ESI
European Stability Initiative
BERLIN - BRUSSELS - ISTANBUL

Lost in the Bosnian labyrinth

Why the *Sejdic-Finci* case should not block an EU application

ESI discussion paper
7 October 2013

Table of contents

Executive summary 2
Introduction 3
Do as the Belgians do? 4
Dervo Sejdic in Cyprus 6
The court: Bosnia vs the EU 10
The issue of Protocol 12 11
A way forward 12
Annex: A long overdue step 14

Executive summary

In December 2009 the European Court of Human Rights found – in its judgement in the case *Sejdic and Finci vs. Bosnia and Herzegovina* – that the constitution and election law of Bosnia and Herzegovina violate the European Convention on Human Rights and its protocols. Bosnia's laws require that political candidates identify themselves as "Bosniak", "Croat" or "Serb" in order to be able to run for president or become a member of the upper house of the state parliament. Behind the international interest in this case lies a strong sense of moral outrage. How can a country in today's Europe prevent a Roma or a Jew from running for head of state? Is this not a racist constitution?

Four years have passed since the ruling. Bosnia's constitution and election laws have not changed. In December 2010 the Council of the EU told Bosnian leaders that the implementation of the ruling was a condition for a "credible application" for EU membership. Since then, the EU has warned that if the issue is not resolved, it will block the country's path to the EU.

On 1 October 2013 Bosnia's most influential politicians travelled to Brussels and agreed on "principles for finding an agreement". They set a new deadline for reaching it – 10 October 2013. However, it is possible that once again no agreement will be reached. The looming question for the EU then becomes: what next? In this paper we argue that the current EU policy of blocking Bosnia and Herzegovina over this issue is unfair and counterproductive. There are three reasons why:

– *This is not an issue of institutional "racism".*

  Apartheid South Africa had a racist electoral system. Bosnia does not. Neither does Belgium or South Tyrol, although in both countries legislation requires citizens to declare a community affiliation for certain purposes, similar to Bosnia. However, only in Bosnia is the ethnicity of any individual not defined in official documents. By leaving it up to any individual to determine how to self-identify – and allowing any individual to change this self-identification in the future – the Bosnian system is *more liberal* than either Belgium's or South Tyrol's. Unlike in Cyprus, it is also not tied to any objective criteria such as religion or the ethnicity of parents. In fact, in 2004 the EU endorsed community-based voting and praised the UN Annan plan for Cyprus based on the very principles that Bosnia's constitution embraces.

– *Bosnia is not violating fundamental human rights.*

  The issue at stake in the election of the Bosnian presidency – the most complicated issue to resolve – is *not* a violation of any rights enumerated by the European Convention on Human Rights itself. It is a violation of Protocol 12 of the Convention, which extends the applicability of non-discrimination from "the rights and freedoms set forth in the Convention" to "any right set forth by law". This protocol has so far been ratified by only 8 out of 28 EU member states.

– *This is not an issue of Bosnia systematically violating its international obligations.*

  Bosnia's record implementing European Court of Human Rights' decisions is better than that of most current EU members.

For all these reasons, non-implementation of the Sejdic-Finci decision cannot justify blocking Bosnia and Herzegovina's application for EU membership. The very reforms that the EU expects from Bosnia have not been asked of other EU applicants, much less of its own member states.

The summit on 10 October in Brussels should be the last of its kind. The best case outcome would be that Bosnia's leaders agree to a solution. However, if they do not, the EU should rethink its current policy and demand that Bosnia and Herzegovina implements this decision as part of wider constitutional reforms that it will undertake during the accession process itself. It should not be a precondition. Making it one was a mistake.

Introduction

In the past four years the Bosnian Dervo Sejdic has become famous among European leaders. Born in 1956, a graduate of a police high school in socialist Yugoslavia, a member of the special police in Sarajevo during the siege of the city, and a Roma rights activist in later years, Sejdic has become a symbol of the fight against discrimination in Bosnia and Herzegovina (here: Bosnia).[1]

In July 2006 Dervo Sejdic brought a case to the European Court of Human Rights (ECtHR[2]). He argued that he was ineligible, because of his Roma origins, to stand as a candidate for the Bosnian state presidency and the upper house of the Bosnian state parliament. According to the country's constitution, these posts were reserved for Bosnia's "constituent peoples", i.e. Bosniaks, Croats and Serbs. A second plaintiff, Jakob Finci, a Bosnian Jew from Sarajevo, made the same complaint as Sejdic a few weeks later.[3]

In December 2009 the court found that the precondition – a declared affiliation as Serb, Croat or Bosniak – "constitutes a violation of Article 1 of Protocol No. 12" of the European Convention on Human Rights.[4] The decision in favour of Sejdic and Finci was by 16 votes to 1.[5] The ruling in *Sejdic and Finci vs. Bosnia and Herzegovina* has since become *the* dominant issue in Bosnian politics.

