# *Democracy* v *Human Rights*? The Strasbourg Court and the Challenge of Power Sharing

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Tension between 'rights' and 'democracy' principle in highly political cases – ECtHR's wide margin of appreciation on elections put into question by recent cases – *Sejdic-Finci* v *Bosnia-Herzegovina (BiH)*: ethnic criteria for standing in election violate Convention – *Zornic* v *BiH*: candidate's exclusion from standing in election on account of her self-chosen identity violates P-12 – *Mathieu-Mohin and Clerfayt* v *Belgium* overruled? – 'Integrative democratic tolerance' approach: five legal and political principles to reconcile 'rights' and 'democracy' principle in highly political cases.

## Introduction

Towards the end of 2009, the Strasbourg Court decided a landmark case. In *Sejdic-Finci* v *Bosnia-Herzegovina* ('*Sejdic*'), the Grand Chamber was called to rule upon the Convention compatibility of Bosnia's ethnic federal system. The organising principle of Bosnia's byzantine political system is ethnic parity between the country's three constituent groups: Muslim Bosniacs, Catholic Croats and Orthodox Serbs. As a flipside, the ethnically pervasive system sits uncomfortably with Convention rights. The Court found that Bosnia's Constitution violated the right to free elections (P1-3) and the Convention's free-standing right to equality ('P12-1').[1] Remarkably, this was the first time the Court had found that a country's constitution violated the Convention and the first time it applied Protocol 12. Nearly five years later in *Zornic*, a case with potentially far-reaching

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[1] ECtHR [GC] 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdic and Finci* v *Bosnia-Herzegovina*.

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legal and political implications, the Court ordered Bosnia to outlaw ethnic discrimination in its political system.[2] Crucially, with *Zornic* the Court puts into question whether states can limit the right to difference[3] when organising their political system. The Bosnian cases touch upon the uneasy relationship between ethnicity and rights in the organisation of a state's political system.

The Strasbourg decisions reverberate beyond Bosnia, as the principles developed by the Court could be applied to liberalise, but also potentially destabilise other power-sharing systems[4] all over the world.[5] For this reason, the Court's handling of the Bosnian cases deserves a thorough analysis and critique. This analysis is embedded in the broader framework of the Court's case law on non-discrimination, with particular emphasis on cases in which minorities challenge the political structure of a state. The main focus is on Strasbourg's case law pertaining to the constitutional architecture of multi-ethnic states. In those highly political cases an 'integrative democratic tolerance' approach, developed in this paper, should guide courts in their judicial decision making.

High-profile cases touching a state's constitutional structure lay bare the tension between 'rights' and the 'democracy' principles. According to Steven Greer, the relationship between state parties and the Court is mediated by three primary constitutional principles: rights, democracy, and priority to Convention rights.[6] With 'rights', Greer refers to the national and European judicial oversight over the Convention. 'Democracy' denotes that 'collective goods/public interests should be pursued by democratically accountable national non-judicial public bodies within a framework of law'.[7] 'Priority to Convention rights' means that Convention rights 'take procedural and evidential, but not conclusive substantive, priority over the democratic pursuit of the public interest'.[8] Greer posits that the strength of the 'priority to rights principle' should vary according to the formal structure of the right and the Convention's

[2] ECtHR 15 July 2014, Case No. 3681/06, Zornic v BiH.

[3] For a more global enquiry on the right to difference, *see* M. C. Foblets et al. (eds.), *Cultural Diversity and the Law: State Responses from around the World* (Bruylant 2010).

[4] For on overview on the concept of a consociational democracy and the academic debates surrounding it, *see* S. Choudry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

[5] B. O'Leary and C. McCrudden, *Courts and Consociations: Human Rights Versus Power Sharing* (Oxford University Press 2013).

[6] S. Greer and L. Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights', 12(4) *Human Rights Law Review* (2012) p. 655. The article has been republished online at <www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Greer.pdf>, visited 15 February 2016.

[7] *Id.* at p. 16 (electronic publication).

[8] S. Greer, 'What's Wrong with the European Convention on Human Rights', 30(3) *HRQ* (2008) p. 680 at p. 697.

underlying constitutional structure.[9] Mediating the tensions between the rights and democracy principles remains an important challenge for the European Court of Human Rights.

Over the last 15 years the rights principle has grown stronger. Geoff Gilbert detected a 'burgeoning minority rights jurisprudence of the European Court'.[10] The minority-friendly case law unfolded against the backdrop of an evolutive interpretation of Article 14, widely known as the Convention's 'Cinderella provision'. Article 14 has no autonomous standing and can be invoked only if it falls within the ambit of another Convention provision. According to Gilbert, just as Cinderella finally made it to the ball against the will of her stepmother and without being noticed by the guests, the Court increasingly inserted Article 14 into its case law by relaxing the 'ambit requirement'.[11] In addition, Article 14 serves as a standard for interpreting Protocol 12, the Convention's free-standing equality right.[12] The Court's evolutive rights interpretation and new Convention instruments have strengthened the rights principle.

In open contrast to this evolution, states have laid claim to a greater margin of appreciation, especially in those areas of law that are important to their constitutional traditions. Although it has not yet entered into force, the adoption of Protocol 15 confirms that states demand a greater margin of appreciation.[13] States are particularly wary that the European Court of Human Rights intervenes into jealously-guarded domains of national policy, such as migration[14] or the right to vote.

State criticism of Strasbourg-based judicial activism has forced judges and scholars to consider the Court's role. In order to balance the rights with the democracy principles, theories of procedural rationality have been developed.[15] New judicial review models blending substantive judicial review with procedural

[9] S. Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation', 3 *UCL Human Rights Review* (2010) p. 1 at p. 7-14.

[10] G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', 24(3) *HRQ* (2002) p. 736.

[11] Ibid.

[12] ECtHR [GC] 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdic and Finci* v *Bosnia-Herzegovina*; ECtHR 9 December 2010, Case No. 7798/08, *Savez Crkava "Rijec Zivota" and Others* v *Croatia*.

[13] S. Lambrecht, 'Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?', 21 *European Public Law* (2015) p. 257.

[14] M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', 8(2) *EuConst* (2012) p. 203.

[15] P. Popelier and C. Van De Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis', 9(2) *EuConst* (2013) p. 230; K. Lenaerts, 'The European Court of Justice and Process-Oriented Review', 31(1) *Yearbook of European Law* (2012) p. 3; R. Spano, 'Universality or Diversity of Human Rights; Strasbourg in the Age of Subsidiarity', 14(3) *Human Rights Law Review* (2014) p. 487 at p. 497-499; R. Spano, 'The European Court of Human Rights

elements have been appropriately termed as semi-procedural.[16] The aim behind theories of procedural rationality is to alleviate the Court from substantively balancing competing interests, while at the same time making sure that the national legislator and national courts have followed rational, evidence-based and Convention-mindful lawmaking or law-interpreting standards.

