significant populations in Bosnia and Herzegovina. The future nevertheless appears vague and hopeless with no foreseeable solutions to development and state arrangement of Bosnia and Herzegovina. Bennett sees moving from Dayton and reforming it is inevitable. Although it is not possible to predict how exactly this is going to happen, he lists three possible alternative scenarios: a "well prepared, inclusive and structured constitutional reform"[6]; reforms "forced upon the country in the wake of further ECtHR rulings"[7]; and a "total breakdown of the existing system"[8] the would result in an internationally led reform of Bosnia and Herzegovina's political system as was done before. According to the author, this will require a change of paradigm, addressing the issue of ethno-national security and

[3] Sumantra Bose, *Bosnia After Dayton – Nationalist Partition and International Intervention*, Oxford: Oxford University Press, 2002.
[4] David Chandler, *Bosnia: Faking Democracy After Dayton*, London-Sterling: Pluto Press, 2000.
[5] Christopher Bennett, *Bosnia's Paralyzed Peace*, Oxford: Oxford University Press, 2011.
[6] Ibid, p. 239.
[7] Ibid.
[8] Ibid.

moving beyond consociational structures as well as addressing the consequences of the country's ethno-democracy[9]. Bennett's proposal is basically suggesting a move from consociationalism to centripetalism and creating some type of "a double confederation"[10] with Serbia and Croatia. Although Bosniac people would likely oppose the change, he argues their opinions would change over time if a preconditioned change of awareness of the two neighbouring countries was put into place and an assurance of their commitment to Bosnia's territorial integrity and sovereignty. In return for accepting the "reunion" of Croat people with Croatia and Serb people with Serbia, Bosniac people would be rewarded, benefiting from the "major internal restructuring, including the dissolution of Republika Srpska"[11], as well as a freedom to live anywhere in the three countries while enjoying freedom of movement of people, goods and ideas[12]. Apparent from Bennett's proposal is a hint of Yugo-nostalgy[13].

Unlike Bennett, McCrudden and O'Leary are staunch defenders of consociationalism in Bosnia and Herzegovina, as they do not see any other system that could replace the type of power-sharing arrangement that is currently in place despite the problems in the existing system. Their joint article[14] includes a summary of the authors' book[15] which defends their idea. The book represents a significant study of consociations as a model of power-sharing and its relationship with human rights, or rather, its supremacy over human rights. Contrary to the book's title, which indicates confrontation between power-sharing and human rights and consequently gives the book represents a defence of consociations in favour for a devaluation of human rights' importance. In the second chapter – "Bosnia as consociation", the

[9] Ibid, p. 253.
[10] Ibid, p. 260.
[11] Ibid.
[12] Ibid.
[13] "It would mean rebuilding the positive links that existed twenty-five years ago, enabling the three countries to combine resources and harmonise procedures in key areas; creating more fluid population and therefore changing ethno-national composition and obliging Bosnia, Croatia and Serbia jointly to address the controversial issues from past." Ibid, p. 260.
[14] Cristopher McCrudden, Brendan O'Leary, "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements", *The European Journal of International Law*, Vol. 24, No. 2, 2013, pp. 477-501.
[15] Christopher McCrudden, Brendan O'Leary, *Courts and Consociations – Human Rights versus Power Sharing*, Oxford: Oxford University Press, 2013.

authors analyse the system established by DPA and the constitution that arose from it. Bosnia and Herzegovina represent a complex arrangement, a type of corporate consociation,[16] with federal, confederal, and consociational[17] characteristics combined. Complex conditions, including the coexistence of three main ethnic groups ("constituent people"), and the urge to stop the Bosnia War with the of the signing of the Dayton Peace Agreement, requested solutions that would satisfy all sides in the conflict. Instead however, the peace agreement left many questions with ambiguous answers. Such is the nature of relationship between entities (federal or confederal) and the status of entities.

In his book, Merdzanovic also makes a significant contribution to the theoretical explanation of Bosnia and Herzegovina's complicated system[18]. He introduces a new concept – imposed consociation, as a term that might best explain the country's internal structure, relations between the state and entities, and international community's continued intervention in the country. Although the concept of imposed consociation[19] is based on the case of Bosnia and Herzegovina, he suggests that it could be applied to other countries as well. Key elements of the imposed consociation include a crucial role for external actors in the consociation's establishment and their continued influence in its functioning. The challenge of classifying the Bosnian system under any existing type of power-sharing arrangement helps explain and justify why Merdzanovic has sought to introduce a new concept and in order to make an imporatant theoretical contribution.

In terms of the compatibility between consociation and human rights, McCrudden and O'Leary argue in their book that the two are in opposition of each other. They discuss the primacy that should be given to the Court's decision concerning consociational settlements. However, I argue in this thesis that human

[16] Ibid, p. 21.
[17] Ibid, p. 25.
[18] Adis Merdzanovic, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina*, Stuttgart: ibidem-Verlag, 2015.
[19] Keil in his book used the term of imposed federation, the one similar to proposed Merdzanovic's concept but did not developed it as much as Merdzanovic developed his own. Soren Keil, *Multinational Federalism in Bosnia and Herzegovina*, Surrey: Ashgate Publications Limited, 2013.

rights and consociations should instead be understood as two sides of the same coin and each work towards the same goal – the promotion of democracy and equal enjoyment of rights for everyone in the country. Human rights is a part of consociational agreements, such as the Dayton Peace Agreement and the Dayton Constitution. Also, the European Convention on Human Rights is part of the bill of rights consisted in this peace agreement. That is why the ECtHR shall naturally be the legitimate decision maker on issues arising from the Dayton Constitution. McCrudden and O'Leary however criticize the potential role of the courts while countries such as Bosnia and Herzegovina undergo a process of transformation towards consociation and impugn its legitimacy to decide on issues, even if they are constitutional, regional or international courts. Human rights, although touched upon, is given little attention other than acknowledging the rights most frequently endangered in consociations and the role courts can and should play in power-sharing. The two rights they find improbable in consociations include the right to equal treatment and right to political participation[20]. In the Sejdić and Finci case, both rights were breached. The Court's decision in this case represented a departure from its predecessors, indicating its constitutional commitment of Bosnia and Herzegovina for human rights. As the authors point out, "on paper Bosnia and Herzegovina has one of the highest standards of human rights protection in the world"[21]. Here again the Court's capability to decide on issues concerning states with consociational elements, its expertise and objectiveness are questioned. The Court's approach in decising this case corresponded with the findings of the Venice Commission, who played a role in the process of bringing the decision and importance to the Court. This was the first case where the ECtHR applied Article 1 of Protocol 12. The Court's decision in the Sejdić and Finci case was described as "a highly activist and interventionist approach"[22] and interpreted as proof of the hypothesis that courts are "potential 'unwinders of ethnic political bargains'"[23]. While consociations might serve as political and practical tools for the resolution of

[20] Christopher McCrudden, Brendan O'Leary, *Courts and Consociations – Human Rights…,* p.
[21] Christopher McCrudden, Brendan O'Leary, *Courts and Consociations – Human Rights..*, p. 86.
[22] Ibid, p. 113.
[23] Ibid, p. 43.

ethnic conflicts, I argue that they are not intended to last forever. The authors likewise agree with this, but argue that courts should not be the ones that decide whether consociations be dissolved and transition into some other arrangement. Instead they assert it should be done by those who created them. Following this logic, consociational arrangements in Bosnia would probably last forever.

Faris Vehabović, who served as a judge on behalf of Bosnia and Herzegovina at the European Human Rights Court, wrote about his experiences, reaffirming and supporting the idea that democracy and the rule of law coincided with the respect for human rights. He acknowledges the discord between the Bosnia and Herzegovina constitution's declarative commitment to these principles and declared constitutional discrimination of its minorities and citizens. The author remarks the legal nature of the constitution and system established, such as the specific clause of the constitution that provides the direct application of ECHR and consequently applies a monistic approach in the application of international law, constitution's controversial legitimation and nature as well as non-existence of the version of the constitution in the official languages of the country and never being ratified in the Parliament. The most important case against Bosnia and Herzegovina at the ECtHR, referred to as the "historic ruling,"[24] was the Sejdić and Finci v. Bosnia and Herzegovina case that attracted attention as the first court decision brought forth based on Protocol 12. The decision was important not only for Bosnia and Herzegovina but also for Europe. Vehabović emphasizes the unfortunate political unwillingness of the government of Bosnia and Herzegovina to implement the Court's decisions and the non-existence of effective legal remedies. Although this book is published in 2016, the decision on the Zornić v. Bosnia and Herzegovina case (2014) is not mentioned. A slightly deeper analysis of *de lege ferenda* effects of this important decision could have contributed to the valuable research in this area.

[24] Faris Vehabović, "Impact of the case law of the European Court of Human Rights on post conflict society of Bosnia and Herzegovina"in Iulia Motoc, Ineta Ziemele (ed.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe - Judicial Perspectives*, Cambridge: Cambridge University Press, 2016. Ibid, p. 94.

As this literature review has demonstrated, the right to be elected remains insufficiently researched. Although Sejdić and Finci case initially received some attention, the other two cases have been neglected and effectively ignored. To illustrate this, no PhD thesis has conducted research on the ECtHR's decisions concerning the right to be elected in Bosnia and Herzegovina. To-date only two master theses have researched the Sejdić and Finci decision, the first analysed the decision under the ECtHR's caselaw concerning electoral rights[25], and the other focused on the decision of implementation[26]. Furthermore, research has been confined within monolithic paradigms, either from an international law or international relations perspective. Consequently, little attention has been given to the theoretical explanation of the problem.

Apart from the theoretical deficiencies, this review has also highlighted that the right to be elected as a human right has insufficiently been conceptualised, often used interchangeable with similar but inaccurate concepts, or confused with other rights. There is a need to conceptually develop and theorise the right to be elected as a human right to improve its implementation. Therefore, this thesis seeks to address the aforementioned gaps – conceptual, theoretical, and contribute to the understanding and importance of the right to be elected to establish a research agenda for future research.

1.6. Overview of Chapters

In this first chapter, it briefly explained and justified the choice of topic. It then provided an overview of the thesis problem, statement of purpose, research design, and underlined the significance of the research topic, its scope and limitations. To demonstrate the importance of the research topic and existing literature gaps, a literature review was conducted. The main themes of the thesis were also introduced – ECtHR, right to be elected, Bosnia and Herzegovina, (ECtHR's) decisions

[25] Šejla Hadžidedić, *The Role of the European Court of Human Rights in Setting Standards on Electoral Rights: Challenges in the United Kingdom and Bosnia and Herzegovina*, Unpublished Master Thesis, Budapest: Central European University, 2014.
[26] Erna Polimac, *Execution of the Sejdić and Finci v. Bosnia and Herzegovina case, the reasons behind the delay,* Unpublished Master Thesis, Tilburg: Tilburg University, 2014.

(concerning right to be elected), and impacts (of the ECtHR's decisions). In consequent chapters these themes shall be explored and analyzed thoroughly.

The second chapter aims at to draw a clear picture of the thesis' conceptual and theoretical framework, which is necessary to understand how the right to be elected, and human rights, are positioned in the international law and the international relations discipline. The aim is to show how international/regional human rights regimes and tribunals are theorized and explained to determine whether the concept of the right to be elected in relation with human rights is a human right, and if so, what its importance is as a human right, concerning the existing international human rights documents. To conceptualize and theorize the right to be elected, this thesis undertakes a comparative analysis of how the right is regulated and guaranteed internationally in countries all over the world to underline the global importance of this right. As this thesis argues, this right is theoretically neglected in academic literature. A preponderance of academic literature tends to exclusively be concerned instead with the right to vote and political participation. The explanation of the thesis' theoretical framework begins with an examination of the relation between international law and international relations, whose interactions have resulted in institutionalism or otherwise referred to as regime theory, a theory that best explains the problems of human rights regimes, and compliance with regimes' norms and tribunals' decisions. It is important to understand in order to critically grasp the states' accession process into the ECHR and compliance with ECtHR's decision, as will be discussed further in this thesis.

To understand and analyse the potential impact of the ECtHR's decisions on the existing system, it is important to take into consideration the background context in Bosnia and Herzegovina at the time in which the rulings were made. The main goal of the DPA, besides a cease fire, was to satisfy the interests of the three dominant ethnic groups – Bosniacs, Croats, and Serbs in the changed constitutional system in the final draft of the Agreement, however at the expense of openly neglecting the rights of minorities and citizens. The third chapter of this thesis focuses on this issue and examines the extraordinary drafting of the DPA and the Dayton Constitution, its unusual characteristics, the problems of its implementation,

and the necessity to amend it. As this thesis highlights, the situation in Bosnia and Herzegovina since the signing to the DPA, has become more complicated. Although the DPA stopped the war and initiated peace building activities, the country continues to face problems which contribute to the image of an ongoing latent conflict that could, if not defused, escalate and resume into a violent conflict. Protests in February 2014 and others since, have reaffirmed this fear. The state structure established by the Dayton Constitution and power-sharing mechanisms have directly disabled the country's prosperity and progress. While some positive changes have been made in post-Dayton Bosnia and Herzegovina, it has only been because of the international community's imposition and pressure, rather than by the initiation of political elites. For the remainder of chapter three, it focuses on the regulation of the right to be elected in the constitutional system of Bosnia and Herzegovina (in the constitution and electoral legislation) and the attempts to reform it, the reasons the reform process has failured and discusses the prospective for future changes of the constitutional system.

In Chapter four, the ECtHR decisions concerning the right to be elected in Bosnia and Herzegovina will extensively be analysed. Prior to conducting this analysis, this thesis provides a review of the Court's caselaw concerning the protection of the right to be elected. Then the Protocol No. 12 to the ECtHR shall be explained and analysed, as will the provision of Article 1. This chapter examines the background behind the ECtHR's decisions, relevant legislation and applicants' complaints. Then the Court's decisions and dissenting opinion will be assessed, and the process of the decisions' execution will be described in detail.

Chapter five is reserved for the disclosure of findings and conclusions. Detailed findings of each chapter shall be summarized, and general conclusions, together with recommendations for future research will be given.

Chapter Two: Conceptual and Theoretical Framework of the Right to be Elected

2.1. Introduction

The complex contemporary concept of human rights implies moral and traditional religious values at its foundation, with philosophical roots in natural law and dignity, a political and legal dimension in modern law as a discipline, and its characteristics in the research area dedicated to individuals' protection beyond a state, or even from a state's arbitrariness. Human rights, after its post-war renaissance, became the standard of modern and developed democratic countries. The first part of this chapter, examines the characteristics, importance and development of human rights to sketch the conceptual framework of this thesis. Only by first understanding the concept of human rights, it is possible to recognize the importance of the right to be elected. As stated in the literature review however, there remains a paucity of research on this topic. Therefore, the first part of this chapter examines relevant international human rights documents and identifies the provisions concerning this right. Next, the constitutional texts worldwide will be analysed for the purpose of determining whether they contain provisions guaranteeing the right to be elected, and if so, whether the right is guaranteed for everyone or restricted to some citizens, with certain prescribed restrictions.

In the second part of this chapter, the thesis' theoretical framework is provided. As the literature review revealed, previous analyses of the ECtHR decisions failed to make any reference to any theory while explaining the process of a state's accession to the ECHR or compliance with the ECtHR decisions. Human rights is a field researched by both international relations and international law disciplines. Both disciplines are deemed in this thesis important in analysing the thesis research problem. International relations theories contribute to the research of international law by providing missing theoretical and/or methodological support as reflected in institutionalism and regime theories. International law on the other hand contributes to international relations as explanatory factor in analysing how states behave in

international system. The reality is that these disciplines are mutually interconnected and undividable.

2.2. Establishment of Conceptual Framework

The contemporary concept of human rights, being a common term used in our everyday lives, has a complex background and is usually used to refer to one branch of law – international human rights law. The emergence and development of this relatively new branch of law is closely connected to the aftermath of World War II. What proceeded the war, was an international effort to create a new and better world where every individual has the potential to enjoy a minimum level of rights and freedoms. Human rights emerged as "a new inclusive standard that emphasized what is shared by and owed to everyone"[27] in the after-war period. Proceeding the war, many universal and regional human rights documents, as well as national legal acts in this area were drafted, and later enforced, becoming instruments for the judicial protection of human rights.

International human rights law brought a change to international law because for the first-time the interests of individuals were protected systematically on an international level. Previoulsy, international law was only concerned with inter-state relations and the individual was mainly considered as an object. With international human rights law, individuals undoubtedly became subjects of international law and the basics of individuals' protection were established. Interests of individuals became protected either under the law on diplomatic protection in peace, or under the international humanitarian law in war. Different from both of these laws, human rights law has different functions[28] and its emergence resulted with significant changes in international relations. Some states adopted the respect for human rights as a part of their foreign policy and by the early 1980's human rights became a

[27] Jack Donnelly, "Human Rights: A New Standard of Civilization?", *International Affairs*, Vol. 1, No. 74, 1998, p. 14.

[28] It provides a common language, reinforces the universality of human rights, legitimizes the claims of rights, signals the perceived will of the international community, provides juridical precision, creates increased expectation of compliance, encourages domestic judicial enforcement, encourages enforcement by international courts or agencies, creates additional stigma and avoids moral relativism. Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", The European Journal of International Law, Vol. 19, No. 4, 2008, p. 657.

standard subject in bilateral and multilateral diplomatic relations. Many new international non-government organizations were established exclusively with the aim of promoting and protecting human rights, and a new era in human history began – the human rights era, with a characteristic of a "human rights culture"[29] emerging. Human rights imposed "supplementary constraints on the freedom of actions of the states"[30], and became a classic civilization standard - European in origin, and internationally not imposed by the force. Today, human rights show that "international legitimacy and full membership in society must rest in part on standards of just, humane or civilized behavior"[31].

Understanding the theoretical foundations of human rights are important to grasp the ideas that underpin them, and its importance and place in a legal and political system[32]. Human rights theory is criticized as "fundamentally flawed, lacking a centre, organizing structure, or unifying value"[33]. Freeman summarizes the problem of human rights theory and explains the discipline:

> The concept of human rights is a moral, political, and legal idea that originated in Christian, natural-law philosophy, became secularized and was revived by the United Nations to articulate its opposition to Fascism, and to unite the world on a set of standards according to which governments are required to treat all human beings decently. It has widespread support in the contemporary world, but there is no agreement on its philosophical basis[34].

The fact that the Universal Declaration of Human Rights is not based on any particular theory reinforces Freeman's argument. This however may be in part the

---

[29] Richard Rorty, "Human Rights, Rationality and Sentimentality", Aakash Sinth Ragore, Alex Cistelecan (ed.), *„Wronging Human Rights? Philosophical Challenges for Human Rights"*, New Delhi: Routledge, 2011, p. 170.

[30] Jack Donnelly, "Human Rights: A New Standard of Civilization?", *International Affairs*, Vol. 1, No. 74, 1998, p. 18.

[31] Ibid, p. 21.

[32] Human rights theories are diffused, and every theorist or writer has their own view about human rights theories. Therefore, it is hard to speak of a coherent distinction of certain human rights theories. The human rights doctrine in many respects is in search for an appropriate human rights theory. That "Holy Grail of this branch of law" shall be giving coherence to the concept of human rights, not being rooted in any particular region but applicable across cultures and sensitive to difference, giving importance to the individual within a social dimension, not being dependent on human rights originating only from the exercise of the state authority, not being ideological but humanistic and timeless and at the same time adaptable to changing ideas of what being human involves. Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", The European Journal of International Law, Vol. 19, No. 4, 2008, p. 677.

[33] Ruti Teitel, "Human Rights Genealogy", *Fordham Law Review*, No. 66, 1997-1998, p. 301.

[34] Michael Freeman, "The Problem of Secularism in Human Rights Theory", *Human Rights Quarterly*, Vol. 26, No. 2, 2004, p. 399.

reason for its success and "part of its brilliance"[35]. Contemporary human rights can be detached from both its history and philosophical roots and still be accepted as a prevailing practice in law, with ambiguity understood as an advantage.

The contemporary concept of human rights emerged as a synergy of the earlier developed concepts of natural law, natural rights and human dignity. Each of these concepts impacted the modern concept of human rights. First there is natural law, considered by Grotius as the "dictate of right reason"[36], a set of "basic practical principles"[37], and a "set of basic methodological requirements of practical reasonableness"[38] needed to formulate "a set of general moral standards"[39]. Another critical concept is natural rights, understood as pre-institutional, belonging to people solely because they are humans[40], which guarantees individual liberty against infringements by the state and establishes social conditions to live dignified human lives[41] by "virtue of being human"[42], and as "basic moral entitlements possessed only by persons"[43]. A third influential concept – human dignity, is a central term used in preambles of the majority of human rights documents[44], and in judicial decisions. It is premised on the idea that "each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for individuals and not vice versa"[45]. This

---

[35] Michael Ignatieff: *"Human Rights as Politics and Idolatry"*, Princeton, N.J. : Princeton University Press, 2001 as referenced in Charles Beitz, "What Human Rights Mean?", *Daedalus*, Vol. 132, No. 1, On International Justice, 2003, p. 36.

[36] Hugo Grotius, De Jure Belli et Pacis (Book 1, 1689) as quoted in Jerome J. Schestack, "The Philosophic Foundations of Human Rights", *Human Rights Quarterly*, Vol. 20, No. 2, 1998, p. 207.

[37] John Finnis, "Natural Law and Natural Rights" (note 4, p. 23) in Chris Brown, "Universal human rights: A critique", *The International Journal of Human Rights*, Vol. 1, No. 2, 1997, p. 44.

[38] Ibid.

[39] Ibid.

[40] Charles Beitz, "What Human Rights Mean?", *Daedalus*, Vol. 132, No. 1, On International Justice, 2003, p. 41.

[41] Ibid.

[42] Jerome J. Schestack, "The Philosophic Foundations of Human Rights", *Human Rights Quarterly*, Vol. 20, No. 2, 1998, p. 203.

[43] R. Wasserstrom, "Rights, Human Rights, and Racial Discrimination" as quoted in: Romuald R. Haule, p. 391.

[44] Interesting is the fact that original text of European Convention on Human right does not referrer to dignity but considers it one of the fundamental values of European human rights law. Rex D. Glensy, "The Right to Dignity", *Columbia Human Rights Law Review*, 43:65, 2011, p. 105.

[45] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law*, Vol. 19, No. 4, 2008, p. 723. Author describes these three

term expresses a foundational commitment to human rights practice[46]. Together these three concepts have proven influential on contemporary interpretations of human rights.

Enforcement and compliance of human rights norms is the issue that provokes serious discussions and criticism. Enforcement of human rights, and more generally of international law, shall not be understood as a process identical to the domestic law enforcement process. It is a different, "transnational" process, which includes institutional interaction, interpretation of legal norms, and attempts to internalize those norms into a domestic legal system[47]. Apart from the European Court for Human Rights, states have not created specific bodies to enforce human rights. Another way for enhancing human rights respect is through the foreign policy of the major powers, but this has not always been very effective since states often side-line or make lipservice to human rights and instead give preference to other pressing issues in relation to certain countries[48].

2.2.1. Right to be Elected as a (Basic) Human Right?

In order to conceptualize the right to be elected, its important to understand if it has the characteristics of human rights. Is there a right to be elected? Is it a human right? Is the right to be elected a basic human right in its nature?

Respect for human rights is a constitutive part of a contemporary understanding of a modern and civilized state[49]. Political participation, together with the respect for human rights, competitive elections and rule of law, is one of the basic principles of a modern democracy. Today there exists many different types of

---

elements as the ontological claim, the relational claim and the limited state claim and they are the minimum core of the the concept of human dignity.

[46] David Luban, "Human Rights Pragmatism and Human Dignity", in Massimo Renzo, Rowan Cruft, and Matthew Liao (editors), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press, 2015, p. 25.

[47] Harold Hongju Koh, "How is International Human Rights Law Enforced?", *Indiana Law Journal*, Vol. 74, No. 4, p. 1399.

[48] Chris Brown, "Universal human rights: A critique", *The International Journal of Human Rights*, 1:2, 1997, p. 53.

[49] Thomas Risse, ""Let's Argue!": Communicative Action in World Politics", *International Organization*, Vol. 1, No. 54, 2000, p. 22.

democracy, the most common being an electoral[50] and liberal democracy[51]. This form of democracy is regarded as the ideal type that each democratic country should strive to become. Unquestionably, democracy and democratization are ultimate goals[52] of every country and its citizens in the modern world[53]. Abraham Lincoln's famous definition of democracy as "government of the people, by the people, and for the people"[54] best summarizes the idea and basis of democratic government.

Elections are one of the key features of every democracy and is unimaginable without elections. Elections refer to both the right to vote and the right to be elected. These rights are interconnected and mutually interdependent. To determine whether there is a human right to be elected, we first have to answer the question whether there is a human right to democracy[55]. Although certain countries do not accept

[50] In some countries, with significant violations of human rights, massive corruption, and a weak rule of law, elections still have an important role. In such circumstances, there is a substantial freedom for parties and candidates to campaign and solicit votes, to speak, publish, assemble, organize, and move about the country peacefully. If there is also a neutral and fair administration of the voting and vote counting, with universal suffrage, secrecy of the ballot, reasonable access to the mass media, and established legal procedures for resolving electoral disputes we can talk about "electoral democracy". Larry Diamond, "Can the Whole World Become Democratic? Democracy, Development, and International Policies", CSD Working Papers, 2003, p. 8–9.

[51] The type of democracy in which protection of individual civil liberties is guaranteed (such as freedom of belief, speech, association and assembly), the rule of law, independent judiciary and protection of ethnic, cultural, religious and other minorities, pluralistic civil society and civilian control over the military. Ibid.

[52] Diamond claims that "the goal for every country should be a political system that combines democracy on the one hand with freedom, the rule of law, and good government on the other." Ibid, p. 9.

[53] Unfortunately, even today that goal is not about to be achieved - "democracy in crisis" is general conclusion of Freedom House's annual report on freedom in the world. 2017 is described as a year in which democracy faced its most serious crisis in decades and was a 12th consecutive year of global decline in freedom, especially affected by the situation in the United States of America, where with President Trump elected many problems emerged, especially the problems with ethnical and religious minorities. On the other hand, influence of the two biggest autocracies in the world, China and Russia, was increased and in some European countries right-wing populist parties won seats in parliaments and even formed a government. (See more at: https://freedomhouse.org/report/freedom-world/freedom-world-2018).

[54] A. Lincoln, Gettysburg Address (Gettysburg National Cemetery, 19 Nov. 1863), available at: http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm (last accessed on May 29, 2018).

[55] This issue is object of discussion among scholars. While some consider that there is a right to democracy and that is listed in main human rights documents (Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights) others deny this and claim that the right to political participation does not mean also the right to democracy. See: Johannes Hendrik Fahner, "Revisiting the human right to democracy: a positivist analysis", *The International Journal of Human Rights*, Vol. 21, No. 3, p. 324-325.

democracy, it does not mean that there is no positive human right to democracy. While democracy might not be a fundamental human right, it still can be considered a human right because of the important functions it enables individuals – to challenge non-democratic regimes and policies before a variety of numbers of international courts and review bodies, especially concerning restrictions on the political rights of specific individuals, irregularities in democratic processes, structural undemocratic features of political systems and the absence of democracy altogether[56].

The Human Rights Committee (HRC), the body of independent experts that provides authoritative, but non-binding opinions on the implementation of the International Covenant on Civil and Political Rights (ICCPR), took a stand that the rights listed in the Article 25 of the Covenant (the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service) are guaranteed to citizens in "whatever form of constitution or government is in force", which indirectly means that these key features of democracies are universally accepted. Also, the European Court of Human Rights in the provision of Article 3 of Protocol No. 1 to ECHR "guarantees individual rights, including right to vote and stand for elections".[57]

If we accept the existence of a human right to democracy, then it is also an argument for the acceptance of the existence of a right to be elected. Universal suffrage, commonly accepted in most democratic states, implies both the right to vote and the right to be elected. If the right to be elected is guaranteed and its fulfilment is protected, then so is the right to vote since the two are mutually interdependent of each other. The relationship between the right to vote and the right to be elected as interdependent, justifies the argument that the right to be elected is a basic human right. This relationship is reflected in two dimensions, one is the voter's interest in freely choosing his representative[58] and the other is the voter's interest in

[56] Johannes Hendrik Fahner, "Revisiting the human right to democracy: a positivist analysis", *The International Journal of Human Rights*, Vol. 21, No. 3, p. 332.
[57] Decisions in cases Aziz v. Cyprus, Application No. 6994/01 (2004), para. 25. and Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81 (1987).
[58] Otherwise elections would make no sense, as it was in communist systems when there were cases that ballot lists on the elections had only one candidate.

making an informed choice[59]. While every voter might not always find a candidate or party he/she would wish to see on the ballot paper or vote for, they still have options amongst a "diverse field of candidates which represent wide and varied cross-sections of society"[60]. This voter's right can be also seen as a dimension of the right on free expression, as this right also concerns interests of audience in hearing what is being said. In order to guarantee the protection of above-mentioned voter's interest, the right to be elected shall be conceptualised as an absolute right, limited by the state only in certain justified cases and without procedural restrictions that would unduly disable the realization of the right. This relationship reflects the importance of the right to be elected. Its signifies the role of preserving all other human rights and contributes to a common liberal culture.

Although the right to be elected is not an absolute right and can be subject to certain restrictions by the states, these restrictions shall serve to legitimatize aims, because the right to be elected is "of obvious importance to the coherence and the development of the democratic state".[61] Therefore, if the right to vote is an implication of a voter's choice, then the right to be elected is an attempt in enabling that choice to practically be implemented. The interdependence between democracy and electoral rights (right to vote and right to be elected), and the context in which this right exists, is one of key features in a (liberal) democracy[62] because "its substantive features provide the minimum conditions necessary for the protection of the strong right to candidacy"[63].

2.2.2. Conceptual Development of Right to be elected

Despite the demonstrated importance of the right to be elected, regarded as one of the basic pillars of democracy, it remains, as already mentioned in the literature

[59] Alecia Johns, "The Case for Political Candidacy as a Fundamental Human Right", *Human Rights Law Review*, No. 16, 2016, p. 49.
[60] Ibid, p. 50.
[61] Gerhand van der Schyff, "The Concept of Democracy as an Element of the European Convention", *Comparative and International Law Journal of Southern Africa*, No. 38, 2005, p. 363.
[62] Alecia Johns, p. 36.
[63] Ibid.

review, a surprisingly underresearched area[64]. Unjustified negligence of this important right in theory and legislation had been evidenced, and only a few significant, but unfortunately, isolated contributions have shed light on its importance and justification as a basic human right[65]. Therefore this thesis seeks to contribute to the conceptual elaboration and research on this topic apart from already underlining the existing gap in literature to encourage researchers to pay attention to this critical topic.

One of the primary problems in conceptualizing the right to be elected is the vast range of synonyms (right to stand for elections, right to stand/run for office/elections and right to candidacy or candidate eligibility) and broader and more widely used concepts such as suffrage or (political) franchise, political participation[66], electoral rights and right to democracy. Consequently this has contributed to the negligence of the conceptualition and research of the concept the right to be elected and continues to be confused with other concepts such as political participation, which has either been used interchangeably or given preference to. This inattention however comes with a price, giving the impression that democracy depends on certain conditions or even prejudices, giving people the right to vote and the right to elect someone to represent them, but not necessarily the right for everyone to be elected. This thesis therefore seeks to draw to attention the

[64] Alecia Johns, p. 30.
[65] Alecia Johns, "Conceptualising Political Candidacy as a Human Right", DPhil thesis, University of Oxford, 2014 (Unfortunately, the thesis is not available online).
[66] Political participation is usually shortly defined as "citizen's activities affecting politics", and more precisely as a voluntary activity of people in their roles as non-professionals or amateurs and which concerns governments, politics, or the state in broad senses of word and is neither restricted to specific phases nor to specific levels or areas (Jan W. van Deth, "What is Political Participation", Oxford Research Encyclopedia of Politics, 2016, p. 2, DOI: 10.1093/acrefore/9780190228637.013.68). Casting a vote, signing a petition, or filing an objection all are examples of political participation. Whiteley similarly defines political participation: "Political participation is always active behaviour and can be engaged in by an individual or a group, with the aim of affecting individual or group concerns. It can be either instrumental or symbolic, must be voluntary and can be legal or illegal. Finally, political participation is always targeted at the state or an entity responsible for discharging state responsibilities or services." Stuart Fox, "Is it Time to Update the Definition of Political Participation?", Parliamentary Affairs, Vol. 67, Issue 2, 2014, p. 500. Also, it is discussed that there is a separate human right to political participation, which is often mixed with and contained in human right to democracy. This right is guaranteed in human rights treaties is claimed to shall be listed among basic human rights. (See: Fabienne Peter, "Human Right to Political Participation", *Journal of Ethics & Social Philosophy*, Vol. 7, No. 1, 2013, p. 1.).

importance of this concept as a human right, and clarify conceptual confusion to improve research on this topic.

In addition to the literature gap, there is a legal one concerning the right to be elected. The most important human rights documents do not for exmplae explicitly prescribe this right. The Universal Declaration on Human Rights does not mention the right to be elected but rather the right to take part in the government, directly or through freely chosen representatives. Article 21 of the Universal Declaration prescribes:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> (2) Everyone has the right to equal access to public service in his country.
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The International Covenant on Social and Political Rights does explicitly mention the right to be elected in its Article 25:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

When comparing and analysing the two provisions, they share many similarities, but the relevant provision of the Covenant is much more precise it is directly prescribing the right to be elected.

When it comes to the human rights instruments in Europe, the core text of the European Convention on Human Rights does not contain any provision regarding political participation at all. But Protocol 1 to the Convention (1952) does prescribe the right to free elections in its Article 3:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

This provision however ceased to regulate the issue in detail as it does not explicitly mention neither universal and equal suffrage nor the right to vote and to be elected[67], as the provisions of the UN human rights documents does. The European Convention on Human Rights is adopted by the Council of Europe but there are also other relevant legal documents in Europe that regulate this issue (regulations of the European Union and documents of the Organization for Security and Cooperation in Europe). Other regional human rights regimes' legal documents contain relevant provisions. Article 23 of the American Convention on Human Rights, which was adopted in 1978, it mentions the right to vote and to be elected and regulates on which basis these rights can be limited (age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings). The African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981 and entered into force in 1986, has only a provision about the right to participate in government (Article 13), similar to the provision of the Universal Declaration.

Domestic regulations evidently do not follow international standards on regulating the right to be elected. Most constitutions do not have provisions regarding the right to be elected, and only some have provisions concerning the right to vote. As will be demonstrated in the next section, the right to be elected, along with other important provisions, is missing in the lists of rights in many constitutions[68].

What emerges from this analysis, is the right to be elected has been developed mainly through jurisprudence of regional and international judicial and monitoring human rights institutions. Generally, the right to be elected shall be guaranteed to

[67] European Court of Human Rights adopted the view this provision entails both right to vote and right to be elected (Case of Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, from March 02, 1987).
[68] Alecia Johns, p. 30.

everyone and the existing eligibility requirements shall be reasonable and non-discriminative. This also includes the eligibility of candidates, which requires procedural fairness. Some of the standards adopted include the duty of the state to take measures to ensure the opportunity for exercising the right to be elected exists, that candidates are proportionate and not excessive, and that non-arbitrary and fair mechanisms for the counting of votes are provided as well as fair and impartial procedures in case of potential electoral misconduct[69]. Still, it is acknowledged by these bodies that every state's historical and political evolution and conditions are to be respected while prescribing conditions for exercising the right to be elected.

Johns mentions the "robust" right to be elected in order to describe general scope of this right. She claims that the content of this right, consists of everyone's potential to be a political candidate, is also includes two duties of states – a positive and negative one. A negative duty on a state is to refrain from imposing unjustifiable eligibility requirements for elective office to protect the core right to be qualified, not the rights of those qualified. Consequently, a state can place restrictions on eligibility only if a strong justification of these restrictions is provided. Positive duty concerns the procedural dimension of the right – general equality of opportunities among potential candidates shall be secured through the establishment of a fair electoral framework within which the right may be exercised.

2.2.3. Right to be elected in Constitutions: Assessment over Examples from Practice

Currently in the United Nations, there are one hundred and ninety-three sovereign states in the world. They widely range in political systems, forms of government, and internal organization. Accordingly, they give importance to different values.

The constitution of a country, besides being a basic legal act and highest law of the state, is the document that best identifies and defines that country. Its provisions exemplify what issues a country's constitution gives the greatest importance to and

[69] Ibid, p. 31.

regulates by this highest legal act. Modern constitutions usually contain sections with basic rights and freedoms listed, which gives us an idea of which rights are given more importance. The remainder part of this section critically analyses if and how often the right to be elected is found in contemporary constitutions in the world. In the event it is not included, this thesis questions how democratic and developed the country likely is.

Using the existing data base of the constitutions of the world,[70] one hundred and ninety-two constitutions currently in force have been analysed. Of the one hundred and ninety-two consitutions analysed, only one hundred and thirty-five constitutions contain provisions regarding the claim of universal suffrage[71], and only thirty-two countries contain provisions guaranteeing the right of citizens to be elected[72]. Johns in her work analysed 150 constitutions and found that 27% contained a provision regarding the right to be elected while provisions of other constitutions had "a more general right to hold public office or to directly participate in government, from which a right to candidacy may conceivably be derived"[73]. 66% of the constitutions had no provision concerning the right to be elected[74].

Following in alphabetical order, the table contains a list of countries whose constitutions contain provisions regarding right to be elected, and makes reference to the number of relevant provisions and their texts as indicated below.

[70] https://www.constituteproject.org/content/about?lang=en
[71] https://www.constituteproject.org/search?lang=en&key=voteun&status=in_force (18.07.2019.).
[72] On the above-mentioned web page, the tool for search of the provisions guaranteeing solely right to be elected was not available so I used previous search and checked if each of the constitutions listed in this search contains such a provision. Potentially, I might have missed some countries if the guarantee of right to be elected was placed somewhere else in the constitutional text and not at the same part as the provision concerning universal suffrage.
[73] Alecia Johns, p. 32.
[74] Ibid.

1 – Provisions concerning right to be elected in the constitutions

Country	Relevant provision	Text of provision
Albania (1998, rev. 2016)	Part II, Chapter 3, Article 45	Every citizen who has attained the age of 18, even on the date of the elections, has the right to elect and be elected.
Andorra (1993)	Title IV, Chapter 1, Article 51	All Andorran nationals fully enjoying their political rights are entitled to vote and to be eligible for election.
Angola (2010)	Title II, Chapter 2, Section 1, Article 54	Every citizen who has attained the age of eighteen years shall have the right to vote and stand for election for any state or local authority body and to serve their terms of office or mandates, under the terms of the Constitution and the law.
Bahrain 2002 (rev. 2017)	Chapter I, Article	e. Citizens, both men and women, are entitled to participate in public affairs and may enjoy political rights, including the right to vote and to stand for elections, in accordance with this Constitution and the conditions and principles laid down by law. No citizen can be deprived of the right to vote or to nominate oneself for elections except by law.
Cambodia (1993, rev. 2008)	Chapter III, Article 34	Khmer citizens of either sex shall enjoy the rights to vote and to stand as candidates for an election.
Canada (1867, rev. 2011)	Part I, C, 3 (Democratic rights of citizens)	Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
Congo (2005, rev. 2011)	Title I, Chapter I, Section 2, Article 5	Without prejudice to the provisions of Articles 72, 102 and 106 of this Constitution, all Congolese of both sexes, of eighteen years of age [at least], and enjoying their civil and political rights are electors and eligible, under the conditions determined by the law.
Egypt (2014)	Chapter III, Article 87	The participation of citizens in public life is a national duty. Every citizen has the right to vote, run in elections, and express their opinion in referendums. The law shall regulate the exercise of these rights. Performance of these duties may be exempted in cases specified by the law.
Ethiopia (1994)	Chapter III, Part II, Article 38, line 1c	Every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights: […] c. To vote and to be elected at periodic elections to any office at any level of government; elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
Fiji (2013)	Chapter 2 (Bill of Rights), Article 23	3. Every citizen who has reached the age of 18 years has the right a. to be registered as a voter; b. to vote by secret ballot in any election or referendum under this Constitution; c. to be a candidate for public office, or office within a

		political party of which the citizen is a member, subject to satisfying any qualifications for such an office; and d. if elected, to hold office.
Gambia (1996, rev. 2004)	Chapter IV, Article 26	Every citizen of The Gambia of full age and capacity shall have the right, without unreasonable restrictions- […] b.to vote and stand for elections at genuine periodic elections for public office, which election shall be by universal and equal suffrage and be held by secret ballot;
Germany (1949, rev. 2014)	Chapter II, Article 28, line 1 and Chapter III, Article 38, line 2	The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body. (38)2. Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
Honduras (1982, rev. 2013)	Title II, Chapter III, Article 37, line 1	The following are rights of citizens: 1.To vote and be elected;
Hungary (2011, rev. 2016)	Article XXIII, line 1	Every adult Hungarian citizen shall have the right to vote and to be voted for in elections of Members of the National Assembly, local government representatives and mayors, and of Members of the European Parliament.
Iraq (2005)	Section II, Chapter I, Article 20	Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.
Kenya (2010)	Article 38.3 (Political Rights)	Every adult citizen has the right, without unreasonable restrictions a.to be registered as a voter; b.to vote by secret ballot in any election or referendum; and c.to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.
Kosovo (2008, rev. 2016)	Chapter II, Article 45, line 1	Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.
Lesotho (1993, rev. 2011)	Chapter II, Article 20, line 1	Every citizen of Lesotho shall enjoy the right: […] b. to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;
Malawi (1994, rev. 1999)	Chapter IV, Article 40, line 3	Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for public office.
Marshall	Article II, Section	Every person has the right to participate in the electoral

Islands (1979, rev. 1995)	14	process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Constitution and to election regulations which make it possible for all eligible persons to take part.
Mongolia (1992, rev. 2001)	Chapter II, Article 16, line 9	The citizens of Mongolia shall be guaranteed to exercise the following rights and freedoms: […] 9. The right to participate in State management [public administration] affairs directly or through the organs of representation. Have the right to elect and to be elected to the State organs. The right to elect shall be exercised from the age of eighteen years, and the age qualification for being elected shall be determined by law, taking into consideration the requirements for the relevant State organs and official positions concerned.
Netherlands (1815, rev. 2008)	Chapter 1, Article 4	Every Dutch national shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament.
New Zealand (1852, rev. 2014)	Part 2, Subpart 2, Article 12	Every New Zealand citizen who is of or over the age of 18 years a. has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and b. is qualified for membership of the House of Representatives.
Palestine	Title Two, Article 26	Palestinians shall have the right to participate in political life, both individually and in groups. They shall have the following rights in particular: […] 3. To vote, to nominate candidates and to run as candidates for election, in order to have representatives elected through universal suffrage in accordance with the law.
Rwanda (2003, rev. 2015)	Chapter 1, Article 2	Suffrage is universal and equal for all Rwandans. All Rwandans, both men and women, fulfilling the requirements provided for by law, have the right to vote and to be elected.
Serbia (2006)	Part 2, 2, Article 52	Every citizen of age and working ability of the Republic of Serbia shall have the right to vote and be elected.
Somalia (2012)	Chapter 2, Title 2, Article 22	2. Every citizen who fulfils the criteria stated in the law has the right to elect and to be elected.
South Africa (1996, rev. 2012)	Chapter II, Article 19, line 3b	3. Every adult citizen has the right a. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and b. to stand for public office and, if elected, to hold office.
South Sudan (2011, rev. 2013)	Part 2, Article 26, line 2	Every citizen shall have the right to vote or be elected in accordance with this Constitution and the law.
Sudan (2005)	Part 2, Article 41, line 2	Every citizen shall have the right to stand for elections in periodic elections, which shall be by universal adult suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electorate.
Turkey	Chapter IV, Part	In conformity with the conditions set forth in the law,

(1982, rev. 2017)	II, Article 67	citizens have the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum.
Zimbabwe (2013, rev. 2017)	Chapter 4, Article 67, line 3	Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right a. to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and b. to stand for election for public office and, if elected, to hold such office

The most common terms used in the constitutional provisions include: the right to be elected (eleven provisions)[75], to stand/be (as/a candidate) for election/public office (thirteen provisions)[76], to run in elections/for office (three provisions)[77], to be eligible for elections (two provisions)[78], to be qualified for membership (two provisions)[79] and to be voted for in elections (one provision)[80]. While analysing relevant provisions of the constitutions, my aim was to find and identify the provisions of the constitutions which guarantee the right to be elected. At the same time, I searched for provisions that guarantee this right to all citizens of the country, without any restrictions or reservations[81]. The provisions of eight states' constitutions –Albanian, Angola, Congo, Fiji, Kosovo, Mongolia, New Zealand, Zimbabwe, mention the age of eighteen years as a condition for every citizen to vote and be elected. Provisions in some other states' constitutions refer to the age in a different way – in Gambia ("full age"), Germany ("age of majority"), Hungary and South Africa ("adult"). This age limitation can be considered as reasonable and acceptable as only persons at the age of eighteen are considered to have the capacity to have rights and obligations. However, limiting the age for being elected on certain

[75] Albania, Ethiopia, Germany, Honduras, Kosovo, Mongolia, Rwanda, Serbia, Somalia, South Sudan Turkey.
[76] Angola, Bahrain, Cambodia, Fiji, Gambia, Kenya, Lesotho, Malawi, Marshall Islands, Netherlands, South Africa, Sudan, Zimbabwe.
[77] Egypt, Iraq, Palestine.
[78] Andorra, Congo.
[79] Canada, New Zealand.
[80] Hungary.
[81] Johns also claims that in liberal democracies only express recognition of the right to be elected as a justiciable constitutional right in is acceptable.

functions or positions is not acceptable[82]. Provisions of constitutions of five states emphasize gender equality of the right to be elected – Cambodia, Congo, Ethiopia, Iraq and Rwanda.