In meeting after meeting, Bosnian politicians have discussed how to implement it. Angela Merkel has invited Bosnia's politicians to Berlin to try to find a solution. Catherine Ashton, Hillary Clinton, Jose Manuel Barosso, foreign ministers, EU commissioners, director generals, special envoys and ambassadors have all spent countless hours trying to forge a compromise – palatable to Bosnia's parliamentarians and others – that would allow Dervo Sejdic to run for president.[6] So far, all of these meetings have been to no avail.

The current Bosnian constitution sets out the presidency's composition:

> "The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska."[7]

---

[1] Slobodna Bosna, "Trijumf 'Malog Roma' protiv Daytona", 19 July 2012.

[2] The *European Court of Human Rights* is abbreviated as ECtHR. This is to distinguish it from the *European Convention on Human Rights* or ECHR.

[3] Jakob Finci is a former president of the Inter-religious Council of Bosnia and Herzegovina and was the ambassador of his country to Switzerland.

[4] It also found that the applicants' "continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification" and therefore breached the Convention and Protocol No. 1.

[5] The Court ruled 16 to 1 in regards to the presidency and 14 to 3 votes in regards to discriminatory procedure for election of delegates to the upper house of the state parliament, the House of Peoples. "Case of Sejdic and Finci v. Bosnia and Herzegovina", applications 27996/06 and 34836/06.

[6] Frankfurter Rundschau, "Merkel im bosnischen Schamassel", 1 February 2011; Delegation of the EU to Bosnia and Herzegovina, "Catherine Ashton and Stefan Fule sent a letter to Bosnia and Herzegovina CoM Chair Bevanda", 17 February 2012; Delegation of the EU to Bosnia and Herzegovina, "Press statement following the meeting of Bosnia and Herzegovina party leaders on 22 March 2013 in Brussels", 22 March 2013; US Embassy to Bosnia and Herzegovina, "Ambassador Moon Delivers Remarks on Bosnia and Herzegovina's Euro-Atlantic Integration", 23 October 2012; U.S. State Department, "Clinton, EU Representative Ashton in Sarajevo", 30 October 2012; Jose Manuel Barroso, "Bosnia and Herzegovina ce u Evropu kada uzme sudbinu u svoje ruke", 8 April 2011.

[7] Article V, "Constitution of Bosnia and Herzegovina", 1995.

As a result there are three separate races. To take part in the race for the Serbian seat, a candidate must be (1) a resident in Republika Srpska and (2) declare his or her affiliation as "Serb" when registering for elections. In the second entity of Bosnia, the Federation, candidates must register as either "Croat" or "Bosniak" to be able to compete.[8] There are no ethnically divided voting rolls. Voters are free to change their mind about who they want to represent them. As a result of this, the number of voters in the Federation for the Croat member of the presidency has oscillated widely. It went from 293,000 to 556,000 in four years (2006 to 2010).[9]

It is important to note that any candidate can decide to register as a Serb, Croat or Bosniak if she or he so wishes. This means Dervo Sejdic could pronounce himself Croat or Bosniak and run for the Croat or Bosniak seat in the 2014 presidential elections. Any voter in the Federation could also vote for him.

Dervo Sejdic argues that it violates his human rights to be forced to define himself as a Bosniak or Croat in order to be a candidate. The ECtHR agrees with him. The question for the EU is how serious a violation of human rights this is in light of Bosnia's EU aspirations. In fact, the very reforms that the EU expects from Bosnia have not been asked of other EU applicants, much less of its member states.

Do as the Belgians do?

Behind the international interest in Sejdic's case lies a strong sense of moral outrage. How can a country in today's Europe prevent a Roma, Jew or a member of another minority from running for parliament or head of state? As one international think tank put it, "even sympathetic observers wonder why the country persists in its 'racist' constitution."[10]

The current situation in Bosnia is, however, less unusual than it is made to appear. To understand this one need look no further than to the European capital, Brussels, and to the election modalities for its regional parliament.