This contribution joins this chorus, but its focus is more specific. In contrast to (semi)proceduralist theories, the integrative democratic tolerance approach is tailored specifically to 'first-order challenges'.[17] These are legal challenges to a country's political architecture or (electoral) rules determining access to its political community. This narrow focus has both downsides and upsides. The downside is that it applies only to a small number of cases; the upside is it addresses more appropriately the legitimacy dilemma that an international human rights court faces in high-profile cases.

These cases force the Court to choose between individual human rights protection and concerns for its legitimacy. As judge Levitis observed in *Zdanoka*: 'on the one hand, of course, it is the Court's task to protect the electoral rights of individuals; but, on the other hand, it should not overstep the limits of its explicit and implicit legitimacy and try to rule instead of the people on the constitutional order which this people creates for itself'.[18]

Against this backdrop, the article discusses the following research question: how has the Court addressed and how should it address the tension between the 'rights' principle and the 'democracy' principle in hard cases involving challenges to the political system of Convention states?

With this question in mind, the discussion will proceed along the following outline. First, the Court's rather prudent approach to sensitive questions of minority rights in the framework of the right to free elections will be discussed. Next, the question is raised whether recent cases on the constitutional structure of Bosnia[19] signal a jurisprudential turn: will the Court apply a stricter scrutiny to how Convention states organise their political system, especially if the latter restricts access to certain public or political positions to members of a particular ethnic/linguistic/religious group? Such an intervention at the heart of the political

and National Courts: A Constructive Conversation or a Dialogue of Disrespect?', 33 *Nordic Journal of Human Rights* (2015) p. 1.

[16] I. Bar-Siman-Tov, 'Semiprocedural Judicial Review', 6 *Legisprudence* (2012).

[17] Samuel Issacharoff referred to questions challenging the political structure of a state as first-order questions. S. Issacharoff, 'Democracy and Collective Decision Making', 6(2) *ICON* (2008) p. 231.

[18] ECtHR 17 June 2004, Case No. 58278/00, *Zdanoka* v *Latvia*; H. O'Boyle, *Law of the European Convention on Human Rights* (Oxford University Press 2009) p. 947-949.

[19] ECtHR [GC] 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdic and Finci* v *Bosnia-Herzegovina*; ECtHR 15 July 2014, Case No. 3681/06, *Zornic* v *BiH*.

system, it is argued, would raise human rights protection to a higher, but more politically sensitive, level.

Finally, with an aim to address such ensuing tension between the 'rights' and 'democracy' principles in human rights adjudication, a set of criteria is developed that offers useful guidance to courts when faced with delicate first-order questions involving the composition of a state's *polity*.

The paper starts with the first landmark voting rights decision of the European Court of Human Rights, *Mathieu-Mohin and Clerfayt* v *Belgium*.[20] The decision illustrates the tension between 'rights' and 'democracy' and is deeply relevant for the main issues discussed at a later stage, which warrants a somewhat lengthy discussion.

## Clerfayt v Belgium

The background of the Belgian case was complex. At the material time, in the early 1980s, the elected representatives and senators had a double mandate: besides their appointment in the national parliament, they were delegates of the newly established regional and community parliaments. While the double mandate was uncontroversial in most parts of Belgium, the situation was different in Brussels Halle Vilvoorde. Brussels Halle Vilvoorde was an 'institutional curiosity'[21] that merged into one electoral district both the bilingual Brussels capital region and the monolingual Flemish districts of Halle and Vilvoorde.

The parliamentarians elected in Brussels Halle Vilvoorde could choose whether to take the oath in French or in Dutch, a choice entailing noteworthy political consequences. At the time, if representatives and (directly elected) senators opted for French, they would become members of the French Community Council (now French Community Parliament) and the French-speaking group in the federal parliament. If Dutch were chosen, they would sit in the Flemish regional council (now Flemish Parliament) and represent the Dutch language group in federal parliament. Language groups in parliament are important with regard to essential matters such as laws requiring a majority within both language groups. Regions are competent for all issues related to the territory, such as environment, energy and economic policy, whereas communities deal with socio-cultural matters such as education and welfare. The choice of which language group to affiliate with was an important political decision for parliamentarians elected in Brussels Halle Vilvoorde.

Parliamentarians who wanted to represent the French-speaking population at state level as well as their home constituency at regional level were caught in a dilemma. The applicants, two prominent French-speaking politicians resident in a Dutch-speaking district within Brussels Halle Vilvoorde, argued that the Belgian

[20] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu Mohin and Clerfayt* v *Belgium.*

[21] F. Delmartino et al., 'Kingdom of Belgium', in L. Moreno and C. Colino (eds.), *Unity and diversity in federal countries* (McGill-Queen's University Press 2010) p. 47 at p. 65.

system unduly discriminated against them and their voters. Unless they declared themselves as Dutch speakers, their voters would not be represented at local level. They argued that under the Convention they should be allowed to represent their group at state level while at the same time being part of the regional assembly. At the heart of the case was the question whether the internal organisation of the state could justify a restriction of active and passive voting rights. Even broader, it brought to the fore the tension between particularism and universality of human rights.[22]

The Commission for Human Rights forwarded the case to the Court, as a strong majority (10-1) had opined that the Belgian system violated the Convention.

A 13-5 majority in the Court's plenary found that the exclusion of declaratively French-speaking parliamentarians from the Flemish regional parliament did not amount to discrimination: '[the restriction] does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State's margin of appreciation within the Belgian parliamentary system – a margin that is all the greater as the system is incomplete and provisional'.[23] For the Court, French-speakers were not excluded from running for the regional council, as they had the option to declare themselves as Dutch-speakers. Neither were their rights as voters breached, as they could be expected to vote for candidates who are 'willing and able' to use the region's language.[24] The Court found no discrimination, given the margin of appreciation granted to states, the general institutional system of the Belgian state, the temporary nature of this particular arrangement, and the large majorities in both language groups buttressing it.

The dissenters counter-argued that voters had a right to vote for a candidate of their choice and candidates had a right to represent them in their group dimension. The dissenting judges reasoned that French-speakers would be excluded from regional political representation unless they voted for Dutch-speakers. Similarly, French-speaking candidates running in Brussels Halle Vilvoorde would have to self-classify as Dutch-speakers to represent their voters. For the dissenting judges, the moral, psychological and political implications of the self-classification violated the Convention rights of French-speaking voters and candidates.[25] Overall, they reasoned, the system discriminated against French-speakers on the sole basis of their language. Far from remaining entrenched in a negative legislator's straightjacket, the dissenting judges suggested two more rights-friendly solutions: French-speakers

[22] Issacharoff, *supra* n. 17, p. 242.

[23] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu Mohin and Clerfayt* v *Belgium*, para. 57.

[24] *Ibid.*

[25] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu-Mohin and Clerfayt* v *Belgium*, joint dissenting opinion of Judges Cremona, Bindschedler-Robert, Bernhardt, Spielmann and Valticos.

elected in Halle-Vilvoorde should be part of the French language group in parliament and of the Flemish Council, or regional councillors should be directly elected.[26] By finding that there were solutions least restrictive to individual rights, the dissenters would have found a violation of the Convention.