In a few of the provisions, the limitations and exceptions to the right to be elected are determined by the law[83], regulated by the law,[84] limited by the court decision[85], election regulations[86] , or be decided by acts of parliament[87]. These limitations make the guarantee of the right to be elected to all citizens potentially "empty" and "superficial", but is still accepted since these provisions at least principally and declaratively guarantee the right to be elected to all citizens. This is not the case however with the constitution of Finland, where there is no guarantee of the right to be elected, it only prescribes specific provisions that shall govern the eligibility to stand for office in national elections[88].

Johns argues that the provisions of constitutions regarding the establishment of the composition of government, or generally outlining those eligible to stand for major elective offices, can be considered to represent Dworkin's "enabling" constitutional rules, which serve to construct a majority government by stipulating the terms and conditions of elections. These rules enable eligible citizens to claim to have a right to be elected, although it is not found in constitutional text. Johns argues that the provisions regarding the right to be elected shall be made explicit, rather than left vague, and found in all constitutions and guaranteed to all adult citizens, without any limitation of the right being justified by the state[89]. So, the state has a duty not only to guarantee the right to be elected to everyone by the constitution, but also to

[82] Example is the provision of Article 27 of the Constitution of Tajikistan: "After having attained the age of 18 years, a citizen has the right to participate in a referendum, to vote, and also to become elected after having attained the age established by the Constitution, constitutional laws, and laws."
[83] Title I, Chapter I, Section 2, Article 5 of the Constitution of Congo. Similar is the provision of Chapter IV, Part II, Article 67 of the Constitution of Turkey: "In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum.
[84] Chapter III, Article 87 of the Constitution of Egypt.
[85] Chapter II, Article 45, line 1 of the Constitution of Kosovo.
[86] Article II, Section 14 of the Constitution of Marshall Islands.
[87] Chapter 1, Article 4 of the Constitution of the Netherlands.
[88] Section 14 of the Constitution of Finland.
[89] Alecia Johns, "The Case for Political Candidacy…", p. 32.

guarantee equal access to the right to all its citizens. Johns calls this a "robust" conception of the right to be elected[90].

Another reason for the need of an explicit provision concerning the right to be elected, is its tight connection to the democratic political system of a state. Only states whose constitutions contain provisions concerning elementary democratic structures can be considered as democratic, because these structural provisions that determine the set-up of a democratic system, must be constitutional, constant, and "immune to change"[91]. Otherwise, the political system of a country, whose constitution does not contain such provisions, would no longer be a democracy[92].

2.3. Establishment of Theoretical Framework

Previous research concerning the ECtHR decisions analysed in this thesis, approached to the research problem either solely from an international law perspective, considering the applied methodology, without analysing theoretical aspects of the problem, or from an international relations perspective, mostly analysing the impacts of these decisions concerning the EU membership process. Acknowledging human rights as a research area of both international law and international relations, and assuming thesis topic is indeed interdisciplinary, the theoretical framework of this thesis is developed on the assumption that these two disciplines are interdependent and interact with each other. As it will be emphasized below, this interaction is especially important in the theoretical realm, whereas international relations provides a missing theoretical framework to international law. Following this claim, and accepting that the main result of this interaction is the application of international relations theories in international law research, institutionalism and regime theory are chosen as this thesis' theoretical framework. Regime theory is a theoretical explanation and background of international

[90] Ibid, p. 33.
[91] Cornelia Schneider, "The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy", *UCL Jurisprudence Review*, 2000, p. 104-105.
[92] Ibid.

institutions and regimes[93]. This theory explains regimes' functioning and states' compliance with the regime rules. Regime theory is chosen as this thesis' theoretical framework.

Furthermore, international law and international relations disciplines' interaction shall be explained, and each discipline's contribution shall be analysed. Then, the institutionalism and regime theory, and finally, human rights regimes shall be explained.

2.3.1. International Law and International Relations

International law[94] and international relations are interrelated disciplines, with continuous interchange, what also causes certain redefinition of each of the fields. Scott explains "the two frequently estranged disciplines"[95] are intertwined in such a measure that it is almost impossible to think about one of these fields without also reflecting on another at the same time[96]. The idea of international law is "an important form of power in international politics"[97].

Although for a long period the two disciplines were estranged and were hardly "talking about the same world"[98], since the nineties, the interaction between international law and international relations has been considered to be strong enough

[93] Regimes can be shortly defined as "the rules guiding cooperative practices in international relations", Robert Keohane, "International Relations and International Law: Two Optics", *Harvard International Law Journal*, No. 38, 1997, p. 488.
[94] For international relations scholars, international law's influence was long time considered minimal in world politics – "There was power and there were rules and when the two clashed there was the rule of power." Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*", European Journal of International Law,* Vol. 11, No. 2, 2000, p. 440.
[95] Ibid, p. 448.
[96] According to Michael Byers, international relations discipline actually emerged out of a split between two groups of Anglo-American international lawyers during 1930's and 1940's – on the international relations side there were realists and on the international law side there were positivists, who differed on their attitude about the role of the state and law in interstate relations. See: Michael Byers, "International Law", p. 613, in Christian Reus-Smith, Duncan Snidal, *The Oxford Handbook of International Relations*, Oxford University Press, Oxford, 2008.
[97] Shirley V. Scott, "International Law as an Ideology: Theorizing the Relationship between International Law and International Politics", *European Journal of International Law,* Vol. 5, 1994, p. 324.
[98] Kenneth W. Abbott, "Elements of a Joint Discipline", *Proceedings of the ASIL Annual Meeting*, Vol. 86, 1992, p. 167.

to contemplate the idea of an emergence of a "joint discipline"[99] – with a new name[100], but with characteristics inherited from both original disciplines: being descriptive, doctrinal, explanatory, normative and instrumental[101]. This new discipline's aim would be "to integrate the domestic and international arena as fully as possible"[102].

Growing interest in interdisciplinary collaboration increased with time and a lot of research has been conducted about the relation and interaction between two disciplines. There are two important explanations for this tendency – first, it is "the result of responses by members of each discipline to the developments in the external environment they seek to explain and shape"[103] and second, of "intellectual dynamics internal to each discipline"[104]. Both disciplines for example share joint concepts – international governance, social construction and liberal agency.

Each of disciplines had accepted the other's contributions, through theoretical and methodological justifications and explanations of complex phenomena of international realm. International lawyers are using international relations theory's insights in their analysis "to diagnose substantive problems and frame better legal solutions; to explain structure or function of particular international legal rules or institutions; and to reconceptualise or reframe particular institutions or international law generally"[105]. Interaction is especially important in the theoretical dimension. Modern international relation theories can offer to international law a new, functional approach, one that will enable legal scholars to understand better the functions which rules, regimes and institutions have for individual states and at the same time enrich

[99] Ibid.
[100] "The study of organized international cooperation", Ibid, p. 168.
[101] Ibid.
[102] Ibid, p. 171.
[103] Anne-Marie Slaughter, Andrew S. Tulumello, Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", *The American Journal of International Law*, Vol. 92, No. 3, 1998, p. 370.
[104] Ibid.
[105] Anne-Marie Slaughter, Andrew S. Tulumello, Stepan Wood, p. 369.

the legal analysis by adding depth to the formal analysis of normative arrangements and purpose of a norm[106].

Law disciplines, because of its normative character, are in a way detached from the political reality of life. This is not just the case with the domestic law disciplines but also with the international law. Legal scholars affiliated with the positivist approach, do not pay too much attention to the political conditions; they follow strict rules of normativity and positive law. However, with an international relations perspective, when legal rules and institutions are situated in a political context, the abstraction and self-contained character of doctrinal analysis are being reduced, while normative idealism is also being channelled in more effective directions and some preferences for particular sources of law and normative outcomes are being suggested[107]. Importance of the international relations perspective is especially useful in rules and institutions' description, explanation and institutional design processes. Through these processes, international relations perspective might enhance the quality of in-depth analysis by incorporating in the description political elements such as a power, interests, different actors, how they function and interact, or what affects their behaviour. A scholar applying international relations theory to legal phenomena might treat legal rules and institutions as phenomena to be explained ("dependent variables") or alternatively might analyse legal rules and institutions as explanatory factors ("independent variables"). Both of these approaches are valuable – the first one helps us understand functions, origins and meaning of rules and institutions, while the second one provides evaluation of effectiveness of legal arrangements in real world[108]. What these functions shall enable is the analysis of legal phenomena from international relations perspective, which would serve in constructing better options in the future, namely designing better institutions capable of producing desired results. The international relations discipline, and especially

[106] Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers", *Yale Journal of International Law*, Vol. 14, No. 2, 1989, p. 406-407.
[107] Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts", *The American Journal of International Law*, Vol. 93, No. 2, 1999, p. 362.
[108] Ibid, p. 363.

international relations theories, can provide a "new conceptual apparatus with which to analyse both old and new areas of law"[109]. Legal scholars can use materials and insights of international relations theory in three ways: "to diagnose substantive problems and frame better legal solutions, to explain the structure or function of particular international legal rules or institutions, and to reconceptualise or reframe particular institutions or international law generally"[110].

Interaction is, of course, present in a reverse direction as well; international law can serve as an explanatory factor in analysing how states behave in international system, mechanisms by which legal rules shape political, but also social structures as well, paying more attention to the process and structure in the international system[111]. International law can contribute to the international relations discipline either through emphasizing legal institutions that its scholars were not aware of earlier, or by offering a new approach to the existing legal phenomena. Besides its importance as an explanatory factor in the analysis of state behaviour in the international system, legal rules have the potential to shape "not only political outcomes but also actors and social structures"[112].

International lawyers criticize political scientists for being too focused on structures and not paying enough attention on a process[113]. Still, both disciplines basically have the same perspective and are affected by globalization and its consequences on the role of a state in the international arena, with growing emphasis and acceptance of international governance[114] instead of international government[115] and the prevalence of soft law over hard law.

---

[109] Anne-Marie Slaughter Burley, "International Law and International relations Theory: A Dual Agenda", *The American Journal of International Law*, Vol. 87, 1993, p. 228.
[110] Anne-Marie Slaughter, Andrew S. Tulumello, Stepan Wood, p. 369.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] International government represents "traditional liberal internationalist ideal of formal international institutions displacing domestic sovereigns in specific issue-areas". Anne-Marie Slaughter, Andrew S. Tulumello, Stepan Wood, p. 371.
[115] International governance means "formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and non-state actors in international affairs". Ibid.

Intellectual dynamics within the disciplines continue and enhance the interaction and collaboration. There are two approaches on justifying the collaboration and interdependence between international relations and international law. One claims that international law is incomplete, missing "reality", and that the international relations discipline provides it. Others claim that international relations and international law are mutually interconnected and interdependent.

Regarding the future prospective of an interdisciplinary collaboration between international relations and international law, it is envisioned that there will remain a continued tendency and increased appreciation for non-state actors, attention to the relationship between domestic and international realms, including their legal and political dimensions, and separation into rationalist and sociological/constructivist camp[116].

2.3.2. Institutionalism and Regime Theory

Different international relations theories, depending on how they see the world, give importance to different aspects of world politics e.g. international law, human rights, or democracy and international organizations[117]. While some international relations theories do not give priority to rules and institutions in explaining relations between states, others do. Although all international relations theories give important place to institutions e.g. constructivism, critical theories, realism and liberalism, regime theory has been developed under liberalism and represents a type of reconciliation between liberalist (liberal institutionalists/neoliberals) and realist (neo-realists) traditions in international relations.

Constructivists have created their definition of institutions as the "structure of identities and interests"[118] that are cognitive entities, closely connected, and conditioned by actors' socialization. In constructivists theories, the focus is not on

[116] Robert J. Beck, "International law and international relations scholarship", p. 26-27, in David Armstrong (ed.), *Routledge Handbook of International Law*, Routledge, 2009, Abingdon.
[117] Tim Dunne, Milja Kurki, Steve Smith, *International Relations Theories – Discipline and Diversity*, Third Edition, Oxford University Press, 2013, Oxford, p. 3.
[118] Jutta Brunnée, Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law*, No. 39, 2000, p. 29.

interests, but on identities. Institutions can be changed as actors' identities change. Multiple identities can exist, although they often overlap, depending on their interactions. Interaction at an international level also determines actors' identities. Some constructivists emphasize the role of international organizations, while others pay more attention to nongovernmental organizations or transnational actors. Even normative expressions change in historical and political context.

Realism and (liberal) institutionalism, being the two most prominent international relations theories, are at the same time often in opposition when it comes to international law and the role of international organizations. For realists, who have dominated the scene of international relations since after World War II due to the failure of idealism/Wilsonism, view international law as a tool at the disposal of the most powerful[119] states and comply with international law only if it is in their interest to do so. Realists adopt a positivist approach to law, because it complements its theoretical framework regarding international law. For realists, independent effects of rules and institutions on states and their behaviour is minimal, and is just a reflection of power relations among states. Realist theory however fails to explain the situations where states show deference to international law although it is not in their own interest. Furthermore it fails to explain Developing states' commitment to the international law. This fact, and the development of norms and principles under the United Nations, such as Right to Protect (R2P) or humanitarian intervention, for example, strengthens the argument of institutionalists.

For liberals, who see individuals and private actors important in international relations, state's preferences are based on domestic politic dynamics and reflect them in the international arena. Democratic states are more likely to support institutions. Also, domestic interest groups can play significant roles in forming international rules and institutions, independently of states. Even some government bodies are developing their own transnational relations and cooperation. Liberals accept traditional law sources, but question its universality. Rather they focus on differences

[119] Shirley V. Scott, p. 314.

between domestic regime types. The significance of transnational norms created by private actors and governmental units is also emphasized.

Each of these theoretical approaches give secondary importance to rules and institutions, and consider them as complementary in explaining main concepts. Only more recently, with the emergence of institutionalism, international institutions and rules were given more attention and importance in international relations theories.

Institutionalists, also known as regime theorists[120], used in combination, idealism's legacy and realists' insights, to develop concepts to explain international institutions or regimes. States do pursue their interests, which can also be a collective one, but do so voluntarily by participating in institutions or regimes[121]. Furthermore, institutionalists understand broad interests as a reflection of citizens' interests and preferences, as they view states as a legal fiction[122]. In practice, institutionalists focus on treaties, either seen as a reciprocal bargain or contract emerging from market-style interactions (narrow, textual interpretation of treaties) or purposive act akin to legislation (teleological, legal process scholars supported interpretation of treaties). Institutionalists accept the existing difficulties of an anarchic environment of international system, but believe that policy makers can affect the structure or design of institutions' collective goals.

By modifying some realists' insights and developing their own concepts, regime theorists offer an explanation on how international regimes constrain and mediate state behaviour. Reciprocity, efficiency, defection and exchange are some of

[120] Regime theory is a strand of institutionalism, developed as a reaction to increased and complex global problems in different fields that requested different approach and solutions. Existing international relations theories had introduced their own regime models, but there is no generally accepted agreement on regimes' nature and elements. Considered as a formal agreement between states, concept of regimes evolved a lot with the time. Regime theory aims to explain decreasing and complex interaction between states, organizations, corporations, and other institutions but also their potential to reshape the international system.

[121] Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power", *European Journal of International Law*, Vol. 11, No. 2, 2000, p. 457.

[122] Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts", *The American Journal of International Law*, Vol. 93, No. 2, 1999, p. 365.

the main concepts regime theorists use in explaining their view of inter-state relations[123].

Formal institutions represent multilateral intergovernmental organizations with physical locations, staff, and budget. Hence, conceptualising international regimes is a little more difficult of a task. Regime analysis emerged because there was an evident "dissatisfaction with dominant conceptions of the international order, authority, and organizations"[124] and a need for reconciliation between the existing reality of the international system, norms, and rules in certain areas of the international realm. Regimes are a type of cooperation, and regimes facilitate cooperation at the same time. Still, regimes cannot be understood only as a cooperation, because cooperation can also take place in the absence of regimes[125]. At the same time, regimes do not equate to order and stability, although they may facilitate it. Also, regimes are not to be used as synonymous with international organizations[126]. International regimes emerge in an environment that lacks any authoritative institutions and is full of risks and uncertainty for actors. That is why their main function is to facilitate mutually beneficial agreements[127] for actors and reduce the uncertainty. International regimes, by providing specific agreements on matters of substantive significance within the issue-area they cover, help coordinate governments' expectations and provide consistency in their interests.

Using the theory of market failure in economics, Keohane explains regimes as "helping to correct institutional defects in world politics"[128]. This theory helps more precisely identify and reduce barriers to agreements states face within international

[123] Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power", *European Journal of International Law*, Vol. 11, No. 2, 2000, p. 457.
[124] Stephan Haggard, Beth A. Simmons, "Theories of international regimes", *International Organization*, Vol. 41, No. 3, 1987, p. 491.
[125] Ibid, p. 495.
[126] Although both regimes and international organizations are institutions, the most significant difference is that regimes do not possess capacity to act, while international organizations do; and also the fact that international regimes are issue-specific institutions by definition and international organizations do not have to have specified area of activity. Andreas Hasenclever, Peter Mayer, Volker Rittberger, "Theories of International Regimes", Cambridge University Press, 1997, New York, p. 11.
[127] Robert Keohane, "The Demand for International Regimes", *International Organization*, Vol. 36, No. 2, International Regimes, 1982, p. 322.
[128] Ibid, p. 335.

regimes, while they also "provide richer interpretations of previously observed, but unexplained, phenomena associated with international regimes and international policy coordination"[129]. Market failure theory is useful in explaining regimes and international system's characteristics. By providing hypotheses about relationships that are less familiar, it also explains "the strength and extent of international regimes"[130]. In order to explain the need for regimes, Keohane applies Coase's theorem[131] to international regimes and formulates it negatively, claiming that regimes' efficiency is in their provision of liability, information and minimizing transaction costs. Given that none of these conditions exists in the international environment, international regimes "may become efficient devices for the achievement of state purposes"[132].

Commonly accepted as a definition in international relations scholarship, international regimes are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations"[133]. This broad[134] "consensus definition"[135] of the concept of regime[136] "was developed to capture, describe, and analyse the totality of cooperative efforts, assumptions, and behaviours in a given international issue area"[137]. Krasner argues that if regime's rules and procedures change it can alter the regime. In this definition "principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are

---

[129] Ibid, p. 336.
[130] Ibid.
[131] Ronald H. Coase, "The Problem of Social Cost," *The Journal of Law and Economics*, Vol. 3, 1960, pp. 1-44.
[132] Robert Keohane, p. 338.
[133] Stephen D. Krasner, *International Regimes*, Cornell University Press, 1983, Ithaca, p. 2
[134] Often quoted is Keohane's definition of regimes but Krasner's is accepted as prevailing definition of international regimes. B. Guy Peters, *Institutional Theory in Political Science: The 'New Institutionalism'*, Pinter, 1999, London, p. 129-130.
[135] Andreas Hasenclever, Peter Mayer, Volker Rittberger, *Theories of International Regimes*, Cambridge University Press, 1997, New York, p. 8.
[136] Albert Stein criticize existing concept of regimes because "it ranges from an umbrella for all international relations to little more than a synonym for international organization". Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World", International Organization, Vol. 36, No. 2, International Regimes, 1982, p. 299.
[137] Tim Dunne, Milja Kurki, Steve Smith, p. 115.

prevailing practices for making and implementing collective choice"[138]. In the event that norms and principles change, he argues that either a new regime can emerge, or an existing regime can disappear from a given issue area[139]. Puchala and Hopkins also accept regime's change in two ways – evolutionary and revolutionary[140]. For them, this is one of main characteristics of regimes[141]. Young refers to international regimes as social institutions, "whose distinguishing feature is the conjunction of convergent expectations and recognized patterns of behaviour or practice"[142], which continuously change either because of its inner dynamic or the external effects of various political, economic or social factors. In its emergence and development, regimes may pass through several developmental stages – spontaneous orders[143], negotiated orders[144] and imposed orders[145]. Regime change occurs as the result of internal contradictions, shifts in underlying power structures in the international system or exogenous forces. For example, when some societal development external to a specific regime leads to a change in human behaviour, it can undermine a regime's essential elements[146]. Haggard and Simmons argue that a regime may

---

[138] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", International Organization, Vol. 36, No. 2, *International Regimes*, 1982, p. 186.
[139] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", International Organization, Vol. 36, No. 2, *International Regimes*, 1982, p. 187-189.
[140] Donald J. Puchala, Raymond F. Hopkins, "International Regimes: Lessons from Inductive Analysis", International Organization, Vol. 36, No. 2, *International Regimes*, 1982, p. 249-250.
[141] Others are regime's differentiation to specific, single-issue and multi-issue regimes; formal and informal regimes classification and distributive bias. Ibid.
[142] Oran R. Young, "Regime Dynamics: The Rise and Fall of International Regimes", *International Organization*, Vol. 36, No. 2, International Regimes, 1982, p. 297.
[143] Institutions which "do not involve conscious coordination among participants, do not require explicit consent on the part of subject or prospective subjects and are highly resistant to efforts at social engineering". Ibid, p. 282.
[144] Those are the "regimes characterized by conscious efforts to agree on major provisions, explicit consent on the part of individual participants, and formal expression of the results" (Ibid, p. 283). Negotiated orders can take a form of constitutional (when prospective subject of regime are part of negotiations) or legislative bargains (when prospective subjects of regimes are not part of negotiations but are represented in negotiating process).
[145] This type of regimes can be defined as "deliberately established by dominant actors who succeed in getting others to conform to the requirements of these orders through some combination of coercion, co-optation, and the manipulation of incentives". There are two type of imposed order: overt hegemony ("dominant actor openly and explicitly articulates institutional arrangements and compels subordinate actors to conform to them") and de facto imposition ("the dominant actor is able to promote institutional arrangements favourable to itself through various forms of leadership and the manipulation of incentive"). Ibid, p. 284.
[146] Ibid, p. 294.

change over time and space in four ways – strength, organizational form, scope, and allocational mode[147].

Robert Keohane, known as the most prominent theorist of regimes, argues that states use international law as an instrument to attain their interests in the international environment. This is the dominant interpretation by international relations theories that view international law through an "instrumentalist optic"[148], while international law theories view it through a "normative optic"[149]. Both optics do value interests, reputation and institutions. However, the main interest of instrumentalists is power, wealth and position in the international system, while international lawyers claim that interests can change. Both accept policymaker's concern for their reputation, however in different contexts, one's reputation can also be used instrumentally for a variety of purposes. Institutions, the central issue that both optics have in focus, give high importance and significance to the functions and benefits, which can be material or normative. Keohane articulates the relation between these important pillars, how they interact and affect the change of institutions, to understand better cooperation in international system. He suggests, "Interests shape institutions, which affects beliefs, including reputations, which in turn affects interests"[150]. Using this interactional pattern and synthesis of instrumentalist and normative optics, democratic governments can affect institutions' principles and rules so that they reflect the values of democratic societies[151].

Regimes can be classified as dead-letter[152], tacit[153] and full-blown[154] regimes, depending on the existence of a formal agreement in the regime formation and convergence of expectations that the rules will be adhered to. Donnelly provides a more complex typology of regimes. Depending on the different regime norms,

[147] Stephan Haggard, Beth A. Simmons, "Theories of international regimes", *International Organization*, Vol. 41, No. 3, 1987, p. 496.
[148] Robert Keohane, "International Relations and International Law: Two Optics", *Harvard International Law Journal*, No. 38, 1997, p. 488.
[149] Ibid.
[150] Ibid, p. 500.
[151] Ibid, p. 502.
[152] Formal rules are existing but there is no expectation that they will be adhered to.
[153] No existing formal rules, but there is an expectation that informal rules will be observed.
[154] There is a high expectation that formal rules will be observed.

standards, or rules, which may differ from fully international to entirely national (authoritative international norms, international standards with national exemptions, international guidelines, and national standards), he distinguishes different types of international decision making activities (authoritative international decision making, international monitoring, international policy coordination, international information exchange, international promotion or assistance, and national decision making), and consequently, different types of regimes (promotional, implementational, and enforcement regimes)[155].

Depending on the area of cooperation achieved by a regime, we can classify them as security regimes, environmental regimes, economic regimes, and human rights regimes. A regime's significance can be measured through its effectiveness and its robustness (resilience)[156]. Regime effectiveness is a regime's static perspective that can be determined at and for any given time. It has two dimensions – a regime can be effective to the extent its members abide by its norms and rules ("regime strength") and to the extent it achieves certain objectives, or fulfils certain purposes. A regime's significance depends on its robustness and resilience to change (e.g. wistands shifts in power or even the withdrawal from some of its members)[157].

Regime theory, described as a process of "reinventing international law in rational-choice language"[158], is generally associated with international institutionalism and is related to international relations developments in early 1980's in America[159]. As already mentioned, regime theory brings together realists and liberalists (liberal institutionalists) in a sense that, although they have different assessments of regimes, they also share the same or similar theoretical assumptions about the way regimes emerge, function and develop. Both realists and institutionalists agree that states, as rational and unitary actors, operate in an anarchic international system and establish regimes in order to promote an international order

[155] Jack Donnelly, "International Human Rights: A Regime Analysis", *International Organization*, Vol. 40, No. 3, 1986, p. 603-605.
[156] Andreas Hasenclever, Peter Mayer, Volker Rittberger, p. 2.
[157] Ibid.
[158] Anne-Marie Slaughter Burley, p. 220.
[159] B. Guy Peters, p. 129.

based on cooperation. While institutionalists argue regimes enable collaboration and promote common good, realists claim that they enable states to cooperate in order to achieve certain benefits.

Liberalists explain regime formation by game theories, namely the Prisoners' Dilemma[160]. Realists also opt for game theory in explaining regimes, but they reject the model proposed by liberalists. According to realist theorists, states opting for regimes face the problem of coordination, not collaboration. That is why Prisoners' Dilemma is not suitable to explain regime formation but the Battle of Sexes [161]. According to Hasenclever, Mayer and Rittberger, theories of regimes can be divided into three strands: power-based (realists), interest-based (neoliberals) and knowledge-based (cognitivists) theories of regimes, depending of the degree of "institutionalism", the view that (international) institutions matter[162]. Accordingly, power-based approaches ascribe limited significance to institutions, and together with interest-based approaches, are described as a rational choice institutionalism, while knowledge-based approaches are characterised by a high degree of institutionalism. An interest-based approach is a mainstream approach to regime theorizing, the one other two approach take as reference in their theorising. Neoliberals and realists represent rationalist approaches to international regimes, they accept states as a "self-interested, goal seeking actors"[163], oriented on the maximization of individual utility. Actors' preferences impact states' calculations of advantages and their outcome are states' foreign policies and institutions. Rationalist theories of regimes do not problematize actor's perceptions or causal beliefs, but they accept the existence of some uncertainties such as international anarchy[164]. The main difference between power-based and interest-based theories of regimes, is their view of states. For neoliberals, states are "rational egoists who are concerned only with

[160] For more details see: Duncan Snidal, "Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes", *The American Political Science Review*, Vol. 79, No. 4, 1985, pp. 923-942.
[161] Richard Little, "International Regimes", in John Baylis, Steve Smith, Patricia Owens, *The Globalization of World Politics – An Introduction to International Relations*, Sixth Edition, Oxford: Oxford University Press, 2014, p. 298-299.
[162] Andreas Hasenclever, Peter Mayer, Volker Rittberger, p. 1-2.
[163] Ibid, p. 23.
[164] Ibid, p. 25-26.

their own gains and losses"[165], while realists insist that states' willingness to cooperate is partially interdependent with other actors' gains from mutual cooperation. Neoliberals see regimes as a "strictly interest-based phenomena"[166], claiming that their creation, maintenance and demise can only be seen from the perspective of "strategically rational but otherwise mutually indifferent actors"[167] and that power-relations is an important factor of cooperation, but that interests are as important. Typical neo-liberal/rationalist approaches to regimes are contractualist (or functional) or situation-structuralist. The problem-structural approach and institutional bargaining are also rationalist approaches to regime analysis, but with less emphasis on rationalist characteristics, hence an interest-based theory.

Realist theories of regime have power in their explanation of international cooperation and regimes. States are concerned with their survival and independence and with their competitors – other states – as they might represent potential danger for their own existence. Cooperation is less easily established and is "a result of shift in distribution of power resources or of unforeseen distributional consequences of regimes"[168]. The theory of hegemonic stability, together with Stephen Krasner's power-oriented research program, and Joseph Grieco's reconstruction of modern realism's theory of cooperation among nations, all represent realist approaches to regime theorizing. The theory of hegemonic stability "links the existence of effective international institutions to a unipolar configuration of power in the issue-area in the question"[169], while both Krasner and Grieco's approach emphasize relative power capabilities and distributional issues undervalued in neoliberal approaches and dismiss the Prisoner's Dilemma. The main difference between these approaches, is the role each author attributes to power. For Krasner, power is a means of statecraft, while for Grieco power is an end (not the ultimate one) of foreign policy[170]. According to Robert Keohane, the theory of hegemonic stability is flawed in a few

[165] Ibid, p. 26.
[166] Ibid.
[167] Ibid.
[168] Ibid, p. 84.
[169] Ibid.
[170] Ibid, p. 86.

aspects,[171] and needs to be incorporated within the supply-demand approach[172]. Supply and demand are metaphors used to explain the emergence of regimes, their development and functioning as well as eventual dissolution.

Knowledge-based, or cognitive strands of theories of regimes, is characterised by a high degree of institutionalism. For cognitivists, states' identities and interests are "shaped by normative and causal beliefs decision-makers hold"[173] and can also be changed by policies. Rationalist explanations of regimes however, are deficient in "a mode of analysis which focuses on the way 'distribution of knowledge' constitutes the identities, and shapes the preferences, as well as the perceived options of state actors"[174]. Depending on how radical their critique of rationalism is, cognitivists can be divided into two categories – weak and strong. Weak cognitivists basically aim to supplement existing rational theories, focusing on the origins and dynamics of rational actors' understanding of the world, whereas weak cognitivists claim that the demand for regimes in international relations depends on actors' perception of international problems, which is caused by its causal and normative beliefs[175]. A theory of interest change is the answer weak cognitivists offer to fill a gap in interest-based theories. Weak cognitivists accept states as rational utility-maximisers, but their perception of utility depends on knowledge and knowledge is irreducible to material structures[176]. On the contrary, strong cognitivists represent an alternative to rational theories, as they problematize the existence and nature of states as competent actors in international politics. They assume that knowledge should be "constituting states and enable them to engage in both power games and cooperative ventures"[177]. Knowledge not only affects states' interests but constitutes their identities, as "they are states by a virtue of shared knowledge which spans in

[171] It "fails to explain lags between changes in power structures and changes in international regimes; does not account well for the differential durability of different institutions within a given issue-area; and avoids addressing the question of why international regimes seem so much more extensive now in world politics than during earlier periods of supposed hegemonic leadership". Robert Keohane, "The Demand for…", p. 326.
[172] Ibid.
[173] Andreas Hasenclever, Peter Mayer, Volker Rittberger, p. 136.
[174] Ibid.
[175] Ibid, p. 137.
[176] Ibid.
[177] Ibid, p. 138.

international relations as a social space"[178]. For strong cognitivists, international society is structured by institutions, which are cognitive entities and necessary features of international politics and prerequisite for rational choices.

Susan Strange's critique of regimes has attracted a lot of attention, as she challenges the validity and usage of the concept of regimes and claims that the study of regimes is a fad, imprecise and woolly, value biased, too static of a view and is narrow-minded (state-centred)[179]. She also claims that there is an understanding of the regime concept that "leads to a study of world politics that deals predominantly with the status quo"[180] because there are many areas out of regimes that are neglected this way. Also, the author accuses regime theorists to be looking for an "all pervasive pattern in political behaviour in world politics, 'general theory' that will provide a nice, neat, and above all simple explanation of the past and an easy means to predict future"[181]. But Strange still accepts that regimes are important because they "have altered the situation or setting in which states interact so the cooperation is more likely"[182] and because "they can alter actors' interests or preferences"[183].

The above mentioned classification, according to the area of cooperation achieved by regimes, enumerates human rights regimes as one of the most important type of regimes. Further this regimes emergence, main characteristics, and importance for international law will be explained.

2.3.3. Human Rights Regimes

International legal human rights regimes are important for human rights protection and vital for peace, progress, and prosperity. Donnelly makes the distinction between the "universal" or UN-centred regime, which he refers to as "the" international human rights regime, and regional and single-issue human rights

[178] Ibid.
[179] Susan Strange, "Cave! Hic Dragones: A Critique of Regime Analysis", *International Organization*, Vol. 36, No. 2, International Regimes, 1982, p. 479.
[180] Ibid, p. 480.
[181] Ibid.
[182] Ibid, p. 513.
[183] Ibid, p. 514.

regimes[184]. He describes the international human rights regime as a "relatively strong promotional regime, composed of widely accepted substantive norms, largely internationalized standard-setting procedures, some general promotional activity, but very limited international implementation, which rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms"[185], and which has no international enforcement. The striking imbalance between regime's normative strength and procedural weakness is the direct result of conscious political decisions and the nature of the UN system. Donnelly argues that post war circumstances shaped the international human rights regime as it is nowadays, with its characteristic "politically weak moral interdependence"[186] being a strong promotional regime, with extensive, coherent, and widely accepted norms, but extremely limited international decision-making powers[187]. On the other hand, regional and single-issue human rights regimes have certain advantages that makes them more successful. Regions tend toward homogeneity, which can be useful in the understanding of human rights and the importance of its protection. States of one region could have similar legal systems, juridical traditions and institutions, and consequently, a similar understanding of the importance of human rights and its effective protection. Geographic proximity, being a reason for different types of interdependence between regional states, can "secure the cooperative transformation of universal proclamations of human rights into more-or-less concrete realities"[188]. As a result, an investigation and remedying of human rights violations is more probable[189]. Also, diplomatic, economic, and other sanctions for human rights violations can effectively be applied on a regional level only. National commitment, cultural community, and

[184] Jack Donnelly, "International Human Rights…", p. 605.
[185] Ibid, p. 613-614.
[186] Ibid, p. 619.
[187] Ibid.
[188] Burns H. Weston, Robin Ann Lukes, Kelly M. Hnatt, "Regional Human Rights Regimes: A Comparison and
Appraisal", *Vanderbilt Journal of Transnational Law*, Vol. 20, No. 4, 1987, p. 589.
[189] Ibid, p. 590.

hegemony, which explain the unusual strength of regional human rights regimes[190], can be found only at a regional level.

The most common challenges international human rights regimes face are treaty ratification and compliance with regime's norms and regulations or court's decisions. There are some tendencies in international human rights treaty ratifications regarding the level of the states democratisation. While most countries ratify treaties which they expect to be able and willing to comply with, there exists a number of countries that join human rights regimes without the intention of complying with them, who end up imitating and using social camouflaging effects to show their declarative commitment to human rights protection. These countries often ratify some treaties late in governments' tenure in office, or ratify some basic treaties late while other sporadic ones are ratified immediately. Also, some countries ratify treaties after their neighbours have (children, civil and political rights, for example), but this is not the case with some other treaties (economic, social and cultural rights)[191]. Interesting are the findings concerning emerging democracies and their readiness for accepting some sovereignty costs associated with treaty ratifications and their intentions for the consolidation of democratic institutions. Research has found that "democratizing states have joined human rights regimes (including dozens of treaties and organizations) that impose greater constraints on their sovereignty at a faster rate than consolidated democracies or dictatorships, which tend to resist joining these higher-cost regimes"[192]. While full-fledged democracies do not need these costs to ensure the protection of human rights, and autocracies avoid them, emerging democracies accept them in order to prove the commitment for democracy and human rights protection. Hafner-Burton concludes that human rights regimes serve different functions for states and have different motivations for them, stating

[190] Jack Donnelly, "International Human Rights…", p. 636.
[191] Emilie M. Hafner-Burton: "International Regimes for Human Rights", *The Annual Review of Political Science*, Vol. 15, 2012, p. 277
[192] Ibid, p. 269.

that variations are present in participation modes, commitment levels, and finally, participation levels explained by domestic politics[193].

Human rights regimes proved to be "quite political, and sometimes personal, in the ways they operate and the decisions they make"[194], which is understandable keeping in mind that states usually appoint the judges in human rights courts. Judicial appointments are made by states, and they prefer the candidates who match their preferences[195]. Expecting the judges to act totally objective and with no influence by their states is not realistic. Consequently, decisions they make about human rights will reflect their own values and positions as well as their states' ideologies and political interests, sometimes maybe even more than strict legal considerations[196]. It was also observed that a link between the governments' political ideology and aspiration towards EU membership affected judges' judicial ideology. The judges appointed by the countries with left-wing governments and aspiring EU members for example, were more activist in decision-making. This dimension of the EU's spill-over effect is interesting, suggesting that the EU could be a stronger driving force behind the increased activism of the ECtHR than thought before[197].

Research on states' participation to human rights regimes also shows different insights such as the participation to regimes has different functions for members, mode of participation varies, and members' domestic politics also affects participation to regimes[198]. On the other hand, the regimes do not really reflect the values of the governments who delegate them authority, but rather represent an interesting mix of the values and positions of the individuals making decisions, some of the ideologies and political interests of the states that appoint those individuals,

[193] Ibid, p. 271.
[194] Ibid, p. 274.
[195] Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", *International Organizations*, Vol. 61, 2007, p. 696.
[196] Emilie M. Hafner-Burton: "International Regimes…", p. 273.
[197] Erik Voeten, "The Politics of International…", p. 697.
[198] Emilie M. Hafner-Burton: "International Regimes…", p. 271.

and the deliberate acting of these actors in a legal process, through which they increase the influence, relevance, and legitimacy of their own institutions[199].

The various factors affecting states in accessing the international human rights treaties, makes it difficult to draw out any clear conclusions about human rights regimes. Hafner-Burton emphasizes few points about human rights regimes' that can be accepted as rules:

- Treaties do not universally or broadly correlate with actual human rights protections;
- Institutional design of law, including the degree of delegation and flexibility, determines in part whether these regimes correspond to respectable human rights behaviours;
- Domestic politics, especially courts and the state's relations with civil society, determines in part these regimes' association with human rights protections. Although both institutional variation in human rights regimes and domestic politics seem to relate to human rights, there is not a clear understanding of the relationships between them.
- Dictators and serial human rights violators are, with a few exceptions, outside the mainstream sphere of influence of most international human rights legal regimes and thus are increasingly outside the core debates and theories about the reach of international law;
- The reasons motivating states to participate in international human rights regimes help to explain the relationship between these regimes and state behaviour[200].

European, African and American human rights regimes have many advantages that have enabled their success. The exceptional success of the European human rights regime is explained by "strong, pre-existing norms, practices and institutions

[199] Ibid, p. 274.
[200] Ibid, p. 279.

of liberal democracy, which permit causal mechanisms to operate through civil society and semi-autonomous government institutions"[201]. Europe's tragic history and philosophic and politic legacy both contributed to this success, but it is important to point out "the instruments of international human rights statecraft remain more primitive and the results correspondingly more modest"[202].

2.4. Conclusion

Being a moral, political and legal concept, a global movement and a law discipline, has made human rights a complex contemporary concept, embedding different aspects and perspectives in social sciences. The discipline's fast development enabled its emergence and protection of different categories of rights, with focus of protecting change over the time. In establishing this thesis' conceptual framework, the right to be elected was analysed in order to define this political right and detect its nature as a human right, protected nationally and internationally. This thesis claims that this right is under researched and under theorized, due in part to the many synonyms that are often used interchangeably or sidelined in preference for other more widely used terms. The right to be elected is directly or indirectly mentioned in most international human rights documents – the Universal Declaration of Human Rights (right to take part in government), International Covenant on Social and Political Rights (right to vote and be elected), European Convention on Human Rights – Protocol No. 12 (right to free elections, which entails both right to vote and right to be elected). How the ECtHR has contributed to the development of the right to be elected will be discussed in the fourth chapter. A comparative analysis of constitutional texts was also conducted in the first part of this chapter, without considering the real level of countries' democratization, and examining solely the presence of provisions guaranteeing the right to be elected. This analysis showed that provisions guaranteeing the right to be elected are present in the constitutions of a small number of countries (only twenty-seven), which proves the claim that the right to be elected is neglected both in academic literature and in practice. Hence, the

[201] Andrew Moravcsik, "Explaining Human Rights Regimes: Liberal Theory and Western Europe", *European Journal of International Relations*, Vol. 1, No. 2, 1995, p. 184.
[202] Ibid.

importance of this right itself, and in enjoyment of the right to vote and right to democracy was emphasized. In the following chapter, the Dayton Peace Agreement and its Annex IV will be discussed in order to explain the constitutional and legal system of Bosnia and Herzegovina, and it shall analyse if the right to be elected is guaranteed in the state's constitution and law, and how the relevant provision is designed.