In the Brussels-Capital region (one of three regions in Belgium), 72 of the parliament's 89 seats are allocated *a priori* to the French-language community. The 17 remaining ones are reserved for the less numerous Dutch-language community.[11]

When a candidate runs for the Brussels parliament, he or she must register as belonging to one of the two language groups. Any candidate who is competing for the seats assigned to one language group can never run for a seat for the other language group.[12] At election time, "Francophones vote Flemish and Flemish people vote Francophone."[13] The francophone

---

[8] Central Election Commission Bosnia and Herzegovina, "2001 Election Law of Bosnia and Herzegovina", 2001.

[9] Central Election Commission of Bosnia and Herzegovina, "General Election Results 2006"; Central Election Commission of Bosnia and Herzegovina, "General Election Results 2010".

[10] International Crisis Group, "Bosnia's Gordian Knot: Constitutional Reforms", 12 July 2012.

[11] Benno Barnard and others, "How can one *not* be interested in Belgian History – War, Language and Consensus in Belgium since 1830", 2006, p. 94. The authors note that in Brussels regional elections it is "illegal for bilingual parties to participate." See also Kris Deschouwer, "The Politics of Belgium. Governing a Divided Society", Palgrave Macmillan, 2009, p. 62.

[12] *Ibid.*

[13] Benno Barnard and others, "How can one *not* be interested in Belgian History – War, Language and Consensus in Belgium since 1830", 2006, p. 94.

group is always awarded the post of prime minister, as well as two ministerial and two state secretary portfolios. The Dutch-speakers get two ministers and one state secretary.[14]

If Dervo Sejdic were to run in such an election, he would have to opt for one of the two language groups and to make sure his identity card confirms that affiliation. And if he were to choose Dutch, he could not become prime minister of the Brussels region, as this position is traditionally reserved for a French-speaker.

The Brussels system operates in a very diverse population. Suffice it to cite a few names of the regional parliament members: Fuad, Aziz, Mohammed, Sfia, Mohammadi, Ahmed, Nadia, Hamza, Jamal, Zakia, Emir, Ahmed, Mahinur, Emin and Fatoumata.[15] Every one of them has chosen to be a member of a particular language community for the rest of his or her life. Each of them might have a complex approach to their personal identity. They might feel Belgian, European, or Moroccan-Belgian. They might be bilingual, trilingual, secular, Muslim. Neither French nor Dutch might be their mother tongue. A book published in 2005 noted that "about 50 per cent of the people in Brussels speak only French at home, 10 percent speak Dutch, 10 percent speak Dutch and another language and about 30 percent speak other languages, unspecified."[16] Yet on deciding to enter politics they have signed up under one of the two categories imposed by the electoral system.

Once in place, systems like that of the Brussels region are usually extremely hard to change. On one occasion, in April 2010, an attempt to question voting rights in the constituency of Brussels-Halle-Vilvoorde (BHV) snowballed into a dispute that led to the resignation of Belgium's Prime Minister. BHV was until recently one of 11 electoral districts in Belgium. It was the *only* electoral district that straddled two separate regions, Flanders and Brussels-Capital. (The country's third region is French-speaking Wallonia.) The BHV district was created in 1966 in order to accommodate a relatively high number of French speakers in the northern outskirts of Brussels, which are part of Flanders.

Each electoral district in Belgium elects a number of representatives to the Federal Parliament as well the European Parliament. Since BHV was a mixed electoral district, French-speaking parties could campaign and get votes there. French voters living in Flanders could thus elect French-speaking parties to the Belgian state parliament. Some Dutch speakers found this objectionable, as Flemish parties cannot campaign anywhere in French-speaking Wallonia. In 2003, the Belgian constitutional court ruled this arrangement to be discrimiminatory.

An article published in April 2010 described the sense of frustration of local officials of both communities trying to find a solution:

> "The two mayors apparently agree on one thing: there seems to be no viable solution. 'I think that in ten years Belgium won't exist anymore. And I think that'd be a shame,' says Thiéry. De Waele, for his part, would not shed a tear: 'This monkeyland – if you'll pardon the expression – hasn't been working for years. You can't reconcile fire and water, you've got to accept that'."[17]

---

14 *Ibid.*

15 Le Parlement de la Region de Bruxelles-Capitale, "Les deputes", accessed 1 October 2013.

16 Benno Barnard and others, "How can one *not* be interested in Belgian History – War, Language and Consensus in Belgium since 1830", 2006, p. 93.