Clerfayt and his peers pleaded against the Belgian system also in front of the constitutional court then known as the Court of Arbitration. They argued that French-speakers deserved a proper representation, reflecting their identity and opinion. They complained that French-speakers living in Flemish territory would have neither proper representation in parliament, nor in the French Community Council. After direct election of regional councillors had been introduced in 1993, French-speaking parliamentarians living in Flanders could no longer be part of the French Community Parliament.[27] In line with what the dissenters had suggested in *Mathieu Mohin and Clerfayt,* the applicants argued that French-speakers should at least be allowed to self-classify as French-speakers in the Flemish parliament by taking the oath in French. Clerfayt and his peers claimed that French-speaking voters should have the right to vote for a candidate who reflects their identity and opinion and that the elected candidate should be able to self-classify according to his linguistic identity.

But the Belgian Constitutional Court, just as the Strasbourg Court, dismissed *Clerfayt's* claims.[28] Both courts were reluctant to shake the equilibrium of the Belgian state through human rights adjudication.

## A Prudent Court

The European Court's prudent approach runs like a common thread through most of its right to vote and elections jurisprudence. Widely known, but nonetheless worth recalling, is that the Convention neither imposes a specific electoral system nor demands that all votes have equal weight.[29] States enjoy a larger margin of appreciation in limiting passive voting rights[30] compared to a narrower margin for restricting active voting rights.[31] To illustrate the Court's rather prudent

[26] *Ibid.*

[27] The composition of the community and regional parliaments was changed by the special law of 16 July 1993 aimed at achieving the federal structure of the state.

[28] Belgian Constitutional Court, 90/94, 22 December 1994 (paras B-4 to B-4.24). Up to 2003, the Belgian Constitutional Court was known as 'Court of Arbitration'. For semantic simplicity I nonetheless refer to it as a constitutional court.

[29] ECtHR 4 April 2006, Case No. 44081/02, *Bompard* v *France*; ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu Mohin and Clerfayt* v *Belgium*, para.para. 54. For a more in depth analysis, *see* Y. Lécuyer, *The Right to Free Elections* (CoE Publishing 2014).

[30] Lécuyer, *supra* n. 29, p. 33-35.

[31] ECtHR [GC] 6 October 2005, Case No. 74025/01, *Hirst* v *UK (No 2)*; ECtHR 22 June 2004, Case No. 69949/01, *Aziz* v *Cyprus*; ECtHR [GC] 18 February 1999, Case No. 24833/94, *Matthews* v *UK.*

approach, a very short case law overview on electoral thresholds and language rights for candidates follows.

As a rule, the Court has opted for a hands-off approach regarding politically sensitive questions such as electoral thresholds. Even if electoral thresholds have the practical effect of excluding minorities from political participation, the Court judged them as Convention compatible. In a case concerning parliamentary representation of Italy's German speaking minority, the Court ruled that Italy is under no obligation to exempt certain groups from the 4% threshold.[32] The Court later ruled that even a threshold of 10% was compatible with the Convention.[33] Such a high electoral threshold made it extremely difficult even for the sizable Kurdish minority to obtain representation in parliament. The Court sidestepped the elephant in the room by using not groups, but political parties as a comparator.[34] The Court used a judicial approach akin to soft law when it argued that a lowering of the 'excessive'[35] electoral threshold would be 'desirable'.[36] In a recent case involving Moldova's election ban for MPs with dual citizenship, the Grand Chamber has narrowly opened the door to group representation by holding that voters have a right to vote for politicians who reflect their views and concerns.[37] This brief overview shows that state parties have no duty to design an electoral system mindful of minorities' interests.

These well-settled principles equally apply to the linguistic rights of candidates for elected office. In *Mathieu-Mohin and Clerfayt*, even dissenting judges took no issue that French-speaking representatives would need to speak Dutch when elected to the Flemish regional council.[38] In *Podkolzina* v *Latvia,* the Court unanimously approved of regulations that required a high command of Latvian in order to run for parliament.[39] In *Birk-Levy* v *France*, the Court upheld French law and jurisprudence forbidding the use of any language other than French in the local parliament in semi-autonomous French Polynesia.[40] In *Fryske Nasjonale*

[32] ECHR 15 April 1996, Case No. 25035/94, *Silvius Magnago and Südtiroler Volkspartei* v *Italy*.
[33] ECtHR [GC] 8 July 2008, Case No. 10226/03, *Yumak and Sadak* v *Turkey*.
[34] *Id.*, para. 121.
[35] *Id.*, para. 144.
[36] ECtHR 30 January 2007, Case No. 10226/03, *Yumak and Sadak* v *Turkey*.
[37] ECtHR [GC] 27 April 2010, *Tanase* v *Moldova*, para. 174. R. O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy', 61(3) *NILQ* (2010) p. 275. For a critical review: A. Timmer, 'Tănase v Moldova: multiple readings of a case concerning multiple nationality', Strasbourg Observers, <strasbourgobservers.com/2010/05/12/tanase-v-moldova-multiple-readings-of-a-case-concerning-multiple-nationality>, visited 15 February 2016.
[38] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu-Mohin and Clerfayt* v *Belgium*, joint dissenting opinion of Judges Cremona, Bindschedler-Robert, Bernhardt, Spielmann and Valticos.
[39] ECtHR 9 April 2002, Case No. 46726/99, *Podkolzina* v *Latvia.*
[40] ECtHR 21 September 2010, Case No. 39426/06, *Birk-Levy* v *France*.

*Partij* v *the Netherlands,* the Court held that minority parties were not exempted from using the state language when applying for registration of their candidate list.[41] Official language requirements, whether in place at state or regional level, are compatible with the Convention.

Also the European Commission on Human Rights has ruled very prudently in electoral rights cases. An interesting UK case serves as an illustration. The Commission upheld UK law excluding British citizens from voting for parliamentary elections on the basis of their residency.[42] A British citizen from Jersey had argued that his exclusion from voting for the Westminster parliament breached his Convention rights. The Channel Islands and the Island of Man form no UK constituency and have no elected representatives in Westminster, notwithstanding formal UK sovereignty over these territories and UK control over international and defence matters. Referring to the historically-grounded special constitutional relationship between the UK and the Channel Islands, the Commission dismissed the application. Even after the European Court of Human Rights granted voting for EU parliamentary elections to UK citizens in Gibraltar,[43] the Channel Islands remain prevented from participating in UK and European elections.[44]

Marc Weller found that the Commission and the Court have been the most prudent bodies of human rights implementation, although they are among the oldest ones in the world.[45] Tellingly, new scholarship warns against entrusting the Court with judicial oversight over the Framework Convention of National Minorities, as the Court's restrictive interpretation would roll back the soft law achievements of the Advisory Committee to the Framework Convention.[46]

Although the Court's has shown restraint in minority-initiated challenges to the political system, Strasbourg has over the years applied more vigorously its non-discrimination doctrine developed back in *Belgian Linguistics*.[47] For Marko, these cases show that the Court is ready to move towards 'full and effective

[41] ECtHR 12 December 1985, Case No. 11100/84, *Fryske Nasjonale Partij* v *Netherlands.*

[42] ECtHR, 13 May 1982, Case No. 8873/80, *X* v *UK.*

[43] ECtHR [GC], 18 February 1999, Case No. 24833/94, *Matthews* v *UK.*

[44] HL Deb 14 March 2002, vol. 632, col. 938 (the competent minister said that 'the Channel Islands are outside the European Union and, as such, extending the European Parliament franchise to them is not possible').