In establishing the thesis' theoretical framework, the interaction between international law and international relations was used as a starting point. These disciplines' interconnectedness and interdependence resulted with the emergence of institutionalism and regime theory, theoretical approaches in international relations that best explain international institutions, rules, norms and compliance with them. Regime theory, representing reconciliation theory between realism and neo-liberalism, is widely accepted among international relations scholars. International legal human rights regimes, being a successful example of the interaction between international law and international relations, offer a theoretical explanation for Bosnia and Herzegovina's accession to ECHR and its Protocols. Bosnia and Herzegovina's efforts to implement the ECtHR's decisions concerning the right to be elected, will be analysed and discussed in the fourth and fifth chapters of this thesis.

Chapter III – The Constitutional System of Bosnia and Herzegovina and the Right to be Elected

3.1. Introduction

Nowadays, there are few, if any, states in the world that can be considered as having a homogenous population. Thus, a guarantee of equal citizens' rights to everyone and the protection of minorities and their rights is a common way of achieving equity in democratic countries. In states with multiple ethnic groups, where none hold the majority of the total poopulation, power-sharing arrangement are often adopted as a solution for ensuring the representation and protection of rights of the groups' members. Power-sharing, often used synonymously with consociationalism, represents a broader concept. Consociationalism, along with federalism and centripetalism, represents one of the more prominent types of power-sharing arrangements,[203] especially for countries emerging from a violent conflict. Consociations are defined as a power-sharing approach that addresses the management of places divided by nationality, ethnicity, language, religion, and other powerful non-class cleavages[204], characterized by a grand coalition, veto power, group autonomy and proportionality. Bosnia and Herzegovina, after signing the Dayton Peace Agreement, became a typical (corporate) consociation. This peace agreement has often been the object of critism, blamed for the country's ongoing deadlock and stalemate.

Without going into detail about the circumstances in which the Dayton Peace Agreement was adopted, this chapter will focus on its main characteristics, followed by an analysis of the peace agreement's annex IV, which serves as the country's constitution. As this chapter points out, the legal document and system it established are directly connected with the implementation of the ECtHR decisions concerning

[203] McCrudden and O'Leary argue that multi-ethnic and multinational states apply two different strategies in dealing with the differences within - first is eliminating differences through assimilation or liberal integrationist approach and second is managing differences through one of the power-sharing types – federalism, centripetalism and consociationalism. Christopher McCrudden - Brendan O'Leary, *Courts and Consociations – Human Rights versus Power Sharing*, Oxford University Press: Oxford, 2013, p. 1.

[204] Arend Lijphart, *Democracy in Plural Societies: A Comparative Explanation*, New Heaven: Yale University Press, 1977.

the right to be elected in Bosnia and Herzegovina. A more detailed analysis on this specific point will be discussed in chapter fourth. For the remainder of this chapter, it examines the efforts and initiatives that have been made concerning constitutional changes since the peace agreement was adopted. Although the process of the constitutional changes already started before the decision of the Sejdić and Finci case, the process of constitutional changes gained momentum following ECtHR's decision. As conceptualized in the previous chapter, the right to be elected in Bosnia and Herzegovina's constitutional and legal system will be analyzed for the remainder of this chapter.

3.2. Dayton Peace Agreement

The Dayton Peace Agreement, which was agreed and concluded at the Wright-Patterson Air Force base in Dayton, Ohio, USA in November and signed in Paris on 25 December 1995, represented a huge milestone, not only for the peace building process in Bosnia and Herzegovina and its overall history, but also the UN's peace building efforts. A new era of peace building not only meant the promotion of conflict resolution and reconciliation, but also the includion of rebuilding civil society, strengthening the rule of law, police restructuring, judicial and penal reform, monitoring human rights, elections and media regulation, and tackling corruption[205]. Besides ending the bloody three-and-a-half-year war in Bosnia and Herzegovina, this agreement set up a new system and internal organization of a country that was one of the successors of former socialist Yugoslavia and one of the first examples of peace building in this new era. After declaring independence from Yugoslavia in 1992 and shortly after finding itself in a war, the future of Bosnia and Herzegovina was in serious jeopardy. The Dayton Peace Agreement served as a life vest that once again changed the official state's name and developed a totally new and different internal

[205] David Chandler, *Peacebuilding - The Twenty Years' Crisis*, 1997–2017, Palgrave-Macmillan: Cham, Switzerland, 2017, p. 68.

organization, often regarded as the world's most complicated system of government[206].

The Dayton Peace Agreement is one of hundreds of peace agreements since the 1990's, which ended more than fifty civil wars[207]. In response to the violent internal conflicts that erupted following the end of the Cold War, the number of peace agreements have increased. Bell explains this increase due to the emergence conflict resolution approaches that involved direct negotiations between governments and their opponents, treating them as equals, linking a cease-fire to political and legal arrangements for holding and exercising power, and placing the agreed settlements in writing, that were signed, and publicly made available for domestic and international participation[208]. Depending on the stage of a conflict, a peace agreement may be classified as a pre-negotiation agreement, framework or substantive agreement, and an implementation or renegotiation agreement. The most interesting and common include framework/substantive agreements, which "establish or confirm mechanisms for demilitarization and demobilization intended to end military violence, by linking them to new constitutional structures addressing governance, elections, and legal human rights institutions"[209]. The Dayton Peace Agreement represents an example of a substantive agreement.

The Dayton Peace Agreement, was a result of USA diplomacy efforts and is "a remarkable document"[210], considering the perplexity of the situation in the country and the short time period it was agreed on. Being "unlike any other peace treaty of modern times"[211], this agreement gave far-reaching powers to international actors, not only in military matters, but also in the most basic aspects of government and state. Most of its annexes were related to the "political project of state-building in

[206]https://www.theguardian.com/news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government
[207] Christine Bell, "Peace Agreements: Their Nature and Legal Status", *The American Journal of International Law*, Vol. 100, No. 2, 2006, p. 373.
[208] Ibid, p. 373-374.
[209] Ibid, p. 377.
[210] Christopher Bennett, *Bosnia's Paralyzed Peace*, Oxford University Press: Oxford, 2011, p. 9.
[211] David Chandler, p. 63.

BiH, of 'reconstructing a society'"[212]. The General Framework for Peace in Bosnia and Herzegovina[213], shortly after referred to as the Dayton Peace Agreement (further: Dayton Peace Agreement or DPA), consists of a main text and twelve annexes. The parties of the Agreement include the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia[214]. Each are obliged to respect each other's sovereign equality and to "refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State"[215]. The following provisions refer to the consecutive annexes of the agreement, while addressing important issues of post-conflict Bosnia and Herzegovina. Exceptional is Article X, in which mutual recognition of independence and respect for international borders of Bosnia and Herzegovina and the Federal Republic of Yugoslavia are emphasized. Annexes concerning military and civil issues are closely connected with the peace building process and other important areas of the newly formed state[216]. A majority of the annexes aim to create a liberal constitutional state. With time, many of the annexes have been implemented, and currently the most important annex is IV to the Dayton Agreement, which is the constitution of Bosnia and Herzegovina (further: the Dayton Constitution). Exceptional importance has also been given to annex VI to the Dayton Peace Agreement – the Agreement on Human Rights. This annex has established important bodies for human rights protection in Bosnia and Herzegovina such as the

[212] David Chandler, "From Dayton to Europe", *International Peacekeeping*, Vol. 12, No. 3, 2005, p. 339.
[213] Full text of original document available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf (last visited on September 11, 2018).
[214] Three countries here and their presidents actually represented three sides in war in Bosnia and Herzegovina; Croats in Bosnia and Herzegovina were represented by the President of the Republic of Croatia Franjo Tuđman, and Serbs in Bosnia and Heryegovina were represented by the President of the Serbia, Slobodan Milošević. The President of the Republic of Bosnia and Herzegovina, Alija Izetbegović, represented Bosnian Muslim (later Bosniacs) and small number of those who did not affiliate themselves with Serbs and Croats but with national identity of Bosnians. It is difficult not to see the fact that the presidents of neighbouring countries signed the peace agreement as a proof that these two countries were directly involved in conflict in Bosnia and Herzegovina.
[215] Article I of the Dayton Peace Agreement.
[216] Military Aspects of the Peace Settlement, Regional Stabilization, Inter-Entity Boundary Line and Related Issues, Elections, Constitution, Arbitration, Human Rights, Refugees and Displaced Persons, Commission to Preserve National Monuments, Public Corporations, Civilian Implementation, International Police Task Force.

Commission on Human Rights[217], the Human Rights Chamber[218] and the Human Rights Ombudsman[219]. In accordance with Article IV of this annex, it was agreed that the Human Rights Chamber would be succeeded by the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina[220] for a certain period, upon which new cases concerning human rights violations shall be solved by the Constitutional Court. The Human Rights Ombudsman continues to existence[221]. Besides having high importance in establishing foundations of human rights protection in Bosnia and Herzegovina, this and few other annexes to the Dayton Peace Agreement (those concerning elections, the restoration of the infrastructure and the settlement of the disputes between the Entities) are also considered to have a "constitutional dimension"[222]. These annexes are not part of the Constitution but the DPA, and although their mutual relations are not clear, they are considered to have an importance comparable to the Dayton Constitution[223]. Bell shares a similar opinion, when stating that "the peace-agreement in its entirety can also be viewed as a constitution in the broadest sense"[224].

The structure and language of peace agreements suggest their legal nature, while their international treaty nature remains the object of the discussion. Usually used criteria for determining international treaty nature is the character of the signatories. The original text of the Dayton Peace Agreement was prepared and signed in English. It was signed by Alija Izetbegović, for the Republic of Bosnia and Herzegovina, Slobodan Milošević[225], for the Federal Republic of Yugoslavia, and

[217] Chapter II, Part A of the Annex VI to the Dayton Peace Agreement.
[218] Chapter II, Part B of the Annex VI to the Dayton Peace Agreement.
[219] Chapter II, Part C of the Annex VI to the Dayton Peace Agreement.
[220] http://www.hrc.ba/
[221] http://www.ombudsmen.gov.ba/Default.aspx?id=32&lang=EN
[222] Fred L. Morrison, "The Constitution of Bosnia-Herzegovina", *Constitutional Commentary*, Vol. 13, No. 2, 1996, p. 145.
[223] Christian Steiner - Nedim Ademović, *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung e.V: Sarajevo, 2010, p. 19.
[224] Christine Bell, p. 392.
[225] He was authorised by Bosnian Serbs to negotiate on their behalf after agreement known as "patriarch paper", agreement concluded upon initiative of the head of Serbian Orthodox Church. In order to end economic sanctions to Serbia and Montenegro, Milošević was ready to compromise and accept peace agreement under the conditions Karadžić and Mladić, who could not attend peace talks because they were indicted for genocide by the International Criminal Tribunal for Former Yugoslavia (ICTY), would never accept. Christopher Bennett, p. 79.

Franjo Tuđman[226], for the Republic of Croatia. Additionally six countries served as signatories and the states-witnesses to the Dayton Peace Agreement [227], and only the main document is signed in this way[228] to contrive an international treaty status to this agreement, of which there are numerous examples[229], but also to bring stabilization to the region. The signatories made the peace agreement legally binding, and consequently, raising the cost of non-compliance. Signatories, sometimes referred to as guarantors or observers, is a common practice in signing peace agreements. Usually they play an important role in the peace building process, however there is no clear understanding what that entails. The signators presence means that the parties to the peace agreement are accepting an obligation to each other and to third parties as well[230].

This international agreement is "ostensibly a treaty between the regional parties"[231] and not formally a treaty between the international agencies and the government of Bosnia and Herzegovina. Rather it is "a transitional document"[232], and "a masterful diplomatic creation"[233]. Although in the agreement it is claimed that the document is signed in Bosnian, Croatian, English and Serbian, it is widely known that it does not exist in any of the official languages of Bosnia and Herzegovina[234].

---

[226] He was representing Bosnian Croats, but in the same time trying to secure interests in Eastern Slavonia. Ibid, p. 80.

[227] Representatives of the European Union Special Negotiator, the French Republic, the Federal Republic of Germany, the Russian Federation, the United Kingdom of the Great Britain and Northern Ireland and the United States of America.

[228] For example, Annex 1-A is signed by representatives of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska and endorsed by the representatives of the Republic of Croatia and the Federal Republic of Yugoslavia. Annex IV, the Constitution of Bosnia and Herzegovina is not signed but separated declarations on its approval are signed and attached by the representatives of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. This issue is making Dayton Constitution's legitimacy even more questionable.

[229] Christine Bell, p. 389.

[230] Ibid, p. 401.

[231] David Chandler, Peacebuilding - The Twenty…, p. 65.

[232] Fred L. Morrison, p. 145.

[233] Zoran Pajić, "A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia andHerzegovina", *Human Rights Quarterly*, Vol. 20, No. 1, 1998, p. 136.

[234] As cited in: Faris Vehabović, „Impact of the case law of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina" in Iulia Motoc, Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe - Judicial Perspectives*, Cambridge University Press: Cambridge, 2016, p. 84.

There is no official translation to be referenced to in any of these languages[235]. The text of the Dayton Peace Agreement and its annexes, including annex IV, was never ratified neither in the Assembly of the Republic of Bosnia and Herzegovina nor Parliamentary Assembly of Bosnia Herzegovina[236]. The copy of the original agreement, which belonged to Bosnia and Herzegovina, disappeared under unknown circumstances in 2008 and till now has never been regained in the possession of state authorities of Bosnia and Herzegovina[237]. All these issues contribute to the legal document's controversy.

From a political perspective, the Dayton Peace Agreement was the reflection of the reality on the ground,[238] an unjust peace, as late Alija Izetbegović described it upon its signature. It is often perceived as awarding aggression and recognizing the results of ethnic cleansing. More than twenty years later, discussions about it continue. It had a potential to provide a basis for the country's development, but it turned to be the biggest obstacle of the country's progress. It failed to "provide a blueprint for a functional state"[239]. The outlined general framework for some institutions, and its core elements were contradictory and paradoxical, and resulted with lack of progress in state-reconstruction. The only progressive period in the country was between 1997 and 2006, the period marked by intensive international intervention and imposition. Since 2006, the country's stagnation has started and continues today.

This peace agreement, viewed from a legal perspective, bears characteristic elements of the new, emerging area of law of peace agreements, and can be understood as typical example of transitional international constitution[240]. Pajić claims that the DPA had two serious consequences in the international realm; one is

[235] This is reason why only the English version of the document is considered to be authentic. Ibid, p. 90.
[236] This is often emphasized as a reason for its legitimacy contestation. Such an idea was not even considered by the representatives of the international community for risk of possible rejection. The neglected will of people was compensated by the elections.
[237] https://www.dw.com/en/bosnian-serb-arrested-with-copy-of-dayton-peace-accord/a-41200505
[238] Christopher Bennett, p. 81.
[239] Soeren Keil & Anastasiia Kudlenko, "Bosnia and Herzegovina 20 Years after Dayton: Complexity Born of Paradoxes", *International Peacekeeping*, Vol. 22, No. 5, 2015, p. 482.
[240] Christine Bell, p. 407.

"implicitly legitimizing the gains of sectarian violence that often amount to the commission of war crimes and crimes against humanity"[241], and second is the marginalization of the UN in favour of NATO as the central mechanism of international conflict resolution.

3.2.1. The Dayton Constitution – General Remarks

Annex IV of the Dayton Peace Agreements serves as a Constitution of Bosnia and Herzegovina since the DPA was signed in 1995. It is not a typical example of a constitutional text, neither according to its adoption and creation, nor according to its content. Peace agreements' constitutions differ from traditional constitutions in form and substance[242]. Bell describes them as "often explicitly transitional"[243], some kind of horizontal "social contracts negotiated between political elites"[244], with heightened reference to international law, and third-party enforcement.

The Dayton Constitution was prepared as an annex to the peace agreement and was agreed on by the same actors that agreed to end the war in Bosnia and Herzegovina[245]. Šarčević argues that the Dayton Constitution does not fulfil any of the specific characteristics of a constitution – its main characteristic, its quality as an international law agreement, which regulates constitutional law matter and its acceptance as the constitution of the state[246]. Furthermore, he claims the Dayton Constitution's two main characteristics were intended as temporary character[247] and emergence in a state of emergency[248], both existing in the time of the signing of the DPA, but could now seize to exist. The legalization of ethnicization of the Bosnian society, state and constitutional law, and the legalization of the war results, including

[241] Zoran Pajić, p. 126.
[242] Christine Bell, p. 392.
[243] Ibid.
[244] Ibid.
[245] Annex IV of the Dayton Peace Agreement – Dayton Constitution is actually not signed, it is approved through declarations by the representatives of the Republic of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and Republika Srpska.
[246] Edin Šarčević, *Dejtonski ustav: karakteristike i karakteristični problemi*, Fondacija Konrad Adenauer e.V., Predstavništvo u Bosni i Hercegovini: Sarajevo, 2009, p. 61.
[247] Ibid, p. 62.
[248] Ibid, p. 63.

heavy war crimes, are two important features of the Dayton Constitution[249]. This is apparent in the composition and functioning of all political bodies. For example, the decision mechanisms at the state level are prescribed in a way that it is practically impossible to bring any kind of decision forward unless all representatives of all three constitutive peoples do not agree[250]. This is secured by the complicated procedures of bringing decisions and additionally strengthening the veto right given to both the parliament and presidency. Regarding the agreement's content, Šarčević argues that the Dayton Constitution does not provide any internal body of the highest sovereignty, and that the few competencies at the state level distributed among Parliament, Presidency and the Council of Ministers do not ascribe this characteristic to any of these bodies. Although the Parliamentary Assembly of Bosnia and Herzegovina can change the constitution, it is a politically difficult process, because the Parliamentary Assembly is constituted on the criteria of the representation of ethnic groups, so all the groups, or the majority of their representatives in the Parliament have to support the constitutional changes[251]. From a legal and technical perspective, the Dayton Constitution incorporates a certain number of legal antonyms, that are embodied in the constitutional text, both considered legally equal. Šarčević identifies the following legal antonyms in the Dayton Constitution: rule of law and authoritarian ethnocracy state, democracy and ethnocracy, federation and confederation, state sovereignty and sovereign authority, justice and injustice as law and crime[252]. This makes Bosnia and Herzegovina committed to certain democratic standards but in practice these standards are being neglected.

Ademović and Steiner, in the introduction to the Commentary of the Dayton Constitution, also indicate that the applicability and effectiveness of the Dayton Constitution is being denied for three reasons: the undemocratic way the Constitution was made, failing to respect the Constitution of the Republic of Bosnia and

[249] Ibid, p. 65.
[250] Faris Vehabović, *Odnos Ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda*, Sarajevo: Asocijacija Alumni Centra za interdisciplinarne postdiplomske studije (ACIPS), 2006, p. 20.
[251] Edin Šarčević, ibid.
[252] Ibid, p. 75.

Herzegovina; the norms the Constitution entails that contradict international law; and unsuitable in practice[253]. They justify this situation due to the specific circumstances of the peace building process in Bosnia and Herzegovina.

The Dayton Constitution replaced the Constitution of the Republic of Bosnia and Herzegovina from 1992, namely, its revised text published in 1993[254]. The legal connection and continuity between the two constitutional documents however still exists. The Parliament of Bosnia and Herzegovina adopted a Constitutional law on changes and amendments of the Constitution of the Republic of Bosnia and Herzegovina on December 12, 1995[255] and in Article 1 authorized the Republic to change the internal organization of the Republic according to the new Constitution of Bosnia and Herzegovina within the DPA framework. In case of non-implementation, the peace agreement can be declared null, and the Republic can continue its existence according to its constitution[256]. This hypothetical scenario is rarely discussed most likely because of the provision of article XII, line 1 of the Dayton Constitution, which prescribes that the Constitution shall enter into force upon signature DPA, "as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina". This unusual and contradictory formulation is interesting[257]. Vehabović suggests the unusual formulation of this provision was in consequence because the text was prepared by American legal experts[258], which made a strong argument claiming that the Dayton Constitution was put into force and thereby replaced the Constitution of the Republic of Bosnia and Herzegovina, and the constitutional amendment from 1995. We therefore have no other option but to accept this opinion, as the twenty-three years long application of the Dayton Constitution confirms it. He accentuates that the Dayton Constitution represents

[253] Christian Steiner, Nedim Ademović, p. 32.
[254] Official gazette of the Republic of Bosnia and Herzegovina, no. 05/II, available in Bosnian at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Ustav%20RBiH.pdf (last accessed on September 12, 2018).
[255] Official Gazette of the Republic of Bosnia and Herzegovina, No. 49/95.
[256] Line 2, Article 1 of the Constitutional law on changes and amendments of the Constitution of the Republic of Bosnia and Herzegovina, Official Gazette of the Republic of Bosnia and Herzegovina, no. 49/95.
[257] Simple grammatical interpretation can bring us to the conclusion that one document cannot at the same time amend and supersede the other legal document.
[258] Faris Vehabović, Odnos Ustava Bosne i Hercegovine…, p. 23.

constitutional charter of Bosnia and Herzegovina and that it, together with the international agreements listed in the Annex I to Dayton Constitution, and the DPA in general and all its annexes represent a constitutional law of Bosnia and Herzegovina[259].

The Dayton Constitution secured the continuation of the legal existence of the Republic of Bosnia and Herzegovina, with a changed name[260] and changed internal structure, but within its internationally recognized borders[261]. In the Dayton Constitution, there is a preamble[262], twelve articles, and two annexes. Bosnia and Herzegovina is defined as a "democratic state, which shall operate under the rule of law and with free and democratic elections"[263]. This provision defines and establishes the state's character as it is a democratic state, committed to the principles of the rule of law and free and democratic elections. But the type of democracy established by the Dayton Constitution is not specified, and different interpretations exist. One interpretation suggests that the type of democracy created in BiH serves the interests of the constituent peoples, who elect their own elites for the purpose of cooperating and working together in post-war Bosnia[264]. The Constitution's emphasis on the rights of the three constituent peoples and "a vast amount of autonomy over the territory in which they were the majority"[265] contributes to this interpretation. Another interpretation argues that the Dayton Constitution foresaw a liberal democracy which protects the rights of the constituent peoples, but at the same time is strongly oriented on guaranteeing human rights of all citizens, no matter what ethnic their ethnic origins or place of residence is[266]. This is itself contradictory, and has proven unachievable in practice, at least not in the

[259] Ibid, p. 25.
[260] Official state's name became simply "Bosnia and Herzegovina", not republic anymore and without more precise description of its political system and characterizing it as a federation or confederation.
[261] Article I of the Dayton Constitution.
[262] Preamble does not contain the reference to the principles of the international law and Pajić finds this as an important shortcoming. Zoran Pajić, "A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia andHerzegovina", Human Rights Quarterly, Vol. 20, No. 1, 1998, p. 128-129.
[263] Article II of the Dayton Constitution.
[264] Soeren Keil, Anastasiia Kudlenko, p. 483.
[265] Ibid.
[266] Ibid.

current setting in Bosnia and Herzegovina, where ethnical elites have opted for the interpretation that enables them to keep power confined for their own ethnic groups as well as over the state institutions.

Another important characteristic of the state, emphasized in the constitutional text, is its commitment to human rights protection, which shall be discussed in more detail later in this chapter. Regarding the changes made of the state's composition and internal organization, the earlier central state of Bosnia and Herzegovina now consists of two entities – Federation of Bosnia and Herzegovina and Republika Srpska, and the third organizational unit – of Brčko district[267]. The striking asymmetry in the entities' official names is obvious and suggests their different and asymmetrical internal organization – one is a centralized republic, while the other is a decentralized federation. Although the state's name remains the same – Bosnia and Herzegovina[268], the relationship between the state and its entities, and the relationship between the entities was "deliberatively left ambiguous"[269]. Almost all competencies are given to the entities, except for a few aspects such as foreign policy, customs policy, monetary policy and air control[270], which remain with the authorities of the state of Bosnia and Herzegovina. The implementation of these competences however was left vague for the purpose of leaving power to the entities or special institutions. This conscious transfer of power to the entities is further illustrated by the rules for bringing forth certain decisions, disabling the central government from exercising the few powers it has. This high level of decentralization makes Bosnia and Herzegovina "a very loose union"[271]. Important provisions of the Dayton Constitution are those concerning the establishment and functioning of the Parliamentary Assembly, Presidency and Council of Ministers and

[267] Article VI.4 of the Dayton Constitution, result of an ammendment in 2009. This is the only ammendment to the Dayton Constitution.
[268] Florian Bieber, *Post-War Bosnia – Ethnicity, Inequality and Public Sector Governance*, Palgrave Macmillan UK: Lodon, 2006, p. 60.
[269] Christopher McCrudden, Brendan O'Leary, *Courts and Consociations*…, p. 21.
[270] Article III of the Dayton Constitution.
[271] Florian Bieber, *Post-War Bosnia – Ethnicity, Inequality and Public Sector Governance*, Palgrave Macmillan UK: Lodon, 2006, p. 40.

Constitutional Court and Central Bank (Articles IV to VII) – main bodies at the state level.

The Dayton Constitution is "a typical transitional document"[272], "an integral part of the international legal agreement"[273], "the product of civil war, of "ethnic cleansing", and of mutual mistrust"[274]. Vehabović argues that this legal document can hardly be considered legitimate primarily because of the way it was adopted and signed and how it entered into force and because its provisions are contrary to international law, it legitimizes discrimination and ethnic cleansing[275]. Power-sharing between state authorities and entities is also a problematic issue. The Dayton constitution "combines minimalist approach in terms of central, state authority and a maximalist approach in terms of balance of powers"[276]. Bosnia and Herzegovina, a state[277] created during a three-week long peace negotiations[278], is well known as an example of consociational power-sharing[279]. McCrudden and O'Leary classify it as a classic corporate consociation"[280], while Bieber prefers not to use the term, but describes it as a triple power-sharing system, with power-sharing in the entities and cantons, as well as at the state level"[281]. Another author classifies it as a "controlled democracy"[282], "a hybrid regime where democratic institutions and mechanisms co-

[272] Faris Vehabović, „Impact of the case law…", p. 84.
[273] Christian Steiner, Nedim Ademović, p. 29.
[274] Fred L. Morrison, p. 145.
[275] Faris Vehabović, „Impact of the case law…", p. 84.
[276] Ibid.
[277] Or rather a "semi-protectorate with a substantial civilian and security presence", according to Florian Bieber, Post-War Bosnia…, p. 3.
[278] Namely, there were proposal to agree on constitution later in separate process from peace agreement but national elites did not accept it.
[279] Merdzanovic argues that Bosnia and Herzegovina can be conceived as a consociation only after the Constitutional People decision of the Constitutional Court of Bosnia and Herzegovina and following actions by the international community. Adis Merdzanovic, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina*, ibidem-Verlag: Stuttgart, 2015, p. 165.
[280] Christopher McCrudden, Brendan O'Leary, *Courts and Consociations*…, p. 21.
[281] Florian Bieber, Postwar Bosnia…, p. 44.
[282] Victor D. Bojkov, "Democracy in Bosnia and Herzegovina: Post-1995 Political System and its Functioning", *Southeast European Politics*, Vol. IV, No. 1, 2003, p. 42.

exist with non-democratic ones and where both have important functions in governing the polity and in doing so have to take account of each other"[283].

The state and its complicated system do not really fit into any of these concepts. As defining of the state's organization in the DPA and the Dayton Constitution is avoided, and its power-sharing mechanisms are complex, it is not sure whether Bosnia and Herzegovina is a (asymmetric) federation, confederation or federalizing state[284]. According to Bieber, it is "at least a federation"[285], but it also constitutes a curious mixture[286] of both federalizing states and federations. Certain elements justify both positions, but still there are some elements that suggest it is a confederation or even a loose multinational federation[287]. Keil describes the political system of Bosnia and Herzegovina as semi-presidential[288] and characterizes Bosnia and Herzegovina as "an internationally administered federation that is based on imposed federalism"[289]. He emphasizes that Bosnia and Herzegovina cannot be considered as a federation[290] because of some of its main features[291], which are not characteristic for federations. Rather, he conceptualizes the system in Bosnia and Herzegovina as an "imposed federalism"[292]. Drawing from other literature[293], Keil defines imposed federalism as "a form of "peace-building" and a method of "conflict

[283] Ibid.
[284] According to Venice Commission, Bosnia and Herzegovina is a federal state. Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, p. 2.
[285] Florian Bieber, Postwar Bosnia…, p. 60.
[286] Ibid.
[287] Ibid, p. 61.
[288] Ibid, p. 99.
[289] Soren Keil, *Multinational Federalism in Bosnia and Herzegovina*, Ashgate Publications Limited: Surrey, 2013, p. 102.
[290] Although he claims that the interpretation of the constitution the Constitutional Court of Bosnia and Herzegovina applied in its famous Constitutional Peoples decision (U-5/98-III), as well as the one of Venice Commission in its document Opinions on the Constitutional Regime of Bosnia and Herzegovina, September 1994–June 1998, CDLF-INF (1998)015, part C "allow for the definition of Bosnia and Herzegovina as a federal country". Ibid, p. 5.
[291] Such as overlap of national and territorial representation at central state level institutions what makes every issue a debate between national groups and not federal units or federal units and central state, and veto power of national groups in House of Peoples, also not being usual for federal states. Ibid, p. 101.
[292] Ibid, p. 131.
[293] He lists four requirements of imposed federalism: 1. being a tool to end a violent conflict between different groups; 2. Being a tool (a guarantee) of internal self-determination of groups in conflict; 3. Not being necessary agreed by the warring parties; and 4. International community's presence in the creation of the federal agreement but also in its implementation. Ibid.

resolution""[294], and lists Bosnia and Herzegovina and Iraq as successful examples. Due to the ambiguities regarding the country's internal organization, and external intervention during the peace negotiations and implementation of the DPA and the Dayton Constitution, Merdzanovic suggests introducing a new theoretical concept – imposed consociation[295]. According to him, imposed consociation has two main characteristics: one is an external actors' crucial role in establishment of the consociational regime, and the second, is an external actors' continued influence on the system[296]. An external actor can consist of either a collective international actor or state(s) with a strategic interest in region, as an authority out of the state, who can exercise power through intervening in a system by imposing legislative or executive decisions. The consociational system in this regard represents a new political regime[297]. Bosnia and Herzegovina, as defined by the Dayton constitution, does have important constitutional elements, and resembles corporate types of consociation, but still has some characteristics of other power-sharing systems. For this reasons, we could either characterize BiH as a sui generis consociation/sui generis power-sharing or accept Merdzanovic's proposed concept, whose main shortcoming is the inability to apply this conceptualization to other practical cases apart from Bosnia and Herzegovina[298].

Initially, when the DPA was signed, power-sharing mechanisms, which included all three constitutional peoples and Others as a separate category, existed only at the state level, as prescribed by the Dayton Constitution; while entities represented two exclusive territories – the Republika Srpska and the Federation of Bosnia and Herzegovina[299]. This however was not done in accordance with the Dayton Constitution. The Dayton Constitution prescribes complying with the

[294] Ibid.
[295] Adis Merdzanovic, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina*, ibidem-Verlag: Stuttgart, 2015
[296] Ibid, p. 141.
[297] Ibid.
[298] In book's epilogue author is shortly analysing the power-sharing in Macedonia and Kosovo, trying to apply his concept on these cases as well. Ibid, p. 385-399.
[299] Entities' constitutions were adopted before the Dayton Constitution.

constitution (Article III.3.b.)[300], giving entities the responsibility to amend their constitutions withing three months in order to be in harmony with the Dayton Constitution[301]. Both provisions were obviously neglected and not implemented by the entity authorities. Alija Izetbegović, at that time Chair of the Presidency of Bosnia and Herzegovina, filed an application to the Constitutional Court of Bosnia and Herzegovina on 12 February 1998 concerning this issue. The Constitutional Court of Bosnia and Herzegovina brought a decision in four parts, by which many provisions of entities' constitutions had been declared unconstitutional.[302] The European Commission for Democracy through Law, better known as a Venice Commission, in its opinion about the Constitutional People's decision[303] confirmed the decision of the Constitutional Court of Bosnia. Moreover, in this opinion it was emphasized that Bosnia and Herzegovina, as a multi-national state, can not justify assimilation or segregation of any ethnic group. The Venice Commission explicitly expressed their conviction that the fact that one of the constituent peoples might be in a majority or minority position in the Entities is put aside by the constitutional recognition of all three people as equal and that it means that none of them is constitutionally recognized as a majority, or, in other words, that they enjoy equality as groups[304]. This principle, consequently, can also be interpreted as a prohibition of "any special privilege for one or two of these peoples, any domination in

[300] "The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina, and the Entities."

[301] Article XII.2 of Dayton Constitution.

[302] Decision No. U-5/98, available at: http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12200.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12207.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12209.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12216.pdf (Last accessed on November 28, 2018).

[303] Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in case U 5/98 on the Issue of the "Constituent Peoples" adopted by the Commission at its 46th Plenary Session (Venice, 9-10 March 2001), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)006-e (last accessed on December 07, 2018).

[304] Ibid, p. 3.

governmental structures or any ethnic homogenization through segregation based on territorial separation"[305].

The implementation of this "landmark decision"[306] by local politicians did not bring change, so the High Representative had to intervene. He appointed constitutional commissions in both entities to solve the issue. Based on the commissions' proposals and negotiations between the local politicians, on 27 March 2002 the Mrakovica Agreement was reached. This agreement contained principles according to which the constitution changes in both entities shall provide constitutionality of all three constituent peoples in both entities and their proportional representation in government and public administration at all levels, based on the 1991 census as the foundation for determining the representation quota. The problem emerged when the National Assembly of Republika Srpska adopted a different version of the amendments, which were in accordance with the Constituent Peoples decision but not with the Mrakovica Agreement. This reflected on the situation in the Federation, where certain resistance to amendments also emerged. As a result, then the High Representative Wolfgang Petritsch, imposed the constitutional amendments in both the Federation of Bosnia and Herzegovina and Republika Srpska. In this way, "ethnic power-sharing mechanisms"[307] were introduced at the whole territory of Bosnia and Herzegovina, but, at the same time, this made the mono-national/bi-national political systems of the entities much more complicated and complex, without reducing the predominance of nationalist interests"[308]. Bennett sees these constitutional changes as "the only attempt to address some of the shortcomings of the political system"[309], which secure formal ethno-national balance at the entity level, but not at the municipality level and in the public companies[310]. Still, only after these amendments did Bosnia and Herzegovina "[become] a consociation (in an

[305] Ibid, p. 4.
[306] Anna Morawiec Mansfield, "Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina", *Columbia Law Review*, Vol. 103, No. 8, 2003, p. 2066.
[307] Soren Keil, p. 95.
[308] Ibid, p. 106.
[309] Christopher Bennett, p. 182.
[310] Ibid, p. 183.

empirical sense) on all of its levels"[311]. This decision represents an important milestone in the constitutional development as well as in the development of electoral system in Bosnia and Herzegovina. Heroic but dangerous judging[312] and the agreement on its implementation managed to reconcile competing tensions, granting positive rights to the ethnic groups, and preserving fundamental negative rights of the individuals making those groups[313].

Bosnia and Herzegovina, as designed in Dayton, is still a non-functional state, but "de facto a protectorate that is characterized by a loose federation with a weak central government"[314]. The conflict in Bosnia and Herzegovina has never been resolved, but only pacified. The conflict continues to be carried out through political bodies and institutions whose work is marked by constant blockades, opposition while searching for a compromise and a sharing of the benefits and compensations. Politicians are eager to cooperate only when it is in their interest, when the issue to be regulated is to their benefit. The issues essential for ordinary citizens life often are not solved until drastic measures such as as protests and blockades of roads are taken. State authorities can not adequately exercise the competencies granted to them by the Dayton Accord, because there is neither the will nor appropriate institutions to enforce them[315]. Only when the OHR intervened, was it possible to establish the needed institutions. The country's bogus progress also was the result of the High Representative's decisions. Although the OHR is not mentioned once in the text of the Dayton Constitution, but rather was included in a separate annex to the DPA - Annex X on the Agreement on Civilian Implementation of the Peace Settlement, the role of this international body in the political system of Bosnia and Herzegovina is very significant. Consisting of only six articles, this annex provides provisions about establishment and the authorities of the High Representative, as well as the privileges

[311] Adis Merdzanovic, p. 289.
[312] Anna Morawiec Mansfield, p. 2080.
[313] Ibid, p. 2082.
[314] Florian Bieber, Post-War Bosnia…, p. 40.
[315] On May 14, 2009 the Republika Srpska National Assembly passed a conclusion stating sixty-eight competencies that were transferred from entity to state. In fact, the list was mostly consisted of competencies either expressly listed in the Constitution as the state institutions' competencies or not explicitly listed in the Constitution but assumed to be state competencies necessary to fulfil state's constitutional obligations (example is the procurement and provision of identity documents).

and immunities of the High Representative and staff employed by him/her in order to facilitate its authorities. Article V of the Annex prescribes that the High Representative is a "final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement". Main authorities granted to the High Representative has included monitoring the implementation of the peace settlement, maintaining close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement, and a high level of cooperation between them and the organizations and agencies participating in those aspects, facilitating the resolution of any difficulties arising in connection with civilian implementation, reporting periodically on progress in implementation of the peace agreement etc.[316] The authority given to the High Representative soon turned out to be insufficient for fulfilling its function. This was in part because of the stubborn deadlocks of the central state institutions created by ethno-national parties, which could not agree on any issue. This indicated to international authorities that the country's progress had to be pushed from the outside. The issue was addressed at the Peace Implementation Conference in Bonn, Germany, in December 1997. The executive powers given to the High Representative at the conference, which will later become well-known "Bonn Powers", were based on the Article V of the Annex X. The Peace Implementation Council[317] decided that the High Representative, "in order to facilitate the resolution of difficulties", can make binding decisions if necessary. Different measures were given to the High Representative through the Bonn Powers - timing, location and chairmanship of meetings of the common institutions; interim measures to take effect when parties are unable to reach agreement, or other measures to ensure implementation of the Peace Agreement throughout Bosnia and

[316] Article II.1. of the Annex X to DPA.

[317] Peace Implementation Council is established at the Peace Implementation Conference was held in London on December 8-9, 1995, in order to mobilise international support for the implementation of the DPA. It is comprised of 55 countries and agencies supporting the peace process in different ways. After initial meeting, five more were held; June 1996 in Florence, December 1996 London, December 1997 Bonn, December 1998 Madrid, May 2000 Brussels. There is also the Steering Board of the PIC, established in London in 1995, which works under the chairmanship of the High Representative as the executive arm of the PIC. The Steering Board provides the High Representative with political guidance. The High Representative chairs biweekly meetings of the Ambassadors to BiH of the Steering Board members. Also, the Steering Board holds meetings twice a year at the level of political directors. See: http://www.ohr.int/?page_id=1220.

Herzegovina and its Entities, as well as the smooth running of the common institutions[318]. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation. These measures were supposed to be temporary and resorted to as a last option or tool to be used to push the country forward and to enact the most essential legislation for the state-building process. The use of Bonn Powers was rationalized as a "necessary short-term steps towards creating the self-sustaining institutions to help ensure that peace would take root"[319]. With these new competencies, the role of the High Representative in the political system of Bosnia and Herzegovina, gained importance and seriously affected the state building process. Of course, this was a problematic issue, as Bosnia and Herzegovina is, at least declaratively, a democratic country. But, the established system, elected ethno-nationalist parties and their interests and the tools given them for protection of their nationalist interest blocked any progress in the country. This was observed in the nature of the decisions first brought about by the authorization of Bonn Powers, concerning the Law on Citizenship, a passport, a flag, a currency, a national anthem, and a coat of arms. These issues, essential for a state, explain the necessity of the establishment of the Bonn Powers. Of course, there were also many negative sides of it. With time, the use of Bonn Powers by the High Representative became almost inevitable, becoming "the primary tool for advancing reforms"[320] and "parallel legislative process"[321]. The system established by the Dayton constitution was pushed aside every time the High Representative had to intervene, and power sharing arrangements were ignored, and fundamental principles of power sharing such as reciprocity and consensual decision-making were undermined[322]. A political culture of consensus and reciprocity was consequently not developed; ethno-nationalist parties continued with their nationalistic rhetoric and firm attitudes and did not have to justify complicated decisions and compromises to their electorate but

[318] Ibid.
[319] Christopher Bennett, p. 153.
[320] Ibid, p. 169.
[321] Ibid.
[322] Soren Keil, p. 107.

instead would blame the High Representative for imposing the decisions. The nature of the imposed decisions varied and changed with time, depending on the person occupying the position. At the beginning, most of the imposed decisions concerned the return of refugees, but later it became more focused on the rule of law, state-building, institution building and finally the EU standards necessary to be adopted as the part of the process of joining to the European Union. Merdzanovic argues that the use of Bonn Powers depended on the person holding the office[323] because their approach and understanding[324] of the mandate and role of the function they obtained. The introduction of Bonn Powers significantly affected the political system and dynamics in Bosnia and Herzegovina, including identity politics. Keil argues that this meant an emergence of a new political actor, which was problematic because it was not part of the system envisaged through the Dayton Constitution and whose decisions were not subject to constitutional review[325]. The High Representative's own, separate perspective of the country and its situation directly affected the implemented policies. This freed local politicians of responsibility and made their obstruction of the Dayton Agreement easier, and to some extent even accepted.

The Venice Commission's findings about the High Representative are valuable in framing the picture of this institution in the past and the role and functions it still has nowadays in the political system of Bosnia and Herzegovina. This international body, in its Opinion (2005)[326] appreciated the role the High Representative had played in cumbersome development in post-war Bosnia and Herzegovina, especially the one of "a safety valve making it possible to adopt urgently required legal texts"[327]. However, it finds that although the Constitutional Court of Bosnia and Herzegovina has judicial control of the constitutionality of the content of legislation

[323] Adis Merdzanovic, p. 228.
[324] Each of the persons being High Representative had their own "doctrine" they applied during their mandate – for example, Petritsch's was the concept of local ownership, while Ashdown applied "Justice and Jobs" programme etc.
[325] Soren Keil, p. 158.
[326] Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, adopted by the Venice Commission at its 62nd plenary session (Venice, 11-12 March 2005), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)004-e (last accessed on December 08, 2018), explained more in details below.
[327] Ibid, p. 21.

enacted by the High Representative, the fact that it does not examine if there is enough of justification for enacting legislation, makes the process contradictory to democratic principles. Although justified at the time, the Bonn Powers became questionable and created a sort of a "dependency culture"[328] and faced certain opposition from local politicians. Few cases for example, are pending before the European Court for Human Rights concerning the actions of the High Representative. The main concern regarding the actions of the High Representative is the inability to appeal any of the decision. Rather the OHR "pursues a political agenda, agreed by the international community, which serves the best interests of the country and contributes to the realization of Council of Europe standards"[329]. No matter what the envisaged aim and justification of the OHR actions, the existence of this body is still considered unacceptable in a democratic country and the Commission proposed its reform in order to make its decisions more transparent and justifiable, until the OHR's presence ceases to exist.