17 Press Europe, "Flemish and Francophones, into the void", 22 April 2010.

In 2012 the Belgian political class finally managed to solve this conundrum by splitting the electoral district.[18] The process took nine years, a constitutional court ruling, the fall of one government, and 589 days of negotiations to form its successor.[19] Even in the capital of Europe, reconciling ethnic communities to new power sharing arrangements proved no easy task.

Belgium is not the only place in Europe outside of Bosnia facing such challenges. In South Tyrol (in northern Italy), another wealthy multi-ethnic region inside the EU, the so-called "Proporz Decree" from 1976 stipulates that positions in the public administration, including the judiciary, are allocated proportionally to Germans, Italians and Ladins, according to census figures.[20]

At each census, every citizen has to declare his or her affiliation to one of the three language groups. Those who do not belong to one of the three groups, "others" in the Bosnian sense, choose the group to which they want to belong. A copy of this declaration is held at court, to be consulted if an individual wants to apply for an administrative post or otherwise enjoy benefits that accrue to a particular language community.[21]

The Brussels region and South Tyrol are two of the richest regions in Europe, without any recent history of conflict.[22] If even they require complicated solutions to accommodate diverse linguistic, ethnic or national communities, and find it hard to amend them, one should not be surprised that one finds similar challenges in post-conflict and poor Bosnia.

Of course, as founding states of the EU, neither Italy nor Belgium ever had to apply for membership. This makes a third case study all the more relevant for Bosnia: Cyprus.

Dervo Sejdic in Cyprus

Had Dervo Sejdic, a Muslim Roma, been born in Cyprus, he would have been deprived of the right to run for office and the right to vote for most of his adult life.[23] He would have been required to register as a member of the Turkish community. Yet, as of 2004 he would have become a citizen of the EU.

Cyprus and Bosnia have much in common. Both were part of the Ottoman Empire until they passed under the control of other European empires – the Habsburgs and the British – at the Congress of Berlin in 1878. In both countries, the Ottoman millet system had encouraged self-governance by groups organised along religious lines. In the 20th century, both countries experienced communal tensions leading to conflict and ethnic partition. In both places, the constitutions drafted by foreigners were unpopular from the outset but are still in force today.

---

18 La scission de BHV est votée, 13 July 2012.

19 The law approving this was adopted by the Belgian Senate on 11 October 2011

20 Rolf Steininger, "South Tyrol. A Minority Conflict of the Twentieth Century", Transaction Publishers, 2009 (2003), pp. 137f.

21 The key decree is Decreto del Presidente della Republica n. 752, "Norme di attuazione dello statuto speciale della Regione Trentino-Alto Adige in materia di proporzionale negli uffici statali siti nella provincia di Bolzano e di conoscenza delle due lingue nel pubblico impiego", 26 July 1976.

22 The 2013 World Happiness Report put Belgium in 21st place, ahead of both France (25th) and Germany (26th).

23 Nowadays there are around five hundred Muslim Roma citizens in the part of Cyprus which is controlled by the Cypriot government. "State Report of Republic of Cyprus to the Advisory Committee on the Framework Convention for the Protection of National Minorities", 2009, p. 21.

Cyprus' was adopted in 1960.[24] Bosnia's was adopted in 1995 as an annex to the Dayton Peace Agreement.[25]

In 1956, the year of Sejdic's birth, Cyprus was a British colony. Four years later, and following an anti-colonial uprising by Cypriot Greek nationalists, the island became independent. Greek and Turkish Cypriots constituted most of the population, the Greeks some 77 per cent, the Turks some 18 per cent.[26] There were also "others": Armenians, Latins, Maronites, and Roma. The country's constitution, bequeathed to it by the British government, featured a complex power-sharing arrangement between the Greek and Turkish communities.