[45] M. Weller, 'Effective Participation of Minorities in Public Life', in M. Weller (ed.), *Universal Minority Rights* (Oxford University Press 2007) p. 477 at p. 515.

[46] S. Berry, 'The siren's call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities', 23 *International Journal on Minority and Group Rights* (2016) p. 1385 (accepted).

[47] ECtHR (plenary) 23 July 1968, Case No. 2126/64 and others, *Relating to certain aspects of the law on the use of languages in education in Belgium* v *Belgium*.

equality' by combating 'structural discrimination' and 'institutional racism'.[48] However, dissenting judges of the Strasbourg Court accuse the Court of having lost track of its prudent direction: '[the Court] behaved like a Formula One car, hurtling at high speed into the new and difficult terrain […and thereby inevitably straying]'.[49] While 'rights' partisans applaud the evolutive interpretation of Convention rights, states have demanded a greater margin of appreciation. The political challenges to the Court's broad interpretation of Convention provisions illustrate well the tension between the rights and the democracy principles.

Whichever view one might take in this fascinating debate, there is ground to believe that the Bosnian cases, discussed in the next sections, raised human rights protection to a higher but more politically sensitive level. In *Sejdic-Finci* v *Bosnia-Herzegovina*[50] and the more recent *Zornic* v *Bosnia-Herzegovina*,[51] the Court declared the country's constitutional structure in breach of the Convention. The Bosnian cases show that the Court does not refrain from transplanting its vigorous anti-discrimination case law into a domain hitherto overwhelmingly left to state discretion, namely the one pertaining to the choice of electoral system.

The next section discusses how Bosnia's internationalised constitutional court navigated the tension between the rights and democracy principles. As Bosnia has one of the most complicated political systems in the world, the following very short introduction to its political system might be helpful. At the same time, the decision of the Constitutional Court illustrates one way to balance the 'rights' with the 'democracy' principle.

## The background

From the start one matter has to be stressed: the constitutional and political structure of Bosnia-Herzegovina is highly particular. The Bosnian Constitution is part of an international peace agreement, which was negotiated under US auspices and signed by the presidents of Bosnia, Croatia and Serbia. The compromise agreed at the Dayton Peace conference can be summed up in three points: (1) most of Bosnia's powers are devolved to two territorial sub-units; (2) Bosnia remains a formally sovereign state; and (3) ethnic groups are equally represented at

[48] J. Marko, 'Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation' in T. Malloy and U. Caruso (eds.), *Essays in Honour of Rainer Hofmann* (Brill 2013) p. 97.

[49] Dissenting opinion of judge Borrego, para. 2, in ECtHR [GC] 13 November 2007, Case No. 57325/00, *D. H.* v *Czech Republic*.

[50] ECtHR [GC] 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdic and Finci* v *BiH*.

[51] ECtHR 15 July 2014, Case No. 3681/06, *Zornic* v *BiH*.

the federal level, where they have a veto right.[52] The two territorial sub-units are the Federation of Bosniacs and Croats (under the constitutional name 'Federation of Bosnia and Herzegovina') and the Serb Republic (under the constitutional name 'Republika Srpska'). The three titular nations are Bosniacs/Bosnian Muslims, Croats, and Serbs. The Dayton agreement confirmed Bosnia's statehood but provided for a highly decentralised state based on parity between titular nations.

The inequality between Bosnia's titular nations raises human rights concerns. Ethnic quotas modify the principle of democratic equality, but are often regarded as a legitimate means to further the democratic participation of minorities in public life.[53] What raises human rights problems in Bosnia is the automatic link between territory and ethnicity.[54] This means that citizens who live in the wrong area of the country are prevented from running for elected office. For instance, the Serb presidency member must be elected from the territory of the Republika Srpska, while Bosniac and Croat presidency members must be elected from the territory of the Federation. The same goes for the upper chamber, with the only difference that the five delegates per group are elected indirectly. One of the most important human rights concerns is the residence-based discrimination between constituent peoples.

The human rights gap becomes even more important if one does not accept that political rights should be tied to group membership. In that case, the unequal treatment is between citizens who belong to a constituent group and those who either do not so belong, or do not accept being ethnically categorised.

Somehow at odds with this ethnic political structure are previous decisions of Bosnia's internationalised constitutional court.[55] The composition of the Constitutional Court reflects both the country's power-sharing system as well as international oversight of Bosnian constitutionalism: every constituent people is in practice 'represented' by two judges,[56] and three international judges are chosen by the president of the European Court of Human Rights.[57] Shortly after the war, in its most 'political' case,[58] the Court had to decide whether constituent peoples were constituent on the whole territory of the state or only within their respective

[52] P. Szasz, 'The Dayton Accord: The Balkan Peace Agreement', 30 *Cornell International Law Journal* (1997) p. 759 (an analysis of the Dayton Peace Agreement and why it will not work).

[53] J. Frowein and R. Bank, 'The Participation of Minorities in Decision Making Processes', 61 *ZaöRV/HJIL* (2001).

[54] C. Grewe and M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' in A. Von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (Brill 2011) p. 1 at p. 32.

[55] J. Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance', 7 *EDAP* (2004).

[56] D. Feldman, 'Renaming Cities in Bosnia', 3 *ICON* (2005) p. 649 at p. 655.

[57] Article VI(1)a of the Bosnian Constitution.

[58] A. Morawiec Mansfield, 'Ethnic but equal: the quest for a new democratic order in Bosnia and Herzegovina', 103 *Colum L Rev* (2003) p. 2052.

entities. Important political consequences flow from the principle of constituency of peoples,[59] chiefly in terms of political representation. In the landmark *Constituent Peoples* decision,[60] a deeply-divided Court found that all constituent peoples are entitled to a special political status not only at state, but also at entity level. Bosnia's internationalised constitutional court has sought to 'impose multi-ethnicity'[61] by giving all titular nations equal rights on the entire territory of the state.

However, 'Others' remained excluded in important institutions at state level. The group of 'Others' is a catch-all constitutional category that includes everyone who does not belong to a constituent people (such as persons belonging to minorities according to Bosnian law).[62] As a former constitutional judge admitted, such judicial unwinding of the Bosnian Constitution would have been politically un-implementable back when the *Constituent Peoples* decision was taken.[63] The Convention compatibility of key state level institutions (presidency and second chamber) remained therefore questionable.

For current purposes, the interesting question is how the national constitutional court dealt with a legal question that confronted the 'rights' and the 'democracy' principles.