3.2.2. Debates on the Dayton Constitution: Efforts for the Change

Soon after the DPA was adopted, the agreement pushed the country into a continuous deadlock. Although the DPA ended the war, critics argue the DPA drafters made a principle mistake. DPA drafters presumed that a system, they had hardly got any side to agree upon, would, once established, run smoothly once implemented. Furthermore, the changes made to the DPA were done for the most part by the same people that were formerly at war with each other. Initially, it was assumed that the Dayton system would fall apart, but despite expectations, it endured and and not building in explicit "sunset clause" has turned out to be its biggest shortcoming[330]. A similar logic was used with the organization of elections. Just one year after ending war, citizens of Bosnia and Herzegovina were assumed to be politically mature enough to participate in elections. However, elections only "served to cement the ethno-national divide and entrench wartime leaders in power, formally

[328] Ibid, p. 22.
[329] Ibid, p. 23.
[330] Katie Engelhart, "Bosnia's Three-Headed Beast: Sejdić and Finci v. Bosnia and Herzegovina and the case for "reasonable" discrimination", http://production.sant.ox.ac.uk/sites/default/files/dahrendorf_k.engelhart.doc, (12 January 2019), p.19.

instituting political deadlock"[331]. Attitudes and reactions before and after every general election in Bosnia and Herzegovina has remained the same. Naively the international community hoped for change, only to find itself disappointed each time with the election results. The International community openly supported any option that would serve as an alternative to the three ethno-national parties in both entities to achieve its expectation, but this was only partly successful and for limited time period. The issue is no longer the awareness and will for change of electoral body but many other complex issues including the system of the state itself. In the case of Bosnia and Herzegovina, it was indeed the international community's "first peace building experiment"[332] and seems that sometimes it is justified when it is claimed that the only real and valuable accomplishment of this document could be ending the war and keeping "the pretence of a single Bosnia"[333].

The need for change of the Dayton Constitution has been apparent since its origins, and the time for change has come now. When would it happen is not certain. But, once it happens the constitutional reform shall be system change – meaning foundational determination of the constitutional system of Bosnia and Herzegovina as a modern democratic state and respect for all individual and collective human rights at its whole territory, in accordance with global and European standards[334]. The timing and dynamics of the implementation of the constitutional changes are difficult to predict, but Vehabović suggests that Bosnia and Herzegovina shall be a republic, and a parliamentary democracy, with a parliament (House of the Representatives) elected from a whole state territory, and eventually a second chamber that would serve to represent the regions and their interests[335].

3.2.3. Right to be elected in the Dayton Constitution

The Dayton Constitution gives an exceptional importance to human rights and democracy. Above discussed legal nature of international agreement ascribed to the

[331] Christopher Bennett, p. 100.
[332] David Chandler, Peacebuilding…, p. 63.
[333] Fred L. Morrison, p. 147.
[334] Faris Vehabović, "Zašto neće doći do sistematskih ustavnih promjena?", *Sveske za javno pravo*, Vol. 1, No. 1-2, 2010, p. 6.
[335] Ibid, p. 8.

DPA, and consequently the Dayton Constitution[336] as its integral part, implies the Preamble being an integral part of the Constitution, with a normative character[337]. In the first line of the Preamble, the respect for human dignity is mentioned as the basis of the Constitution[338]. Human dignity, liberty, and equality are positioned as the "fundamental and central constitutional values"[339]. The state's main task is to protect and guarantee these values. This is reflected in other provisions of the Dayton Constitution concerning human rights, such as Article II and X.2, and Annex 1. The concept of human dignity is not however defined, so it is left open to interpretation. Later in the eighth line of the Preamble, the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and other important human rights documents are listed as the Dayton Constitution's inspiration. The human rights documents listed in the DPA, Annex 1 (not containing the Universal Declaration of Human Rights), and the wording in the Preamble, affirms the respect for human rights, in particular the rights of minorities, emphasizing the importance of the the regional and global human rights documents.

In Article II of of the Dayton Constitution, it regulates human rights and freedoms[340]. Exceptional importance is given to human rights in the Dayton Constitution, in Article II.1 stating, "the highest level of internationally recognized human rights and fundamental freedoms" is guaranteed. It eliminates any kind of discrimination, especially in the context of the European Human Rights Convention and its protocols.

[336] The DPA is accepted to be an international treaty, and as such is regulated by the 1969 Vienna Convention on the Law of Treaties. Consequently, the Dayton Constitution, as its annex and part of an international treaty, although having a constitutional character is governed by applicable international norms.
[337] Christian Steiner, Nedim Ademović, p. 37.
[338] "Based on respect for human dignity, liberty, and equality".
[339] Christian Steiner, Nedim Ademović, p. 37.
[340] Article II – Human Rights and Fundamental Freedoms.

The provision in Article II.2[341] of the Dayton Constitution might be considered as one of the most important provisions in the whole constitutional text concerning human rights. It prescribes direct application of the European Convention in Bosnia and Herzegovina and its priority over all other law. This provision's importance was especially high before Bosnia and Herzegovina ratified the European Convention and became a member of the Council of Europe. Its interpretation created a dilemma – was this provision applicable only to law and other regulations, or to the Dayton Constitution itself as well. Sulejman Tihić, former member of Presidency of Bosnia and Herzegovina, requested the opinion of the Constitutional Court on the superiority of the European Convention over the Dayton Constitution and the Constitutional Court rejected the decision as inadmissible and declared that it is not in its competence "to decide in the present case on the conformity of certain provisions of the Constitution of BiH with the European Convention and its Protocols"[342]. The Court stated that the European Convention entered into force through the Constitution of Bosnia and Herzegovina, and so its "constitutional authority derives from the Constitution of Bosnia and Herzegovina and not from the European Convention itself"[343]. While the provisions of the European Convention have priority in application over any legal act in the country, including the constitution[344], Begić explains that the European Convention was intended to be applied in Bosnia and Herzegovina "only partially by virtue of its Constitution"[345]. Direct application and "priority over all other law" in application of the European Convention and its Protocols[346] meant that all legal acts have to be in accordance with the Convention. This did not include the Constitution[347]. However, after Bosnia and Herzegovina signed the European Convention and became a member of the European Council in

[341] "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."
[342] Decision of the Constitutional Court of Bosnia and Herzegovina, no.: U-5/04, from March 31, 2006, point 16. Decision is available at: http://www.ustavnisud.ba/dokumenti/_en/u-5-04-71799.pdf (last accessed on January 12, 2019).
[343] Ibid, point 14.
[344] Faris Vehabović, „Impact of the case law…", p. 90.
[345]Zlatan Begić, "Legal Capacities of the Dayton Constitution in the Process of Accession of Bosnia and Herzegovina to European Union", *Journal of Politics and Law*, Vol. 9, No. 1; 2016, p. 13.
[346] Christian Steiner, Nedim Ademović, p. 159.
[347] Zlatan Begić, p. 14.

2002, it was obliged to harmonize its legislation with the European Convention and following protocols[348].

The real intention of the constitution makers behind the discussed provision is still not clear,[349] but the intention of leaving it ambiguous is[350]. The need to establish certain human rights protection standards, combined with country's uncertain and unpredictable progress towards achieving membership status at the Council of Europe and ratification of the European Convention, helps explain why it was left ambiguous. In this way, the European human rights standards would be applicable even without formally signing the Convention. Steiner and Ademović share a similar opinion, stating that the constitution makers aimed "to automatically, in an "ultra-monistic" manner, introduce into the national legal system the necessary international law related to fundamental human rights and freedoms, in order to avoid, amid divergent national interests, the complicated procedure of enacting laws"[351]. Of course, implementation of this provision was not an easy task[352].

The provision of the Article II.3 enumerates some of the rights protected. The expression used in this provision, and in the proceeding provisions, indicates that it was intended as an exemplary, not exclusive list of human rights[353]. All other human rights and fundamental freedoms guaranteed and protected in the human rights documents listed, either in the Dayton Constitution, or in the Annex I[354], shall equally be protected.

---

[348] Ibid.
[349] It is claimed that this provision was put intentionally in the constitution in order to lead to its self-destruction. Katie Engelhart, p.19.
[350] Ibid, p. 6.
[351] Christian Steiner, Nedim Ademović, p. 177.
[352] Ibid.
[353] The right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude or to perform forced or compulsory labor; the rights to liberty and security of person; the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings; the right to private and family life, home, and correspondence; freedom of thought, conscience, and religion; freedom of expression, freedom of peaceful assembly and freedom of association with others; the right to marry and to found a family; the right to property; the right to education; the right to liberty of movement and residence.
[354] Annex I - Additional Human Rights Agreement to be Applied in Bosnia and Herzegovina contains following human rights documents: 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977

Although the right to vote and the right to be elected are not listed in the provision of Article II.3, the Dayton Constitution, as indictated from the previous discussion, indirectly protects them. If this argument is accepted, the provision of Article 3 of Protocol No. 1 to the European Convention of Human Rights, shall be directly applied and have priority over the discriminative provisions of Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Dayton Constitution. As it stands, provisions of the Dayton Constitution and other legal acts in the country, explicitly show that the right to be elected is limited to certain categories of people. This is especially case with the provisions of the Dayton Constitutions concerning the election of the members of Presidency and the House of the Peoples. The restrictions existed in the entities until the implementation of the Constitutional People decision, when formally all constitutional people became represented in both entities.

The Election Law of Bosnia and Herzegovina is one of the most important legal documents concerning the right to be elected, which contains provisions for organizing and implementing elections, as well as the election results[355]. This law has been amended many times, either by the intervention and imposition of High Representatives or the Constitutional Court decisions. It still remains the object of discussion, with many calls for it to be changed and amended. This controversial law's provisions, especially those concerning the distribution of positions in legislative and executive powers, are highly important.

Although the Dayton Constitution does not directly mention the right to vote and be elected, the Election Law in Article 1.4. prescribes:

Geneva Protocols I-II thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities.

[355] Official Gazette of Bosnia and Herzegovina, No. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/01, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 07/14, 31/16.

> Each citizen of Bosnia and Herzegovina who attained eighteen years of age shall have the right to vote and right to be elected (further: electoral rights), in accordance with the provisions of this law.
>
> To exercise this right, a citizen must be registered as a voter, in accordance with this law.[356]

Furthermore, the Election Law stipulates certain restrictions on the right to vote, to be elected and participate in a political party in elections (Article 1.6 to 1.8 of the Election Law). For example, a person serving a prison sentence ascertained by the International Tribunal for the former Yugoslavia for war crimes, or indicted and failed to comply with the order and appear before the Court, cannot register to vote, be a candidate of the elections, or hold any appointive, elective or any other public position in the territory of Bosnia and Herzegovina. In the event such a person holds a position or function in a political party or coalition, that party or coalition is deemed ineligible to participate in the elections[357]. The restrictions not only apply to the International Trubunal, but also the Court of Bosnia and Herzegovina, Court of the Federation of Bosnia and Herzegovina, Court of Republika Srpska and Court of Brčko District of Bosnia and Herzegovina. It also applies to proceedings in other countries, where the International Tribunal for the former Yugoslavia, has reviewed file prior to the arrest and found that it meets international legal standards, and in the cases of serious breach of the international humanitarian law[358]. A person can only become a candidate if they previously resigned from their position or function as a judge of regular and Constitutional courts, prosecutor, deputy, attorney, Ombudsmen, Member of the Human Rights Courts/Chambers/Councils, notary, member of police forces, civil servant, member of the Armed Forces of BiH, member of the Intelligence and Security Agency, and diplomatic and consular representative of Bosnia and Herzegovina abroad[359]. From the analysis of these provisions, it is apparent that universal suffrage is guaranteed in Bosnia and Herzegovina, with no age restriction, which is the mostly common criticized restriction in comparative law,

[356] Author's translation. Unofficial translation of the Election Law and its amendments is available at the web site of the Office of the High Representative: http://www.ohr.int/?page_id=68222 (last accessed on January 14, 2019).
[357] Article 1.6 of the Election Law of Bosnia and Herzegovina.
[358] Article 1.7 and 1.7.a of the Election Law of Bosnia and Herzegovina.
[359] Article 1.8 of the Election Law of Bosnia and Herzegovina.

and the limits placed on exercising the right to be elected to certain categories. Rigorous restrictions on the right to be elected are reasonable given the short amount of time that passed after the war, the unsuccessful reconciliation process in country, and extensive crimes that were committed. For comparison, in some countries, persons with a criminal record are not allowed to become a candidate at elections (Australia, Belgium, Bolivia, Brazil, Britain, Colombia, Fiji, Iceland, Israel, Italy, Jamaica, Japan, Luxembourg, Malaysia, Malta, Mauritius, Namibia, The Netherlands, New Zealand, Norway, South Africa, Sri Lanka, and Zimbabwe)[360].

Article 8.1 determines the election of members of the Presidency of Bosnia and Herzegovina, in accordance with the Article V of the Dayton Constitution. Following the territorial principle of the constitutional norm, Bosniac and Croat members to the Presidency are elected from the Federation of Bosnia and Herzegovina, and Serb member to the Presidency from the Republika Srpska. Members of the Presidency can only come from the different constitutive peoples elected territorially, but not be exclusively elected by the voters of their own ethnic group. However, Article 8.1 states that voters in the Federation of Bosnia and Herzegovina can vote either for a Bosniac or Croat candidate no matter if they are Serb or a member of some minority group (Others), whereas voters in Republika Srpska can only vote for one of the Serb candidates, even if they are Bosniac, Croats or Others. This provision has been especially problematic for Croats, because allegedly Croats are being outvoted by Bosniacs in elections for the Croat member of Presidency. For them, or rather for the Croat Democratic Union (HDZ), the Croat member of Presidency, Željko Komšić, elected from 2006-2014 and again 2018-2022 was elected by Bosniacs votes and is therefore not the legitimate representative of the Croats[361]. This has also been the reaction from Croatia[362], who has excessively trying to impact the election processes in Bosnia and Herzegovina, by emphasizing the need for change of the electoral

[360] The ACE Electoral Knowledge Network, http://aceproject.org/main/english/pc/pcc07.htm (Accessed on 16 January, 2019).
[361] https://www.france24.com/en/20181008-bosnia-risks-political-crisis-after-divisive-vote (Accessed on 16 January 2019).
[362] http://www.balkaninsight.com/en/article/croatian-politicians-fears-for-the-future-of-croats-in-bosnia-after-elections-10-09-2018 (Accessed on 16 January 2019).

law[363], and lobbying at the EU Parliament[364]. Komšić's election is both legal and legitimate, under the current Constitution and laws of the country. Komšić is perceived as a threat to the HDZ, the main Croat nationalistic party, firstly because he does not come from this party, and because he spent the whole war-time in Sarajevo serving as a member of the Army of the Republic of Bosnia and Herzegovina, making him in their eyes not "enough Croat". He is perceived as a threat for Croat national interests[365]. This "Croat Question"[366] is the reflection of the frustration of Croat nationalists regretting missing their opportunity for the creation, or rather legalization[367] of their own, third entity in Bosnia and Herzegovina, who are constantly claiming that Croats in Federation are being discriminated, deprived of their rights, outvoted etc. The reality is that Croats used this issue "to transform political disagreement into a discussion of legal matters"[368].

The Election Law further prescribes rules for the election of members of the Parliamentary Assembly of Bosnia and Herzegovina, and entities – presidents and parliaments. In Bosnia and Herzegovina, the electoral system applied is "a proportional representation system with open party lists for the lower houses of the national parliament and the parliaments of the two semi-autonomous entities, the cantonal assemblies, and the municipal councils' elections"[369]. The division of the country into electoral units, complicated distribution of mandates and the existence of the compensation mandates together with indirect election of members of House of People at both state and entity level makes voters' role in choosing their

[363] https://www.aljazeera.com/indepth/features/croatia-undermining-bosnias-sovereignty-181218142705856.html (Accessed on 16 January 2019).
[364] http://www.balkaninsight.com/en/article/croatina-mps-call-eu-to-discuss-bosnian-elecetions-10-26-2018 (Accessed on 16 January 2019).
[365] Adis Merdzanovic, p. 216.
[366] Ibid, p. 215.
[367] So called "Hrvatska zajednica Herceg Bosna" (Croat Community of Herceg Bosna), although formally abolished with Washington Agreement, actually still exist. It was a parastate formed in war, consisted of the cities with Croat majority. Some schools in cantons of Federation of Bosnia and Herzegovina with Croat majority continue to issue diplomas with coat of arms of that statelet, for example, there is also electric company in those cantons named "Elektroprivreda HZ HB" etc.
[368] Adis Merdzanovic, p. 218.
[369] http://aceproject.org/ace-en/topics/es/annex/esy/unexpected-implications-of-the-open-lists-and-the (Accessed on January 17, 2019).

representatives is just illusionary. Additionally, there are serious suspicions about electoral engineering, even for the candidates on the same party list.

Although the electoral legislative in Bosnia and Herzegovina *de lege lata* is far from ideal, it is important to bear in mind the many significant amendments that have already been made to the Election Law, some imposed by the High Representative and others by the Constitutional Court's decisions. Issues not regulated by the Constitution are regulated by the Election Law as long as they are in accordance, making it easier to make changes. Unfortunately, the specific nature of this Law undermines the interests of those on power, who refuse to accept any limitation or decrease of their privileges. For this reason, it is hard to expect any change of this legal act soon.

3.3. Initiatives for Change of the Annex IV of the Dayton Peace Agreement

The complexity of the system established by the Dayton Constitution, along with the firm positions of ethno-national elites against any change, give the impression that changing the Dayton Constitution is impossible. This legal document however, contains a provision prescribing how the amendement procedure in Article X (Amendment):

> The Constitution may be amended by a decision of the Parliamentary Assembly, including a two thirds majority of those present and voting in the House of Representatives.

The amendment procedure is restricted only by securing the continuation of the human rights protection standard established by the Dayton Constitution. Line 2 of the same article prescribes that:

> No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

The most important issue is in regards to the constitution's revision. It remains debated whether changes are intended as partial or full revisions to the constitution. The provision in line 1 mentions changes can only be made to amendments and not

the constitution[370], and goes on to explain in line 2 the restrictions of this procedure. Amendments to the Dayton Constitution are to be adopted by the Parliamentary Assembly of Bosnia and Herzegovina, including a two thirds majority of those present and voting in the House of Representatives – qualified majority. Article IV.2.b prescribes that the quorum of the House of Representatives is majority of all elected representatives, and for the decisions to be brought forth to both the House of Representatives and the House of Peoples majority of present and voting members is requested. Because the Article is not precise about what it means by "qualified majority", it is generally assumed and understood as the simple majority. The decision on amending the Dayton Constitution can be made by a vote of fifteen members of the House of Representatives[371]. Further details about amendment procedures are regulated by rules of procedures of Parliamentary Assembly houses. Accordingly, the amendments can be proposed by the Presidency, Council of Ministers, House of Representatives and House of Peoples or by any of the delegates of both houses of the Parliamentary Assembly of Bosnia and Herzegovina[372]. In both houses, envisaged amendment procedure requires opinion of the Presidency and the Council of Ministers, if they are not the ones proposing the amendments and public hearing are identical. Procedure for voting on constitutional amendments in the House of Peoples is same as in law adopting procedure – does not require a qualified majority. In the constitution, the amending procedure on the use of the veto to protect national interests, is not regulated. Steiner and Ademović consider that the amendments to the Dayton Constitution are subject to the vital national interest veto procedure[373]. They further conclude that in the process of making amendments to the constitution, there is a possibility of outvoting one of the constituent peoples, but not

[370] The unofficial translation of the Dayton Constitution in Bosnian uses the wording "može se izmjeniti i dopuniti" (may be changed and amended), which does not correspond to the English version, which is the authentic one.
[371] Christian Steiner, Nedim Ademović, p. 975.
[372] Article 140 of Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, available at: https://www.parlament.ba/data/dokumenti/pdf/Poslovik%20PD%20bs.pdf (last accessed on 24 February 2019) and Article 131 of Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, available at: https://www.parlament.ba/data/dokumenti/pdf/Poslovnik%20doma%20naroda%20bs.pdf (last accessed on 24 February 2019).
[373] Christian Steiner, Nedim Ademović, p. 977.

entities. They argue that entity veto right can be used and it is not a subject to legal review in the House of Representatives if the session is attended by all of its members, so "the functionality of the State depends on the will of delegates elected from either Entity to the House of Representatives"[374]. On the other hand, in the House of Peoples, outvoting one constituent people is possible only if amendments to the Constitution are not destructive to the vital national interest of that people. If representatives of one of the constituent peoples would opt for boycotting the sessions of the Parliamentary Assembly of Bosnia and Herzegovina and prevent adopting constitution amendments in that way, it might not be an obstacle for functioning of the House of Representatives, if the quorum requirement and the majority requirement would be satisfied. The work of the House of Peoples would be blocked in case that delegates representing one constituent people are not present, and consequently, whole state and its functioning would be blocked as well[375].

Up until now, the Dayton Constitution has been amended once. Amendment I[376] to the Dayton Constitution was adopted in 2009, providing the final decision on the status of Brčko District. The Brčko District officially became the third organizational unit of Bosnia and Herzegovina, defined as "a unit of local self-government with its own institutions, laws and regulations"[377].

However, it is important to point out that some other constitutional changes have been achieved, but indirectly by the decisions of the High Representative. In this case, competence has been transferred from entities to the state. The High Representative decided to adopt laws to change, amend and regulate[378] the constitution, without however changing the text in areas such as the Court and Prosecutors of Bosnia and Herzegovina, and financing of the institutions of Bosnia

[374] Ibid, p. 980.
[375] Ibid.
[376] The Amendment I to the Constitution of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 25/09, available at: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20Amendment%20I%20to%20BH%20Constitution%2025-09.pdf (last accessed on 26 February 2019).
[377] Ibid.
[378] Damir Banović, Saša Gavrić, "Ustavna reforma u Bosni i Hercegovini", *Politička misao*, No. 2, 2010, p. 167.

and Herzegovina. The transfer of competencies from the entities to Bosnia and Herzegovina have been done through entity parliaments' decisions, amendments to the entity constitutions, agreements between entities and the state government, and by laws adopted by the Parliamentary Assembly of Bosnia and Herzegovina. The most important of these indirect amendments include: the establishment of the High Judicial and Prosecutors Council, Armed Forces of Bosnia and Herzegovina, Intelligence – Security Agency of Bosnia and Herzegovina, and State Investigation and Protection Agency[379].

Although the need changes in the Dayton Constitution has been apparent from the onset, serious discussions for reform started with the Council of Europe Parliamentary Assembly's Resolution 1384 and continued with the Venice Commission Opinion, followed up by the European Court of Human Right's decision in the case Sejdić and Finci v. Bosnia and Herzegovina. This decision provoked different proposals for constitutional change. The most important, and perhaps most controversial, was known as the "April package", which attempted to change the Dayton Constitution. Additionally, many NGO's prepared proposals for constitutional changes, "keeping the broad structure of Dayton but making a combination of substantive changes (e.g. adding Supreme Court) as well as lesser tweaks"[380]. Although innovative proposals[381], none of them got serious attention from the international community. Despite their potential theoretical significance, their proposals were effectively ignored. Also, worth mentioning is that none of the major parties, when discussing the constitutional changes, sought "a more civic order, grounded less on ethno-national factors and more in accountability and participation"[382].

[379] Ibid, p. 168.
[380] Valery Perry, "Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?", *International Peacekeeping*, Vol. 22, No. 5, 2015, p. 6.
[381] Ibid.
[382] Ibid, p. 7.

3.3.1. Venice Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative

When Bosnia and Herzegovina was accepted in the Council of Europe in 2002, the awareness of the system's shortcomings was present. It was apparent that there was a need for stronger central institutions, and a decrease in the entities' competencies. Eventually these changes were brought about, but mainly through the imposition of the High Representative.

Later 23rd June 2004, the Parliamentary Assembly of the Council of Europe authorized the Venice Commission, in Resolution 1384 titled "Strengthening of democratic institutions in Bosnia and Herzegovina"[383], "to make a comprehensive assessment of the conformity of the Constitution of Bosnia and Herzegovina with the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter of Local Self-Government (ETS No. 122). Furthermore, the assessment examined the efficiency and rationality of the present constitutional and legal arrangements in Bosnia and Herzegovina"[384] and determined if the existence of the High Representative is compliable with the Council of Europe's basic principles, and with the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Venice Commission conducted an indepth research on the constitutional situation in the country, which included field visits to Bosnia and Herzegovina to understand the impressions and opinions of local politicians and officials on some of the proposals. Recognised as a federal state, the Venice Commission noted the complexity and oddities of the Dayton Constitution, described as "the unique case of a constitution never officially published in the official languages of the country concerned but agreed and published in a foreign language, English"[385]. It correctly identified the state's most important problem – the dispersal of power at many all

[383] http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17232&lang=en (21.07.2019).
[384] Ibid.
[385] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e (21.07.2019), p. 3.

levels. In a very small territory, they argued that it created "too many bureaucracies and too many posts for politicians"[386], where more than 50% of GDP goes to administration costs, namely, financing a cumbersome bureaucracy.

Regarding the current constitutional settings, the Commission found the competencies given to the central state "extremely narrow". Although some provisions in the Dayton Constitution justify extending state level competencies (such as the provisions concerning human rights and free movement of goods, services, capital and persons), the Commission argued that such a weak state "will not be able to make much progress on the way towards European integration"[387]. For this reason, they found Constitutional reform inevitable for many of reasons, recommending a comprehensive and not a piecemeal transfer of responsibilities, including executive agencies and a decrease of bureaucracy, a decrease of the High Representative's intervention and a formal change visible in constitutional text. The Commission focused on a few provisions of the Constitution and institutions that were creating clear obstacles for Bosnia and Herzegovina in becoming a functional state, and respecting the Council of Europe's standards and ratified human rights documents – the vital national interest veto, the House of Peoples, and the Presidency. In general, the Venice Commission found that the decision-making mechanisms at the central state level in Bosnia and Herzegovina were "not efficient and rational but cumbersome and with too many possibilities of blocking the taking of any decision"[388].

The Venice Commission considers that the vital national interest veto shall be precisely and strictly defined in the Constitution. Aware that its total abolishment is unrealistic, they suggest that it "excessively broad but focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture"[389]. The vital national interest veto, for example, is defined in the Constitution of Federation of Bosnia and Herzegovina, but the provided definition is

[386] Ibid, p. 5.
[387] Ibid, p. 8.
[388] Ibid, p. 11.
[389] Ibid, p. 10.

too broad, and it is possible to characterize almost any issue to be of vital national interest. In the other entity, the situation is not much better; the interest veto as it is prescribed is open for abuses. The Venice Commission proposed reviewing the veto interest mechanism in both entitities and at the state level in order to "develop a definition of vital interest and a mechanism for resolving disputes which would be parallel in the constitutions of the two Entities and mutatis mutandis the State"[390].

A bicameral system, characteristic of federal states, foresees a second chamber's main task to ensure "a stronger representation of smaller entities"[391]. This is not case in Bosnia and Herzegovina, where the House of Peoples only represent an additional institution, where interests of the constitutional peoples are protected by the vital national interest veto. The Commission found this absolutely unnecessary and proposed "to move the exercise of the vital interest veto to the House of Representatives and abolish the House of Peoples"[392]. They claimed this would have a twofold effect – streamlining procedures and facilitating the adoption of legislation without endangering the legitimate interests of any people, while also solving the problem of the discriminatory composition of the House of Peoples.

Furthermore, the Commission described the Presidency of Bosnia and Herzegovina as a "highly unusual arrangement"[393], which is neither functional nor efficient, but aware that an existence of a single president, with strong power, is currently not a possible solution for Bosnia and Herzegovina. Therefore, the Commission suggested the concentration of the executive power within the Council of Ministers, as a collegiate body in which all constituent peoples would be represented. This would enable the existence of a single President as a Head of State, who would hold the position without important powers. An indirect election of the President by the Parliamentary Assembly, with a majority ensuring that the President enjoys wide confidence within all peoples, could be better option than a direct election. Additionally, they added that the rule that President may no longer belong

[390] Ibid, p. 15.
[391] Ibid, p. 10.
[392] Ibid.
[393] Ibid, p. 11.

to the same constituent people as his predecessor to satisfy the quest for equal representation of constituent peoples.

The Commission, aware of the firm positions the constitutive peoples have about the country's internal organization, advocated for a strengthening of local authorities. They proposed executive federalism[394], the tendency present in most European federal countries, that envisages concentrating most or all legislative tasks at the central level, while leaving executive tasks to the entities. Alongside of this, the Commission suggested the total abolition or decrease in the number of cantons. By heading to these proposals, local authorities would not have to adopt numerous legislative documents, the problem of the collision of the regulations on very small territories would be avoided, and at the same time, the need of people would probably be better met. The Commission saw "no ethnic rationale for keeping legislative responsibilities at the Cantonal level"[395] and proposes "a concentration of legislative tasks at the level of the FBiH"[396].

The Venice Commission showed a familiarity with the conditions agreed upon in both the Constitution of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina, and their main characteristics. They hoped key political actors in Bosnia and Herzegovina were aware of the need for having "democratically legitimate constitutions prepared with the participation of all political forces and civil society in a public and transparent process"[397]. The system's main problem was identified - the combination of both the territorial and ethnic principle, which is to blame for the creation of this Frankenstein state.

The rules on the composition and election of the Presidency and the House of Peoples, as well as the rules on the composition and election of the House of Peoples are clearly not compatible with the European Convention on Human Rights, especially its Article 14, and with Protocol No. 12. The Commission declared that the time for reforms had come and the existing arrangements were neither efficient

[394] Ibid, p. 14.
[395] Ibid.
[396] Ibid.
[397] Ibid, p. 16.

nor rational and lacked democratic content. In conclusion, the Commission proposed concrete steps to be implemented as the part of the constitutional changes in Bosnia and Herzegovina. Concerning the role of the High Representative in the political system of Bosnia and Herzegovina, it was suggested to introduce an independent panel of legal experts (ideally, international legal experts), which would have to give its consent to any decision of the High Representative. The proposals for the change of the Dayton Constitution included following:

- A transfer of responsibilities from the Entities to central state by means of amendments to the Dayton Constitution;
- A streamlining of decision-making procedures within Bosnia and Herzegovina, especially with respect to the vital interest veto;
- A reform of the provisions on the composition and election of the Presidency and the House of Peoples;
- The territorial re-organization of Bosnia and Herzegovina – concentration of legislative responsibilities within the Federation of Bosnia and Herzegovina at the Entity level and strengthening of local government in both entities;
- The change of the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens; as a medium- and long-term goal of the constitutional reform in Bosnia and Herzegovina.

The Venice Commission's opinion has been extremely important; firstly, because it finally highlighted all the shortcomings of the system established by the Dayton Constitution, and second, it emphasized the need for the elimination of discriminative provisions and offered the options and solution concerning those changes. It became a kind of reference and starting point for all further debates on constitutional changes, as it correctly identified all the problems of the current system. It also proposed "soft", however substantial, reforms to the Dayton

constitution instead of "hard" reforms that involve a new territorial order in Bosnia and Herzegovina[398].

3.3.2. "April package"

Soon after the Venice Commission's opinion, an American initiative called the "Dayton Constitutional Project" emerged and certain proposals concerning the constitutional reform in Bosnia and Herzegovina were presented. This was "the only serious, albeit modest, attempt to move beyond the Dayton settlement", but unfortunately it never progressed very far. Through the US embassy in Sarajevo, this project managed to reach Bosnian politicians and motivate them to start negotiations about a constitutional reform. The nine-month long process gained momentum as a series of party leaders met and produced a document which became known as the "April Package"[399]. The process involved discussions between heads of the country's eight most important political parties, and the three-man secretariat, chaired by Don Hays, US diplomat and former principal deputy high representative. The aim was to conclude negotiations and reach an agreement about reforms to have them voted for in the state parliament by March 2006. Changes then could enter into force before the general elections scheduled for October 2006[400]. During the negotiations, representatives from the Party for Bosnia and Herzegovina (SBiH), and later the Croatian Democratic Community (HDZ), the leading Croatian party in Bosnia and Herzegovina, strongly disagreed with some of the proposed solutions concerning the issue of "entity voting" and withdrew from the negotiations. This issue also caused the HDZ to split into two parties – HDZ 1990 and HDZ BiH.

The constitutional reform proposal that was sent to parliament for voting, was significantly different than the initial one and covered the distribution of competencies, state parliament, the Presidency and the Council of Ministers. The proposal suggested strengthening Bosnian central institutions by updating the

---

[398] Soren Keil, p. 142.
[399] The document is available in Bosnian at http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Aprilski_paket1.pdf (last accessed on December 09, 2018).
[400] Christopher Bennett, p. 174.

constitution to include those reforms that were already achieved indirectly, as explained above (such as the creation of a joint Defence Ministry) and the creation of two new ministries for the Environment and for Agriculture. Furthermore, the proposal suggested changing the parliamentary system, with the House of Representatives being directly elected on the basis of one person, one vote, and the House of Peoples being elected by the House of Representatives, consisting of seven Bosniacs, seven Croats and seven Serbs. Additionally, the "perfect federalism", in which both Houses have to agree on all forms of legislation, would be changed and the House of Peoples would have to decide on only those pieces of legislation that involved constitutional changes and the national interest veto. The House of Peoples would, furthermore, be involved in the election of the President and the two Vice-Presidents. As stated in Amendment III, the three-member Presidency would be abolished and, instead, the office of a permanent President would be created with two Vice-Presidents (President and Vice-Presidents all being from a different national group). Furthermore, the amendment foresaw the transfer of the competencies of the Presidency to the Council of Ministers, where the post of the Chair of Council of Ministers would be transferred into the position of a Prime Minister.

The "April Package" failed on 26 April 2006 to gain the required two-third majority in the House of Representatives by only two votes. Haris Silajdžić, head of the SBiH, strongly campaigned against this constitutional reform, specifically, against the entity voting which allegedly would reinforce the country's division and bring the country's existence into question. These changes were charged as "cosmetic", as they would not abolish Republika Srpska and implied ratification of the Dayton Constitution, which never was ratified in Parliament. This issue also was challenged by HDZ 1990, who claimed that this will selectively discriminate Croats.

As demonstrated, these constitutional changes provided the chance to move beyond the initial solutions agreed upon in the Dayton Constitution, however in the end the opportunity was wasted. Although not all of the parties were satisfied, the

proposals had the potential to bring about important progress in the establishment of functional institutions and central state authorities[401].

3.3.3. Prud Process

Despite the "April package" failure, it was obvious that Bosnia and Herzegovina still urgently needed changes and reforms to break the continuing deadlock in state institutions. Aware of this, meetings were held between Čović, Dodik, and Izetbegović in November 2008 to discuss and find possible solutions to meet the Peace Implementation Council's conditions for the OHR's closure and related constitutional reform, to make Bosnia and Herzegovina more functional and better equipped for EU integration[402]. The series of meetings took place near Odžak in Northern Bosnia, where leaders from the three biggest ethnic parties in Bosnia and Herzegovina met and talked about their demands regarding constitutional changes. However little progress was achieved. These talks showed that constitutional changes meant something different for each of the sides and that compromise on this issue was nowhere in sight. In the end, nothing came out of their discussions. The discussions were more declarative in nature, listing issues that each of the three major ethnical groups' parties regulating and resolving, with almost no connection to real constitutional changes. It was however agreed that the Dayton Constitution should be harmonized with the European Convention on Human Rights and Freedoms and that changes to amendments of existing constitutional text should be carried out with the expert assistance of international institutions. Other issues agreed on concerned the distribution of state property, census, fiscal council and the reconstruction of the Council of Ministers[403].

3.3.4. Butmir process

An initiative by the US and EU, known as the "Butmir process", consisted of two meetings and intensive talks held on 8 and 9 and on 21 and 22 October 2009, "between the highest-level international negotiating team ever assembled in the

[401] Faris Vehabović, "Zašto neće doći…", p. 26.
[402] Christopher Bennett, p. 198.
[403] http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (14.07.2019).

former Yugoslavia"[404], including representatives of seven of the eight parties that were part of the negotiations about April package. The negotiation team included two former High Representatives, Carl Bildt and Miroslav Lajčak, now foreign ministers of Sweden and Slovakia, and high ranked EU and USA officials – Director-General for External and Politico-Military Affairs at the Council of European Union Robert Cooper, EU Commissioner for Enlargement Oli Rehn, and Deputy US Secretary of State James Steinberg. The purpose of the meetings, was to negotiate reforms that would enable the country to function better and that would lead to the eventual close the OHR.

The constitutional amendments negotiated in Butmir consisted of changes in competencies and the number of delegates in the House of Representatives and House of Peoples, as well as a change in the election of the President and two vice-presidents of Bosnia and Herzegovina. According to the proposals, there would be no more collective Presidency, and the President and vice-presidents would no longer exclusively have to be members from one of the three constitutive nations. Its competencies would be limited to the election of ambassadors and the signing of laws and the ratification of international agreements adopted in the Parliamentary Assembly. The executive power would be concentrated at the Council of Ministers, which would be in charge of foreign policy, executing the laws and proposes budget and laws and coordinates institutions' cooperation and fulfils country's international and domestic obligations. The veto right would strictly be used in the House of Peoples, serving as its main role. Laws adopted in the House of Representatives, would by default be considered as adopted in the House of Peoples, if in the fifteen days procedure on the protection of vital national interest would not be started[405].

In the end, the Butmir talks failed due to timing, their unnecessary rush, over emphasis of EU integration versus financial incentives, and finally poor preparations[406]. However, the main reason for the failure was "the Bosnian leaders had mutually incompatible visions of their country and no incentive to

[404] Christopher Bennett, p. 206.
[405] http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (14.07.2019).
[406] Christopher Bennett, p.207.

compromise"[407]. The Butmir process, just as the Prud process, showed once again that there was no minimum compromise on meaning and content of constitutional changes. Each of the leaders of three main ethnic group parties had different aims in the negotiation process. While Dodik and Serbs aimed to close the OHR, they were unwilling to make any compromise that would satisfy the other two leaders demands. Croat and Bosniac leaders conditionally agreed to the closure of the OHR, in return for fulfilment of their demands. The Butmir process only weakened the already marginalized position of OHR.

3.3.5. Efforts for changes of the Law on Elections

As this thesis has discussed, no ethnic group in Bosnia and Herzegovina has been happy with the Dayton Constitutional arrangements. Of the three ethnic groups, Croats have been the most disgruntled, who claim they were forced into the Federation with Bosniacs, and have not been able to exercise their rights. Often Croats allege "majorization", a term used by Croat politicians, referring to the situation where Bosniacs have the majority, which Croats feel deprives them of their rights. Two issues in particular disturb Croat politicians, the election of member of Presidency and the delegates of the House of Peoples in the Parliament of Federation of Bosnia and Herzegovina. In the Federation, voters have the possibility of voting for either a Bosniac or Croat candidate for Presidency. Croats argue Bosniacs have voted for Croat candidates from the multi-ethnic Social Democratic Party (SDP) to prevent the election of candidates coming from HDZ. They also argue that some of the provisions of the Law on Elections, namely the provisions about the elections of the members of the House of Peoples in the Parliament of Federation of Bosnia and Herzegovina, enables cantons with a Bosniac majority to dominate in terms of representation. Furthermore, Croats argue the number of elected delegates does not reflect the number of Croat people living in those cantons, so the interests of the Croats are not properly represented.

[407] Ibid.

Dr Božo Ljubić, then the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina from HDZ 1990 party, filed a case at the Constitutional Court of Bosnia and Herzegovina on 20 September 2014, requesting the Court to decide if some of Election Law provisions are in conformity with the Constitution of Bosnia and Herzegovina. The contested provisions were in regards to the issue of the election of delegates to the House of People in the Parliament of Federation of Bosnia and Herzegovina. Although the issue did not directly concern changes of the Dayton Constitution, but rather the Election Law of Bosnia and Herzegovina, the two are interconnected. The election processes and the procedures at different levels in Bosnia and Herzegovina affects the legislative and executive power, and as it is in this case, can be used for the constant obstructions, and change of the focus from the necessity of constitutional change.

The Constitutional Court asked the opinion on this issue from the Venice Commission, namely, if the contested provisions of the Law on Election are in accordance with the European standards and comparative law. The Venice Commission approached the issue with respect to the domestic circumstances and European standards as well. In its opinion[408], it emphasized that election legislation shall be accepted as the state's competence, since it is not explicitly mentioned in the Dayton Constitution, meaning that it falls within the competencies of the entities. However, the DPA in Annex 3 – Agreement on Elections established Provisional Election Commission[409], and stated that after the war, elections should be succeeded by a Permanent Election Commission, "with responsibilities to conduct future elections in Bosnia and Herzegovina"[410]. In this way, it was "tacitly accepted that the legislative framework for elections would be adopted at the State level" and that its implementation would be the central state's competence. Although in most

[408] Venice Commission's Opinion No. 862/ 2016, from 17 October 2016, Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)024-e (last accessed on 19 January, 2019).
[409] Article III of Annex 3 to the General Framework Agreement for Peace in Bosnia and Herzegovina.
[410] Article V of Annex 3 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

democratic systems a second chamber in the legislative body is intended to serve and to represent the constituent units of a federation, the Venice Commission awknowled this was not the case in Bosnia and Herzegovina. The second chamber, in the case of Bosnia and Herzegovina, secures equal representation of constitutive peoples, and Others. Its main function is the veto power in the legislation process, in cases allegedly dangerous for vital national interest[411]. Additionally, it represents "a system of indirect election that could be described as so circumscribed as to constitute a form of selection, respectively allocating seats to constituent peoples and cantons"[412]. European electoral standards demand an even distribution of the seats between the constituencies, at least in lower houses of parliament, and regional and local elections and to be freely contested in a popular vote. The rules on the election of the delegates to the House of Peoples cannot go against these standards. The Venice Commission proposed changing the norm of the Election Law regarding the allocation of seats of the House of Peoples as it is stated in the Constitution of the Federation[413].

The Court brought the decision on the 1 December 2016, and decided that the provision of Article 10.12 (2) (where each of the constituent peoples shall be allocated one seat in every canton), provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), and items a-j of the Election Law of Bosnia and Herzegovina, were not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina[414]. The other contested provisions in the Election Law, however,

---

[411] Venice Commission had already gave its opinion about this body in the Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, about which was written more in details above.

[412] Venice Commission's Opinion No. 862/ 2016, from 17 October 2016, Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)024-e (last accessed on 19 January, 2019), p. 11.

[413] Instead of "Each constituent people shall be allocated one seat in every canton" to be "In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body".

[414] Decision of the Constitutional Court of Bosnia and Herzegovina, No.: U-23/14, from 1 December 2016, available at: http://www.ustavnisud.ba/dokumenti/_en/U-23-14-1058444.pdf (last accessed on 12 January 2019).

were found in conformity with the Constitution of Bosnia and Herzegovina and its Article I (2)[415].

For Pobrić, the actual issue was over the conflict over organic/federal authority, not abstract constitutionality control as the Court referred it, which consequently ruled its decision. The Court accepted and wrongly formulated an appeal that did not solve the basic question of authority in regulating the issue of the election of members of the House of Representatives of the federal Parliament[416]. He also claims there was a conflict of authority in law-making between Bosnia and Herzegovina and Federation of Bosnia and Herzegovina. It is questionable who was authorized to bring forth the laws regarding Article A.1.8 line 2 and 4 of the Constitution of the Federation of Bosnia and Herzegovina. The Constitutional Court in its ruling, took a stand that it was the law-making body of Bosnia and Herzegovina, who is authorized to bring forth laws regarding elections of the member of the House of the Peoples of the federal Parliament. Pobrić however argues that the entity's constitution cannot create any kind of obligation for the state lawmaker[417]. Unlike Pobrić, Mrkonjić considers the logic in the Constitutional Court's ruling correct. He argues the Parliamentary Assembly of Bosnia and Herzegovina is authorized to regulate the election of the member of the House of Peoples of both the federal Parliament and the National Assembly of RS. This is because of the fact that these indirect elections affect the election of the members of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and its functioning. The Parliamentary Assembly is authorized to regulate its election, and any regulation of this issue at the entity level would be against the Article IV/4 of the Dayton Constitution[418].