The first free elections took place in August 1960. Electoral lists were drawn up along ethnic lines. The constitution stated:

> "The State of Cyprus is an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President being Turk elected by the Greek and the Turkish Communities of Cyprus respectively as hereinafter in this Constitution provided."[27]

The constitution also defined who belonged to these two communities:

> "The *Greek Community* comprises all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share the Greek cultural traditions or who are members of the Greek-Orthodox Church;
>
> The *Turkish Community* comprises all citizens of the Republic who are of Turkish origin and whose mother tongue is Turkish or who share the Turkish cultural traditions or who are Moslems."[28]

Those citizens of Cyprus who were neither Greek nor Turkish – including the three recognized religious minorities, Armenians, Latins and Maronites – had to make a choice:

> "Citizens of the Republic who do not come within the provisions of paragraph (1) or (2) of this Article shall, within three months of the date of the coming into operation of this Constitution, opt to belong to either the Greek or the Turkish Community as individuals, but, if they belong to a religious group, shall so opt as a religious group and upon such option they shall be deemed to be members of such Community."[29]

A Muslim Roma, therefore, would have had no choice but to be considered a member of the Turkish community.[30]

The 1960 constitution fell apart in late 1963 when the Greek majority pushed for changes and abolished, among others, the Turkish vice president's veto power. A week later fighting broke out. Turkish Cypriot leaders declared the constitution null.[31] Tensions grew and the conflict

---

24 See the Constitution of Cyprus, 1960.

25 See OHR, "The General Framework Agreement for Peace in Bosnia and Herzegovina", 14 December 1995.

26 N. Trimikliniotis, C. Demetriou, "The Cypriot Roma and the Failure of Education: Anti-Discrimination and Multiculturalism as a Post-accession Challenge", January 2009.

27 Article 1, "The Constitution of Cyprus", 1960.

28 Article 2, *Ibid.*

29 *Ibid.*

30 Council of Europe, "Second Periodic Report by Cyprus on the Application of the Framework Convention for the Protection of National Minorities", 2006, p. 10.

31 Oliver Richmond, "Mediating in Cyprus – The Cypriot Communities and the United Nations", p. 79.

spread. International mediation efforts failed. In 1974, following a coup by radical Greek Cypriots against the country's first president, Archbishop Makarios, the Turkish military invaded and occupied the north of the island.[32] Cyprus has remained physically separated ever since.

As a result of the crisis, the parts of the Cypriot constitution referring to a Turkish community were suspended. This meant that all of its members, including Muslim Roma, lost both the right to run for public office and the right to vote.[33] In 2001, as Cyprus made headway in its accession negotiations with the EU, the Council of Europe's Advisory Committee for the Protection of National Minorities noted:

> "The impossibility for Turkish Cypriots to cast a vote in parliamentary and presidential elections, as well as at present to conclude civil marriages with Greek Cypriots, constitute discriminatory situations."[34]

In January of the same year, Ibrahim Aziz, a Turkish Cypriot living in the Greek part of Nicosia, asked to be registered to vote in the parliamentary elections of May 2001. His request was refused on the grounds that, "under Article 63 of the Constitution, members of the Turkish-Cypriot community could not be registered in the Greek-Cypriot electoral roll."[35] As Cyprus had been a member of the Council of Europe since the early 1960s, Aziz was able to turn to the ECtHR. While the court deliberated, Cyprus concluded its talks with the EU.

As the accession process neared the finish line, UN negotiators made a last ditch effort to find a solution to the island's division. Its outcome, the so-called Annan plan, included a proposed new constitution for the United Republic of Cyprus.[36] The Annan plan was fully endorsed by the UN, the EU, the US and most European member states. In a strongly worded resolution from April 2003, the European Parliament gave it a thumbs-up:

> "… this final document constitutes a historic compromise which would end one of the longest-running conflicts in Europe and could serve as a shining example for handling equally difficult international issues."[37]

This "shining example", however, was based on the same principles of community voting as those embedded in the 1960 constitution. The state legislature was to have two chambers:

> "The Senate shall be composed of an equal number of Greek Cypriot and Turkish Cypriot senators. They shall be elected on a proportional basis by the *citizens of Cyprus, voting separately as Greek Cypriots and Turkish Cypriots*, in accordance with the law."[38]

The Annan Plan was, however, rejected in a referendum. In May 2004 Cyprus became a member of the EU with the 1960 constitution still in force.

In June 2004, the ECtHR published its judgment in the case of *Aziz v. Cyprus*:

---

28 N. Trimikliniotis, C. Demetriou, "The Cypriot Roma and the Failure of Education: Anti-Discrimination and Multiculturalism as a Post-accession Challenge", January 2009.
33 *Ibid.*
34 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, "Opinion on Cyprus", 6 April 2001
35 ECtHR, "The Case of Aziz v. Cyprus", 22 September 2004.
36 The Annan Plan, "The Comperhensive Settlement of the Cyprus Problem", 31 March 2004.
37 European Parliament, "Resolution on Cyprus", 21 April 2004. V0//EN.
38 The Annan Plan, "The Comperhensive Settlement of the Cyprus Problem", 31 March 2004.