The Bosnian Court developed an exit strategy. Bosniac politicians, who for strategic and ideological reasons are most interested in de-ethnifying the Bosnian state, had petitioned the Court. In a first case, the Court dismissed the case on admissibility grounds, arguing that the Convention cannot trump the national Constitution.[64] In an interesting turn, it found a second case admissible.[65] On the merits, it ruled the rights restriction proportionate to the legitimate aim of preserving the peace in Bosnia-Herzegovina. In an *obiter dictum*, it suggested that parliament eliminate discrimination from Bosnia's Constitution at some point in the future.[66] Ilijaz Pilav appealed to Strasbourg, where his case has been pending

[59] Z. Begic and Z. Delic, 'Constituency of peoples in the constitutional system of Bosnia and Herzegovina: Chasing fair solutions', 11(2) *ICON* (2013) p. 447.

[60] Bosnian Constitutional Court, U-5/98-III, 1 July 2000.

[61] F. Palermo, 'Bosnia-Erzegovina: la Corte costituzionale fissa i confini della (nuova) società multietnica' [*Bosnia-Herzegovina: The Constitutional Court sets the boundaries of Bosnia's (new) multi-ethnic society*], IV *Diritto Pubblico Compara. to ed Europeo* [*European and Comparative Public Law*] (2000) p. 1479.

[62] For more, *see* commentary on the preamble in C. Steiner and N. Ademovic (eds.), *Constitution of Bosnia-Herzegovina: Commentary, translated by D. Čolaković* (Konrad Adenauer Stiftung 2010) p. 37; as well as E. Hodzic and N. Stojanovic, 'New/Old Constitutional Engineering?' (Analitika 2011).

[63] J. Marko and D. Railic, 'Minderheitenschutz im östlichen Europa: Bosnien und Herzegowina' (Institute for East European Law at Cologne University 2005).

[64] Bosnian Constitutional Court, U13/05, 26 May 2006, para. 10.

[65] Bosnian Constitutional Court, AP-2678/ 06, 29 September 2006.

[66] *Ibid*, para. 22.

for many years.[67] The Bosnian Court dismissed challenges to the state constitution, but left the door open for jurisprudential turns by applying the proportionality test.

The decisions revealed a lively debate between the Constitutional Court's international judges in relation to the question of normative hierarchy between the Convention and Bosnia's Constitution.[68] While the systematic and teleological method of interpretation proposed by judge Grewe would have implied primacy of the Convention over the Constitution (favourable to the 'rights' principle), judge Feldman's textual interpretation left little doubt that the Constitution as an institutional blueprint was Bosnia's supreme law of the land.

In closing his concurrence, judge Feldman conceded that the European Court of Human Rights, which has no duty to uphold the Bosnian Constitution, might decide differently. Feldman, at any rate, counselled the Strasbourg Court against such a finding.[69]

## Sejdic and Zornic

While *Sejdic* has sparked a vivid debate in the literature, the conceptual repercussions of the *Zornic* judgment have not yet been fully grasped. *Sejdic* is the landmark decision on Protocol 12 and remains an important right to vote case. The legal question raised by the applicants in *Sejdic* was whether the election law to Bosnia's upper chamber violated the right to free elections, alone or in conjunction with Article 14, and whether the composition of Bosnia's presidency breached Protocol 12. Both applicants were prevented from running for presidency and upper chamber seats because these state institutions constitutionally reflect the shared power between Bosnia's three nations (Bosniacs, Serbs, and Croats). The case not only led to deep and well-reasoned case commentaries,[70] but equally provoked a vivid debate on broader legitimacy issues.[71] The later *Zornic* case raised many interesting substantive and conceptual questions but is yet untouched by the literature. Both judgments will be briefly discussed in the present section.

[67] ECtHR, Case No. 41939/07, *Pilav* v *BiH* (pending). Statement of facts <caselaw.echr.globe24h.com/0/0/bosnia-herzegovina/2013/09/02/pilav-v-bosnia-and-herzegovina-126684-41939-07.shtml>, visited 15 February 2016.

[68] Dissenting opinions of judge Grewe in U-13/05 and AP-2678/06 (*Pilav*); concurring opinion of Feldman in the same judgments.

[69] Feldman in *Pilav*, *id*.

[70] S. Bardutzky, 'The Strasbourg Court on the Dayton Constitution: Judgment in the case of Sejdic and Finci v Bosnia and Herzegovina', 6(2) *EuConst* (2010) p. 309-333.

[71] *See* O'Leary and McCrudden *supra* n. 5. C. Bell, 'Power-sharing and human rights law', 17(2) *International Journal of Human Rights* (2014) p. 204.

The Court framed *Sejdic* as a case of ethnic discrimination against vulnerable peoples. Both applicants belonged to minorities: Dervo Sejdic and Jakob Finci were respectively of Roma and Jewish origin. The Court set the scene by declaring ethnic/racial discrimination democratically unacceptable: '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'.[72] It could apply its strong case law on vulnerable peoples,[73] where the state margin of appreciation is tight.[74] This 'strict scrutiny' means that Strasbourg will apply a least restrictive means test that almost invariably ends in a violation finding.[75] The frame under which the Court chose to situate *Sejdic* determined the intensity of its judicial review.

The only, albeit strongly, dissenting voice came from judge Bonello. He argued that the Court has accepted the most disparate grounds for restricting the right to stand as a candidate in election. Bonello enumerated many Strasbourg cases pointing to judicial restraint in challenges to power-sharing systems and autonomy regimes.[76] Relevant but missing from Bonello's list is *Py* v *France,* where the Court upheld a ten-year residency requirement for French nationals to vote in French New Caledonia as 'local requirements' justifying restrictions to the right to vote.[77] However, in *Sejdic* the Court failed to accept one of the most serious justifications: the threat to peace in a society that has been victim of Europe's most brutal war since World War II. With reference to prior case law on similar matters, Bonello vociferously argued that the Court should have granted Bosnia a margin of appreciation.

*Zornic* v *Bosnia* was even more significant than *Sejdic*, particularly for its broader legal implications.[78] Azra Zornic, a Bosniac politician of the multi-ethnic party SDP, refused to declare her affiliation with any constituent people when running for election. The broader question raised touches upon the boundaries of self-classification: do states have an obligation under the

[72] *Id*., para. 44.

[73] D. Anagnostou and E. Psychogiopoulou (eds.), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context* (Brill 2009); L. Peroni and A. Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', 11(4) *ICON* (2013) p. 1056.

[74] Popelier and Van De Heyning, *supra* n. 15, at p. 230. R. O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy', 61(3) *NILQ* (2010) p. 263.

[75] Marko, *supra* n. 48, at p. 97.

[76] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu Mohin and Clerfayt* v *Belgium*; ECtHR 15 September 1997, Case No 23450/94, *Polacco and Garofalo* v *Italy*; ECtHR 15 July 1965, Case No. 2333/64, *Inhabitants of Leeuw-St-Pierre* v *Belgium*.

[77] ECtHR 11 January 2005, Case No. 66289/01, *Py* v *France*, para. 64.