---

[415] Provisions of Subchapter B - Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina.

[416] Nurko Pobrić, "Izbor delegata u Dom naroda Parlamenta Federacije Bosne i Hercegovine: Odluka Ustavnog suda Bosne i Hercegovine U-23/14 od 1. decembra 2016", p. 7, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Nurko_Pobric15.pdf (last accessed on 12 February, 2019).

[417] Ibid, p. 6.

[418] Petar Mrkonjić, "Implementacija rezultata Općih izbora 2018. godine u odnosu na izaslanike Doma naroda Parlamenta FBiH", p. 5, available at:

Ljubić's petition claimed that the contested provision is against the will of people as shown in elections. He further argued that by prescribing one representative from each canton, it did not reflect the proportion of people of that ethnic group living there now. To further illustrate this point, the 1991 census was still followed in determining number of seats allocated for each ethnic group since the official results of the 2016 census had not been published yet[419]. The allocation of seats in House of Peoples in federal Parliament until the 2018 election were as follows:

Figure 2 – the allocation of seats in the House of Peoples in federal Parliament applied until 2018

	Bosniacs	**Croats**	**Serbs**	**Others**	**Total**
Una-Sana Canton	2	1	2	0	5
Posavina Canton	1	1	1	0	3
Tuzla Canton	3	1	2	2	8
Zenica-Doboj Canton	3	2	2	1	8
Goražde Canton	1	1	1	0	3
Central Bosnia Canton	1	3	1	1	6
Herzegovina-Neretva Canton	1	3	1	1	6
West Herzegovina Canton	1	2	1	0	4
Sarajevo Canton	3	1	5	2	11
Canton 10	1	2	1	0	4
TOTAL:	**17**	**17**	**17**	**7**	**58**

But, Mr. Ljubić claimed that this way of seat allocation allows election of the representatives from the cantons where one ethnic groups members do not make minimum 5,88% in total population of that canton. do not live the representatives are being elected. The percentage is found by dividing 100% with the number of the ethnic group representatives in the House of Peoples (17 members).

The Constitutional Court of Bosnia and Herzegovina ordered the Parliamentary Assembly to implement the decision in six months. When if failed to do so, the disputed provisions of the Election Law were repealed, creating a legal

http://fcjp.ba/templates/ja_avian_ii_d/images/green/Petar_Mrkonjic1.pdf (last accessed on 13 February 2019).

[419] The Election Law prescribes the using of the results of the last census.

loophole. The amendment procedure was supposed to end six months prior to the general elections in 2018 so that the new provisions of the law would be applicable. Twelve months however passed, and no agreement on this issue could reached. Two proposals for changes of the Election Law were presented, one prepared by the HDZ, and another by the SDA. Both parties voted for these changes in the House of Representatives, however, they failed to achieve the needed number of votes. The Croats' proposal reached only 11 votes, while the Bosniacs' proposal had only 7 votes. The Croats' proposal envisioned an election of Croats' delegates to House of Peoples in Parliament of Federation of Bosnia and Herzegovina from those cantons in which they are the majority or relative majority. They insisted on changes in the election of members of Presidency in the Federation, by determining ethnic electoral units for the election of a Croat, and respectively a Bosniac member of Presidency. The SDA's proposal was to keep the current law as the solution, with some modifications for certain election units[420]. When the necessary amendments were not adopted and the earlier Constitutional Court's decision in the case U-23/14 were not implemented, the Constitutional Court on 6 July 2017, decided to end the disputed provisions of the Election Law[421]. According to Ademović, this created an unregulated area, not a legal gap. He considers that the Central Election Committee, as an executive body, has neither the constitutional nor legal authority to interfere and fill this unregulated area. In his opinion, the Central Election Committee could eventually be authorized to fill in the legal gaps by legal interpretation techniques, but the issue in this case cannot be considered to be a legal gap. Consequently it can only be regulated by lawmaker – either the Parliamentary Assembly of Bosnia and Herzegovina or the Parliament of the Federation of Bosnia and Herzegovina[422]. The issue of the election of the members of the House of Peoples in the Parliament of Federation of Bosnia and Herzegovina, is the Federation's residual power, as

[420] http://balkans.aljazeera.net/vijesti/izmjene-izbornog-zakona-nisu-prosle-u-bh-parlamentu (last accessed on 19, January 2019).
[421] Decision of the Constitutional Court from 6 July 2017 is available at: http://www.ustavnisud.ba/dokumenti/_bs/U-23-14-1087466.pdf (last accessed on 10 February, 2019).
[422] Nedim Ademović, "Opšti izbori u Bosni i Hercegovini 2018: pravni triler bez hepienda?", p. 8, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Nedim_Ademovic.pdf (last accessed on 10 February, 2019)

prescribed in the Dayton Constitution[423]. The author further claims that the issue of determining the number, structure and the way of the election of the delegates in the House of Peoples, can be determined only by the law, be it either state or federal law, and not by the act of the executive body[424].

Eventually, general elections were held on 7 October 2018. The election's results however have not been implemented, and the government, at both the central and federal level, has not been formed for more than three months after the elections. As previously mentioned, the Croat parties, especially HDZ, has used this issue of seat allocation in the Federal House of Peoples to create problems to try to create further division of Bosnia and Herzegovina. Even with no changes made to the Election Law, the 2018 election and its results could have been implemented without any problem as suggested by the European Stability Initiative[425]. It suggests following the existing provision of the Election Law[426], which is also the provision of the Constitution of the Federation of Bosnia and Herzegovina and which is prescribing the application of last census. As the results of the 2013 census then were official and published, new quotas and number of delegates from each canton in the House of Peoples in Parliament of Federation can be determined.

This is how the Central Election Commission reasoned, and on 18 December 2018 a Direction on Change and Amendments of the Direction on Implementation of Indirect Election for the Government Institutions under the Election Law of Bosnia and Herzegovina was issued [427]. Accordingly, the number of delegates to the House of Peoples of the Federal Parliament was determined as follows:

---

[423] Ibid, p. 9.
[424] Ibid, p. 11.
[425] "Don't believe the Hype - Why Bosnian democracy will not end this October", from 30 January 2018, available at: https://www.esiweb.org/pdf/ESI%20-%20Hype%20and%20Bosnian%20elections%20-%2030%20Jan%202018.pdf (last accessed on 19 January, 2019).
[426] The one prescribing that in the House of Peoples there shall be at least one Bosniak, one Croat, one Serb from each canton which has at least one such delegate in its legislative body.
[427] Available in Bosnian at: https://www.izbori.ba/Documents/2018/Posredni_izbori/12/Uputstvo_18_12_2018-10_00-bos.pdf (last accessed on 19 January, 2019).

Figure 3 – the allocation of seats in the House of Peoples in federal Parliament applied in 2018

	Bosniacs	**Croats**	**Serbs**	**Others**	**Total**
Una-Sana Canton	2	1	2	1	6
Posavina Canton	1	1	1	0	3
Tuzla Canton	3	1	2	2	8
Zenica-Doboj Canton	3	1	1	1	6
Goražde Canton	1	1	1	0	3
Central Bosnia Canton	1	3	1	1	6
Herzegovina-Neretva Canton	1	3	2	0	6
West Herzegovina Canton	1	3	1	0	5
Sarajevo Canton	3	1	3	2	9
Canton 10	1	2	3	0	6
TOTAL:	**17**	**17**	**17**	**7**	**58**

Although Croat politicians insisted on the idea that three canton shall choose no Croat delegates to the House of Peoples of the Federal Parliament, this is not representing the real situation and is not proportional to people living there, especially not in Sarajevo, for example, where, according to 2013 census, 17,520 Croats live. HDZ's proposal would remove the provision of the Election Law, which is identical to the provision of the Article 8 of the Constitution of the Federation of Bosnia and Herzegovina.

In the table below, different modes (and numbers) were used for the election of Croat delegates from cantons of the Federation for the House of Peoples of the Federal Parliament as shown below. The first column corresponds to the mode of elections in 2014, before the Constitutional Court's decision in the Ljubić case. In the second column, is the HDZ's proposal of the amendment of the Election Law[428]. The third and fourth column are identical, and represent the distribution of seats according to the provisions of the Election Law into force and the results of the 2016 census.

[428] Available at: http://ba.n1info.com/Binary/69/Prijedlog-zakona.pdf (last accessed on 20 January, 2019).

Figure 4 – the comparative view of allocation of seats in the House of Peoples in federal Parliament in 2014, according to HDZ's proposal, ESI's proposal and the one applied after the elections in 2018

	2014	HDZ's Proposal	ESI's Assumption	2018
Una-Sana Canton	1	0	1	1
Posavina Canton	1	1	1	1
Tuzla Canton	1	1	1	1
Zenica-Doboj Canton	2	1	1	1
Goražde Canton	1	0	1	1
Central Bosnia Canton	3	4	3	3
Herzegovina-Neretva Canton	3	5	3	3
West Herzegovina Canton	2	3	3	3
Sarajevo Canton	1	0	1	1
Canton 10	2	2	2	2
TOTAL:	**17**	**17**	**17**	**17**

The Central Election Committee gave cantonal legislative bodies seven days (the Direction was published on 18 December 2018) to provide them with lists of the names of delegates to be elected in the House of Peoples in the Federal Parliament. Immediately after, twenty seven members of the House of the Representatives of the Federal Parliament from the SDA party sent an appeal to the Constitutional Court of Bosnia and Herzegovina concerning the issue of which census should be applied in the process of the mandates distribution – the one from 1991, as it is prescribed in the Federal Constitution, or the one from 2013, as it is envisaged in Election Law. The SDA party argues that the 1991 census shall be applied until the implementation of the Annex 7 to Dayton Peace Agreement. Mrkonjić argues that this will never happen. However, if there are legal provisions put into place that insist on its full implementation, then they have to be respected and it has to be applied[429]. Otherwise, each decision or mandate that it is not based on, could be challenged and disputed. The situation is even more complicated by the existence of the provisions with

[429] Petar Mrkonjić, "Implementacija rezultata Općih izbora 2018. godine u odnosu na izaslanike Doma naroda Parlamenta FBiH", p. 12-13, available at: http://fcjp.ba/templates/ja_avian_ii_d/images/green/Petar_Mrkonjic1.pdf (last accessed on 13 February 2019).

reference to the implementation of the Annex 7 in the Federal Constitution. Regarding the appeal of the SDA members of the House of the Representatives, the Court declared that deciding on this issue does not fall within its authority[430].

Another similar case has since then come forward. On 10 January 2018, Borjana Krišto, the presiding of the House of the Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, filed a complaint to determine if the Article IV.A.8, line 3 of the Constitution of the Federation of Bosnia and Herzegovina is in the conformity with the Dayton Constitution. The provision is similar to the provision of the Election Law. which was declared unconstitutional[431]. The Constitutional Court asked the Opinion of the High Representative, as the body authorized for interpretation and implementation of the Dayton Constitution. In its opinion[432], the High Representative accentuated the same points as in the one given in the Ljubić case. The decision has however has not been concluded, but rather the case has been postponed till March 2019. The decision of this case, together with the previous unimplemented decisions of the Constitutional Court of Bosnia and Herzegovina, and the European Court for Human Rights, highlights the urgent need for massive constitutional reforms in Bosnia and Herzegovina at all levels, which has so far been ignored and delayed for too long.

3.3.6. EU Membership Requirements and Initiatives for changes of Election Law

The role of the European Union in Bosnia and Herzegovina has remained ambiguous, sometimes serving as a mediator between ethnic elites, a partner, or the one holding the carrot and the stick. Amongst the confusion of the role its supposed to play, the EU in the BiH has effectively done little. Its presence in the country dates back to 1996, when it was the Delegation of the European Commission, and from

[430] http://balkans.aljazeera.net/video/pribinja-o-apelaciji-borjane-kristo-ustavni-sud-raspravljat-ce-u-martu?qt-video_wide_tabs=1&qt-video_side_tabs=1 (last accessed on 12 February 201).
[431] While the unconstitutional provision of the Election Law was "Each of the constituent peoples shall be allocated one seat in every canton", the challenged provision of the federal Constitution is "In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body".
[432] Brief submitted by the High Representative concerning the request of the applicant in Case No. U 4/18, available at: http://www.ohr.int/?p=99294&print=pdf (last accessed on 13 February 2019).

2009 it has remained the 'Delegation of the European Union to Bosnia and Herzegovina.' The function of the European Union Special Representative (EUSR) was mandated by the Council of the European Union with the aim of reinforcement of the EU's political support for its policy objectives in BiH. Currently, the European Union Special Representative – Ambassador Johann Sattler performs both functions, Head of EU Delegation to BiH and EU Special Representative in BiH.

Beginning in 2000, the USA's interest and influence in the region decreased, leaving greater space for the EU. At one point, the function of the High Representative and European Union Special Representative was merged in one person, and as the closing of the Office of the High Representative was planned, it was envisaged that gradually its place will be taken by the European Union Special Representative. This merger however did not last long, and soon after the two positions split again. Following the decline of the USA's engagement in the region, it was assumed that the EU would play a greater role. This has however not been the case, and instead the EU has served more over the developments in the country [433]. Perhaps this is in part due to the absence of clear criteria defining the EU's role. Bieber considers "the closest document to a list of EU conditions for state-building is the European Partnership Document"[434]. The EU's state-building criteria includes: police reform, cooperation with the ICTY, reform of the public administration, the creation of a single economic space, and improvements in human rights protection, increased efficiency of Parliamentary Assembly, institutionalized coordination mechanisms between the state and the entities, changes to the constitution, and electoral system[435].

The overall situation in Bosnia and Herzegovina remains dire in terms of its aspirations to become an EU member country. Certain reform processes, which are part of the standard procedure countries go through on becoming an EU member, has

[433] https://foreignpolicy.com/2018/03/21/bosnia-is-teetering-on-the-precipice-of-a-political-crisis-balkans-election-law-dodik/ (Accessed on 17 January, 2019).
[434] Florian Bieber, "Building Impossible States? State-Building Strategies and EU Membership in the Western
Balkans", *Europe-Asia Studies*, 2011, Vol. 63, No. 10, p. 1793.
[435] Ibid, p. 1793-1794.

remained slow in Bosnia and Herzegovina, with almost little or no progress for years. The country's internal organization, incompetence and concentration of the most important competencies at the entity level, large administration, and many legislative levels are just a few of the factors hindering progress. Additionally, there is a non-existing political will for the implementation of reforms, high levels of corruption, combined with the constant political crisis among parties of the governing coalition. Electoral legislation, public administration and judicial system reforms, the fight against corruption and organized crime, and economic development are just some of the areas that are in need of urgent reforms.

At the beginning of 2000, state building efforts were underway to assist the country with Euro-Atlantic integration. The establishment of certain state institutions however, was regularly opposed by Serb politicians. Furthermore, the country's progress was imposed by the High Representative, who was aware of these actions' shortcomings, but had no other option but to foster progress in Bosnia and Herzegovina. Despite the unorthodox ways used to bring about progress, it has nevertheless helped shape a more positive image of the country and has demonstrated "the potential 'pull of Brussels'; that is, the transformational power of the incentive EU membership, as opposed to the earlier 'push of Dayton'."[436] Still, obstructions continue, and no single issue can be agreed upon smoothly without somekind of intervention and imposition. The EU has lowered its standards and conditions to help Bosnia and Herzegovina and to motivate its political leaders. Paradoxically, this has not produced any significant results, but on the contrary has made the politicians even more reluctant on implementing necessary reforms and tackling the serious issues the country has. At the same time, this has harmed the EU's credibility in the country, already deteriorated in war period.

Before signing of the Stabilization and Association Agreement (SAA), many arguable issues in Bosnia and Herzegovina remained unaddressed, the Sejdić and Finci verdict representing one of the most serious ones. After the ECtHR decided in this case, the EU insisted on its implementation as a pre-condition for the SAA to

[436] Christopher Bennett, p. 153.

enter into force, and non-implementation would mean serious consequences for the country[437]. Apparently, the EU made serious efforts to assist the country on this issue, through organizing numerous discussions, different institutions bodies' sessions, and joint meetings[438], in order to try to reach an agreement with Bosnian politicians on the measures to be taken until the 2010 elections[439], which otherwise would not be accepted as legal neither by the European Council nor European Commission. However, no agreement on the decision's implementation was reached, primarily because the main political (nationalist) parties were not ready to give up of what Dayton guarantees to them[440]. The elections were still held, and the issue was simply put aside by the EU, although regularly mentioned in EC's progress reports on Bosnia and Herzegovina[441].

Four years later, the 2014 elections were held, and again no changes were made on the disputed rules for the election of members to Presidency and delegates to the House of Peoples. The issue of the implementation of this decision became a political issue, and the EU was accused of unfairly and counterproductively conditioning the country's progress based on the status of candidates[442]. In December 2014, a new EU strategy for Bosnia and Herzegovina was introduced,[443] resulting in a joint British and German initiative, described as the last chance for the country. The country's leaders agreed to put the SAA into force and comply to reforms, including the implementation of the ECtHR's Sejdić and Finci decision. The primary

[437]https://www.economist.com/eastern-approaches/2013/10/09/the-Sejdić-finci-question (last accessed on 23 January 2019).
[438] Chronologically, most of those meetings and sessions, as well those organized in Bosnia and Herzegovina by politicians themselves and their parties, together with some NGOs is listed here: https://www.esiweb.org/pdf/ESI%20-%20Sejdić%20Finci%20chronology%20-%20Not%20for%20lack%20of%20trying.pdf (last accessed on 23 January 2019).
[439] http://europa.eu/rapid/press-release_MEMO-13-840_en.htm (last accessed on 23 January 2019).
[440] In Republika Srpska it was insisted on direct election of the Serb member of Presidency and in Federation there was no readiness for accepting any asymmetrical solution, while also Croats, namely HDZ actually saw this issue as an opportunity to change the way of the election of the Croat member of Presidency, in order to be elected exclusively by Croat votes.
[441] Which are not even named "progress report", as there is no progress to recorded.
[442] European Stability Initiative, "Lost in Bosnian Labyrinth – Why the Sejdić-Finci case should not block the EU Application?", ESI Discussion Paper, 7 October 2013, available at: https://www.esiweb.org/pdf/esi_document_id_143.pdf (last accessed on 23 January 2019).
[443] http://www.balkaninsight.com/en/article/uk-germany-propose-bosnia-s-renewed-eu-perspective (last accessed on 23 January 2019).

focus however, was on the much needed economic reforms. Bosnian politicians were also requested to write a declaration of their commitment to the reform process, and it emphasized that no reform shall be imposed by the High Representative[444]. Following this proposal, the SAA entered into force on 1 June 2015.

Bosnia and Herzegovina officially applied for EU membership in February 2016, after have been a potential candidate for years, without formerly succeeding to submit their application[445]. In September of the same year, the European Council invited the European Commission to submit its opinion on the merits of the country's application. In December the Commissioner for the European Neighbourhood Policy and Enlargement Negotiations handed over a comprehensive questionnaire concerning all EU accession criteria a country needs to prepare and to submit. The answers were submitted in February, but additional questions were asked. Collecting the consolidated answers lasted much longer than with other countries, and although country officials promised to submit the answers to the questionnaire by the October 2018 the deadline was missed[446]. Finally, in February 2019 the answers were submitted to the President of the European Commission, but with twenty questions left unanswered[447]. The explanation was that there was a lack "of comprehensive information" to answer the questions, one of which included the non-implementation of the thirteen decisions of the Constitutional Court of Bosnia and Herzegovina[448]. Once these questions have been adequately answered, the Commission will give its opinion about country's application.

In the interim report in 2018, it was apparent that the EU expected serious reforms from Bosnia and Herzegovina, including the amendment on the election law

[444] https://euobserver.com/opinion/126780 (23.01.2019).
[445] The country hardly managed to fulfil the preconditions (political, economic and democratic measures) needed to start working of the Feasibility Study for the opening of negotiations on a Stabilisation and Association Agreement in 2003.
[446] https://balkaninsight.com/2018/12/11/bosnia-s-uncertainty-over-finalising-eu-questionnaire-12-10-2018/ (06.03.2019).
[447] https://balkaninsight.com/2019/03/04/bosnia-leaves-gaps-in-answers-to-eu-questionnaire/ (Accessed on 06 March 2019).
[448] Ibid.

and the constitution[449]. One of the most important obstacles in the process of EU integration, is the fact that a "significant number of the competencies relevant to the process of European integration, is the responsibility of the entities as well as the cantons"[450] and there is not enough coordination between the state and the entity level, nor the Federation and canton levels in exercising these competencies. Consequently, the implementation of the commitments deriving from the EU integration process, and those from other international agreements, is constantly blocked. In order to make progress, Bosnia and Herzegovina will inevitably have to go through a series of serious constitutional changes.

3.4. Conclusion

The Dayton Peace Agreement's importance in stopping the bloodiest conflict of the twentieth century is indisputable. However, because of many shortcomings and the complicated system it established, it is characterized as "one of the most detailed and complicated peace agreements in history"[451], which has left Bosnia and Herzegovina "stuck between complexity and paradoxes"[452]. Bosnia and Herzegovina, whose bogus internal structure has certain federal characteristics, is defined neither as a federation nor a confederation in its constitution. Rather it has continued to exist as a complicated form of power-sharing[453].

The Dayton Constitution determined the composition of state institutions in Bosnia and Herzegovina, both by ethnic and territorial principle, except for the Constitutional Court of Bosnia and Herzegovina, where only the territorial principle is applied. Application of these principles has lad to the constitutive peoples' domination over state institutions and decision-making processes in the country, and

---

[449] European Commission-Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf (06.03.2019).
[450] Zlatan Begić, p. 12.
[451] Soeren Keil & Anastasiia Kudlenko, p. 485.
[452] Ibid.
[453] Lijphart in his first book on the subject (1968) he first used the term "the politics of accommodation", to change to "consociational democracy" and later to "power-sharing", explaining it by the difficulties the term caused beyond academia. Arend Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, Routledge: London, 2008, p. 6.

systematic discrimination of minorities and citizens, especially concerning the electoral rights. Although the right to be elected is not explicitly guaranteed in the Dayton Constitution, the right is indirectly enjoyed and enabled through the principles contained in the preamble of the constitutional text. However, this right is guaranteed by the election legislation, to all citizens of Bosnia and Herzegovina who have reached the age of eighteen years old. Few attempts to change the constitution, by relevant regional bodies and advocated by the US and EU failed to produce any results, just as the election polls failed to produce any significant change for years. The country's deadlock continues, even though the potential outbreak of conflict is low. The country remains "in a peaceful stalemate, which is likely to continue until a structural change occurs that triggers the outbreak of conflict"[454]. Political elites fail to reach an agreement on the common state, its vision and future while major international actors are reluctant to decide and actively work on the future of the Bosnian state and determine the best way forward[455]. Important questions for the country's future are left to be decided by "a handful of politicians together with technocrats, without broader public engagement or awareness"[456]. The analysis of the DPA, Dayton Constitution and right to be elected in Bosnia and Herzegovina conducted in this chapter has been necessary to understand the ECtHR decisions that will be analysed in chapter four. Some of the issues the Court has decided on are directly connected with the general characteristics of DPA and the Dayton Constitution. The conceptual framework, established in the previous chapter, was used in this chapter to analyse the existence of the constitutional provisions regulating the right to be elected. In the next chapter, the framework will further be applied to analyse previous ECtHR's decisions concerning this right and how its scope was defined by the Court through case-law. Different aspects of this right will also be considered and the Court's earlier decisions.

---

[454] Argyro Kartsonaki, "Twenty Years After Dayton: Bosnia-Herzegovina (Still) Stable and Explosive", *Civil Wars*, Vol. 18, No. 4, 2016, p. 508.
[455] Soeren Keil & Anastasiia Kudlenko, p. 482.
[456] Valery Perry, "Constitutional Reform…", p.14.

Chapter Four: Case study of Bosnia and Herzegovina - European Court of Human Rights and Decisions concerning Right to be Elected

4.1. Introduction

In the 1950s, when ECHR was adopted, the European consensus was established. At that time, no one could have predicted how the established human rights protection system in Europe would develop, and how it would lead to the creation of an exceptional human rights regime. Nowadays, the European human rights regime is unarguably the most successful and most significant in the world.

The Court rapidly developed and reformed in the nineties with the anticipation of many Central and Eastern European countries accession into the ECHR[457]. The protected rights have since then evolved, initially protecting fundamental rights of first generation. In consequent protocols, social and political rights were also protected. The Court's interpretation of the scope of each protected right contributed to widening of the list of protected rights. The right to be elected was added to the Convention in Protocol No. 1, or more precisely through caselaw and interpretation of the right to free elections from Article 3 of Protocol No. 1. Only recently was this right developed. A caselaw concerning this right only started to develop towards the end of seventies and beginning of eighties, with many decisions brought in nineties concerning the post-Soviet states. A modest number of cases might have been the result of the interpretation of the right and the accepted principle of states' margin of appreciation. The regulation of this right under the ECHR was previously mentioned in the second chapter of this thesis, but as argued, the importance of this political right deserves much more academic attention and research, especially in connection to democracy and free elections, which are basis and essentials of European consensus. For this reason, the first part of this chapter analyses the ECtHR's caselaw concerning this right.

[457] Robert Harmsen, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform", John Morison, Kieran McEvoy, Gordon Anthony (eds.), *Judges, Transition and Human Rights*, Oxford: Oxford University Press, 2007, p. 33.

Before proceeding, it is important first to discuss another important issue concerning the Protocol No. 12 to the ECtHR. The non-discrimination clause in Article 14 of the Convention was limited only to the rights guaranteed in ECtHR, which proved to be insufficient. In 2000's a wider prohibition of discrimination in Europe was established after a new protocol to the ECHR was adopted. Protocol No. 12 guarantees all rights set forth by the law should be enjoyed without any discrimination. Although the accession to the protocol was limited, it still was significant and ensured its entering into force. The scope of this protocol, namely in Article 1, includes the Court's interpretation on the prohibition of discrimination clause, which later provoked issues concerning the development of anti-discrimination law in Europe.

Bosnia and Herzegovina was among the first countries that accessed to Protocol No. 12. To what extent the country's relevant authorities were aware of the scope of this protocol and potential consequences of accession to it is unknown. Some citizens of Bosnia and Herzegovina saw it as an opportunity and decided to use it. Mr. Sejdić, Mr. Finci, Ms. Zornić, Mr. Šlaku and Mr. Pilav all stood against being discriminated in the system established in Dayton, and challenged it in Court, contributing to the establishment of the ECtHR's caselaw concerning Protocol No. 12. How the court approached and reached its decision will be discussed in the proceeding section, along with its implications for the scope of Protocol No. 12.

4.2. Decisions of the ECtHR concerning the Right to be Elected and its Impacts

The Right to be elected, otherwise referred to by the ECtHR as the right to stand for elections, is not regulated by the ECHR, but by its Protocol No. 1. Article 3 of this Protocol prescribes the right to free elections[458]. Also, in the ECHR's preamble, it states that fundamental freedoms, which represent the foundation of justice and peace in the world, can best be obtained by an effective political

[458] "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

democracy. Article 3 of the Protocol No. 1 guarantees free and democratic elections. Although this provision's interpretation only restricts the right to the legislature, it is of great significance, accepted as one of the fundamental rights protected by the ECHR. Protocol No.1 was adopted in 1952, and since then numerous judgments based on the Article 3 have been delivered. The interpretation of Article 3 has shaped the right to free elections, including the right to stand for elections, as maintained in this provision (Mathieu-Mohin and Clerfayt v. Belgium, §§ 48-51; Ždanoka v. Latvia [GC], § 102; Podkolzina v. Latvia, § 35; Melnitchenko v. Ukraine, § 57; Riza and Others v. Bulgaria, § 142; Davydov and Others v. Russia, §§ 284-285). Over the years, the European democracy standards have been established.

Although the legislative power is not restricted to parliament, the power given to local authorities in many countries, to make regulations and by-laws, is distinguished from the legislative power of the parliament. Subsequently, the provision of Article 3 does not cover local elections, neither municipal nor regional ones. However, the application of this provision to the presidential elections is not totally excluded, at least theoretically. The Court stated[459] that in the event the office of the Head of State is given "the power to initiate and adopt legislation or enjoy 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"[460]. In every case, the ECtHR examines the constitutional structure of the state, its functions, and roles as an institution to determine how the legislative power of the concerned state is exercised. Regarding the organizations of elections, it is important to point out, states have a wide margin of appreciation in deciding a reasonable number of intervals for holding elections, and other issues.

[459] The case was declared inadmissable, and the same or similar stand was not used in bringing decisions later.
[460] Boškoski v. the Former Yugoslav Republic of Macedonia, § 1, Application no. 11676/04, from 2 September 2004, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-66589%22]} (last accessed on 15 March 2019).

Although the wording of Article 3 seems restrictive, there have been an impressive number of cases concerning this provision(119 cases)[461]. It mentions various aspects of the right to free elections, including: the right to vote (restrictions on the right to vote because of national origin, citizens living abroad, persons placed under protection, or prison), the eligibility (formal conditions of eligibility, disqualification due to prior conduct or affiliations, disqualification based on ethnical origin), voting irregularities, electoral systems, and media coverage of elections. All these decisions have been shaped by the election systems and electoral rights in Europe.

The provision's literal interpretation indicates that this provision does not establish a certain right for individuals, but rather creates obligations for states. In "regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, comprising the right to vote (the "active" aspect) and to stand for election (the "passive" aspect)"[462]. As mentioned above, the margin of appreciation is left to states and they can prescribe certain limitations to these rights. These "implied limitations" are not precise in the provision, as in the case of the rights in Articles 8 to 11 of the ECHR. Every state is "free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a given case"[463]. In this sense, the ECtHR had been taking into consideration "whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people"[464]. The electoral legislation of every country has been analysed in light of its own historical context

[461] European Court of Human Rights – Court's decisions database, https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22article%22:[%22P1-3%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22typedescription%22:[%2215%22]} (last accessed on 15 March 2019).
[462] Council of Europe, "Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights - Right to free elections", p. 6-7, available at: https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf (last accessed on 15 March 2019).
[463] Ibid, p. 7.
[464] Ibid.

and political evolution, and as a result, the unacceptable characteristics of one system could be accepted as justified and reasonable in the electoral system of another country. The right to free elections also concerns the post-election period, namely, the counting of votes and the recording and transmission of the results. A state is obliged to ensure that the processes of ascertaining, and recording the votes are implemented carefully. Concerning the entitlement to complain on the alleged violations, the Court accepted that besides individuals, political parties whose candidates' rights had been violated, can independently claim to be victims. The most important cases the interpretations of the Article 3 of Protocol No. 1 was applied included: Mathieu-Mohin and Clerfayt v. Belgium[465] and Ždanoka v. Latvia[466].

The ECtHR has reached the verdict concerning the violation of the right to be elected in sixty cases[467], twelve of which have represented key cases[468]. In one of the more prominent cases –Podkolzina v. Latvia, the Court interpreted the right to stand for elections as "inherent in the concept of a truly democratic regime"[469]. This right cannot be "arbitrarily deprived of it at any moment"[470], it can be limited only after "the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions"[471]. The decision in question "must be reached by a body which can provide a minimum of guarantees of

[465] Case of Mathieu-Mohin and Clerfayt v. Belgium, Application no. 9267/81, from 2 March 1987, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57536%22]} (last accessed on 16 March 2019).
[466] Case of Ždanoka v. Latvia, Application no. 58278/00, 16 March 2006, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-72794%22]} (last accessed on 16 March 2019).
[467] European Court of Human Rights – Court's decisions database, https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22article%22:[%22P1-3%22],%22kpthesaurus%22:[%22476%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22typedescription%22:[%2215%22]} (last accessed on 15 March 2019).
[468] European Court of Human Rights – Court's decisions database, https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22importance%22:[%221%22],%22article%22:[%22P1-3%22],%22kpthesaurus%22:[%22476%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22typedescription%22:[%2215%22]} (last accessed on 15 March 2019).
[469] Case of Podkolzina v. Latvia, Application no. 46726/99, from 9 April 2002, §35, available at: http://hudoc.echr.coe.int/eng?i=001-60417 (last accessed on 16 March 2019).
[470] Ibid.
[471] Ibid.

its impartiality"[472], and "the discretion enjoyed by the body concerned must not be exorbitantly wide"[473], but "circumscribed, with sufficient precision, by the provisions of domestic law"[474]. At the same time, "the procedure for ruling a candidate ineligible must be guaranteed a fair and objective decision and prevent any abuse of power on the part of the relevant authority"[475]. The standards set out in this Court's decision, if applied properly, would indeed serve in securing a transparent and fair procedure, and consequently, ensure the right to stand for elections.

Additionally, the Court found violations of the right to stand for elections in a number of other cases, including: the termination of the mandate of Members of Parliament as a result of the dissolution of their party by the Constitutional Court (Sadak and Others v. Turkey), the refusal to register a candidate in parliamentary election (Melnychenko v. Ukraine), the immediate application during the current parliamentary term of provision disqualifying those engaging in professional activities from sitting as MPs (Lykourezos v. Greece), the illegitimate and unjustified exclusion of two electoral districts from the country-wide vote tally (Georgian Labour Party v. Georgia), the inability of persons with multiple nationalities to stand as a candidate in parliamentary elections (Tănase v. Moldova), the permanent ineligibility of an impeached President to stand for election to parliamentary office (Paksas v. Lithuania), a member of parliament prevented from discharging his duties as a result of his prolonged pre-trial detention, without a proper examination of the possibility of alternative measures (Selahattin Demirtaş v. Turkey).

Most applicants' cases came from Azerbaijan (19), Turkey (9), Bosnia and Herzegovina (4), Italy (4), and Latvia (4). Each of these cases concern different aspects of the election process. In four of the cases, a violation of Article 3 of Protocol No. 1 was found in connection with Article 14 of the ECHR (Prohibition of the discrimination) – Sejdić and Finci v. Bosnia and Herzegovina, Zornić v. Bosnia and Herzegovina, Danis and Association of Ethnic Turks v. Romania, and Šlaku v.

[472] Ibid.
[473] Ibid.
[474] Ibid.
[475] Ibid.

Bosnia and Herzegovina. The cases against Bosnia and Herzegovina shall be analyzed later in this chapter.

4.3. Protocol No. 12 to the ECHR and Bosnia and Herzegovina's Accession

Both the principles of equality and non-discrimination seek to tackle similar issues – treating persons in similar situations in the same way. The principle of non-discrimination can be understood as "treating similar situations differently and treating different situations equally unless this differential treatment is objectively justified"[476]. Despite being "the most frequently protected principle of international human rights law,"[477] it has only recently gained importance. This was reflected in the ECtHR's case law, which lacks a theoretical and doctrinal consistency [478].

Article 14 of the ECHR prescribes the prohibition of discrimination, but provides only limited protection, when compared to other international human rights protection instruments. This "odd provision"[479] is conceived of "as a minimal clause, subsidiary to national constitutional equal protection clauses"[480] and "a second-class guarantee under ECHR law"[481]. This provision, together with its modest caselaw, (only seventy-four cases since ECHR entered into force) proved to be insufficient "to constitute a complete regime of ECHR discrimination law"[482], and had also resulted with "a regrettable lack of overall coherence"[483] in this area. This is in part because of the prohibition's accessory character regarding other Convention provisions, and the fact that the Court has often chosen to decide on the violation of the right itself, and not under Article 14[484].

---

[476] Samantha Besson, „Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It TakesTwo to Tango in the Council of Europe*"", The American Journal of Comparative Law*, Vol. 60, No. 1, 2012, p. 163.
[477] Ibid, p. 154.
[478] Janneke Gerards „The Discrimination Grounds of Article14 of the European Convention on Human Rights", *Human Rights Law Review*, Vol. 13, No. 1, 2013, p. 102.
[479] Ibid, p. 100.
[480] Samantha Besson, „Evolutions in Non-Discrimination…", p. 154.
[481] Ibid, p. 159.
[482] Ibid, p. 160.
[483] Ibid.
[484] Janneke Gerards, p. 100.

The provision of Article 14 prohibited only the discrimination of the rights and freedoms guaranteed in the Convention:

> The enjoyment of the rights and freedoms set forth in this Convention 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.

This provision set a wide list of prohibited discrimination grounds, which are exemplary. Discrimination is prohibited, even if founded on some other grounds not mentioned in Article 14. At the same time, its scope is limited to the rights listed in the ECHR. It did not create an additional right, but an applicable principle if the case in question falls within the ambit of some of the rights in ECHR[485]. These rights include mostly civil and political individual rights, as well as some economic and social rights. The case-law concerning the provision of Article 14, taken in conjunction with a substantive right, can be examined even if there has been no violation of the substantive right itself. Furthermore, a complaint of discrimination can fall within the scope of some specific right, even if the specific entitlement in the ECHR does not relate to a specific issue. Still, it will be considered to fall within the scope of the ECHR indirectly through an interpretation.

Other guarantees prohibiting discrimination, were provided in special human rights protection documents. However, it was still not enough to claim the general prohibition of discrimination as existing in the European human rights regime. The quest for equal protection before the law of all persons, as reflected in the fundamental principles of human rights - equality, pushed for the creation of a wider protection than the existing one – general prohibition of discrimination.

While the material scope of the non-discrimination principle under Article 14 was limited and encompassed all national law concerning the rights guaranteed in ECHR, Protocol No. 12 broadened the prohibition of discrimination to all areas of national law. In its Preamble, the first discusses the principle of equality before the

[485] Samantha Besson, „Evolutions in Non-Discrimination…“, p. 156.

law and equal protection by the law is emphasized as a fundamental principle, and the promotion of this principle through the collective enforcement of a general prohibition of discrimination is the goal to be achieved by this legal document. The wording the Preamble, indicates the relation between the principles of equality and prohibition of discrimination. These intertwined principles ensure "equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists"[486]. The Preamble's third line refers to measures taken to promote full and effective equality, which obliges states to adopt anti-discriminatory laws as well as implement them, and ensure these laws are respected in practice.

Prescribed general prohibition of discrimination in Article 1 implies the following:

> 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.
>
> No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The first paragraph of Article 1 is almost identical to Article 14 of the ECHR. The difference is contained in the words "by law", in the provision of the Article 14. The rights and freedoms set forth in the Convention are to be protected from discrimination, while in the provision of Article 1, enjoyment of the rights set forth by the law and by any public authority are those for which the discrimination is prohibited. This nuanced difference between the two almost identical provisions changed the whole system of prohibition of discrimination in the European human rights regime. This way, a general non-discrimination clause was introduced, and the scope of the protection from discrimination was extended beyond the rights and freedoms guaranteed in the ECHR to all rights guaranteed in the national legislations

[486] Council of Europe, "Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms", p. 3, available at: https://rm.coe.int/16800cce48, (last accessed on 16 March 2019). This report "does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although it may facilitate the understanding of the Protocol's provisions".

of the countries which sign and ratify the Protocol No. 12. For these countries, a principle of equality before and in the law was introduced[487]. With Article 1 of Protocol No. 12, the prohibition of discrimination became a free-standing right under the ECHR[488], a self-standing non-discrimination principle[489]. Now, with it, a general and independent non-discrimination principle is guaranteed[490]. The scope of the protection was explained as such to cover the cases where a person is discriminated against:

- in the enjoyment of any right specifically granted to an individual under national law;
- in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- by any other act or omission by a public authority (for example, the behavior of law enforcement officers when controlling a riot)[491].

To conclude, the prime objective of this provision is to embody a negative obligation - to not discriminate against individuals. In the second paragraph, the prohibition of discrimination by public authorities is also emphasized. The term has been used before by the ECHR[492], referring "not only administrative authorities but also the courts and legislative bodies"[493]. However, the protection of individuals from discrimination is also applicable in the relationships between private persons,

[487] Samantha Besson, „Evolutions in Non-Discrimination …", p. 155.
[488] Handbook on European non-discrimination law, Luxembourg: Publications Office of the European Union, 2018, ISBN 978-92-871-9851-8, doi:10.2811/792676, p. 28.
[489] Samantha Besson, „Evolutions in Non-Discrimination …", p. 152.
[490] Ibid, p. 157.
[491] Council of Europe, "Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms", p. 5.
[492] Article 8, paragraph 2, and Article 10, paragraph 1 of the ECHR.
[493] Council of Europe, "Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms", p. 6, available at: https://rm.coe.int/16800cce48, (last accessed on 16 March 2019).

which should normally be regulated by the state but are delegated to private persons in some cases[494].

In Article 2 of the Protocol, it prescribes the territorial application of the general prohibition of discrimination.

Due to the similarities and at times overlapping between Article 14 of the ECHR and Article 1 of the Protocol No. 12, questions of applicability may arise. However, Article 1 of Protocol No. 12, is the provision of an additional Protocol. Therefore, it does not amend or abrogate Article 14 of the ECHR, but rather it is considered an additional Article to the Convention (Article 3 of Protocol No. 12) for the States which signed and ratified the Protocol No. 12. For states who have signed and ratified Protocol No. 12, there is a possibility of an eventual overlap between the two provisions. Article 32 of the ECHR prescribes that if any matter or question of interpretation and application arises, or the precise relationship between the provisions of the Convention and the protocols is uncertain, the decision falls within the jurisdiction of the Court to make the final decision. In the event there is a need for protection from discrimination of the right that is guaranteed by the Convention it is expected that the provision of Article 14 of the ECHR will be applied. If the relevant right is not guaranteed by the ECHR then Article 1 of Protocol No. 12 shall be applied. Of course, this will also depend on how the applications are formed and what are the applicants' claims in every specific case. Usually applicants allege the violation of some substantive right in conjunction with Article 14. If the ECtHR finds a violation of a substantive right, it will not also examine the complaint of discrimination, as it would basically involve the examination of the same complaint. This is how the Court proceeded in deciding in the Sejdić and Finci case and the other decisions analysed here. Also, recent case law indicated that the Court does not assess whether Protocol No. 12 has been violated, if Article 14 is applicable, as was the situation in the Sejdić and Finci case regarding the election for the House of Peoples. Yet, it is interesting and worth mentioning that the Court took an opposite stance in the Zornić case. Namely, applicants in both Sejdić and Finci v. Bosnia and

[494] Ibid, § 28.

Herzegovina and Zornić v. Bosnia and Herzegovina complained about the violation of Article 14 in conjunction with Article 3 of Protocol No. 1, regarding the illegibility to be elected to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. In the first case, the Court found the violation of Article 14 of the ECHR in conjunction with Article 3 of Protocol No. 1 regarding the election to the House of Peoples, and consequently concluded that there was no need to examine the alleged violation of the Article 1 of Protocol No. 12 regarding the same issue. In the case of Zornić v. Bosnia and Herzegovina, it was very similar to the previous one, with the identical complaints of the applicant, and the Court found the violation of the Article 14 of the ECHR in conjunction with Article 3 of Protocol No. 1 and the violation of the Article 1 of Protocol No. 12 regarding the election to the House of Peoples. For the remainder of this section, it will examine this case in greater detail.