> "The applicant, as a member of the Turkish–Cypriot community living in the Government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the house of representatives of the country of which he was a national and where he had always lived."[39]

Following this decision, Turkish Cypriots were given the right to vote and stand for election to the European Parliament, irrespective of their place of residence in Cyprus. A special law, "The Exercise of the Right to Vote and be Elected by Members of the Turkish Community with Ordinary Residence in the Free Areas of the Republic", was enacted in 2006, giving Turkish Cypriots in the government-controlled area the right to vote and run for any national office.[40]

Despite this, the idea of community-based voting remains a core principle within the Cypriot constitution. In 2009, a review of the Council of Europe's Framework Convention for the Protection of National Minorities made the following recommendation to the government of Cyprus:

> "Look for possibilities to review the obligation to affiliate to either the Greek Cypriot Community or to the Turkish Cypriot Community imposed on the Armenians, the Latins and the Maronites, as well as the legal obligation to vote in elections for their representatives in parliament."[41]

The government in Nicosia responded by defending the principle of ethnic-based electoral roles. It warned that "under the current delicate political situation related to the Cyprus issue, any amendment of this kind would be politically incorrect, if not practically impossible".[42] It continued:

> "The Constitutional obligation of religious groups to opt to belong to one of the two Communities, either the Greek or Turkish Community, should not be viewed in isolation of other Constitutional provisions which go to the root of the constitutional structure of the state …"[43]

It stressed that the bi-communal structure "cannot, in any way, be amended, whether by way of variation, addition, or repeal".[44]

This raises a major question. How could the EU endorse community-based voting in Cyprus in 2004 and criticize it so vehemently less than a decade later in Bosnia? Is it credible to strong-arm Bosnia into overhauling its internationally drafted constitution when the EU has only recently praised a UN peace plan for Cyprus based on the very principles that Bosnia's charter embraces?

---

39 ECtHR, "The Case of Aziz v. Cyprus - Summary", 22 September 2004,

40 Council of Europe, "Third Report submitted by Cyprus pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities", 30 April 2009.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

The court: Bosnia vs the EU

When Bosnia joined the Council of Europe in 2002, it took on a large series of commitments.[45] The most important of these was respecting the judgements of the ECtHR. Now that the court has spoken, Bosnian leaders are obliged to implement its rulings.

However, should a single case of non-compliance constitute a barrier to EU accession? Bosnia is not the only member state of the Council of Europe that has not complied with every one of the court's judgements right away. In 2012 a report on the execution of ECtHR rulings notes that Bulgaria was put under "enhanced supervision" by the Committee of Ministers of the Council of Europe because of a court case where execution had been pending since July 2003.[46] In Italy, implementation of some ECtHR judgements has been pending since 1996.[47]

Numerous EU member states also have problems complying with ECtHR rulings. The UK has refused to comply with an October 2005 ECtHR ruling regarding the rights of prisoners to vote.[48] In fact, most EU members have a significantly worse record than Bosnia when it comes to implementation of ECtHR court judgments. In 2011, of the ten countries that had piled up the most ECtHR rulings pending, seven were EU members. Italy, a founding member of the EU, has long led the list. In total, just six EU member states have *fewer* pending cases than Bosnia.[49]

ECtHR cases pending execution (2011)[50]

Rank	Member State	Number of cases
1.	Italy (EU)	2522
2.	Turkey	1780
3.	Russian Federation	1087
4.	Poland (EU)	924
5.	Ukraine	819
6.	Romania (EU)	636
7.	Greece (EU)	442
8.	Bulgaria (EU)	344
9.	Hungary (EU)	260
10.	Slovenia (EU)	228
…		
32.	*Bosnia and Herzegovina*	17

This does *not* mean that Bosnia and Herzegovina does not have an obligation to implement the Sejdic-Finci ruling. It does, and the sooner it implements the decision the better.

However, neither the EU nor the Council of Europe is justified to single out this one case of non-compliance as an exceptional violation of international obligations without a serious

45 *Ibid.*

46 See the case Kitov Group dimitrov v. Bulgaria, from July 2003, in the "Report on Execution of Court Rulings", p. 49, April 2013.