[78] ECtHR 15 July 2014, Case No. 3681/06, *Zornic* v *BiH*.

Convention to design their electoral system in such a way as to accommodate an individual's identity choice?

The Bosnian system is liberal in that regard, as it leaves individuals free to define their ethnic identity. Public bodies have no means of disputing what the citizen declares as his ethnic affiliation, as there are no criteria defining group membership. Bosnians could declare themselves as Martians or Eskimos and some have done so.[79] When running for elections, candidates remain free to declare themselves as part of one of the three titular nations or other groups. However, for certain positions affiliation with one of the titular nations is mandatory.[80] In order to prevent abuse, a candidate cannot change ethnic identity within one electoral cycle.[81] Anyone can run for political office in Bosnia, but for a limited number of high political offices an affiliation with one of the titular nations is required.

With *Zornic*, the European Court of Human Rights seems to have overturned its precedent on self-classification. In *Mathieu-Mohin and Clerfayt* v *Belgium,* the Strasbourg Court ruled it proportionate that French-speakers had to declare themselves Dutch-speakers in order to be part of an elected political assembly. Only the dissenting judges argued that French-speaking politicians would suffer unacceptable moral, psychological and political consequences.[82] In *Zornic*, the Court has taken over the view of dissenters in *Mathieu-Mohin and Clerfayt.* For whatever reason[83] one refuses to affiliate with one of the titular nations, the legislator still has to make sure that the candidate can run for elected office: '[a candidate] should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification'.[84] In even stronger terms, the Court argued that Bosnia must establish a political system without ethnic discrimination and without granting special rights to constituent peoples.[85] While in the Belgian case the Court accepted limits to self-classification, in the Bosnian case it demanded the legislator to accommodate almost any identity choice.

*Zornic* is the more problematic case, compared to *Sejdic*, with regard to its effect on power-sharing systems. Scholars have based a restrictive reading of *Sejdic* on the

[79] G. Sandic-Hadzihasanovic, 'Historic Census Pushes Bosnians To Decide Who They Are', *Radio Free Europe,* 1 October 2013, <www.rferl.org/content/bosnia-census/25123381.html>, visited 15 February 2016.

[80] Electoral code of Bosnia-Herzegovina, Article 4.19(7).

[81] *Ibid.*, Article 4.19(6). *See also* a recent case on self-classification that reached the Bosnian Constitutional Court, decision AP-66/15, 10 February 2015.

[82] ECtHR (plenary) 2 March 1987, Case No. 9267/81, *Mathieu-Mohin and Clerfayt* v *Belgium*, joint dissenting opinion of Judges Cremona, Bindschedler-Robert, Bernhardt, Spielmann and Valticos.

[83] ECtHR 15 July 2014, Case No. 3681/06, *Zornic* v *BiH*.

[84] *Id.* para. 31.

[85] *Id.* para. 43.

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argument that Bosnia was a special case[86] and that an ethnocratic implementation (through adding positions in the presidency and upper chamber for 'Others') would be compatible with the Convention.[87] However, nowhere in the *Zornic* judgment is it mentioned that Bosnia was a special case. In addition, the Court's focus on self-classification, the absence of any mentioning of Convention-compatible power sharing systems[88] (such as in *Sejdic)* as well as the 'unusually precise'[89] wording point towards a broadening of the *Sejdic* principles. While *Sejdic* could be read in a restrictive or in a broad way, the latter reading was preferred by the Court in *Zornic*.

The *Sejdic* and *Zornic* decisions have not been implemented by Bosnia, causing harm to both the country but also the Strasbourg Court. Stojanovic and Hodzic have comprehensively discussed how Bosnia could comply with the *Sejdic* judgment.[90] Nonetheless, Bosnia's parties were rather unconcerned in implementing the judgment in a minority-friendly way.[91] After six years of putting political and financial pressure on Bosnia to change its constitution, the EU has recently given up on making *Sejdic*'s implementation a precondition for Bosnia's EU accession.[92] Although *Sejdic* is widely regarded as an equality landmark case, the practical effect of the ruling has in no way lived up to the hopes it gave rise to.

The next section argues that the legal principles developed by the Court might affect political systems much closer to the centre of the Convention system.

## Beyond Bosnia

If the Bosnian cases are taken as a standard, other power-sharing systems might be incompatible with the Convention. The broad interpretation of Protocol 12 and

[86] Thomas Burri had argued that the Dayton Constitution made Bosnia a special case with limited impact on other Convention states: 'The Rigidity of Structures to Protect Minorities – Hidden Facets of the Strasbourg Court's judgment in *Sejdic* and the Banjul Commission's decision in *Endorois*', in D. Thürer (ed.), *International Protection of Minorities – Challenges in Practice and Doctrine* (Schulthess 2014) p. 201.

[87] O'Leary and McCrudden, *supra* n. 5, p. 146.

[88] The Court's press release, however, mentioned that there exist other Convention-compatible power-sharing systems that could be applied in Bosnia.

[89] Interview with Faris Vehabovic, Bosnian judge at the European Human Rights Court and member of the Chamber who decided *Zornic.* 'Vehabović: U slučaju "Zornić" traži se izmjena Ustava BiH'[*Vehabovic: The Zornic case is about changing the BiH Constitution*], Vijesti, 25 December 2015, <vijesti.ba/clanak/252118/vehabovic-u-slucaju-quot-zornic-quot-trazi-se-izmjena-ustava-bih>, visited 29 February 2016.

[90] E. Hodzic and N. Stojanovic, 'New/Old Constitutional Engineering?' (Analitika 2011).

[91] F. Bieber, 'Ungovernable Bosnia – From the Ruling of the European Court of Human Rights on the Sejdic-Finci Case to the Government Crisis', *IEMed Yearbook* (2014) p. 186.

[92] Council of the European Union (Foreign Affairs), 'Council Conclusions on Bosnia-Herzegovina', Brussels, 15 December 2014.

Article 3 of Protocol 1 puts a question mark on Northern Ireland's political system, particularly the dual premiership and the cross-community requirement for certain key decisions. At the start of their term, members of the Northern Ireland Assembly have to designate as 'Nationalist', 'Unionist' or 'Other'.[93] With the 'Good Friday Agreement', the First and Deputy First Minister were elected on a joint ticket with majority support of both 'Unionist' and 'Nationalist' Assembly Members.[94] After a modification of the initial bargain, the First Minister and Deputy First Minister are chosen by the largest party of each designation. [95] This allows for the possibility that political parties representing the 'Others' may nominate the First or Deputy First Minister. However, O'Leary and McCrudden raised the question whether the 'compelled identification' requirement for assembly members when voting for the joint heads of the Northern Ireland executive might violate the Convention.[96] The Northern Ireland Human Rights Commission recently opined that while cross-community voting is compliant with the letter of the Convention, sweeping interpretations following the 'spirit of the Convention' might lead the European Court of Human Rights to find cross-community voting arrangements to violate Convention law.[97] Up to this point national courts have taken a rather deferential approach in cases involving the Northern Irish Peace Agreement,[98] and no cases on the Northern Irish political system have yet reached the European Court.