The Protocol was adopted 04 November 2000 and needed ten member states' ratification to enter into force, a condition which was fulfilled on 01 April 2005. Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxemburg, Malta, Montenegro, Netherlands, North Macedonia, Portugal, Romania, San Marino, Serbia, Slovenia, Spain and Ukraine are the countries that signed and ratified this Protocol up to now. Austria, Azerbaijan, Belgium, Czech Republic, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Norway, Republic of Moldova, Russian Federation, Slovak Republic, and Turkey signed, but did not ratify the Protocol No. 12[495].

Bosnia and Herzegovina was among the first countries to sign and ratify the Protocol. When it entered into force, it also became applicable in the country. Approximately a year after, the first case was registered, claiming that the alleged violation of Article 1 of the Protocol No. 12 against Bosnia and Herzegovina. The case attracted a lot of attention, primarily because it was the first case where the new standard of the prohibition of discrimination was applied. Second, it represented a

[495] Council of Europe, "Chart of signatures and ratifications of Treaty 177 - Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Status as of 16/03/2019", available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=ati3ikzf (last accessed in 16 March 2019).

case which had the potential of shattering the whole system established by the Dayton Peace Agreement. Unlike many European countries, who did not ratify this Protocol, Bosnia and Herzegovina surprisingly did. The question remains why? Perhaps it was because many of the leaders were not aware of the consequences it could have. This is what judge Mijović concluded concerning the decision of the Sejdić and Finci case.

The authority for issues concerning the procedures for accessing, signing and ratifying international agreements in Bosnia and Herzegovina, is distributed between different ministries and administrative bodies, including Presidency, Parliamentary Assembly, Ministry of Foreign Affairs, Ministry of Human Rights and Refugees and Ministry of Justice. Authorities of each of these bodies are regulated by the Dayton Constitution, and by the special Law on Procedure for Signing and Implementing of International Agreements and the Law on Ministries and Other Administrative Bodies of Bosnia and Herzegovina. The Presidency of Bosnia and Herzegovina is "negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina" (Article V.3.d of the Dayton Constitution), and the Parliamentary Assembly of Bosnia and Herzegovina, as it is already stated in this provision, is "deciding whether to consent to the ratification of treaties" (Article IV.4.d of the Dayton Constitution). The presidency, the main government body responsible for concluding international agreements in Bosnia and Herzegovina, can transfer the authority to conclude a certain international agreement to the Council of Ministers or other competent bodies of Bosnia and Herzegovina[496]. The signing of the international agreement can be initiated by the institutions of Bosnia and Herzegovina, entities, cantons and other regional and local communities and companies, non-governmental organizations and other legal persons from the area of their activities. An initiatives is delivered to the Council of Ministers through the competent ministry. The competent ministry, upon finding the submitted initiative for signing a certain international agreement, delivers it to the Council of

[496] Article 3 of the Law on Procedure for Signing and Implementing of International Agreements (Official Gazette of Bosnia and Herzegovina, No. 29/00, 32/13).

Ministers together with a draft of the proposal and a detailed basis[497] for negotiations to conclude the agreement[498]. Further steps in the procedure include the authorities of the Presidency, the Council of Ministers and Ministry of Foreign Affairs. But the role Ministry of Foreign Affairs is limited and in accordance with the Law on Ministries and Other Administrative Bodies of Bosnia and Herzegovina[499]. In Article 8, the Law prescribes that the Ministry of Foreign Affairs is authorized for preparing bilateral and multilateral agreements and in representing Bosnia and Herzegovina in diplomatic relations with other countries, international organisations and at international conferences. On the other hand, the Ministry for Human Rights and Refugees has few important competencies concerning human rights including:

- monitoring and implementation of international conventions and other documents on human rights and fundamental freedoms;
- promoting and protection of individual and collective human rights and freedoms;
- co-ordination and preparation of reporting to the competent domestic and international human rights treaty bodies, and implementation and execution of decisions of human rights treaty bodies;
- designing and implementing activities to facilitate the fulfilment of Bosnia and Herzegovina's obligations concerning accession to Euro-Atlantic integration, in particular concerning the application of the European Convention on Human Rights and its Protocols;
- monitoring, drafting and disseminating information on standards, achievements and activities in the area of human rights[500].

In accordance with these legal provisions, the Ministry for Human Rights and Refugees submitted to the Council of Ministers a draft proposal and draft basis for negotiations concerning the signing of Protocol No. 12 to the ECHR. According to this procedure, the Presidency of Bosnia and Herzegovina adopted a decision on signing the Protocol, which took place on 24 April 2002, and the Parliamentary

[497] Ibid, Article 4, line 5.
[498] Ibid, Article 4, line 3.
[499] Law on Ministries and Other Administrative Bodies of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 103/09, 87/12, 6/13, 19/16).
[500] Ibid, Article 12.

Assembly ratified it on 29 July 2003. It is hard to guess the reasons that led Bosnia and Herzegovina to sign and ratify the Protocol No. 12 when bearing in mind the many established European democracies did not. Maybe it was the result of idealism of some bureaucrat, or short-sightedness of politicians regarding the potential consequences it could have for the country. However, it was in accordance with the commitments Bosnia and Herzegovina accepted when becoming a member of Council of Europe and its profile of a country with high respect for human rights, which is, unfortunately, a reality only on paper. Citizens systematically continue to be discriminated and their rights are not respected and protected.

4.4. Sejdić and Finci, Zornić, Šlaku, and Pilav ECtHR Decisions

The system established by the Dayton Constitution has had many shortcomings and critiques immediately following the signing of DPA and the implementation of Dayton Constitution. These critiques were mainly related to the type of state that was designed and created, which is non-functional with a large administration. The established system is complicated and has prevented the country from making real progress. Although declaratively human rights protection was developed, it systematically continues to discriminate many of its citizens as discussed in the previous chapter.

The decisions issued by the ECtHR emphasized the non-logic of the declarative commitment of the Dayton Constitution towards the respect for human rights and racial discrimination embedded within it. Besides being the first ECtHR decisions based on Protocol No. 12 and also touching upon the "sensitive post-war constitutional settlement of Bosnia and Herzegovina"[501], the analysed decisions confirmed that the current system in Bosnia and Herzegovina is discriminating minorities, and citizens who do not want to be affiliated with any of the three ethnic groups or the constituent peoples. Decisions in the cases Sejdić and Finci v. Bosnia and Herzegovina, Zornić v. Bosnia and Herzegovina, Šlaku v. Bosnia and

[501] Samo Bardutzky, "The Strasbourg Court on the Dayton Constitution Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina – Case Note", *European Constitutional Law Review*, No. 6, 2010, p. 309.

Herzegovina and Pilav v. Bosnia and Herzegovina (further: the ECtHR decisions concerning right to be elected in Bosnia and Herzegovina) are one of the most significant milestones in post-war Bosnia and Herzegovina and for the general prohibition of discrimination in Europe.

4.4.1. Background

The first of the analysed cases originates from the two separate applications filed in July and August 2006, that were later merged and decided together as one case in front of the Court. Both applicants, Dervo Sejdić and Jakob Finci, are members of national minorities (Roma and Jewish communities), and consequently did not declare affiliation with any of the constituent peoples. Both applicants have held important public positions and actively participated in the public life of the state. However, of because not declaring themselves as members of one of the three constituent people, they were not able to stand for elections as a member of the House of Peoples of the Parliamentary Assembly or the Presidency of Bosnia and Herzegovina. For this reason, both filed complaints of being discriminated against in the election process.

The applicant in the second case, Ms. Azra Zornić, a citizen of Bosnia and Herzegovina who refused to declare her affiliation with any of the three constituent peoples or national minorities, simply declared herself as a citizen of Bosnia and Herzegovina, and actively participated in the political life of the country. Hence, she was deprived of her rights and not able to stand for elections as a member of the House of Peoples of the Parliamentary Assembly or the Presidency of Bosnia and Herzegovina.

In the third case, the applicant Amir Šlaku is a member of the Albanian minority in Bosnia and Herzegovina, who has worked in the Ministry for Human Rights and refugees and actively in the NGO sector (his father was one of the founders of the Association of Albanians in Bosnia and Herzegovina - Klub

Albanaca). The Court found this case "identical to Sejdić and Finci"[502] and because of this the details of the case will not be discussed further.

The applicant in the fourth case, Ilijas Pilav, is a Bosniac medical doctor who was born and lived in Srebrenica, Republika Srpska for his life, and was socially and politically active in the local community and at the entity level for years. Nevertheless, because of both the territorial and ethnical restrictions concerning the elections to the Presidency, he could not become a member of the Presidency of Bosnia and Herzegovina.

The restrictive constitutional provisions regarding the election of members of the House of Peoples and Presidency are imposing twofold restrictions to candidates, they must be members of a certain constituent people and come from a certain part of the country. In the first three cases, the ethnic aspect of the restriction was emphasized because the applicants were not affiliated with any of the constituent people, while in the fourth case another dimension of discrimination in the constitutional provisions was emphasised.

4.4.2. Relevant Legislation and Applicants' Complaints

Before indicating the relevant legislation of the analysed cases, it is necessary to make a remark regarding the issue of affiliation with the one of the constituent peoples, as it is one of the central issues common for all the analysed cases. The Dayton Constitution, in its Preamble, makes the distinction between the constituent peoples (Bosniacs, Croats and Serbs, along with Others) and citizens[503]. All of these groups are in theory equally positioned in relation with the constitution. In practice, members of other ethnic groups and national minorities and the citizens generally are not equally positioned with the members of the constituent peoples in Bosnia and Herzegovina. The Constitutional Court confirmed this situation is legal and constitutional in its decision[504]; it took a stand that "the Constitution of Bosnia and

[502] Case of Šlaku v. Bosnia and Herzegovina, Application no. 56666/12, from 26 May 2016, § 29.
[503] "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina…"
[504] Decision in the case No. U 5/98 – III Partial Decision.

Herzegovina determines that Bosniacs, Croats and Serbs are the architects-framers of the Constitution"[505]. Without explicitly saying so, the Court confirmed that Others and citizens are systematically deprived of their rights.

Another important aspect of this issue is the declarative nature of ascertaining one's ethnic affiliation. The Dayton Constitution does not have any provision concerning the determination of one's ethnicity, and this issue is also not regulated by any law. That is why it is widely accepted that self-classification is a proper mode of determination. This mode of determining the one's ethnicity is prone to abuse and changes. For example, the Election Law of Bosnia and Herzegovina prescribes that the candidate lists shall contain among others, a "declared affiliation with a particular constituent people or the group of Others"[506]. The same provision explains that the declaration of one's affiliation is the basis for determing whether a person has the right to stand as a candidate for certain positions, and without it, shall be eliminated in the election process. The determination of a person's ethnic affiliation was similar in the former Yugoslavia – declarative self-classification, with no objective conditions to be fulfilled such as knowing the language, or belonging to a certain religion, etc.

The provisions, concerning the election of the members of the House of the Peoples and the Presidency of Bosnia and Herzegovina, contain obvious restrictions for members of national minorities and the citizens who do not declare their affiliation with one of the three constitutive peoples, particularly in regards to certain parts of the country's territory. The relevant provisions of the Dayton Constitution are Article IV and Article V. Article IV.1 of the Dayton Constitution prescribes the composition of the House of Peoples:

> The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

In order to be eligible for the position of member of the House of Peoples, one must declare themselves either as a Croat or Bosniac and be living in the Federation of

[505] Christian Steiner - Nedim Ademović, p. 61.
[506] Article 4.19. (4) of the Election Law of Bosnia and Herzegovina.

Bosnia and Herzegovina or declaring oneself as a Serb and living in Republika Srpska. Neither a Serb from the Federation of Bosnia and Herzegovina can be a member of the House of Peoples nor can a Croat or Bosniac living in Republika Srpska be a member of this legislative body. The situation is identical with the election to the Presidency of Bosnia and Herzegovina. The relevant provision combines both the ethnic and territorial principle in the process of the election for this executive state organ. Article V of the Dayton Constitution regulates the election of the members of Presidency of Bosnia and Herzegovina:

> The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

The cited provisions contain ethnical and territorial restrictions and are consequently discriminative, in addition to those who do not affiliate with one of the constitutive peoples. Provisions of the Election Law in reality reflect the principles established in the Dayton Constitution. They are very similar to the constitutional provisions concerning the election to these bodies, and contain some technical rules concerning the election process.

In the case evaluation process, the ECtHR considered the case in the light of international law and referred to different legal documents of the United Nations, Council of Europe, EU and OSCE. Namely, the Court invoked provisions of Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination[507], Articles 2(§1), 25 and 26 of the International Covenant on Civil and Political Rights[508], and opinions and reports of the Committee on the Elimination of Racial Discrimination, Venice Commission, European Commission against

[507] This provision prohibits racial discrimination, especially in enjoyment certain rights among which are political rights as well, "in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service".

[508] First mentioned provision prescribes that all the rights guaranteed in this document shall be respected and ensured "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 26 again recommends regulation of the prohibition of discrimination by the law. Article 25 prescribes that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, vote and be elected, and to have access to public service, without distinctions and unreasonable restrictions.

Racism and Intolerance (ECRI), the OSCE Office for Democratic Institutions and Human Rights and European Commission. The referred provisions prohibit racial discrimination in an election process. All of the mentioned opinions and reports warn of the existence of discriminative constitutional provisions, emphasizing the applied discriminative practices and condemn them.

Mr. Sejdić and Mr. Finci complained on their ineligibility to stand for election to the House of Peoples and the Presidency on the grounds of their Roma and Jewish origin, claiming that this was racial discrimination. They relied on Article 14 of ECHR, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. Ms. Zornić similarly complained of her ineligibility to stand for election to the House of Peoples and Presidency, but from perspective that she was refused to declare her affiliation with any of the constituent peoples. She declared herself as a citizen of Bosnia and Herzegovina, consequently, she was found ineligible to stand for elections, and claimed to be discriminated against. She also relied on the same provisions as the applicants in the first case. In the third case, applicant Mr. Pilav, complained that he could not stand as a candidate for the Presidency both because of declaring the affiliation with Bosniacs and living in Republika Srpska. He based his appeal on the Article 1 of Protocol No. 12 to the ECtHR.

The applicants' complaints in first two cases were identical[509]; in both cases the applicants' alleged violation was founded on the same legal basis and invoking the same provisions of the ECHR. However, the cases differed in respect to the applicants' non-affiliation with the constituent peoples. While Sejdić and Finci were affiliated with Roma and Jewish national minorities, Zornić refused to affiliate with any constituent peoples and simply declared herself as a citizen of Bosnia and Herzegovina. The Dayton Constitution does not recognize citizens as a separate category and does not ascribe them any specific rights under the current constitutional settings, so the applicant is classified as Others, meaning anyone who is not affiliated with the constituent peoples, and directly considered as a minority.

[509] Case of Zornić v. Bosnia and Herzegovina, Application no. 3681/06, 15 July 2014, § 30.

4.4.3. Court's Decision

In order to decide the cases, the Court discussed the admissibility and merits of the cases. Admissibility issues requested the Court to decide whether the applicants are indeed victims of discrimination, and whether the respondent state should be held responsible for the alleged violation. The applicants "must be directly affected by the impugned measure"[510], not simply contest the provisions of the national law and give preference to the ECHR. In deciding these issues, the ECtHR in Sejdić and Finci v. Bosnia and Herzegovina case took a stand that the applicants may claim to be victims of alleged discrimination, because of their active participation in public life "it would be entirely coherent that they would in fact consider running for the House of Peoples or Presidency"[511]. Bardutzky argues that in such a situation, where the issue concerns an impugned prohibitive legislative provision "there is no need to individualize 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"[512]. He finds the Court's argument on the applicants' active engagement in public life and their likeliness to consider running for elections dubious[513]. The Government did not object to this issue. Considering the issue of state's responsibility for alleged violations, the Court noticed the specific circumstances of the constitutional situation in Bosnia and Herzegovina, namely, the fact that its constitution is the annex to an international treaty, actually, the peace agreement and, without discussing whether the state can be responsible for putting in place the contested constitutional provisions, the Court considers that "it could nevertheless be held responsible for maintaining them"[514], as only the Parliamentary Assembly of Bosnia and Herzegovina has a power to amend the Constitution[515]. The

[510] Case of Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06 (GC), 22 December 2009, § 28.
[511] Ibid, § 29.
[512] Bardutzky, p. 325.
[513] Ibid.
[514] Ibid, § 30.
[515] The Court referred to its analysis of the powers of the High Representative in § 17 of the decision, where it corroborated that although this international administrator was authorized to impose legislation and even entity constitutions did not have power to make amendments to the Dayton Constitution. That is why the only authority that has to power to do it is the Parliamentary Assembly of Bosnia and Herzegovina.

Court reaffirmed this stance in two of the cases – Zornić and Pilav. In the Zornić case, the Government objected the victim status of the applicant, claiming that the applicant could not be considered actively involved in political life, as she only once was a candidate at the elections for the Parliament of the Federation of Bosnia and Herzegovina and did not win a seat, and also that she could declare herself as one of the constitutional peoples but chose not to by her own will and could change her mind any time. In the Pilav case, the Government contested the applicant's victim status as he declared an affiliation with the Bosniac people, and therefore the same restrictions were applied to the other two constitutional peoples, and by therefore by changing the place of residence, he could exercise the right in question.

In discussing the merits of the cases, the applicants claimed that the factual situation represented an ethnical discrimination, which is a form of racial discrimination, "not capable of justification and amounted to direct discrimination"[516], being especially difficult to justify because of the area in which it is applied – political participation and representation at the highest level of state. Zornić and Pilav repeatedly claimed the applied discrimination on the basis of their ethnic origin, while Pilav emphasized the combination of both the ethnical and territorial principle, which made it impossible to exercise his rights.

The Government emphasized similar arguments in all three cases and argued that it "enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament"[517], as well as that "the time was still not ripe for a political system which would be a simple reflection of majority rule"[518]. Furthermore, in two latter cases, it repeatedly was argued that the applicants can change their self-classification and declare the affiliation with one of the other constituent peoples (Zornić v. Bosnia and Herzegovina) or their place of residence (Pilav v. Bosnia and Herzegovina), and that because of this possibility, they are were not actually deprived of their rights.

[516] Sejdić and Finci v. Bosnia and Herzegovina, § 32.
[517] Ibid, § 34. Case of Pilav v. Bosnia and Herzegovina, Application no. 41939/07, 9 June 2016, § 31.
[518] Ibid. Zornić v. Bosnia and Herzegovina, § 24.

The Court in its assessments firstly examined the applicability of the relevant of the ECHR provisions in cases of the alleged violations concerning the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. In the first case, the applicants relied on Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone and Article 1 of Protocol No. 12 in their the allegation of the violation concerning the House of Peoples. In the second case, the applicant relied on the same provisions of the ECHR, and in the third case, the applicant only claimed his ineligibility to stand for the elections for Presidency.

Assessing the first case, the Court first remarked on the nature of the provision of Article 14 of the Convention. As it was already discussed above, the Court reclaimed that this provision "has no independent existence since it has the effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions"[519]. Nevertheless, this provision's scope can be extended to the rights which are not explicitly listed in the ECHR – "those additional rights falling within the general scope of any Convention article, for which the State has voluntarily decided to provide"[520].

The Court therefore had to decide on whether or not to apply Article 14 in conjunction with the Article 3 of Protocol No. 1 concerning the nature of the House of Peoples of Bosnia and Herzegovina. The provision of Article 3 of Protocol No. 1 is applicable only to elections of a legislature. The Court considers that the word legislature must be interpreted in every single case concerning the state's "constitutional traditions and the scope of the legislative powers of the chamber in question"[521]. Keeping in mind the bicameral design of most states' parliaments and general rule of the non-electiveness of the second chamber, the Court took a stand that the provision of Article 3 of Protocol No. 1 is "carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both

[519] Sejdić and Finci v. Bosnia and Herzegovina, § 39.
[520] Ibid.
[521] Ibid, § 40.

chambers in each and every bicameral system"[522]. However, it still considered this provision applicable "to any of a parliament's chambers to be filled through direct elections"[523]. In relation to this, the Court concluded that the House of Peoples of Bosnia and Herzegovina, although being composed through indirect elections, enjoys extensive legislative powers concerning the passage of legislation. Without the approval of this chamber state's budget, international obligations and the treaty ratification cannot be done. Because of all these powers, the Court decided that the elections for the House of Peoples of Bosnia and Herzegovina fell within the scope of the Article 3 of Protocol No. 1[524]. The Court then needed to decide whether there was discrimination in the process of the elections for the House of Peoples. In assessing this issue, the Court referred to its previous stance on the meaning of discrimination – "treating differently, without an objective and reasonable justification, persons in similar situations"[525]. The eventual different treatment would be justified if the distinction pursued a legitimate aim or there was a reasonable relationship of proportionality between the means employed and the aim to be achieved. The ECtHR corroborated that discrimination on the account of a person's ethnic origin is a form of racial discrimination, in which case "the notion of objective and reasonable justification must be interpreted as strictly as possible"[526], but also that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures"[527]. In other words, the Court considered ethnical discrimination unacceptable in democratic countries, especially in Europe.

Although the country's progress has not always been consistent, it has been significant and there have been important steps indicating the country's commitment to achieve the relevant international standards in different areas. The power-sharing

[522] Ibid.
[523] Ibid.
[524] Ibid, § 41.
[525] Ibid, § 42.
[526] Ibid, § 44.
[527] Ibid.

mechanisms peculiar for Bosnia and Herzegovina, does not necessarily have to be abolished, but rather evolve to end the exclusion of ethnic groups other than the "constituent peoples". The Court emphasized the country's progress concerning membership in the Council of Europe and in signing the Stabilization and Association Agreement with the EU, voluntarily accepting its certain standards and implementation as well as integrating them into the country's system. Because of all these facts, the existing distinction cannot have an objective and reasonable justification and represents the breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1. The Court took a stand that there was no need to examine violations under Article 3 of Protocol No. 1 alone and Article 1 of Protocol No. 12. However, this verdict was changed. In the case of Zornić v. Bosnia and Herzegovina, the Court also decided that there was a violation of the Article 1 of Protocol No. 12 regarding the elections for the House of Peoples. The Court did not state why it found it necessary to declare the applicability and violation of both Article 14 of the Convention and the Article 1 of Protocol No. 12. This was corroborated in the case of Šlaku v. Bosnia and Herzegovina.

Furthmore, in the Zornić v. Bosnia and Herzegovina case, the Court decided to examine the application of Article 46 of the Convention as well. This implies that the Court was aware of the complexity of the issue in this case, and considered it more important than the previous one and consequently the applied violation more severe. The Court's decision on the violation of both Article 14 of the ECHR and Article 1 of Protocol No. 12, could be understood as an attempt to interpret the latter provision as a qualified type of discrimination in cases of especially unacceptable discriminative practices[528]. This was verified in the Šlaku v. Bosnia and Herzegovina decision, in which "the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and a violation of Article 1 of Protocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina"[529]. The Court previously concluded that although the scope of the provisions of Article 14 and

[528] Email correspondence with Mr. Faris Vehabović (07 May 2019).
[529] Šlaku v. Bosnia and Herzegovina, § 29.

Article 1 of Protocol No. 12 is different, the meaning of the term discrimination in both cases is identical[530] and the test for determining of discrimination are same[531]. Although very brief, these explanations are extremely valuable in understanding the application of Article 1 of Protocol No. 12.

In terms of the Presidency of Bosnia and Herzegovina, it cannot be considered as a legislative body of the state[532]. The applicants therefore could not claim the same violation of the ECHR provisions on the ineligibility to stand for the election for the House of Peoples. That is why the applicants in all three cases analysed, opted for the same claim of the violation regarding their ineligibility for the election to Presidency of Bosnia and Herzegovina - Article 1 of Protocol No. 12. The Court accepted this provision applicable[533] in the first case and followed that stand in two others as well.

The Court emphasis on the character of the provision – the general prohibition of discrimination, and the meaning of the term discrimination being the same in both provisions, no matter what the difference in the scope in Article 14 of the ECHR and Article 1 of Protocol No. 12[534] was. The Court found the provisions concerning the election to the Presidency discriminatory and a breach of Article 1 of Protocol No. 12, "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"[535]. In the second decision, the Court relied on the previous decision, and validated the found violations in this case as well[536]. The third case moderately differed from the previous two cases. The Court found that "the present applicant is theoretically eligible to stand for election to the Presidency", however it went on to state, "in reality, as long as he lives in the Republika Srpska he cannot use this

[530] Ibid, § 25.
[531] Ibid, § 26.
[532] The Court took the stand on this issue in case Boškoski v. "the former Yugoslav Republic of Macedonia", Application No. 11676/04, from 2 September 2004.
[533] Sejdić and Finci v. Bosnia and Herzegovina, § 53.
[534] Ibid, § 55.
[535] Ibid, § 56.
[536] Zornić v. Bosnia and Herzegovina, §§ 36-37.

right"[537]. Discussing the caselaw concerning the residence requirement in the election process, the Court found that the residence requirement itself is not "disproportionate or irreconcilable with the underlying purposes of the right to free elections" and that it can have a purpose in ascertaining the nature and degree of the links existing between the individual applicant and the legislature of the country. However, the Court assessed that in the present case the Presidency of Bosnia and Herzegovina is a political body of the state and its decisions affect all its citizens, no matter their residence, and that is why the applicant can be concerned with the political activity of this body[538]. The Court found that the "exclusion is based on a combination of ethnic origin and place of residence" and that this discriminatory treatment is a violation of Article 1 of Protocol No. 12.

In all three analyzed decisions the Court found the violation of Article 1 of Protocol No. 12 regarding the elections to the Presidency, and violation of the same provision regarding the elections to House of Peoples. In these decisions the Court was for the first time deciding on the application of a general prohibition of discrimination and took the stand concerning the provision's interpretation[539], namely how the general prohibition of discrimination should be defined and interpreted. Described as "remarkably brief for such an important case"[540], the decision in Sejdić and Finci case was the first case in which the decision was based on Article 1 of Protocol No. 12. The Court was criticized for not giving enough space to make it clear what the meaning of the phrase "set forth by the law" shall mean – only rights established in the domestic law of the state or also those consisted in international law as well[541]. Beside this, these cases also showed that the rights or some aspects of certain right not falling into the scope of the rights protected by ECHR can now be protected through the invoking of the provision of Article of Protocol No. 12, such as the discrimination in the process of the election to non-legislature.

[537] Pilav v. Bosnia and Herzegovina, § 43.
[538] Ibid, § 45.
[539] See above.
[540] McCrudden-O'Leary, p. 93.
[541] Bardutzky, p. 329.

The Court found it appropriate to consider the case under the provision of Article 46 of the ECHR in Zornić v. Bosnia and Herzegovina and Šlaku v. Bosnia and Herzegovina, but this was not the case in Pilav v. Bosnia and Herzegovina. In both cases it was stated that "the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in Sejdić and Finci"[542]. Besides being a sign of not respecting the Convention, this was also seen as "a threat to the future effectiveness of the Convention machinery"[543], and "the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees" was recommended[544]. For the Court "more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions"[545], and "the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina 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"[546].

4.4.4. Dissenting Opinions

The ECtHR decisions are not always adopted unanimously. Some judges may dissent with the majority, partly or totally, and even take an opposite stand. In the decision of the Sejdić and Finci case, there was one partly concurring and partly dissenting opinion (by judge Mijović, joined by judge Hajiyev) and one dissenting opinion by judge Bonello. The Zornić decision had only one partly dissenting opinion by judge Wojtyczek.

In her concurring and partly dissenting opinion, judge Mijović reasons that ethnic affiliation in Bosnia and Herzegovina is not an objective and legal category,

[542] Šlaku v. Bosnia and Herzegovina, § 37, Zornić v. Bosnia and Herzegovina, § 40.
[543] Šlaku v. Bosnia and Herzegovina, § 26.
[544] Šlaku v. Bosnia and Herzegovina, § 39, Zornić v. Bosnia and Herzegovina, § 42.
[545] Šlaku v. Bosnia and Herzegovina, § 40, Zornić v. Bosnia and Herzegovina, § 43
[546] Ibid.

but a subjective and political one which gains on importance only if an individual is desiring to get involved in politics. Everyone has a right to declare or not his or her ethnic affiliation, but there are no objective parameters in establishing it. Further, she emphasized her disappointment with the Court's interpretation of Article 1 of Protocol No. 12, which was rather poor and gave an impression that this provision is applicable only because Article 14 is not applicable, especially because this is the first case concerning the general prohibition of discrimination. In her opinion, the Court's more detailed discussion on the necessity of the existence of a tripartite structure, present in many other institutions in country, would be much more useful in the current case, but also in relation to the future caselaw related to this provision.

Judge Mijović especially challenged the Court's stance concerning the characterization of the House of Peoples, emphasizing the way members of this body are appointed/designated/selected (but not elected) and the nature of this chamber as an important element to be considered when distinguishing this political body from other similar bodies. As an argumentation to this claim, she asserts that the list of candidates has not been announced during an electoral campaign or at any other moment before the appointment and that there is no criteria that candidates for membership in this chamber of the Parliamentary Assembly of Bosnia and Herzegovina have to fulfill in order to be appointed. Because of this, the judge Mijović argues there is no general right for anyone to stand for the election to the House of Peoples. She claims that the House of Peoples cannot even be considered as a second chamber but only part of the Parliamentary Assembly of Bosnia and Herzegovina, with an exclusive task of defending the interests of constituent peoples. This sui generis mechanism, as judge Mijović defines the House of Peoples, is outside of ambit of Article 3 of Protocol No. 1 because "the right of any individual to stand for election to the House of Peoples per se simply does not exist in domestic law; the House of Peoples is a non-elective organ, having neither the typical characteristics nor the powers of a second chamber"[547], and also because of its structure. She also questioned the state's progress and emphasized the reality of the

[547] Sejdić and Finci v. Bosnia and Herzegovina, p. 47.

current social and inter-ethnical relations in the country. Judge Wojtyczek criticized the same issue in the Zornić case. He argued that the specific wording of Article 3 of Protocol No. 1, although it includes both the right to vote and to be elected, could be understood in a more restrictive way in the case of second chambers elections and therefore cannot claim the existence of "neither a subjective right to vote nor a subjective right to stand in elections to this chamber"[548].

Judge Bonello's dissenting opinion was bolder in claiming that the Court assumed to have a role in deciding on the issues concerning an international peace treaty. He argued that the Court had deliberatively neglected the country's and region's past. He also doubts the Court's findings on the country's progress and current political situation being correct, claiming that "it is not for the Court to establish, by a process of divination, when the transitional period is over, or when a state of national emergency is past, and everything is now business as usual"[549]. Although judge Bonello did not state it directly, from his opinion it is apparent that he considers that the Court's jurisdiction in specific cases of Bosnia and Herzegovina to be limited. This is a reflection of the international community's foreign policy towards Bosnia and Herzegovina, being quite consistent from the beginning of Yugoslavia crisis till today, which basically "advocated preserving a vague conception of 'stability' or 'peace' rather than an insistence on democratization and human rights"[550], which might have been a good solution in conflict aftermath, but had proved to be wrong strategy and failure considering the long term effects.

4.5. Execution of Judgments in Accordance with the Article 46 of the ECHR

The effectiveness of the international tribunals' decisions and their execution is often left solely to the will of the states. It is assumed that states with stronger human rights practices are more likely to comply with the human rights tribunals' decisions

[548] Zornić v. Bosnia and Herzegovina, p. 17.
[549] Ibid, p. 54.
[550] Elena Cirkovic, "Contested citizenship in Bosnia and Herzegovina", Engin F. Isin and Peter Nyers (eds.), Routledge Handbook of Global Citizenship Studies, Oxon - New York: Routledge, 2014, p. 461.

than those with poor human rights records[551]. Similarly, we might expect such states to be handed down fewer rulings than those states with more human rights violations. On the other hand, strong states or regional hegemons contribute to the compliance with the decisions through different measures, such as trade agreements or membership negotiations (EU) and naming and shaming (Council of Europe)[552]. The domestic institutions' role in compliance procedures is also important. Domestic institutions or more precisely states' executive institutions are those responsible for international human rights tribunals' decisions implementation. This is the direct result of the subsidiarity principle characteristic for these judicial bodies - meaning "states' rights and responsibilities to implement the norms in the conventions and the tribunals' rulings in a domestically appropriate way"[553]. In practice, the ECtHR strictly follows this rule and limits its authority to determining the existence of human rights violations and financial reparations, while all other measures are left to be determined by the states. This in turn can potentially create an ambiguity regarding the measures to be taken, but usually this is circumvented by coordination between the states and the Committee of Ministers. Motives for states to comply with the international human rights tribunal rulings are similar to those states who comply with international law, which can be explained through few theoretical explanations[554].

The European human rights regime has managed to regulate the issue of the compliance and the execution of judgements, combining information politics, technical expertise in the area of human rights, and naming and shaming[555]. Hence, one of the most important problems ECtHR is now facing, is the overload of repetitive cases, caused by non-compliance with measures of non-repetition.

---

[551] Courtney Hillebrecht, "The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change", European Journal of International Relations, Vol. 20, No. 4, 2014, p. 1104.
[552] Ibid, p. 1104-1105.
[553] Courtney Hillebrecht, Domestic Politics and International Human Rights Tribunals – The Problem of Compliance, New York: Cambridge University Press, 2014, p. 22.
[554] Ibid, p. 33.
[555] Ibid, p. 7.

Article 46 of ECHR establishes the states' obligation to implement the ECtHR's decisions and regulates the procedure in collaboration of the Court and the Committee of Ministers in this process. Only final ECtHR judgments are executable. Article 44 of ECHR prescribes when its judgment becomes final. The judgments brought by Grand Chamber are final upon its bringing. The decisions brought by the Chambers are final in cases when parties declare that they will not refer to Grand Chamber, or after three months upon the decision, if there was no request for referring the case to Grand Chamber, or if the case was referred to Grand Chamber but was rejected. The Court took stand that its judgments are declaratory[556]. This means that the Court only confirms the existence of the alleged violation but leaves it to the States to determine the means necessary for the decisions' execution. The obligation for the States to implement the decisions is immediate. However, additional steps in the execution process are supervised and approved by the Committee of Ministers of the Council of Europe, which also decides when the judgment is implemented by bringing the final resolution.

Article 46 regulates the process of the execution of the Court's judgments as follows:

> 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
>
> 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

[556] Case of Marckx v. Belgium, App. No. 6833/74, 13 June 1979, § 58.

> 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

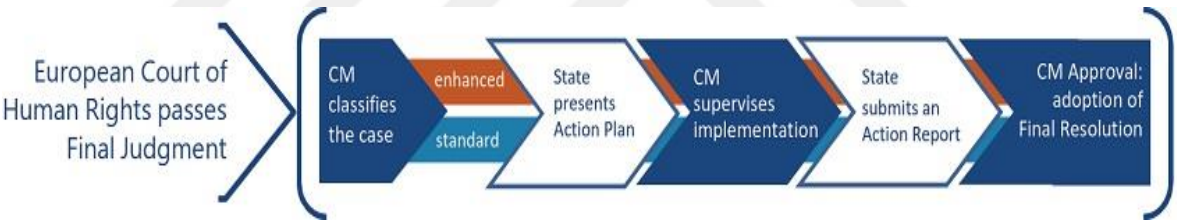
Measures necessary for the judgments' implementation can vary, but generally can be classified as individual and general measures. Sometimes ECtHR indicates some of the measures to be taken in the decisions' execution in the decision text, but as a rule, these measures are determined in coordination between the states and the Committee of Ministers. Individual measures usually consist of putting an end to the continuing violation, providing restitution in integrum, and paying a just satisfaction when awarded by the Court. General measures aim to prevent the repetition of the same violations in the future and are usually ordered in cases of structural or systematic violations of the ECHR. These measures are often consistent with certain norms, decisions, jurisprudence or national practice. States are then obliged to ascertain under which authority the violation is conducted and to remedy it, namely, often changing the legislative, sometimes in a time period set by the Court.

Under the Committee of Ministers of the Council of Europe, there is a Department for the Execution of Judgements of the European Court for Human Rights. It advises and assists the Committee of Ministers in supervision of the implementation of the Court's judgments (in accordance with the Article 46, line 2), but also provides support to states in order to "achieve full, effective and prompt execution of the judgments"[557]. The assistance provided to the Committee of Ministers includes making proposals for the prioritisation of the Committee's supervision action, concerning the initial choice of the supervision track (standard or enhanced) and any subsequent transfer of cases between the two tracks. Additionally they assist with proposals for cases to be included in the Committee's meetings and provides analyses and assessments of the state of execution. The Committee of

[557] Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, available at: https://www.coe.int/en/web/execution/presentation-of-the-department (last accessed on 31 March 2019).

Ministers supervises the adoption of necessary measures for decisions' implementation, which can vary from individual to general ones, and states have a margin of appreciation in ascertaining them. States set out the measures to be taken to execute judgments, and present them to the Committee of Ministers, who prepares an action report about the measures taken or not taken by the state. This practice was introduced in 2004, but since 2009 became a standard part of the judgments' execution procedure. Also, until 2006, the Committee of Ministers had three parallel databases concerning the decisions' execution: a list of individual measures states have taken, a list of general measures states have taken, and a list of cases whose compliance was pending. From then on, annual compliance reports on states, started to be prepared. Cases remain under supervision until the required measures are taken and the process is closed by final resolution of the Committee of Ministers.

Figure 5 - Process of the Committee of Ministers' Supervision of the Judgments Execution[558]



According to the Rules of the Committee of Ministers for the supervision of the execution of judgments, and of the terms of friendly settlements,[559] decisions are taken to special human rights meetings, with a public agenda (Rule 2), and the priority is given to the execution of judgments in which the Court has identified as a "systematic problem" (Rule 4).

The compliance and implementation system under the ECHR, relies on domestic implementation of the Court's decisions. It "combines judicial review of

[558] Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, The Supervision Process, https://www.coe.int/en/web/execution/the-supervision-process#{%2214997657%22:[],%2214997692%22:[1]} (last accessed on March 31 2019).
[559] Council of Europe, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, available at: https://rm.coe.int/16806eebf0 (last accessed on March 31 2019).

individual complaints against states, European oversight and monitoring, as well as national-level actors and departments charged with implementation of the ECtHR's judgments that detect violations"[560], and wide discretion in deciding which specific forms of action and reforms are necessary in the implementation of judgments given to national authorities[561]. Because of this, successful implementation of the Court's decisions depends on a state's internal characteristic and capacities. The political will and management capacity and infrastructure are essential elements for high level compliance with human rights norms and rulings[562]. This might include various planned and well-coordinated activities among the civil service, parliamentarians, and administrative elites, courts, independent authorities, and other state bodies; beginning with education and raising awareness of human rights protection importance.

However, most judgments of the ECtHR are being implemented. In some cases, the implementation process lasts too long, and a state's will for the implementation of the decisions has become questionable. For this reason, there is a need for additional measures in the compliance and implementation process.

After Protocol No. 14 was introduced in 2010 and put into force, the infringement proceeding in paragraph 4 of Article 46 of ECHR began allowing the Committee of Ministers to apply to the Court to ascertain whether a country has refused to abide by a final judgment. This extreme measure was intended to be used only in exceptional circumstances, to serve as a threat to make states comply with the ECtHR decisions. The infringement proceedings only started to be used in complicated cases, when execution needs required serious changes to the country's legislation. Characterised as "an ill-suited 'solution' to a real, but ultimately political, problem"[563], this procedure has been considered ineffective in addressing the non-

[560] Dia Anagnostou, Alina Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter", The European Journal of International Law, Vol. 25, No. 1, 2014, p. 209.
[561] Ibid.
[562] Ibid, p. 227.
[563] Fiona Delondras, Kanstantsin Dzehtisarou, "Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights", International and Comparative Law Quarterly, Vol. 66, 2017, p. 467.

execution of Court decisions, and instead overburdening the Court and creating tensions about international judicial supervision. Delondras and Dzehtisarou argue that the issue of the ECtHR's execution of its decisions is more political than legal in nature. It aslo touches on the problem of the legitimacy and effectiveness of the ECtHR, implying the ineffectiveness of the Court to properly protect rights[564]. Furthermore, they claim the infringement proceedings are futile, impractical and may cause a potential backlash,[565] creating case overload for the Court, without providing any remedies to address the rights violated[566]. After infringement has been concluded, the ECHR does not offer further steps on how to proceed. The countries who do not comply to the ECtHR's decisions can be suspended from voting rights in Council of Europe bodies and institutions and expelled from the organization.

The infringement procedure has so far been started in one case – Ilgarov v. Azerbaijan in 2017. The Committee of Ministers in this case, supervised the execution of the decision. Initially, the government of Azerbaijan did nothing to implement the decision, so the Committee of Ministers decided to examine the case at each of their meetings until the decision was implemented. The Committee also issued five interim resolutions concerning this case and repeatedly urged for the decision's implementation and called for the intervention of the member states and international organisations. In its final interim resolution, the Committee warned they would take additional measures unless Azerbaijan complied[567]. Before launching this procedure, the Committee served a formal notice to Azerbaijan on the next measures they were willing to take[568]. The Committee of Ministers launched the proceedings in December 2017, after it was clear that Azerbaijan showed bad faith.

---

[564] Ibid, 469-470.
[565] Ibid, p. 482-489.
[566] Ibid, p. 490.
[567] Strasbourg Observers, Lize R. Glas, "The Committee of Ministers goes nuclear: infringement proceedings against Azerbaijan in the case of Ilgar Mammadov", https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/ (last accessed on 04 April 2019).
[568] Interim Resolution CM/ResDH(2017)379 Execution of the judgment of the European Court of Human Rights Ilgar Mammadov against Azerbaijan - Adopted by the Committee of Ministers on 25 October 2017 at the 1298th meeting of the Ministers' Deputies, available at: https://rm.coe.int/1680760c7a, (last accessed on 03 April 2019).

4.5.1. The Execution of Judgements in Sejdić and Finci Group of Cases

In the Zornić decision, the Court found it appropriate to consider the case under Article 46 of the Convention[569]. The Court reasoned that Article 46 interpreted in the light of Article 1 of the ECHR:

> [I]mposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings[570].

In this respect, the Court concluded that "the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in Sejdić and Finci"[571]. The Court even stated that this behaviour "represents a threat to the future effectiveness of the Convention machinery"[572]. The Court repeated this decision in decision in the Šlaku v. Bosnia and Herzegovina case as well[573].

The execution of judgements in Sejdić and Finci, Zornić, Pilav, and Šlaku cases have been assessed as the Sejdić and Finci cases. When there are few cases under the Committee of Ministers' supervision concerning the same violation, or if they are linked to the same structural or systemic problem in the state, the Committee may decide to group the cases and deal with them jointly for the supervision of its execution[574]. The Sejdić and Finci represents a group of cases, jointly under enhanced supervision, which requires urgent individual measures, pilot judgments, and judgments revealing important structural and/or complex problems as identified by the Court and/or by the Committee of Ministers, and interstate cases. The progress of the execution of cases under the enhanced supervision procedure are closely

[569] Zornić v. Bosnia and Herzegovina, § 38.
[570] Ibid, § 39.
[571] Ibid, § 40.
[572] Ibid.
[573] §§ 35-40.
[574] Department for the Execution of Judgments of the European Court of Human Rights – Glossary, https://www.coe.int/en/web/execution/glossary#{%2215005454%22:[9]}, (last accessed on 31 March 2019).

followed, and exchanges with the national authorities supporting the execution are facilitated[575]. In other cases, standard supervision procedure applies, which relies on the respondent states' ensuring the effective execution of the Court's judgments and decisions. The Committee of Ministers' intervention is limited and serves to ensure that adequate action plans/reports have been presented and verifies the adequacy of the measures announced and/or taken at the appropriate time.