47 See Ceteroni Group v. Italy, from November 1996, in the "Report on Execution of Court Rulings", p. 52, April 2013.

48 ESI, "Gripping debate among UK Tories on human rights and the ECHR – excerpts", 1 March 2013. ECHR Blog, "UK Prisoner Voting Rights Update", 28 March 2013.

49 Council of Europe, "Report on Execution of Court Rulings", December 2011.

50 *Ibid.*

explanation. Which raises a further question: can it be argued that Bosnia's violation of the European Convention of Human Rights and Fundamental Freedoms in this case is particularly grave?

The issue of Protocol 12

In 2004 the Parliamentary Assembly asked the Venice Commission "to determine how far these practices [the Bosnian constitution and election law] comply with Council of Europe basic principles."[51] In its report from March 2005 the Venice Commission responded that:

> "The ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature."[52]

Table: Protocol 12 in Bosnia and EU Member States[53]

Country	Signed	Ratified	In force
Cyprus	2000	2002	2005
Finland	2000	2004	2005
Netherlands	2000	2004	2005
Bosnia and Herzegovina	***2002***	***2003***	***2005***
Croatia	2002	2003	2005
Luxembourg	2000	2006	2006
Romania	2000	2006	2006
Spain	2005	2008	2008
Slovenia	2001	2010	2010
Austria	2000	–	–
Belgium	2000	–	–
Czech Republic	2000	–	–
Estonia	2000	–	–
Germany	2000	–	–
Greece	2000	–	–
Hungary	2000	–	–
Ireland	2000	–	–
Italy	2000	–	–
Latvia	2000	–	–
Portugal	2000	–	–
Slovakia	2000	–	–
Bulgaria	–	–	–
Denmark	–	–	–
France	–	–	–
Lithuania	–	–	–
Malta	–	–	–
Poland	–	–	–
Sweden	–	–	–
United Kingdom	–	–	–

[51] Parliamentary Assembly of the Council of Europe, "Resolution on strengthening of democratic institutions in Bosnia and Herzegovina", 23 June 2004.

[52] Venice Commission (European Commission for Democracy through Law), "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers oft he High Representative", 11 March 2005. On this basis the ECtHR later found that Sejdic and Finci also should have the right to be nominated for the upper house of the Bosnian state legislator.

[53] Council of Europe, "Status of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms", Status as of 28 September 2013.

In other words, the provisions concerning the election of members of the presidency do not constitute a violation of one of the core rights of the Convention of Human Rights. The right to be elected president does not derive from the convention directly, but from protocol 12, which only entered into force in Bosnia in April 2005, and which served as the basis for the ECtHR judgement in Sejdic and Finci.[54] Protocol 12 extends the applicability of non-discrimination from "the rights and freedoms set forth in the Convention" to "*any right* set forth by law".[55]

It is worth noting that only 8 out of the 28 EU member states have so far ratified protocol 12. The EU's principled position on this judgement and Bosnian compliance relies on a principle that most EU members have still not accepted.

A way forward

As we have seen, far from being an outlier, Bosnia's voting mechanism is similar to that in a number of other European democracies. Bosnia's problems are familiar and the very reforms that the EU expects from it have not been asked of other EU applicants, much less its member states. Of course, some may argue that this issue should be easy to solve. Yet so was the dispute over the multilingual area of Brussels-Halle-Vilvoorde, or the Cyprus issue, at least in theory.

In Bosnia the ethnicity of any individual – voter and politician – is not defined in any official document or tied to any objective criteria such as religion, name, or the ethnicity of parents. It is totally subjective. Voters can vote for whomever they want. A candidate's self-afilliation cannot be challenged by anyone. Bosnian ethnic quotas – including those with constitutional backing – are soft law, since ethnicity itself is not defined.

Such flexibility does not exist in Cyprus. There, the constitution makes it as hard as possible to change communal affiliation:

> "A Greek or a Turkish citizen of the Republic … may cease to belong to the Community of which he is a member and belong to the other Community upon
>
> (a) A written and signed declaration by such citizen to the effect that he desires such change, submitted to the appropriate officer of the Republic and to the Presidents of the Greek and the Turkish Communal Chambers;
>
> (b) The approval of the Communal Chamber of such other Community."[56]

The Cypriot constitution adds that "a married woman shall belong to the Community to which her husband belongs. A male or female child under the age of twenty-one who is not married shall belong to the Community to which his or her father belongs …"[57] It is neither the Cypriot constitution of today, nor even the Annan plan of 2004, that should inspire Bosnia.