Italy's South Tyrol province is yet another example in which individual rights are restricted by allocating high political offices on the basis of identity markers that underpin political identity. The presidency of South Tyrol's provincial council rotates between German and Italian-speakers every half term, equally to the exclusion of others. The same goes for power sharing in the province's executive, where the two deputy presidents must respectively belong to the German and Italian language groups. A reform extended access to the Council's presidency and vice-presidency to the third language group (Ladin speakers),

[93] Section 3(7) of the Standing Orders of the Northern Ireland Assembly.

[94] Section 16(3) Northern Ireland Act (as enacted).

[95] Annex A, Agreement at St. Andrews between the Irish and British governments, and Northern Irish political parties.

[96] C. McCrudden and B. O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements', 24(2) *EJIL* (2013) p. 477 at p. 494.

[97] Opinion of the Northern Ireland Human Rights Commission on the Assembly and Executive Reform Bill, 2 November 2015, at <www.nihrc.org/uploads/publications/NIHRC_ADVICE_Assembly_and_Executive_Reform_Bill_(FINAL).pdf>, visited 7 February 2016.

[98] G. Anthony, 'Public Law Litigation and the Belfast Agreement', 8(3) *European Public Law* (2002) p. 401; G. Anthony and J. Morison, 'The Judicial Role in the New Northern Ireland: Constitutional Litigation and Devolution Disputes', 21 *European Review of Public Law* (2009) p. 1219.

but only if the other language groups gave up their statutory right to hold these positions.[99] The situation with regards to inclusion in the provincial government is similar, but with the additional problem that Ladin speakers are *de iure* barred from becoming deputy presidents. South Tyrol's proportionality system, by to which all public jobs are distributed according to an ethnic key, equally raises questions for its compatibility with Protocol 12 and EU law.[100] Power-sharing systems allocate public and political positions according to ethnic/national/linguistic criteria that might be Convention incompatible.

Belgium too might not escape criticism from Strasbourg. In Belgium, the region of election automatically determines the language group of a member of the House of Representatives. This means that a French-speaking deputy elected in Flanders will be part of the Dutch language group. The determination of language group is important, as 'special' (quasi constitutional) legislation has to be passed by a two-thirds majority, including a majority in both language groups. The region of election equally determines whether a parliamentarian will be counted among the Dutch- or French-speaking members of executive.[101] This would violate the *Zornic* principle, as the group determination is not a matter of one's personal choice, but is externally imposed on the applicant solely based on territorial considerations. Even more rigid is the Brussels system, where constitutional law permanently bans candidates for elected office from changing language group.[102] The overlap between *ethnicity* (or community) and *territory* has been the main point of criticism by the Council of Europe's constitutional advisory body, the

[99] With the reform of 2001, Ladin speakers can accede to the presidency or vice-presidency of the Council and be nominated to the provincial government irrespective of the proportional strength of their language group. However, a Ladin speaker can only take the position allocated by statute to a German or Italian speaker subject to the agreement of a majority of assembly members from the respective language groups. Articles 48 and 50, Statute of Autonomy for the Region Trentino-South Tyrol (as modified by constitutional law of the Italian Republic of 31 January 2001, nr .2).

[100] The question on the compatibility of the South Tyrol system with Convention and EU law was put to the ECJ by the labour court of Bozen/Bolzano. In ECJ 24 April 2012, Case C-571/10, *Kamberaj*, the ECJ declined to answer whether EU law trumped fundamental principles of the constitutional system of the concerned member state, in this case minority protection, because such question was not material to the case at hand.

[101] J. Velaers, 'De pariteit in the Minsterraad (artikel 99, tweede lid van de Grondwet)' [*The parity in the council of ministers – article 99.2 of the Constitution*], 1 *TBP* (2015) p. 4 at p. 12. According to Article 99 of the Constitution, the Council of Minsters has an equal number of French- and Dutch-speaking ministers. Linguistic affiliation is determined by the language group one represents in parliament. Report Chabert, parliamentary documents of the Chamber BZ1968, 10-nr. 25/2, p. 2.

[102] *Special Law on the Brussels Region* (12 January 1989), Article 17(1). Hugues Dumont and Sébastien van Drooghenbroek argued that the Brussels parliament election law would not stand up to the proportionality test of the Strasbourg Court, in 'L'interdiction Des Sours-Nationalités À Bruxelles', *Administration Publique Trimestriel* (2011) p. 201 at p. 215-6.

Venice Commission,[103] and the primary role of identity in elections to the Brussels parliament is at odds with the Court's constructivist conceptualisation of identity.[104]

Ran Hirschl argued that the challenge raised by the Bosnian cases is much broader than generally acknowledged. In Hirschl's words, the broader question is to what extent an external court should intervene in the internal affairs of a well-defined community.[105] For Hirschl, *Sejdic* seems less problematic than the British Supreme Court's meddling into the intra-Jewish diatribe of who is to be considered a Jew.[106] For Tom Ginsburg, on the contrary, 'virtually any human rights court or constitutional court decision destabilizes prior understandings, so why treat consociations any differently?'[107]

## An internal ceasefire

The difference between consociations and other political systems is that power-sharing systems represent the political equivalent of a military ceasefire. Historically, these agreements have been put in place to end intergroup violence: a war in Bosnia, 'troubles' in Northern Ireland, small-scale civil conflict in the Former Yugoslav Republic of Macedonia, bombs in South Tyrol/Italy, or to prevent a war as in Belgium. In many divided polities throughout Europe, political power-sharing compromises were put in place to prevent or overcome inter-community violence.

As power-sharing systems are designed to protect a higher public interest, supra-national courts face an important legitimacy dilemma. The Belgian Constitutional Court elevated these political 'ceasefires'[108] to a 'superior public interest'.[109] If international courts are called upon to rule on the human rights compatibility of domestically defined 'superior public interest', they might collide with the boundaries of their explicit and implicit legitimacy.[110] Supra-national courts such as the European Court of Human Rights self-define their role as

[103] Venice Commission, 'Opinion on the Constitutional Situation in Bosnia-Herzegovina and the Powers of the High Representative', CDL-AD (2005) 004, Venice, 11 March 2015.

[104] J. Ringelheim, 'Identity Controversies before the European Court of Human Rights: How to Avoid the Essentialist Trap?', 3(7) *German Law Journal* (2002) p. 167.

[105] T. Ginsburg, 'Courts and Consociations (review)', *ICONnect (ICON blog),* 16 August 2013, <www.iconnectblog.com/2013/08/review-of-courts-and-consociations-by-christopher-mccrudden-and-brendan-oleary-oup-2013/>, visited 15 February 2016.

[106] *Id.*, referring to *R (E)* v *Governing Body of JFS* [2009] UKSC 15. For a clarifying but applauding comment, *see* K. Monaghan, 'Case Comment: R (E) v Governing Body of JFS & Ors [2009] UKSC 15', <ukscblog.com/case-comment-r-e-v-governing-body-of-jfs-ors-2009-uksc-15/>, visited 15 February 2016.