The Sejdić and Finci group of cases make four out of eight cases against Bosnia and Herzegovina under enhanced supervision[576]. Last year at the Committee of Ministers meetings the group of case were discussed and three interim resolutions were made reference to (in 2011, 2012 and 2013) concerning this decision. It was concludeded[577], that there is a need for Constitutional and election legislation reform and in light of becoming a member of the Council of Europe, the country was remindeded of its commitment to review its election legislation standards and to make necessary revisions. This interim resolution also emphasized other problems in the decision's execution, such as non-implementation of prepared action plans, and the organization and implementation of 2010 elections according to the discriminative legislation. The authorities and political leaders of Bosnia and Herzegovina were called upon to take the needed measures for the elimination of discrimination in the election process, to prepare necessary amendments and regularly inform them on achieved progress in constitutional and election legislation reform. The second interim resolution[578] corroborated the need for the constitutional

[575] Ibid.
[576] Department for the Execution of Judgments of the European Court of Human Rights, available at: https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECLanguage%22:[%22ENG%22],%22EXECState%22:[%22BIH%22],%22EXECSupervision%22:[%22ENHA%22],%22EXECIsClosed%22:[%22False%22]}, last accessed on 27 April 2019.
[577] Interim Resolution CM/ResDH(2011)291 - Execution of the judgment of the European Court of Human Rights Sejdić and Finci against Bosnia and Herzegovina, adopted by the Committee of Ministers on 2 December 2011 at the 1128th meeting of the Ministers' Deputies, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059ddb0 (last accessed on 01 April 2019).
[578] Interim Resolution CM/ResDH(2012)233 - Execution of the judgment of the European Court of Human Rights Sejdić and Finci against Bosnia and Herzegovina, adopted by the Committee of Ministers on 6 December 2012
at the 1157th meeting of the Ministers' Deputies, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059ddb0 (last accessed on 01 April 2019).

and election legislation reforms for the judgement's execution. The necessity of providing guarantees for all citizens' right to be elected with these amendments and direct dependence of the country's EU integration prospects of this issue was underlined. Finally, they emphasized their disappointment with the government's failure to fulfil its earlier commitments and executive authorities and political leaders' failure to reach a consensus on the constitution amendments. Once again the Government was reminded of its obligation to Bosnia and Herzegovina regarding Article 46 of the Convention and the need to amend the Constitution and electoral legislation and bring them into conformity with the Convention requirements "without any further delay"[579]. In the end, it was decided to "examine the present case at each of its "Human Rights" meeting until the political leaders and authorities of Bosnia and Herzegovina reached a consensus on the measures required for the execution of this judgment"[580]. The third interim resolution[581] recalled repeated calls for the implementation of Sejdić and Finci group of cases and consequent constitutional and electoral legislation cases, not only by the Committee of Ministers of the Council of Europe, but also relevant UN and EU institutions. Again, the Government was reminded that although politicians gave numerous commitments on this issue, they still failed to implement them and that the 2014 elections were about to held according to discriminative rules. It was warned that "the legitimacy and the credibility of the country's future elected bodies"[582] could be questionable if elections are held without necessary reforms made. The resolution firmly called upon all authorities and political leaders in the country to implement the decisions before 2014 elections, which unfortunately never happened. The Committee of Ministers continued to follow the implementation of the group of cases on its consequent

[579] Ibid, p. 21.
[580] Ibid, p. 22.
[581] Interim Resolution CM/ResDH(2013)259 - Execution of the judgment of the European Court of Human Rights
Sejdić and Finci against Bosnia and Herzegovina, adopted by the Committee of Ministers on 5 December 2013
at the 1186th meeting of the Ministers' Deputies, available at:
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805b2ad6 (last accessed on 03 April 2019).
[582] Ibid.

meetings, last held September 2018[583] and in March this year. In the September meeting, it was concluded that there was no improvement on the decisions' implementation and that most probably, the 2018 general elections would also be held without needed reforms and represent another breach of Article 46 of ECHR.

Additionally, the Parliamentary Assembly of the Council of Europe has brought three resolutions concerning this goup of cases. These resolutions also emphasized the continuous failure to reach the political consensus on constitutional reforms and the deadlock in the state institutions, as well as the worrying statements and possible actions of some politicians. The still existing need for the function of the High Representative and the need for reform of the overall Dayton system, which has had numerous challenges, was emphasized in the first resolution and the Assembly called the Bosnian authorities to implement various reforms, including ending obstructionism and working constructively at the level of state institutions, in order to speedily enact key legislation necessary to advance on the path of Euro-Atlantic integration, speeding up the implementation of key reforms relating to the implementation of the remaining commitments to the Council of Europe, and implementing a comprehensive local government reform[584]. In the Resolution 1725 (2010)[585], the main findings from the Resolution 1701 (2010) were corroborated and it was stressed that the initiatives for constitutional changes launched by the domestic authorities had not produced any concrete result. It urged the country not to lose more time on making its constitutional amendments and in appointing a member to

[583] Council of Europe, Ministers' Deputies 1324th meeting, 18-20 September 2018 (DH) Human Rights - H46-4 Sejdić and Finci group v. Bosnia and Herzegovina (Application No. 27996/06), Supervision of the execution of the European Court's judgments, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Notes/1324/H46-4E%22]} (last accessed on 27 April 2019).

[584] Parliamentary Assembly of Council of Europe, Resolution 1701 (2010) - Functioning of democratic institutions in Bosnia and Herzegovina, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17800&lang=en (last accessed on 01 April 2019).

[585] Parliamentary Assembly of Council of Europe, Resolution 1725 (2010) - Urgent need for constitutional reform in Bosnia and Herzegovina, available at: http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNzg0NyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE3ODQ3 (last accessed on 01 April 2019).

the Venice Commission and other Council of Europe monitoring bodies. Resolution 1855 (2012) similarly corroborated the findings in two previous resolutions and reiterated that the Sejdić and Finci judgment is legally binding and must be implemented and that its non-implementation before 2014 elections might even bring into question country's continued membership in Council of Europe. This resolution showed the abyss the country is in. After more than a year after the general elections held, the government still has not made reforms at the state level, and at the cantonal House of Peoples could not agree on delegates to be sent to the Federal House of Peoples. The Presidency is governed by the head of political parties who bring all important decisions to the country's representatives in the Council's bodies. However they have not held elections for years. Overall the country's progress since becoming a member of the Council of Europe has been minimal and has remained in stagnation. Once again, the country was called to make constitutional reforms at the state and entity levels, based on the Venice Commission's recommendations[586]. The disappointment of the Government's failure to implement the judgements and needed constitutional and elective legislation has been reflected in the Parliamentary Assembly's documents concerning Bosnia and Herzegovina. Recommendation 2025 (2013) disucsses the functioning of the democratic institutions in Bosnia and Herzegovina[587] and Resolution 2201 (2018), remainding political leaders of the obligations and commitments they made on behalf of Bosnia and Herzegovina[588]. After detecting numerous problems in the country, the authorities of Bosnia and

[586] Parliamentary Assembly of Council of Europe, Resolution 1855 (2012) - The functioning of democratic institutions in Bosnia and Herzegovina, available at: http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xODA1NyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE4MDU3 (last accessed on 01 April 2019).

[587] Parliamentary Assembly of Council of Europe, Resolution 2025 (2013) - The functioning of democratic institutions in Bosnia and Herzegovina, available at: http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMDIwOSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIwMjA5 (last accessed on 01 April 2019).

[588] Parliamentary Assembly of Council of Europe, Resolution 2201 (2018) - The honouring of obligations and commitments by Bosnia and Herzegovina, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24465&lang=en (last accessed on 01 April 2019).

Herzegovina and the key political stakeholders were called to "shoulder their responsibilities, stop obstructionism and work constructively at the level of State institutions". Especially in areas of rule of law and human rights are those in which serious reforms and actions are needed.

Bosnia and Herzegovina took some steps on the execution of the decision in Sejdić and Finci case, by submitting an action plan, and consequently updating it following other decisions made in this group of cases. ECtHR decisions execution procedure differs action reports[589] and action plans[590]. The action report is more informative and designed to provide recommendations on how to go about implementing the action plan. In February 2010, Bosnia and Herzegovina delivered a document prepared by the Central Election Commission of Bosnia and Herzegovina concerning the activities needed for the implementation of the decision in the case Sejdić and Finci[591]. According to this document, the Central Election Commission set an ambitious plan of legislation changes that included the amendment of the state, entity and cantonal constitutions and Election Law in some two and half months, to amend the legislation and organize general elections in October, and to implement the Sejdić and Finci decision. According to HUDOC-EXEC database, Bosnia and Herzegovina submitted the Updated Information on Action plan on 27 May 2011[592]. It stated a Working Group was established in accordance with the Action Plan[593] of Council of Ministers of BiH for the Execution of Sejdić and Finci ruling and the decision of the Council of Ministers of 9 March 2010. Proposals for the amendments

[589] "Report transmitted to the Committee of Ministers by the respondent State setting out all the measures taken to implement a judgment of the European Court and / or the reasons for which no additional measure is required". Council of Europe, Glossary (last accessed on 29 April 2019).
[590] "Document setting out the measures taken and / or envisaged by the respondent State to implement a judgment of the European Court of Human Rights, together with an indicative timetable". Ibid.
[591] Central Election Commission of Bosnia and Herzegovina, Proposal of Activities for Changes of the BiH Constitution and BiH Election Law aimed at Implementation of the Decision of the European Court of Human Rights in Strasbourg in case Sejdić-Finci, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2010)108E%22]} (last accessed on 27 April 2019).
[592] Ministry for Human Rights and Refugees, Office of the Agent of the Council of Ministers before the European Court of Human Rights, Updated Information on Action Plan (No. 11-Ai-1/10-495/11), from 26 May 2011, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2011)403E%22]} (last accessed on 01 May 2019).
[593] This document is not in the database and its number or exact date is not given so it is not clear what did it contain.

of BiH Constitution by members of this Working Group (leading political parties - SDA, HDZ BiH, HDZ 1990, SBiH, SDS, SNSD) were outlined in the appendix to this information. The working group had its last meeting on 19 October 2010, and a report on its work was adopted by the Council of Ministers at a session held on 14 December 2010. However, no consensus was reached on adopting any of the proposed constitutional amendments and all of the groups activities ended.

On 03 October 2010 the general elections in Bosnia and Herzegovina were held, with discriminatory constitutional provisions still being enforced. Upon implementation of the election results, a new ad hoc joint commission of both houses of the Parliamentary Assembly was formed. Their task was to prepare proposals of the amendments to the Constitution of Bosnia and Herzegovina until 30 November 2011 and propose a law on the amendments to the Election Law of Bosnia and Herzegovina until 31 December 2011. Following, they were to forward them to the parliamentary procedure[594]. The Committee did not manage to reach a consensus on the content of the constitutional amendments until the given deadline, and both houses of the Parliamentary Assembly agreed on extending the time given till 12 March 2012[595]. The deadline passed again without the task accomplished. Despite the representation of all of the important political parties in the working group, no agreement was reached on the content of the constitutional amendment. In many respects, the group was doomed from the beginning, since each of the parties submitted their own separate proposals of suggested constitutional amendments to the parliamentary procedure instead of working together.

In October 2013, the Council of Europe was about to adopt a resolution concerning sanctions to Bosnia and Herzegovina for the non-execution of the decision in the Sejdić and Finci case, including even the suspension of the country's

[594] Ministry for Human Rights and Refugees, Office of the Agent of the Council of Ministers before the European Court of Human Rights, Updated Action Plan (No. 11-Ai-1/10-825/11), from 19 October 2011, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2011)915E%22]} (last accessed on 01 May 2019).

[595] Ministry for Human Rights and Refugees, Office of the Agent of the Council of Ministers before the European Court of Human Rights, Updated Action Plan (No. 11-Ai-1/10-37/12), from 20 January 2012, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2012)64E%22]} (last accessed on 01 May 2019).

membership in the organization. Due to the reaction and lobbying of the country's mission in Strasbourg, the minister in charge and the parliamentary delegation to the organization, it was decided to drop the potential suspention[596]. In an informative letter 19 May 2015[597] written by the then ambassador Almir Šahović and country's Permanent Representative at the Council of Europe at the time, he acknowled the verdict. This letter was informative only, basically repeating the declarative commitment of Bosnia and Herzegovina to execute judgments, and the continuation of diplomatic efforts. The document was submitted by the government of Bosnia and Herzegovina and has been analysed up until now concerning the execution of the Sejdić and Finci decision. In the meantime, the case Zornić v. Bosnia and Herzegovina was decided in 2014. The Council of Ministers of Bosnia and Herzegovina, at a meeting held on 12 January 2015, adopted the Information on the finality of the Zornić v. BiH judgment and decided to task the Ministry of Justice with preparing an action plan for execution of both judgments and submit it to the Council of Ministers for adoption within 30 days. A prepared action plan[598] envisioned two phases of the decisions' implementation: first concerning the constitutional amendments, and second focusing on the amendment of electoral legislation. The first measure was to be implemented upon forming a working group consisting of three ministers from the Council of Ministers of Bosnia and Herzegovina – one member from each caucus of the House of Representatives of the Parliamentary Assembly of BiH, and one delegate from each ethnic caucus of the House of Peoples of the Parliamentary Assembly of BiH, as well as a representative of the Central Election Commission of BiH. Once this group was formed (in ten days after the Action Plan is adopted by the Council of Ministers), it was supposed to adopt its rules of procedure (in next fifteen days), prepare a draft of amendments to the Constitution of Bosnia and Herzegovina (until the end of November 2015), and

[596] Interview 20 with ambassador to Council of Europe Almir Šahović from 15 April 2015, available at: https://www.youtube.com/watch?v=0s0uhQuUtrs (last accessed on 28 April 2019).
[597] Communication from the authorities (19/05/2015) concerning the case of Sejdić and Finci against Bosnia and Herzegovina (Application No. 27996/06), available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2015)541E%22]} (last accessed on 29 April 2019).
[598] Email with Ms. Belma Skalonjić, Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights (25 April 2019).

deliver it to the Council of Ministers to adopt and forward to the Parliamentary Assembly for further proceeding (end of December 2015). The draft of the amendments to Election Law was supposed to be prepared until the end of the November 2015, which would have been adopted by the Council of Ministers one month after adopting amendments to the Constitution. This action plan was adopted on the 22nd meeting of the Council of Ministers held on 08 September 2015 and the appointed ministers for members of the working group (Minister of Human Rights and Refugees, Minister of Justice and Minister of Foreign Trade and Economic Relations). The problem occurred with the appointment of other members of the working group - caucuses of the House of Representatives and one caucus of the House of Peoples, both of which submitted names of their representatives. However, two other caucuses of the House of Peoples did not appoint their representatives despite numerous calls by the Ministry of Justice, which caused the blockade in the process of the execution of the judgments[599]. In the meantime, the Pilav decision also became final and there was a need for updating the action plan in order to include this decision to the execution procedure as well. However, there has been no updated action plan on the execuation of the decisions since March 2017 to the Committee of Ministers in March 2017. According to this document, the draft of the updated action plan for the execution of the decisions was prepared, and a timeframe for its execution was reset, in order to be more realistic and achievable as the working group was not established yet[600]. At the same, in the House of Representatives of Parliamentary Assembly, there was an initiative to prepare the draft of the constitutional amendments, which was then forwarded to the Council of Ministers, who put the Ministry for Human Rights and Refugees and Ministry of Justice in charge of fulfilling the task. However, two years have since passed and no significant

[599] Ministry for Human Rights and Refugees, Office of the Agent of the Council of Ministers before the European Court of Human Rights, Updated Action Plan (No. 11-Ai-1/10-755/16), from 18 October 2016, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2016)1154E%22]} (last accessed on 02 May 2019).

[600] Committee of Ministers of Council of Europe, 1288th meeting (June 2017) (DH) - Action plan (14/03/2017) - Communication from Bosnia and Herzegovina concerning the case of SEJDIĆ AND FINCI v. Bosnia and Herzegovina (Application No. 27996/06) available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680703e9c (last accessed on 01 April 2019).

progress in the constitutional and amendments to the electoral legislation has been made, including the preparation of serious and professional proposals, with the exception of rhetorical discourses in the election campaign.

In academic discussions, concerning the issue of constitutional reform, it is widely accepted that the interventions would have to be minimal, "a constitutional amendment strictly limited to redressing electoral discrimination, in lieu of a larger package of constitutional reforms"[601]. Even a minimal intervention in the constitutional text however, would consequently mean changing at least twenty other important legal documents, including entity and cantonal constitutions[602]. Some proposals regarding the implementation of the decisions in the Sejdić and Finci group, suggest allocating additional seats for the group of Others in the House of Peoples and omitting ethnicity as a condition for being a candidate for the Presidency of Bosnia and Herzegovina, while at the same time keeping the structure the same – one member from Republika Srpska and two from Federation of Bosnia and Herzegovina. Theoretically everyone would have the right to be elected to the House of Peoples and to the Presidency, but would further complicate an already complicated decision-making mechanisms in the country.

At the meeting of the Committee of Ministers 12-14 March 2019, the Sejdić and Finci group of cases was scheduled to be discussed again in June 2019 (last examined in September 2018)[603], and a competent minister from Bosnia and Herzegovina (most probably Minister of Foreign Affairs[604]) was expected to present the strategy for implementation of the decisions, because of "the urgency of finding new ways and means of progressing with the adoption of all constitutional and legislative reforms necessary to bring the electoral system into line with the

[601] Marko Milanovic, "Sejdić & Finci V. Bosnia and Herzegovina. App. Nos. 27996/06 & 34836/06", *The American Journal of International Law*, Vol. 104, No. 4, 2010, p. 640.
[602] Nedim Kulenović, Inja Hadžialić-Bubalo, Mirza Korajlić, "Presuda Sejdić i Finci protiv Bosne i Hercegovine - Konkretne posljedice – prvi pregled", *Sveske za javno pravo*, vol. 1, br. 1-2, 2010, p. 4.
[603] Committee of Ministers of Council of Europe, 1340th meeting, 12-14 March 2019 (DH) Consolidated indicative list of cases for the 1348th meeting (June 2019) (DH) adopted at the 1340th meeting, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809375a3 (last accessed on 01 April 2019).
[604] Email with Ms. Belma Skalonjić, Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights (26 April 2019).

Convention requirements; consequently exhorted the authorities to devise without further delay a concrete action plan, with a clear time-frame, with a view to finding rapidly a solution to the present situation"[605]. At the June 2019 Committee of Ministers meeting, this body's previous stand on a manifest breach of Bosnia and Herzegovina's unconditional obligations regarding ECtHR decisions' non-implementation was corroborated. "The utmost importance of relaunching the reform work without further delay"[606], as the highest priority necessary to eradicate the current discriminations in state's electoral system was emphasized and political leaders and all relevant authorities were urged to pursue all necessary consultations and take all required actions "to ensure that the present continuing and long-standing violation of Bosnia and Herzegovina's obligations under the Convention, and in particular of Article 46, is brought to an end before the next elections in 2022"[607]. Certain project activities were noted as being run under the Human Rights Fund in order to prepare for the reform process. It was decided that in the next Committee of Ministers meeting in December 2019, a competent minister from Bosnia and Herzegovina shall be invited again to report on "the progress made in developing and implementing the strategy necessary to ensure that constitutional and legislative arrangements are in place before October 2021 i.e. one year before the next elections"[608].

The country's general compliance rate with the ECtHR's decisions is estimated to be 42%, which is not bad comparing to the total compliance rate of 48%[609]. Some argued that the Council of Europe and the European Union should be "more forceful" regarding the implementation of the Sejdić and Finci group of decisions,

[605] Committee of Ministers of Council of Europe, 1324th meeting, 18-20 September 2018 (DH) H46-4 Sejdić and Finci group v. Bosnia and Herzegovina (Application No. 27996/06), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016808d5953 (last accessed on 01 April 2019).
[606] Committee of Ministers of Council of Europe, 1348th meeting, 4-6 June 2019 (DH) H46-4 Sejdić and Finci group v. Bosnia and Herzegovina (Application No. 27996/06), available at: https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECState%22:[%22BIH%22],%22EXECIdentifier%22:[%22004-3141%22]} (last accessed on 26 July 2019).
[607] Ibid.
[608] Ibid.
[609] Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals – The Problem of Compliance*, New York: Cambridge University Press, 2014, p. 48.

because non-implementation puts both the European Court's Protocol 12 jurisprudence and the European anti-discrimination standards generally at risk[610]. This would make Bosnia and Herzegovina "take its ties to the European community and requirements for EU accession seriously"[611].

The reality is that there is sole declarative commitment of Bosnia and Herzegovina's government for the execution of the decisions. Declarative because the government indeed accepts the decisions and resolutions of the Committee of Ministers, attends the meetings, corroborates the need for constitutional changes etc. but in reality nothing happens. No concrete action, no implementation, and no document or strategy for adoption has been taken, rather there only exists a declarative will to do it. Will the Committee of Ministers continue to tolerate this inaction remains to be seen. The slow implementation of the 2018 elections results and the fact that the government at the state level has not been formed yet (end of July 2019) only confirms the claims there exists a political crisis in the country and the non-existence of political consensus on any issue.

Minority Rights Group International, a UK based non-governmental organization which closely followed the situation in Bosnia and Herzegovina and has been involved in the Sejdić and Finci case from the very beginning. Their lawyer Clive Baldwin, was actually part of the team representing Mr. Finci before the Court. Since then the Group has closely followed the execution of the Sejdić and Finci decisions for years. In the document submitted to the Committee of Ministers in June 2016, in accordance with Article 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, this NGO requested the initiation of infringement proceedings on the basis of the effective refusal of Bosnia and Herzegovina to implement the judgment. This NGO, together with the Human Rights Watch and Benjamin N Cardozo School of Law, closely followed the developments in the execution of the decisions procedure and delivered submissions with their

[610] Elizabeth Raulston, "(Un)Justifiable?: A Comparison of Electoral Discrimination Jurisprudence at the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina", *The American University International Law Revie*w, Vol. 28, No. 2, 2018, p. 703.
[611] Ibid.

opinions and comments to the Committee of Ministers in May 2010, November 2011, December 2012, February 2014, November 2015, June 2016, November 2016 and September 2017. They addressed the necessary amendments to the Constitution and Electoral Law, and proposed the composition of the Presidency and the composition and function of the House of Peoples, in order to effectively execute the decision for the Sejdić and Finci case in 2010.

Before the 2014 general elections, the necessity of the judgment's implementation was again emphasized. The NGO highlighted the discrimination entrenched in the state constitution, reflected in local constitutions and national public institutions, where important seats were explicitly and implicitly reserved for the main ethnic groups. The submission concerning the initiation of the infringement procedure, submitted in June 2016, claimed that the pre-condition of exceptionality in applying to these proceedings was met in the case of the non-execution of Sejdić and Finci ruling, not only because of "the systemic and continuing nature of the human rights violations but also the gravity and nature of these violations"[612]. They claimed that the infringement proceedings were "the next logical procedural step for the Committee to take as BiH authorities have persistently failed to implement the Judgment despite long-term supervision"[613]. However, the Committee of Ministers still have shown tolerance to the non-implementation of their decisions and extended the timeline. It remains to be seen if the next general elections in Bosnia and Herzegovina will meet the deadline for the implementation of the decisions.

4.6. Conclusion

The central concept of this thesis – the right to be elected – had been discussed in all previous chapters. Firstly, in chapter one, it evaluated its presence in academic literature, and then in chapter two, described, discussed and analysed this concept. Its presence and regulation in the international human rights (chapter two),

[612] Communication from a NGO (Minority Rights Group International), from 27.06.2016., in the case of Sejdić and Finci against Bosnia and Herzegovina (Application No. 27996/06) – Request for Initiation of Infringement Proceedings, p. 13, available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2016)867E%22]} (last accessed on 03 May 2019).
[613] Ibid, p. 15.

constitutional and legal system of Bosnia and Herzegovina (chapter three), and finally, norms concerning this right and their interpretation in ECHR were explained (first part of this chapter). Through these assessments, the concept of right to be elected has been analysed thoroughly. It then discussed Protocol No. 12 to the ECHR in Article 1, introduced a general prohibition of discrimination in European human rights protection regime and enabled that every right set forth by law can be equally enjoyed.

The second part of this chapter, included an analysis of the ECtHR's decisions concerning the right to be elected in Bosnia and Herzegovina. All decisions were analysed together because of the similarity of the applicants' claims and Court's decisions. This avoided repetition, while at the same time, the differences were emphasized. The second part of the chapter was used to describe and explain the application of the law and the Court's decisions, drawing to attention those judges who dissented from the majority opinions. In the following chapter, additional detailed analyses and findings shall be discussed and explained.

Chapter Five: Conclusions and Suggestions

5.1. Introduction

When the Court brought the decision of the Sejdić and Finci case ten years ago, Bosnia and Herzegovina, although already in a decline phase[614], was still considered a transitional country with the potential of making improvements and progressing further despite its problems. Country's officials behaved in a similar way, stating their commitment for respecting the Court's decision and implementation.

Nowadays, the situation has completely changed. Bosnia and Herzegovina is now characterized as a "frozen conflict"[615]. This conceptualization of the country fits well considering the existing internal structure of the country, tensions between ethnical group representatives in the government, rhetoric and pretensions of the leadership of Bosnia and Herzegovina's entity Republika Srpska. More than "10 years of increasingly hostile zero-sum politics"[616] leaves little hope that the situation will improve anytime soon.

In regards to the ECtHR's verdicts in Sejdić and Finci group, it seems unlikely after numerous promises, meetings, commitments, and many failed initiatives and constitutional amendments attempts, that there is a will or a way Bosnian politicians can agree to implement these decisions. Although the political aspects of the issue are important, it does not change the legal facts discussed here. That is exactly why the implementation of the ECtHR decisions continues to be a current issue on the agenda at the meetings between EC, EU and Bosnia and Herzegovina. The implementation of the Sejdić and Finci group of cases remains under enhanced supervision of the Committee of Ministers, discussed and evaluated at each of the Committee's meeting, which are held every three months. Representatives of the government of Bosnia and Herzegovina attend these meetings and contribute to them. In accordance with Article 46 of ECHR, the implementation of the Court's decisions is the responsibility of Bosnia and Herzegovina.

---

[614] Valery Perry, "Frozen, stalled, stuck, or just muddling through: the post-Dayton frozen conflict in Bosnia and Herzegovina", *Asia Europe Journal*, Vol. 17, No. 1, 2019, p. 110.
[615] Ibid, p. 123.
[616] Ibid, p. 117.

5.2. Summary of Research

This thesis has focused on the analysis of the ECtHR's decisions concerning racial discrimination in the election process on basis of ethnic origin. Rights of some citizens of Bosnia and Herzegovina have been violated because they were not affiliated with the country's three constitutional peoples, either because they declared themselves as a Jew, Roma, Albanian, or simply because they refused to declare their ethnicity. The other scenario analysed is those who declare their affiliation with one of these three groups, but reside in a certain part of the country where their group does not hold the majority. Consequently, as has been discussed, this has led to the deprivation of the right to be elected to the state presidency or second chamber of the parliament in Bosnia and Herzegovina. The Court's rulings confirmed the violation of the ECHR provisions, which prohibites discrimination and notes the relevant constitutional provisions that are discriminative.

The literature review conducted in the first chapter, implied that the thesis topic explored has not been researched before. It showed that only one of the analysed decisions had been researched, the decision in the Sejdić and Finci v. Bosnia and Herzegovina case, and at that, only examining some aspects of this decision, mainly the political aspects concerning the decision's importance for the country's potential EU membership. Even in cases, where the decision's legal aspects were analysed in relation to electoral rights in Europe and the implementation of the decision, there was no theoretical explanation of the research problem, neither from legal theories nor from an international relations theories perspective. This led to the conclusion that the ECtHR decisions concerning the right to be elected in Bosnia and Herzegovina are not analysed sufficiently.

Although the analysed decisions concerned racial discrimination, the declared discrimination was in the election process and the enjoyment of the right to be elected. Therefore, the conceptualization of the right to be elected was important to analyse the research problem. At the same time, this was the thesis' main concept, and the literature review conducted, demonstrated that this is an under researched and under theorized concept.

In the second chapter, it was necessary to determine the relation of this right with other closely related rights, and terms used in its conceptualization. Subsequently, the existence of provisions concerning the right to be elected in relevant international human rights documents was explored, and finally, relevant provisions in constitutional texts of countries all over the world were analysed to indicate if they contain the provisions prescribing the right to be elected. It was found that the right to be elected is directly or indirectly regulated in almost all international human rights documents: Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Social and Political Rights, Article 3 of Protocol No. 1 to the European Convention on Human Rights, Article 23 of the American Convention on Human Rights, and Article 13 of the African (Banjul) Charter on Human and Peoples' Rights. The conducted analysis on the presence of provisions guaranteeing the right to be elected at the national level, showed that this right is regulated in the constitution of twenty-eight countries in the world. The regulation of this right in Bosnia and Herzegovina's constitutional system was analysed in third chapter, asserting that the right to be elected is not guaranteed explicitly in the constitutional text, but Dayton Constitution's Preamble (first and eighth line) and by some of the other provisions (Article II and X.2, and Annex 1), which can be interpreted as guaranteeing this right indirectly.

The right to be elected is explicitly guaranteed in the Election Law of Bosnia and Herzegovina, to every citizen who has attained the age of eighteen years, and is registered as a voter. The above mentioned provision of Article 3 of Protocol No. 1 to the European Convention on Human Rights also implicitly established the right to be elected in the European human rights regime. This provision prescribes the right to free elections, but through ECtHR's caselaw, it had been interpreted that this right's scope covers the right to be elected as well. The cases decided in relation to the right to be elected by the ECtHR was explained in fourth chapter.

The establishment of the theoretical framework of right to be elected was based on the literature review's finding that previous research in this area approached the research problem either solely from international law or only from an international relations perspective. The thesis' theoretical framework was established on the

assumption that international law and international relations are interrelated research areas, with continuous interchange and interaction, and that the human rights regimes are an example of the successful interaction between these research fields. It was claimed that regime theory is especially useful in explaining states cooperation in the human rights area, and that human rights regimes are highly important for understanding why states comply with human rights regimes rules and norms, and international human rights tribunals decisions.

The focus of chapter three was on the description and analysis of the Dayton Peace Agreement and its main characteristics and shortcomings, and its constitutional dimension reflected primarily in Annex IV to the DPA which serves as Bosnia and Herzegovina's constitution. While the DPA succeeded in stopping the war, it has not helped bring about reconcilation in the country. The Dayton Constitution, often perceived of as the main obstacle for country's progress, was corroborated in the peace agreement. It has been characterized as a substantive peace agreement, known for its important functions in demilitarization and demobilization to end violence, and which gives high importance to the constitutional structures concerning governance, election and human rights protection. While some of this agreement's annexes have been implemented, the others have a constitutional dimension and along with the Annex IV constitute country's constitution. The Dayton Constitution is often described as a typical transitional document, which established Bosnia and Herzegovina as a democratic state, committed to the principles of the rule of law and free and democratic elections, but did not define the state's nature. Nor does it specifiy if Bosnia and Herzegovina is a (imposed) federation, confederation, federalizing state, or only (imposed) consociation. The consecutive part of this chapter, pointed to the necessity of the constitutional amendments, and different initiatives and attempts that have so far been made. The Dayton Constitution allows for its amendment and prescribes the procedure for doing so in Article X. The international community initiated and supported the constitutional amendments, beginning with the Council of Europe Parliamentary Assembly's resolution 1384 from 2004, followed by Venice Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina

and the Powers of High Representative from 2005, and continuing with constitutional amendments initiatives in 2008 and 2009. The aim has been to make the state more functional and democratic, but has ended as a failure. As demonstrated, there is a lack of political will to make changes is the country, a main reason for country's deadlock. Additionally, in the electoral legislation reform attempts, Croats have indirectly tried to change the Dayton Constitution and secure the dominance of the main Croat party HDZ over all political functions reserved for Croat people. The EU's indirect role in constitutional reforms through the process of membership, has also turned out to be a failure. The ECtHR's decisions implementation have been postponed for later stages. In this way Bosnia and Herzegovina and its citizens faith has been left to the mercy of corrupted politicians satisfied by maintaining the status quo.

The analysis on the ECtHR decisions concerning the right to be elected in Bosnia and Herzegovina were based on Article 14 of ECHR and Article 1 of Protocol No. 12 to the ECHR. The provisions are the basis for (general) prohibition of discrimination in Europe. This thesis has provided an indepth analysis concerning the decision making process, the legislature relevant for decision making, merits, and reasons for the dissenting and concurrent opinions. In chapter four, it explained the importantance of understanding the implementation process.

5.3. Discussion and Interpretation of Findings

Before proceeding to the discussion of the analysed ECtHR decisions and their impact, it is useful to remember once more about the alleged violations and the Court's decision in the analysed cases. The table below provides a sample of the alleged violation, admissibility, merits and the Court's decisions.

Table 5 - Prohibition of discrimination in conjunction with the right to be elected in Bosnia and Herzegovina – cases analysis

	Alleged violation	**Admissibility**	**Merits**	**Court's decision**
Sejdić and Finci v. Bosnia and Herzegovina (2009) Racial discrimination (ethnical discrimination – members of minorities) Ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina	**House of Peoples**			
	Article 14 of the ECHR in conjunction with Article 3 of Protocol No. 1	-Because of the applicants' active participation in public life they can claim to be victims of alleged discrimination; -State can be held responsible for maintaining the contested constitutional provision; **-Admissible.**	-Elections to the House of Peoples falls within the scope Article 3 of Protocol No. 1; -Ethnical/racial discrimination cannot be objectively justified in a contemporary democratic society.	Violation
	Article 3 of Protocol No. 1			No need to examine
	Article 1 of Protocol No. 12			No need to examine
	Presidency			
	Article 1 of Protocol No. 12		-Provision applicable; -There is no pertinent distinction between the notion and amount of discrimination concerning the House of Peoples and Presidency.	Violation
Zornić v. Bosnia and Herzegovina (2014) Racial discrimination (ethnical discrimination – refusal to declare affiliation with any of the "constituent people"/declares as a citizen)	**House of Peoples**			
	Article 14 of the ECHR in conjunction with Article 3 of Protocol No. 1	-Because of the applicant's active participation in public life they can claim to be victims of alleged discrimination; -State can be held responsible for maintaining the contested constitutional provision; **-Admissible.**	-The present case is identical to Sejdić and Finci; -The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification.	Violation
	Article 3 of Protocol No. 1			No need to examine
	Article 1 of Protocol No. 12			Violation

	Presidency			
	Article 1 of Protocol No. 12		Same as in Sejdić and Finci.	Violation
Pilav v. Bosnia and Herzegovina (2016) Discrimination of the member of the „constituent people“ in some parts of the country (combination of ethnic origin and place of residence)	**Presidency**			
	Article 1 of Protocol No. 12	-State can be held responsible for maintaining the contested constitutional provision; **-Admissible.**	-Exclusion is based on a combination of ethnic origin and place of residence and as such discriminatory.	Violation
Šlaku v. Bosnia and Herzegovina (2016) ***the case identical as the Sejdić and Finci v. Bosnia and Herzegovina***	**House of Peoples**			
	Article 14 of the ECHR in conjunction with Article 3 of Protocol No. 1	-Because of the applicants' active participation in public life they can claim to be victims of alleged discrimination; -State can be held responsible for maintaining the contested constitutional provision; **-Admissible.**	-The meaning of the discrimination in Article 1 of Protocol No. 12 is being identical to that in Article 14, therefore the test for its existence being the same as well; -case identical to Sejdić and Finci.	Violation
	Article 3 of Protocol No. 1			No need to examine
	Article 1 of Protocol No. 12			Violation
	Presidency			
	Article 1 of Protocol No. 12		Same as in Sejdić and Finci.	Violation

From the table above, it can be discerned that the applicants claims in second and fourth case were identical. The applicants both claimed the violation of their right to be elected to the House of Peoples and Presidency, while in the third case, the applicant only claimed the violation of his right to be elected to Presidency, and not to the House of Peoples (it is not clear why the applicant in this case decided not to claim violation of his right to be elected to House of Peoples).

The Applicants claims were based on Article 14 of ECHR (in conjunction with Article 3 of Protocol No. 1), Article 3 of Protocol No. 1 to ECHR, and Article 1 of Protocol No. 12 regarding the election to House of Peoples and Article 1 of

Protocol No. 12 regarding the election to Presidency. It is not clear why the applicants claimed violation of both provisions of Article 14 and Article 1 of Protocol No. 12. One possible explanation is that the applicants considered their right to be elected was violated, while at the same time they considered this discriminatory because of their ethnic origin being the main reason for this ineligibility. At the same time, they were aware that the right they claimed to be violated, might not be accepted by the Court as being under the scope of the invoked provisions (Article 3 of Protocol No. 1 and Article 14), and the invoking of Article 1 of Protocol No. 12 served as "plan B" option in that case.

Nevertheless, in the case of Sejdić and Finci v. Bosnia and Herzegovina, the Court found the violation of Article 14 and stated that there was no need for examining violation of Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. However, in the second case, the Court changed their mind, and found Article 14 had been violated with no need for examining violation of Article 3 of Protocol No. 1. Yet the Court still found Article 1 of Protocol No. 12 violated as well. This outcome was not explained or justified in the decision's text, but was confirmed in Šlaku v. Bosnia and Herzegovina decision, where the Court explained there existed different scopes of the provisions of Article 14 and Article 1 of Protocol No. 12. This meant the term discrimination and the test for the existence of discrimination in both the provisions are identical. The Court found the violation of both these provisions in relation to the House of Peoples, and shortly explained this reasoning by "continued ineligibility to stand for election for House of Peoples of Bosnia and Herzegovina"[617]. Also, in both these decisions, the Court discussed the case under the provision of Article 46 of the ECHR, where it stated that the declared violation is a direct result of non-implementation of previous decisions, and that there was no excuse for the maintenance of discriminatory provisions in Bosnia and Herzegovina any more, but rather there was a need for the guarantee of equal rights to all its citizens. These remarks shall be useful in discussing decisions' impacts below. In

[617] § 29 Case of Šlaku v. Bosnia and Herzegovina, Application No. 56666/12.

thesis introduction it was stated that political and legal impacts shall be discussed, and that other impacts are not the object of thesis analysis[618].

5.3.1. Political Impacts of the ECtHR Decisions concerning Right to be elected in Bosnia and Herzegovina

Before reviewing the legal impacts of the analysed decisions, it is first important to discuss their political impacts. As stated in the introduction of this thesis, the decision in the case of Sejdić and Finci v. Bosnia and Herzegovina, concerns the basis of the country's constitutional system, as it implies constitutional and electoral reform. This has been verified by the Council of Europe's Committee of Ministers, and Bosnia and Herzegovina's officials many times on different occasions. The acceptance of necessity of constitutional reform/amendments by all major actors (political parties in Bosnia and Herzegovina and international community's representatives) is major political impact of the analysed decisions. Despite declarative commitment to ECtHR decisions execution and participation in negotiations on previous constitutional reform attempts, they have failed to reach any type of consensus on the content of the future reforms. Updated action plans for the execution of the Sejdić and Finci group of decisions and proposals of constitutional reforms have not been made due to the inability of establishing a working group. If this working group had been formed, and the plan and constitutional reforms were prepared, potentially the impact of decision in Zornić, Pilav and Šlaku cases could be discussed more in details. Had these decisions assumed higher significance and been given greater legal importance then their implementation would have been reflected in the content of planned reforms. The implementation of following decisions will request absolute elimination of the ethnic principle in the rules for elections to the House of Peoples and Presidency, which would mean a radical change to the system. Negligence of these cases in academic literature, media, political life and

[618] Example is assistance in breaking down ethnic and religious divisions in Bosnia and Herzegovina by encouraging political participation and representation and promoting social cohesion. Lucy Claridge, "Discrimination and political participation in Bosnia and Herzegovina - Sejdić and Finci v. Bosnia and Herzegovina", Minority Rights Group International Briefing Paper, available at: https://minorityrights.org/wp-content/uploads/old-site-downloads/download-787-Briefing-Paper-Discrimination-and-political-participation-in-Bosnia-and-Herzegovina.pdf (last accessed on 22 April 2019).

international relations has contributed to these disappointing results and unsuccessful implementation of the Sejdić and Finci group of cases.

Another important political impact concerning the effects of the decisions on the EU membership process the potential threat for the country's membership in the Council of Europe. The importance of the decision in the Sejdić and Finci v. Bosnia and Herzegovina case to the country's access to EU was explained the chapter three. Although the execution of the decisions was postponed for a later stage in the accession process, this does not mean its importance for the EU has decreased. The country reports on Bosnia and Herzegovina regularly stress the necessity of the execution of the analysed decisions. However, some argue that the decision's implementation shall not be a condition for EU membership[619], while there are also views that both the EU and the Council of Europe should do more in imposing sanctions for the non-implementation of the decisions[620]. The Council of Europe follows the execution of the ECtHR decisions through its different human rights institutions, mainly through Committee of Ministers meetings, which is the body for the supervision of the ECtHR's decisions. In the case of Bosnia and Herzegovina, authorities, as discussed, have not shown enough will to execute the decisions, putting the country's membership to the Council of Europe in question.

Finally, the impact of the decisions is in Bosnia and Herzegovina's image in international relations. Compliance with international law, international human rights treaties, and finally, international human rights tribunals' rulings can have various implications. A state's image in international arena can be significantly improved if that state signs, ratifies and complies with certain human rights documents, especially if these norms are internalized and applied in the country. When a state fails to comply, it can create a negative image for a state internationally and cause its citizens dissatisfaction with the government. The implementation or non-implementation of the international human rights tribunals rulings can be an indicator or test of the government's real commitment to the respect for human rights.

[619] https://www.esiweb.org/pdf/esi_document_id_143.pdf (22 April 2019).
[620] Raulston, p. 704.

Therefore, states do not have much of a choice but to comply with the international human rights tribunals' decisions, especially in Europe and particularly for the countries aspiring to become a member of the EU, such as Bosnia and Herzegovina. The perception and conceptualization of the issue of the execution of the international human rights tribunals' decisions is not likely to change in the near future. To foster compliance with the human rights tribunals' rulings, nuanced compliance measures and a renewed focus on the domestic politics of compliance is needed[621]. However, the system of the execution of the ECtHR's decisions is well developed and it is often claimed that all the Court's decisions are being implemented sooner or later. The procedure of decisions implementation and supervision is consists of meetings at the highest level and reporting and follows the execution procedure. Different actions known as "naming and shaming" and recently introduced infringement procedure serve to foster states reluctant to execute the decisions.

5.3.2. Legal Impacts of the ECtHR Decisions concerning Right to be elected in Bosnia and Herzegovina

This thesis argued that the legal impacts of the analysed ECtHR decisions have not been sufficiently researched. As argued, the importance of all analysed decisions is higher than it is perceived, especially the legal impacts of the latter decisions. They impact the core of the country's constitutional system, and establish the basis for the anti-discrimination law in Europe concerning the general prohibition of discrimination. They also contribute to our understanding of the relation between consociational power-sharing arrangements in peace agreements and the constitutions being agreed upon as the part of peace agreements and human rights, as well as the nature of the European Court of Human Rights.