---

[54] Note that the Court relied on Protocol 12 regarding election of the presidency; while in case of election to the House of Peoples it relied on article 14 in conjuction with article 3 of protocol 1.

[55] ECHR, "Protocol No. 12 to the ECHR", 4 November 2000.

[56] Article 2, "The Constitution of Cyprus". 1960.

[57] *Ibid.*

Preserving the ability of Bosnian citizens to define and change their identification also creates the necessary space to redefine rigid national identities over time. One possible way forward lies in changing the meaning of what "makes" a Bosniak, a Croat, or a Serb. This would also make it easier over time to find a compromise how to implement the Sejdic-Finci court decision.

There will likely always be majorities who identify themselves as Croats, Serbs and Bosniaks in Bosnia. But modernity is also about identities that are fluid, open to change – something nationalists in the past have always tried to suppress. Modern Europe has to have a place for Catholic Greeks, Christian Turks, and Muslim Austrians.

If Dervo Sejdic were to run for president in 2015 as a Croat Roma or Bosniak Roma, he would change what it means to be a Bosniak or Croat. This would challenge narrow ethnic categories directly. The goal is a Bosnia where it is possible to be a Catholic Serb, an Orthodox Bosniak, or a Muslim Croat. For this, one does not need foreign diplomats, political leaders, and ever more complicated formulas. It can be done by citizens, including intellectuals and civil society – today.

This does not mean that *Sejdic-Finci* must not be implemented. It does mean that implementation will become easier as memories of the 1992-1995 war fade. As the Venice Commission wrote in 2005:

> "One might however still wonder whether under the specific, fairly exceptional, conditions of Bosnia and Herzegovina such an apparent discrimination may be justified … In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives."[58]

The less exceptional conditions in Bosnia are, and the more peace and stability are secure, the easier it will become to reform the constitution. In May 2013 EU enlargement commissioner Stefan Fule told the European Parliament:

> "We have a responsibility and commitment to Bosnia: 1995, Dayton. We imposed this agreement on them. We have a commitment, and that Dayton Agreement was the best framework for them, to impose peace on Bosnia. The time has come to think about another framework, one for actually transforming Bosnia. Enlargement is the most powerful transformation instrument we have."[59]

It is high time, and in the interest of both the citizens of Bosnia and Herzegovina and of the EU, that this instrument be put to use. The time to move forward on this issue is now. Non-implementation of the Sejdic-Finci decision cannot justify blocking Bosnia and Herzegovina on its EU path.

The summit on 10 October in Brussels should be the last of its kind. The best case outcome would be that Bosnia's leaders agree to a solution. However, if they do not, the EU should rethink its current policy and demand that Bosnia and Herzegovina implements this decision as part of wider constitutional reforms that it will undertake during the accession process itself. It should not be a precondition. Making it one was a mistake.

---

[58] European Commission for Democracy through Law (Venice Commission), "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers oft he High Representative", 11 March 2005.

[59] European Parliament, "2012 Progress Report on Bosnia and Herzegovina (Debate)", 22 May 2013.

Annex: A long overdue step

The three members of the Bosnian presidency should consider sending, as soon as possible, a letter to Brussels containing the country's application for membership in the EU.

In case there will be no solution to the issue of implementing the Sejdi-Finci judgement on 10 October 2013 this application letter might be accompanied by an explanatory note:

> "We acknowledge that since 2009 the ECtHR decision *Sejdic and Finci vs. Bosnia and Herzegovina* has not been implemented. We want to assure the European Union that there is a broad consensus among politicians in Bosnia and Herzegovina that we have to meet our international commitments and implement this decision.
>
> Many efforts have been made. However, after almost four years of intense negotiations, both in Bosnia and Herzegovina and outside with our international friends, we are aware that we have not yet succeeded to find a consensus. This does not mean that we can or will give up.
>
> We are convinced, however, that it will be easier to resolve this and many other issues within the European accession process. We also do not believe that it serves the interests of any of the citizens of Bosnia and Herzegovina, or the European Union, if our country is not making progress together with our neighbors.
>
> We recall the commitments made by the EU towards Bosnia and Herzegovina. We therefore hope that the European Union will accept our application."