From the outset, the most important legal impact of the analysed ECtHR decision is the establishment of the legal obligation of the constitutional reform in Bosnia and Herzegovina. Although the Dayton Constitution had many shortcomings and disadvantages, as explained in chapter three, there already was a generally

[621] Hillebrecht, p. 154.

acceptance that there was a need to amend it prior to the analysed ECtHR rulings. This formal declaration made by the highest authority for human rights in Europe has had a great significance in the constitutional reform process. Bosnia and Herzegovina acceded to the ECHR, which is considered as a "constitutional instrument"[622] of the European system, and consequently the ECtHR has became competent to decide if its political system is providing political equality of all its citizens[623]. The analysed ECtHR decisions established that Bosnia and Herzegovina has a legal obligation to make constitutional amendments and change of discriminative constitutional provisions, and indirectly, the change of political system.

Second, this thesis argued that these decisions impact is in establishment of the basis for protection of minorities who lack electoral rights in other ECHR states, and in providing a legally binding judgment that can be relied upon against their own governments[624]. Although the issue of respecting minorities rights might not be a problem in developed democracies, there are still some countries in Europe who face issues of minorities rights violations. That is why these decisions could be encourage other minorities to endeavour to reach the full enjoyment of all their rights, especially political participation.

Third, in these decisions, the Court indicated the high importance of equality and protection from discrimination. Although applicants claims included the violation of one of the rights guaranteed in the Convention (Article 3 of Protocol No. 1), and the violation of the provision concerning the prohibition of discrimination in the enjoyment of human rights guaranteed by the ECHR (Article 14), the Court had decided that latter is more important and that there was no need to protect separately enjoyment of the substantive right when one is discriminated in the enjoyment of the

---

[622] Steven Wheatley, "The construction of the constitutional essentials of democratic politics by the European Court of Human Rights following Sejdić and Finci", Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds.), *Examining Critical Perspectives on Human Rights*, New York: Cambridge University Press, 2012, p. 165.
[623] Ibid, p. 173.
[624] Lucy Claridge, "Discrimination and political participation in Bosnia and Herzegovina - Sejdić and Finci v. Bosnia and Herzegovina", Minority Rights Group International Briefing Paper, available at: https://minorityrights.org/wp-content/uploads/old-site-downloads/download-787-Briefing-Paper-Discrimination-and-political-participation-in-Bosnia-and-Herzegovina.pdf (last accessed on 22 April 2019).

same right. This demonstrated that the protection from discrimination is highly important and a priority in human rights law nowadays in Europe.

Fourth, these decisions significantly contributed to establishing the basis of anti-discrimination law in Europe concerning general prohibition of discrimination. As it was explained in the first part of the fourth chapter, the general prohibition of discrimination is a contemporary development in human rights protection and its growing importance is of increased interest for research and practice. This followed with the adoption of the new Protocol No. 12 to the European human rights regime of the ECHR. The analysed decisions, represented the first to be based the new Protocol, and whose interpretation was made by the Court, attracting the attention of both practitioners and theorists all over the continent and wider. Many were eager to see how the decision in Sejdić and Finci v. Bosnia and Herzegovina would shape caselaw concerning this important provision and if this provision would become a "a 'safety net' for cases that could not be applied to Article 14 of the Convention in conjunction with one of the Convention rights"[625]. The Court took a stand that the definition of discrimination from Article 1 of Protocol No. 12 is identical to the one from Article 14 ECHR, and that the test for finding discrimination in both provisions is the same. The decision on the Sejdić and Finci v. Bosnia and Herzegovina case demonstrated this, when the Court decided that there was no need to examine the violation of Article 1 of Protocol No. 12 after already finding Article 14 violated, leading to the conclusion that this provision's scope could be the rights which are not under the scope of Article 14. In these cases that was the right to be elected to non-legislative, executive position. However, the decisions in these cases opened up space for different interpretations of the provision of Article 1 of Protocol No. 12, and potential relationship with Article 14. As previously explained in the decisions Zornić v. Bosnia and Herzegovina and Šlaku v. Bosnia and Herzegovina, the Court not only found Article 14 in conjunction with Article 3 of Protocol No. 1 violated, concerning the election to the House of Peoples, but it also found the violation of Article 1 of Protocol No. 12 concerning the election to House of Peoples and

[625] Bardutzky, p. 331.

explained it by the "continued ineligibility to stand for election". In these decisions, the Court also stated that the term and test for discrimination is identical for both provisions. In this way, the Court showed that these provisions does not have to exclude each other's application but can be applied complementary. When declaring the existing discrimination in both cases, it serves to condemn the continued and unsanctioned discrimination in the enjoyment of the human rights guaranteed by the ECHR. It remains to be seen how the caselaw concerning provision of Article 1 of Protocol No. 12 will develop in the near future.

The fifth impact of the analysed decisions is their contribution in the understanding of the relation between consociational power-sharing arrangements in peace agreements and the constitutions being agreed upon as the part of peace agreements and human rights. The Court in Sejdić and Finci decision took a stand that consociational features of the state's system cannot justify discrimination of the enjoyment of human rights. The state was claimed as responsible for maintaining the discriminative provisions, and that Bosnia and Herzegovina accepted the responsibility to change these provisions upon becoming a member of Council of Europe. Furthermore, the Court argued that the country had made some progress, and therefore did not need to completely abandon the power-sharing mechanisms at that moment. This showed that the Court took into consideration the specific power-sharing arrangements in Bosnia and Herzegovina, but also the importance of human rights, and that these mechanisms and human rights do not have to be in opposititon and exclusion of each other but that members of the Council of Europe have to follow established standards and apply them, no matter what the specific circumstances was. However, five years later in the Zornić decision, the Court reasoned that the mechanisms protecting special rights of the constituent people, excluded minorities or citizens of Bosnia and Herzegovina, and was found unacceptable eighteen years after the conflict ended. This decision was repeated again two years later in Šlaku v. Bosnia and Herzegovina decision. Although dissenting opinions existed in the first case amongst judges, and some academics, who contested the Court's stand about the relevance of time that passed since the end of the conflict and the necessity to make changes, the Court, in later cases, took an

even stricter position, and favored the constituent peoples in Bosnia and Herzegovina. Accordingly, it can be concluded that certain privileges in consociations can be justified only temporarily and for a short period of time in the aftermath of a conflict but that the countries which are aiming at being democratic and members of Council of Europe and EU must respect certain human rights and enable equality to all of its citizens in enjoyment of these rights.

Sixth, the decisions impact will effect future power sharing arrangements. McCrudden and O'Leary for example argue that the analysed decisions will negatively affect future consociational arrangements, leading to the exclusion of the bill of rights, regional courts and jurisprudence of human rights law[626]. However, they claim the opposite can also be claimed as well, that future power sharing arrangements will give more importance to equality in defining its main features, or at least in limiting their durability, through the inclusion of sunset clauses in peace agreements. The authors seem to idealize and exaggerate the importance of consociations, but these arrangements are far from perfect. Feldman claims that these power sharing arrangements are associated with a number of problems such as entrenching divisions, encouraging politicians to seek support within single social groups rather than trying to build inter-group consensus, legitimating systems with more than single sovereign demos, and creating a disbalance between the power of various peoples and parties and levels of popular support for the parties claiming to represent them or the size of the populations they claim to represent[627]. All of this might open up more space for critics of consociations, more research on other models of power sharing such as centripetalism, and their eventual application in conflict resolution, as it was mentioned in the third chapter.

Seventh, the ECtHR decisions impact is in confirms the responsibility for the respect of states international obligations. When assessing the situation in Bosnia and Herzegovina and whether it can be held responsible for the maintenance of

[626] Christopher McCrudden, Brian O'Leary, Courts and Consociations…, p. 147.
[627] David Feldman, "Constitutionalism, Deliberative Democracy, and Human Rights", John Morison, Kieran McEvoy, Gordon Anthony (eds.), *Judges, Transition and Human Rights*, Oxford: Oxford University Press, 2007. p. 453.

discriminatory constitutional provisions, the Court stated that Bosnia and Herzegovina voluntarily accepted to meet the relevant standards of the Council of Europe. Therefore, it must abide and undertaken responsibilities, including the respect for the Convention of rights and the Court's decisions.

Finally, the impact of these decisions indirectly affect the Court's legitimacy to decide in cases concerning a state's constitution and post-conflict states whose close war past is still poses as a serious threat for peace and stability. The Court's legitimacy to decide on these issues was disputed by some judges[628], and by theorists[629], however an overwhelming majority widely accepted that the Court as the constitutional court of Europe in human rights law. Earlier, as previously mentioned, the "living instrument" doctrine or evolutive interpretation of the ECHR allows the Court to follow the evolution of European society and to adjust the meaning of certain Convention provisions to current conditions, which might be significantly different to the meaning these provisions had when they were first drafted[630]. Dzehtisarou argues that the consent states give to the original meaning, when ratifying the Convention, is unlikely to cover the new meaning of the Convention. Therefore, the Court has to ensure some other sources of legitimacy are provided to back up its judgments, especially once the ECtHR resorts to judicial innovation, such as evolutive interpretation[631]. This is even more important when the Court's role as the "the most influential regional human rights court in the world"[632] is considered; the influence it has in Europe, especially in eastern states, and in the world generally cannot be underestimated and will continue to grow in the future as well. The source of the evolutional legitimacy currently is the European consensus[633], is "conceptualized as an updated implied consent of the states"[634], which actually "facilitates the dialogue between the Court and the Contracting Parties and it ensures

[628] Dissenting opinion of judge Bonnello in Sejdić and Finci v. Bosnia and Herzegovina.
[629] Christopher McCrudden, Brian O'Leary, Courts and Consociations…, p. 147.
[630] Steven Wheatley, p. 156.
[631] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge: Cambridge University Press, 2015, p. 145
[632] Ibid.
[633] Ibid, p. 10-17.
[634] Ibid, p. 175-176.

that the States participate in a decision-making process and that the Court honours its subsidiary role"[635]. The issues the Court had been deciding and principles it has applied resemble those decided on by national supreme courts; its exploring of legitimacy of aims for human rights restriction, its proportionality and necessity in a democratic society evokes similar issues that these courts can decide on and apply, which is why it has been considered "a quasi-Constitutional Court sui generis"[636], and the ECHR is accepted as "a sort of constitution for the European member states as far as fundamental rights are concerned"[637]. It is assumed that in future the Court "must consciously continue to elaborate on its role within the context of a wider constitutional order, assuming its responsibilities for both the development of Convention rights and the overall maintenance of the Convention system"[638]. It is unlikely that the analysed cases will affect the Court's legitimacy, as some have argued, but on the contrary its decisions will only strengthen it.

5.4. Significance of the Study

The multidisciplinary character of this research makes it significant in multiple ways. Firstly, it is important because of the interdisciplinary approach to the research topic, which was for the first time researched through the acknowledgment of both the international law and international relations disciplines achievements, which permitted for the analysis of both the political and legal aspects of the research problem. International legal human rights regimes are accepted as the result of successful interaction between these disciplines and an explanation for states access to human rights regimes and compliance with international human rights tribunals decisions. Second, the thesis drew to attention the negligence of this research topic and on the concept of the right to be elected as an important human right. Finally, this thesis filled the gap in literature related to the research of the ECtHR's decision

---

[635] Ibid.
[636] Luzius Wildhaber, "Rethinking the European Court of Human Rights", Jonas Christoffersen, Mikael Rask Madsen (eds.), *The European Human Rights Courts between Law and Politics*, New York: Oxford University Press, 2011, p. 227.
[637] Jochen A. Frowein, "The Transformation of Constitutional Law through the European Convention on Human Rights", *Israel Law Review*, Vol. 41, No. 3, 2008, p. 499.
[638] Robert Harmsen, p. 53.

concerning the right to be elected in Bosnia and Herzegovina, namely emphasizing their legal impacts.

This research will prove useful to politicians, and employees in public administration, enabling them to better understand the analysis of the decisions and their important impact. This study will also be useful for students taking human rights classes in law, political sciences and international relations because it aims to incorporating findings of more than one of these disciplines, promoting interdisciplinary research and advocating the interaction and interchange between international law and international relations disciplines, and their mutual contribution to each other's research. Furthermore, this study should not only attract students from the Bosnia and Herzegovina, but also those familiar with the topic, and interested in post-conflict societies and human rights developments in these countries.

5.5. Recommendations for Further Research

Further research concerning the thesis topic can be conducted concerning the theoretical and practical aspects. The main concept, the right to be elected, remains under researched and under theorized and consequently future research is needed for a better conceptualization of this important human right. Also, more research is needed concerning the importance of regime theory for the study of international law and international human rights law, and the importance and functions of international legal human rights regimes.

As it was emphasized in the introduction, this research was limited primarily by the number of analysed cases. Consequently, this limitation opens space for further research in this area. Depending of the caselaw development concerning the right to be elected in Bosnia and Herzegovina, further research might include more cases. Namely, Ilijas Pilav complained of the violation of his right to be elected to Presidency of Bosnia and Herzegovina but not to the House of Peoples. The application concerning the right to be elected of Bosniacs from Republika Srpska to the House of Peoples could emerge at the ECtHR. Also, there is a possibility of the application for the violation of the right to be elected to the Presidency and to the

House of Peoples of Croats residing at Republika Srpska and Serbs residing in the Federation of Bosnia and Herzegovina, which would result in cases very similar to case of Pilav v. Bosnia and Herzegovina, but concerning other ethnic groups and eventually other entity, while still remaining similar in the representation of discrimination in the enjoyment of right to be elected – as a combination of ethnic and territorial principle in prescribing conditions for elections.

Another listed limitation includes the research methods. This research remained limited mostly to documents analysis, and focused on the political and legal dimension of the analysed issue. Hence, some interviews available online were consulted and correspondence with relevant experts in the field was achieved. Concordantly, the research reflects attitudes and opinions from a limited number of relevant persons. Eventual further research on the topic could be more based on questionnaires and in-depth interview with ECtHR judges who took part in the decision making process and understand more holistically the reasons for their decisions, and also why there was a range of dissenting opinions. This type of analysis could be especially important in the Zornić v. Bosnia and Herzegovina and Šlaku v. Bosnia and Herzegovina decisions, which are the most interesting and important for both Bosnia and Herzegovina's future development and for the development of ECtHR's case law concerning general prohibition of discrimination.

Previous research focused mainly on the political aspects of the analysed ECtHR decisions, while other aspects were neglected. While this thesis aimed on filling the gap in literature concerning legal impacts of the analysed ECtHR decisions, research on sociological and psychological impacts and aspects of the decisions could be useful for their implementation

REFERENCES

BOOKS:

"Oxford Dictionary of Law", Seventh Edition, Oxford University Press, 2009, Oxford

ARMSTRONG David, *Routledge Handbook of International Law*, Abingdon: Routledge, 2009,

BAYLIS John, SMITH Steve, OWENS Patricia, *The Globalization of World Politics – An Introduction to International Relations*, Sixth Edition, Oxford: Oxford University Press, 2014

BENNETT Christopher, *Bosnia's Paralyzed Peace*, Oxford: Oxford University Press, 2011

BIEBER Florian, *Post-War Bosnia – Ethnicity, Inequality and Public Sector Governance*, London: Palgrave Macmillan UK, 2006

BOSE Sumantra, *Bosnia After Dayton – Nationalist Partition and International Intervention*, Oxford: Oxford University Press, 2002

CHANDLER David, *Bosnia: Faking Democracy after Dayton*, London-Sterling: Pluto Press, 2000

CHANDLER David, *Peacebuilding - The Twenty Years' Crisis, 1997–2017*, Cham: Palgrave-Macmillan, 2017

CIRKOVIC Elena, "Contested citizenship in Bosnia and Herzegovina", Engin F. Isin and Peter Nyers (eds.), *Routledge Handbook of Global Citizenship Studies*, Oxon - New York: Routledge, 2014.

DONNELLY Jack, *Universal Human Rights in Theory and Practice*, New York: Cornell University Press, 2013

DUNNE Tim, KURKI Milja, SMITH Steve, *International Relations Theories – Discipline and Diversity*, Oxford: Oxford University Press, 2012

DZEHTSIAROU Kanstantsin, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge: Cambridge University Press, 2015.

FELDMAN David, "Constitutionalism, Deliberative Democracy, and Human Rights", John Morison, Kieran McEvoy, Gordon Anthony (eds.), *Judges, Transition and Human Rights*, Oxford: Oxford University Press, 2007.

FREEMAN Michael, *Human Rights: an Interdisciplinary Approach*, Cambridge: Polity Press/Blackwell, 2002

HARMSEN Robert, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform", John Morison, Kieran McEvoy, Gordon Anthony (eds.), *Judges, Transition and Human Rights*, Oxford: Oxford University Press, 2007.

HASENCLEVER Andreas, MAYER Peter, RITTBERGER Volker, *Theories of International Regimes*, New York: Cambridge University Press, 1997

HILLEBRECHT Courtney, *Domestic Politics and International Human Rights Tribunals – The Problem of Compliance*, New York: Cambridge University Press, 2014.

KEIL Soren, *Multinational Federalism in Bosnia and Herzegovina*, Surrey: Ashgate Publications Limited, 2013

KRASNER Stephen D, *International Regimes*, Ithaca: Cornell University Press, 1983

MCCRUDDEN Christopher, O'LEARY Brendan, *Courts and Consociations – Human Rights versus Power Sharing*, Oxford: Oxford University Press, 2013.

MERDZANOVIC Adis, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina*, Stuttgart: ibidem-Verlag, 2015

MOTOC Iulia, ZIEMELE Ineta, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe - Judicial Perspectives*, Cambrıdge: Cambridge University Press, 2016

NYSTUEN Gro, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, Leiden/Boston: Martinus Nijhoff Publishers, 2005

PETERS B. Guy, *Institutional Theory in Political Science: The 'New Institutionalism'*, London: Pinter, 1999

REUS-SMITH Christian, SNIDAL Duncan, *The Oxford Handbook of International Relations*, Oxford: Oxford University Press, 2008

ŠARČEVIĆ Edin, *Dejtonski ustav: karakteristike i karakteristični problemi*, Sarajevo: Fondacija Konrad Adenauer e.V., Predstavništvo u Bosni i Hercegovini, 2009

SHELTON Dinah, *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013

STEINER Christian, ADEMOVIĆ Nedim, *Constitution of Bosnia and Herzegovina – Commentary*, Sarajevo: Konrad Adenauer Stiftung e.V, 2010

VEHABOVIĆ Faris, *Odnos Ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda*, Sarajevo: Asocijacija Alumni Centra za interdisciplinarne postdiplomske studije (ACIPS), 2006

WHEATLEY Steven, "The construction of the constitutional essentials of democratic politics by the European Court of Human Rights following Sejdić and Finci", Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pedersen (eds.), *Examining Critical Perspectives on Human Rights*, New York: Cambridge University Press, 2012.

WILDHABER Luzius, “Rethinking the European Court of Human Rights”, Jonas Christoffersen, Mikael Rask Madsen (eds.), *The European Human Rights Courts between Law and Politics*, New York: Oxford University Press, 2011

ARTICLES:

____“Don’t believe the Hype - Why Bosnian democracy will not end this October”, from 30 January 2018, available at: https://www.esiweb.org/pdf/ESI%20-%20Hype%20and%20Bosnian%20elections%20-%2030%20Jan%202018.pdf (last accessed on 19 January, 2019)

ABBOTT Kenneth W., “Elements of a Joint Discipline”, *Proceedings of the ASIL Annual Meeting*, Vol. 86, 1992, p. 167-172

ABBOTT Kenneth W., “International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts”, *The American Journal of International Law*, Vol. 93, No. 2, 1999, pp. 361-379

ABBOTT Kenneth W., “Modern International Relations Theory: A Prospectus for International Lawyers”, *Yale Journal of International Law*, Vol. 14, No. 2, 1989, pp. 335-411

ADEMOVIĆ Nedim, “Opšti izbori u Bosni i Hercegovini 2018: pravni triler bez hepienda?”, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Nedim_Ademovic.pdf (last accessed on 10 February, 2019)

ANAGNOSTOU Dia, MUNGIU-PIPPIDI Alina, “Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter”, *The European Journal of International Law*, Vol. 25, No. 1, 2014.

BANOVIĆ Damir, GAVRIĆ Saša, “Ustavna reforma u Bosni i Hercegovini”, *Politička misao*, No. 2, 2010, pp. 159-180

BARDUTZKY Samo, “The Strasbourg Court on the Dayton Constitution Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina – Case Note”, *European Constitutional Law Review*, No. 6, 2010.

BEGIĆ Zlatan, “Legal Capacities of the Dayton Constitution in the Process of Accession of Bosnia and Herzegovina to European Union”, *Journal of Politics and Law*, Vol. 9, No. 1; 2016, pp. 11-20, doi: 10.5539/jpl.v9n1p11

BEITZ Charles R., “From Practice to Theory”, *Constellations*, Vol. 20, No. 1, 2013, pp. 27-37

BEITZ Charles, “What Human Rights Mean?”, *Daedalus*, Vol. 132, No. 1, On International Justice, 2003, pp. 36-46

BELL Christine, “Peace Agreements: Their Nature and Legal Status”, *The American Journal of International Law*, Vol. 100, No. 2 , 2006, pp. 373-412

BESSON Samantha, ‘The European Union and Human Rights: Towards A Post-National Human Rights Institution?’, *Human Rights Law Review*, Vol. 6, No. 2, 2006, pp.

BESSON Samantha, „Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It TakesTwo to Tango in the Council of Europe"“, *The American Journal of Comparative Law*, Vol. 60, No. 1, 2012.

BIEBER Florian, “Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans”, 2011, *Europe-Asia Studies*, Vol. 63, No. 10, 2011, pp. 1783-1802, doi: 10.1080/09668136.2011.618679

BOJKOV Victor D., “Democracy in Bosnia and Herzegovina: Post-1995 Political System and its Functioning”, *Southeast European Politics*, Vol. IV, No. 1, 2003, pp. 41-67

BROWN Chris, “Universal human rights: A critique”, *The International Journal of Human Rights*, Vol. 1, No.2, 1997, pp. 41-65

BRUNNÉE Jutta, TOOPE Stephen J., "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law*, No. 39, 2000, pp. 19-74

CHANDLER David, "From Dayton to Europe", *International Peacekeeping*, Vol. 12, No. 3, 2005, pp. 336-349, doi: 10.1080/13533310500074077

CLARIDGE Lucy, "Discrimination and political participation in Bosnia and Herzegovina - Sejdić and Finci v. Bosnia and Herzegovina", https://minorityrights.org/wp-content/uploads/old-site-downloads/download-787-Briefing-Paper-Discrimination-and-political-participation-in-Bosnia-and-Herzegovina.pdf

DELONDRAS Fiona, DZEHTISAROU Kanstantsin, "Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights", *International and Comparative Law Quarterly*, Vol. 66, 2017.

DIAMOND Larry, "Can the Whole World Become Democratic? Democracy, Development, and International Policies", *CSD Working Papers*, 2003, pp. 1–26, available at: escholarship.org/uc/item/7bv4b2w1, last accessed May 3, 2018.

DONNELLY Jack, "Human Rights as Natural Rights", *Human Rights Quarterly*, Vol. 4, No. 3, 1982.

DONNELLY Jack, "International Human Rights: A Regime Analysis", *International Organization*, Vol. 40, No. 3, 1986.

DONNELLY Jack, "Human Rights: A New Standard of Civilization?", *International Affairs*, Vol. 1, No. 74, 1998.

FAHNER Johannes Hendrik, "Revisiting the human right to democracy: a positivist analysis", *The International Journal of Human Rights*, Vol. 21, No. 3, pp. 321-341

FOX Stuart, "Is it Time to Update the Definition of Political Participation?", *Parliamentary Affairs*, Vol. 67, Issue 2, 2014.

FREEMAN Michael, “The Problem of Secularism in Human Rights Theory”, *Human Rights Quarterly*, Vol. 26, No. 2, 2004.

FROWEIN Jochen A., “The Transformation of Constitutional Law through the European Convention on Human Rights”, *Israel Law Review*, Vol. 41, No. 3, 2008.

GERARDS, Janneke, „The Discrimination Grounds of Article14 of the European Convention on Human Rights“, Human Rights Law Review, Vol. 13, No. 1, 2013.

GILABERT Pablo, “Human Rights, Dignity and Power”, in Massimo Renzo, Rowan Cruft, and Matthew Liao (ed.), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press, 2015

GLENSY Rex D., “The Right to Dignity”, *Columbia Human Rights Law Review*, 43:65, 2011.

HAFNER-BURTON Emilie M., “International Regimes for Human Rights”, *The Annual Review of Political Science*, Vol. 15, 2012, DOI: 10.1146/annurev-polisci-031710-114414

HAGGARD Stephan, SIMMONS Beth A., ”Theories of international regimes”, *International Organization*, Vol. 41, No. 3, 1987.

HAULE Romuald R., “Some Reflections on the Foundations of Human Rights – Are Human Rights an Alternative to Moral Values?”, A. Von Bogdandy & R. Wolfraum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 10, 2006.

HILLEBRECHT Courtney, “The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change”, *European Journal of International Relations*, Vol. 20, No. 4, 2014.

HUGHES Glen, “The Concept of Dignity in the Universal Declaration of Human Rights”, *Journal of Religious Ethics*, Vol. 39, No. 1, 2011.

JOHNS Alecia, “The Case for Political Candidacy as a Fundamental Human Right”, *Human Rights Law Review*, No. 16, 2016.

KARTSONAKI Argyro, “Twenty Years After Dayton: Bosnia-Herzegovina (Still) Stable and Explosive”, *Civil Wars*, Vol. 18, No. 4, 2016, doi: 10.1080/13698249.2017.1297052

KEIL Soeren, KUDLENKO Anastasiia, “Bosnia and Herzegovina 20 Years after Dayton: Complexity Born of Paradoxes”, *International Peacekeeping*, Vol. 22, No. 5, 2015, doi: 10.1080/13533312.2015.1103651

KEOHANE Robert, “International Relations and International Law: Two Optics”, *Harvard International Law Journal*, No. 38, 1997.

KEOHANE Robert, “The Demand for International Regimes”, International Organization, Vol. 36, No. 2, *International Regimes*, 1982.

KOH Harold Hongju, “How is International Human Rights Law Enforced?”, *Indiana Law Journal*, Vol. 74: Iss. 4, Article 9.

KRASNER Stephen D., “Structural Causes and Regime Consequences: Regimes as Intervening Variables”, *International Organization*, Vol. 36, No. 2, International Regimes, 1982.

KULENOVIĆ Nedim, Hadžialić-Bubalo Inja, Korajlić Mirza, “Presuda Sejdić i Finci protiv Bosne i Hercegovine - Konkretne posljedice – prvi pregled”, *Sveske za javno pravo*, vol. 1, br. 1-2, 2010

LAFONT Cristina, “Should We Take the “Human” Out of Human Rights? Human Dignity in Corporate World”, *Ethics & International Affairs*, 30, No. 2, 2016.

LIJPHART Arend, “Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice”, Routledge: London, 2008

LUBAN David, “Human Rights Pragmatism and Human Dignity”, in Massimo Renzo, Rowan Cruft, and Matthew Liao (ed.), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press, 2015

MACDONALD Margaret, “Natural Rights”, *Proceedings of the Aristotelian So*ciety, New Series, Vol. 47,1946-1947.

MANSFIELD MORAWIEC Anna, "Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina", *Columbia Law Review*, Vol. 103, No. 8, 2003.

McCRUDDEN Christopher, "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law*, Vol. 19, No. 4, 2008.

McCRUDDEN Christopher, O'LEARY Brendan, "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements", *The European Journal of International Law*, Vol. 24, No. 2, 2013.

MCCRUDDEN Christopher, O'LEARY Brendan, "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements", *The European Journal of International Law*, Vol. 24, No. 2, 2013, pp. 477-501

McINERNY Ralph, "Natural Law and Human Rights", *The American Journal of Jurisprudence*, Vol.1, No. 36, 1991.

MILANOVIC Marko, "Sejdić & Finci V. Bosnia and Herzegovina. App. Nos. 27996/06 & 34836/06", *The American Journal of International Law*, Vol. 104, No. 4, 2010.

MORAVCSIK Andrew, "Explaining Human Rights Regimes: Liberal Theory and Western Europe", *European Journal of International Relations*, Vol. 1, No. 2, 1995.

MORRISON Fred L., "The Constitution of Bosnia and Herzegovina", *Constitutional Commentary*, Vol. 13, No. 2, 1996.

MRKONJIĆ Petar, "Implementacija rezultata Općih izbora 2018. godine u odnosu na izaslanike Doma naroda Parlamenta FBiH", available at: http://fcjp.ba/templates/ja_avian_ii_d/images/green/Petar_Mrkonjic1.pdf (last accessed on 13 February 2019)

PAGDEN Anthony, "Human Rights, Natural Rights, and Europe's Imperial Legacy", *Political Theory*, Vol. 31 No. 2, 2003.

PAJIĆ Zoran, “A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia andHerzegovina”, *Human Rights Quarterly*, Vol. 20, No. 1, 1998.

PERRY Valery, “Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?”, *International Peacekeeping*, Vol. 22, No. 5, 2015, doi: 10.1080/13533312.2015.1100082

PERRY Valery, “Frozen, stalled, stuck, or just muddling through: the post-Dayton frozen conflict in Bosnia and Herzegovina”, Asia Europe Journal, Vol. 17, No. 1, 2019

PETER Fabienne, “Human Right to Political Participation”, *Journal of Ethics & Social Philosophy,* Vol. 7, No. 1, 2013.

POBRIĆ Nurko, “Izbor delegata u Dom naroda Parlamenta Federacije Bosne i Hercegovine: Odluka Ustavnog suda Bosne i Hercegovine U-23/14 od 1. decembra 2016”, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Nurko_Pobric15.pdf (last accessed on 12 February, 2019)

PORTER Jean, “From Natural Law to Human Rights: Or, Why Rights Talk Matters”, *Journal of Law and Religion,* Vol. 14, No. 1, 1999-2000.

PUCHALA Donald J., HOPKINS Raymond F., “International Regimes: Lessons from Inductive Analysis”, *International Organization*, Vol. 36, No. 2, International Regimes, 1982.

RAULSTON Elizabeth, “(Un)Justifiable?: A Comparison of Electoral Discrimination Jurisprudence at the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina”, *The American University International Law Review*, Vol. 28, No. 2, 2018.

RISSE Thomas, “Let’s Argue!: Communicative Action in World Politics”, *International Organization*, No. 54, Vol. 1, 2000.

RORTY Richard, “Human Rights, Rationality and Sentimentality”, in: Aakash Sinth Ragore, Alex Cistelecan (editors), *Wronging Human Rights? Philosophical Challenges for Human Rights*, Routledge, 2011, New Delhi, pp. 167-185

SCHACHTER Oscar, “Human Dignity as a Normative Concept”, *The American Journal of International Law*, Vol. 77, 1983, pp. 849-854

SCHNEIDER Cornelia, “The Constitutional Protection of Rights in Dworkin’s and Habermas’ Theories of Democracy”, *UCL Jurisprudence Review*, 2000, pp. 101-121

SCOTT Shirley V., “International Law as an Ideology: Theorizing the Relationship between International Law and International Politics”, *European Journal of International Law*, Vol. 5, 1994, pp. 313-325

SHESTACK Jerome J., “The Philosophic Foundations of Human Rights”, *Human Rights Quarterly*, Vol. 20, No. 2, 1998, pp. 201-234

SIMPSON Gerry, “The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power”, *European Journal of International Law*, Vol. 11, No. 2, 2000, pp. 439-464

SLAUGHTER Anne-Marie, TULUMELLO Andrew S., WOOD Stepan, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship”, *The American Journal of International Law*, Vol. 92, No. 3, 1998, pp. 367-397

SLAUGHTER BURLEY Ann-Marie, “International Law and International relations Theory: A Dual Agenda”, *The American Journal of International Law*, Vol. 87, 1993, pp. 205-239

SNIDAL Duncan, “Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes”, *The American Political Science Review*, Vol. 79, No. 4, 1985, pp. 923-942

STEIN Arthur A., "Coordination and Collaboration: Regimes in an Anarchic World", International Organization, Vol. 36, No. 2, *International Regimes,* 1982, pp. 299-324

STRANGE Susan, "Cave! Hic Dragones: A Critique of Regime Analysis", *International Organization,* Vol. 36, No. 2, International Regimes, 1982, pp. 479-496

TEITEL Ruti, "Human Rights Genealogy", *Fordham Law Review,* No. 66, 1997-1998, pp. 301-317

TRAN Céline, "Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdi´c and Finci v. Bosnia and Herzegovina", *Human Rights Brief,* Vol. 18, No. 2, 2011.

VAN DER SCHYFF Gerhard, "The Concept of Democracy as an Element of the European Convention", *Comparative and International Law Journal of Southern Africa,* No. 38, 2005, pp. 355-372

VAN DETH Jan W., "What is Political Participation", *Oxford Research Encyclopaedia of Politics,* 2016, pp. 1-18, DOI: 10.1093/acrefore/9780190228637.013.68

VEHABOVIĆ Faris, "Impact of the case law of the European Court of Human Rights on post conflict society of Bosnia and Herzegovina" in Iulia Motoc, Ineta Ziemele (ed.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe - Judicial Perspectives,* Cambridge University Press: Cambridge, 2016, pp. 80-109

VEHABOVIĆ Faris, "Zašto neće doći do sistematskih ustavnih promjena?", *Sveske za javno pravo,* Vol. 1, No. 1-2, 2010.

VOETEN Erik, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", *International Organizations,* Vol. 61, 2007.

WALDRON Jeremy J., “Is Dignity the Foundation of Human Rights?”, *New York University Public Law and Legal Theory Working Papers*. 2013, Paper 374

WESTON Burns H., LUKES Robin Ann, HNATT Kelly M., “Regional Human Rights Regimes: A Comparison and Appraisal”, *Vanderbilt Journal of Transnational Law*, Vol. 20, No. 4, 1987.

YOUNG Oran R., “Regime Dynamics: The Rise and Fall of International Regimes”, *International Organization*, Vol. 36, No. 2, International Regimes, 1982.

LEGAL DOCUMENTS:

The Universal Declaration of Human Rights, available at: https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last accessed on 12 September 2019)

The International Covenant on Social and Political Rights, available at: https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (last accessed on 12 September 2019)

European Convention on Human Rights, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed on 12 September 2019)

CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, http://www.refworld.org/docid/453883fc22.html (last accessed: May 3, 2018)

The General Framework for Peace in Bosnia and Herzegovina or Dayton Peace Agreement, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf (last accessed on December 09, 2018)

"April Package" of the Constitutional Changes Proposal, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Aprilski_paket1.pdf (last accessed on December 09, 2018)

"Butmir Package" of the Constitutional Changes Proposal, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (last accessed on December 09, 2018)

"Prud Package" of the Constitutional Changes Proposal, http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (last accessed on December 09, 2018)

Council of Europe's Resolution 1384 – titled Strengthening of democratic institutions in Bosnia and Herzegovina, available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17232&lang=en (last accessed on December 08, 2018)

Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in case U 5/98 on the Issue of the "Constituent Peoples" adopted by the Commission at its 46th Plenary Session (Venice, 9-10 March 2001), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)006-e (last accessed on December 07, 2018)

Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, adopted by the Venice Commission at its 62nd plenary session (Venice, 11-12 March 2005), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)004-e (last accessed on December 08, 2018)

Opinion No. 862/ 2016, from 17 October 2016, Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016), available at:

https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)024-e (last accessed on 19 January, 2019)

Direction on Change and Amendments of the Direction on Implementation of Indirect Election for the Government Institutions under the Election Law of Bosnia and Herzegovina, available at: https://www.izbori.ba/Documents/2018/Posredni_izbori/12/Uputstvo_18_12_2018-10_00-bos.pdf (last accessed on 19 January, 2019)

Amicus Curiae Opinion of the High Representative/Brief submitted by the High Representative concerning the request of the applicant in Case No. U 4/18, available at: http://www.ohr.int/?p=99294&print=pdf (last accessed on 13 February 2019).

Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at: https://rm.coe.int/16800cce48 (last accessed on 12 September 2019)

Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights Right to free elections, updated on 30 April 2019, available at: https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf (last accessed on 12 September 2019)

Right to free elections – Factsheet, May 2013, available at: https://www.echr.coe.int/Documents/FS_Free_elections_ENG.pdf (last accessed on 12 September 2019)

Updated action plan for the execution of the Sejdić and Finci group of cases

Collection of Interim Resolutions 2009-2017 (by country)

Resolution 1725 (2010) Urgent need for constitutional reform in Bosnia and Herzegovina (Parliamentary Assembly of the Council of Europe)

Resolution 1855 (2012) The functioning of democratic institutions in Bosnia and Herzegovina (Parliamentary Assembly of the Council of Europe)

CONSTITUTIONS:

Constitution of Albania (1998, rev. 2016), available at: https://www.constituteproject.org/constitution/Albania_2016.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Andorra (1993), available at: https://www.constituteproject.org/constitution/Andorra_1993.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Angola (2010), available at: https://www.constituteproject.org/constitution/Angola_2010.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Cambodia (1993, rev. 2008), available at: https://www.constituteproject.org/constitution/Cambodia_2008.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Canada (1867, rev. 2011), available at: https://www.constituteproject.org/constitution/Canada_2011.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Congo (2005, rev. 2011), available at: https://www.constituteproject.org/constitution/Democratic_Republic_of_the_Congo_2011.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Egypt (2014), available at: https://www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Ethiopia (1994), available at: https://www.constituteproject.org/constitution/Ethiopia_1994.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Fiji (2013), available at: https://www.constituteproject.org/constitution/Fiji_2013.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Gambia (1996, rev. 2004), available at: https://www.constituteproject.org/constitution/Gambia_2004.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Germany (1949, rev. 2014), available at: https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Honduras (1982, rev. 2013), available at: https://www.constituteproject.org/constitution/Honduras_2013.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Hungary (2011, rev. 2016), available at: https://www.constituteproject.org/constitution/Hungary_2016.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Iraq (2005), available at: https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Kenya (2010), available at: https://www.constituteproject.org/constitution/Kenya_2010.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Kosovo (2008, rev. 2016), available at: https://www.constituteproject.org/constitution/Kosovo_2016.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Lesotho (1993, rev. 2011), available at: https://www.constituteproject.org/constitution/Lesotho_2011.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Malawi (1994, rev. 1999), available at: https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Marshall Islands (1979, rev. 1995), available at: https://www.constituteproject.org/constitution/Marshall_Islands_1995.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Mongolia (1992, rev. 2001), available at: https://www.constituteproject.org/constitution/Mongolia_2001.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Netherlands (1815, rev. 2008), available at: https://www.constituteproject.org/constitution/Netherlands_2008.pdf?lang=en (last accessed on 12 September 2019)

Constitution of New Zealand (1852, rev. 2014), available at: https://www.constituteproject.org/constitution/New_Zealand_2014.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Palestine (2003, rev. 2005), available at: https://www.constituteproject.org/constitution/Palestine_2005.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Rwanda (2003, rev. 2015), available at: https://www.constituteproject.org/constitution/Rwanda_2015.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Somalia (2012), available at: https://www.constituteproject.org/constitution/Somalia_2012.pdf?lang=en (last accessed on 12 September 2019)

Constitution of South Africa (1996, rev. 2012), available at: https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en (last accessed on 12 September 2019)

Constitution of South Sudan (2011, rev. 2013), available at: https://www.constituteproject.org/constitution/South_Sudan_2013.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Sudan (2005), available at: (last accessed on 12 September 2019)

Constitution of Republic of Turkey (1982, rev. 2017), available at: https://www.constituteproject.org/constitution/Turkey_2017.pdf?lang=en (last accessed on 12 September 2019)

Constitution of Zimbabwe (2013, rev. 2017), available at: https://www.constituteproject.org/constitution/Zimbabwe_2017.pdf?lang=en (last accessed on 12 September 2019)

The Constitution of the Republic of Bosnia and Herzegovina, Official Gazette of the Republic of Bosnia and Herzegovina, No. 05/93, available at: http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Ustav%20RBiH.pdf (last accessed on December 09, 2018)

The Constitutional Law on changes and amendments of the Constitution of the Republic of Bosnia and Herzegovina, Official Gazette of the Republic of Bosnia and Herzegovina, No. 49/95

The Constitution of Bosnia and Herzegovina or Dayton Constitution, available at: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (last accessed on December 09, 2018)

The Amendment I to the Constitution of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 25/09, available at: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20Amendment%20I%20to%20BH%20Constitution%2025-09.pdf (last accessed on December 09, 2018)

The Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH", nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 & 88/08)

LAWS:

Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/01, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 07/14, 31/16)

Law on Ministries and Other Administrative Bodies of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 103/09, 87/12, 6/13 I 19/16)

Law on Procedure for Signing and Implementing of International Agreements (Official Gazette of Bosnia and Herzegovina, No. 29/00, 32/13)

JUDGMENTS:

The Constitutional Court of Bosnia and Herzegovina's Constitutional Peoples Decision No. U-5/98 (decision is published in four parts), available at: http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12200.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12207.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12209.pdf, http://www.ustavnisud.ba/dokumenti/_en/u-5-98-12216.pdf (last accessed on November 28, 2018).

Decision of the Constitutional Court of Bosnia and Herzegovina, no.: U-5/04, available at: http://www.ustavnisud.ba/dokumenti/_en/u-5-04-71799.pdf (last accessed on January 12, 2019)

Decision of the Constitutional Court of Bosnia and Herzegovina, no.: U-23/14, available at: http://www.ustavnisud.ba/dokumenti/_en/U-23-14-1058444.pdf (last accessed on January 12, 2019)

Decision of the Constitutional Court of Bosnia and Herzegovina on non-implementation of the Decision No.: U-23/14, from 6 July 2017, available at: http://www.ustavnisud.ba/dokumenti/_bs/U-23-14-1087466.pdf (last accessed on 10 February 2019)

Case of Mathieu-Mohin and Clerfayt v. Belgium, Application no. 9267/81, 1987

Case of Aziz v. Cyprus, Application No. 6994/01, 2004

Case of Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06 (GC), 22 December 2009

Case of Zornić v. Bosnia and Herzegovina, Application no. 3681/06, 15 July 2014

Case of Šlaku v. Bosnia and Herzegovina, Application no. 56666/12, 26 May 2016

Case of Pilav v. Bosnia and Herzegovina, Application no. 41939/07, 9 June 2016

Case of Mathieu-Mohin and Clerfayt v. Belgium, Application no. 9267/81, 2 March 1987

Case of Podkolzina v. Latvia, Application no. 46726/99, 9 April 2002

Case of Ždanoka v. Latvia, Application no. 58278/00, 16 March 2006

Case of Boškoski v. the Former Yugoslav Republic of Macedonia, Application no. 11676/04, 2 September 2004

WEBSITES:

www.ohr.int

https://hudoc.echr.coe.int

https://hudoc.exec.coe.int

www.esiweb.org

www.peacemaker.un.org

www.assembly.coe.int

www.venice.coe.int

www.hrc.ba

www.ombudsmen.gov.ba

www.dw.com

www.guardian.com

www.freedomhouse.org