[107] Ginsburg, *supra* n. 105 (ICON blog).

[108] P. Martens, *Théories du droit et pensée juridique contemporaine* (Larcier 2003) p. 256.

[109] Belgian Constitutional Court, 23 May 1990, no. 18/90, at B.9.1, B.9.2.

[110] Judge Levitis in ECtHR 17 June 2004, Case No. 58278/00, *Zdanoka* v *Latvia*.

'supplementary and subsidiary to the protection of rights and freedoms under national legal systems'.[111] Judicial unwinding of power-sharing systems raises questions if courts, in particular international courts, trespass on their constitutional space.

Courts in consociational democracies have therefore shown restraint when faced with first-order challenges to the structure of the political system. Challenges to consociational systems may reopen inter-community political conflict and destabilise weak democracies.[112] Pildes and Issacharoff hypothesise that courts in divided societies will elevate public order and stability over abstract human rights principles.[113] State courts in Italy, Northern Ireland and Belgium have refrained from unwinding inter-community compromises.[114] As predicted in legal theory, courts largely deferred to the legislator in first-order challenges.

Court intervention risks being rejected as partisan, as constitutional law is often a function of political interests. Strategic group interests underpin the understanding and interpretation of constitutional law.[115] Belgium is an example. While for Flemings the country's division into language regions is the cornerstone of Belgium's Constitution, for French-speakers no, or very limited, normative consequences flow from this principle.[116] Already back in *Belgian Linguistics,* the Belgian government feared that it would be a victory for French-speaking 'extremists' over Belgian 'wisdom' had the Human Rights Court found a violation.[117] Put more abstractly, apex courts have a choice between a centralising interpretation, in the name of universal human rights, and a decentralising interpretation, which contextualises human rights in light of internal political structures[118] – either choice risks to be perceived as partisan.

## Looking for the safety valve

The European Court of Human Rights has an implicit rather than explicit political question doctrine. In *Belgian linguistics*, the Belgian government had raised the

[111] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) p. 236.

[112] Issacharoff, quoted in O'Leary and McCrudden, *supra* n. 5, p. 43.

[113] Issacharoff, *supra* n. 17, p. 234. Richard H. Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective', in S. Choudry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) p. 173.

[114] O'Leary and McCrudden, *supra* n. 5, p. 43.

[115] C. Harvey and A. Schwartz (eds.), *Rights in Divided Societies* (Hart Publishing 2012).

[116] W. Martens, *Mémoires pour mon pays* [Memories for my country] (Racine 2006) p. 404 [citing the divided opinion of the French and Dutch-speaking Council of State chambers (delivered on 15 June 1988) on the normative meaning of the constitutional concept of language regions.]

[117] *See* Belgian parliamentary discussions reproduced in Council of Europe, *1965 ECHR Yearbook* (Martinus Nijhoff 1967) p. 471 at p. 481.

[118] Issacharoff, *supra* n. 17, at p. 242.

preliminary objection that important legal and political matters, such as the constitutional structure of the state, constituted a 'reserved domain'.[119] The idea of an eminently political domain free from judicial review was rejected by the Court without much ado. In *Zdanoka*, Slovenian judge Zupancic argued that the 'colossal progress of constitutional law' transformed formerly political questions into central rule of law issues.[120] Nonetheless, scholars have quickly grasped that the Court 'recognized the political component of the law it administers' by applying the margin of appreciation doctrine.[121] It accords a margin of appreciation mainly depending on the area of law, the existence of a European consensus and the type of right in question.[122] The European Court of Human Rights rejected the idea that certain areas of law constitute domains reserved to the national legal order, but recognises national sovereignty through the more flexible instrument of the margin of appreciation doctrine.

While the 'colossal progress of constitutional law' has progressively eroded the margin of appreciation in many areas of law,[123] strong state criticism had induced the Court to 'enter into an age of subsidiarity'.[124] Various theories of procedural rationality, or even semiprocedural rationality, are one such way to recalibrate the Court's margin of appreciation.[125] Popelier and Van De Heyning argued that courts should scrutinise whether legislative choices are based on rational, evidence-based decision-making.[126] In this sense, Popelier pleads for procedural rationality as an 'interesting golden mean' able to protect rights when the political salience of a case impedes substantive review.[127] Citing *Vodafone*,[128] European Court of Justice judge Lenaerts, writing extra-judicially, called for 'strict process review'. Lenaerts posited that strict process review allows the European Court of Justice to use its passive virtues and avoid unnecessary substantive conflicts with political branches.[129] Process theories allow a high level of human rights

[119] For a rich account of the judicial politics behind *Belgian Linguistics*, *see* E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010) at p. 225-238.

[120] ECtHR [GC] 16 March 2006, Case No. 58278/00, *Zdanoka* v *Latvia.*

[121] M. Tushnet, 'Institutions for Implementing Constitutional Law', in I. Shapiro et al. (eds.), *Rethinking Political Institutions* (New York University Press 2006) p. 241 at p. 250.

[122] P. van Dijk. and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer 1990) p. 589.

[123] Bossuyt, *supra* n. 14.

[124] Spano 2014, *supra* n. 15, p. 487.

[125] *See* different contributions in P. Popelier et al. (eds.), 'The role of courts as regulatory watchdogs', 3 *Legisprudence – special issue* (2012).

[126] Popelier and Van De Heyning, *supra* n. 15, at p. 230.

[127] P. Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs', 6(3) *Legisprudence* (2012) p. 257 at p. 260.

[128] ECJ 8 June 2010, Case C-58/08, *Vodafone and Others* v *Secretary of State for Business, Enterprise and Regulatory Reform.*

[129] Lenaerts, *supra* n. 15, at p. 3.

protection, while at the same time respecting the subsidiarity principle and avoiding substantive conflict.

The 'integrative democratic tolerance' approach, developed by the author, is inspired by these both descriptive and prescriptive theories of judicial decision-making, but is different from it. It is specifically tailored to politically sensitive legal challenges to the constitutional structure of a state.

## 'Rights' and 'democracy' – The 'integrative democratic tolerance' approach

The broader aim of the 'integrative democratic tolerance' approach is to reconcile the democracy principle with the protection of fundamental rights. It particularly applies to those cases in which a court is called on to rule on cases involving the constitutional structure of a state. The integrative democratic tolerance approach is tailored to the Strasbourg Court, which has a 'supplementary and subsidiary'[130] function to national human rights protection. In addition, the European Court faces a more challenging institutional (political) environment than national apex courts. Albeit on a lesser scale, also national constitutional courts might find the integrative democratic tolerance approach useful. The following five legal and political principles form its backbone.

*First,* the democratic and constitutional legitimacy criterion. The higher the majorities that supported the law on which the restriction is based,[131] the more recent the agreement is and the higher the legal norm on which the power-sharing agreement is built on, the more courts should use restraint. This is particularly true when the compromise has been integrated in a country's constitutional law or it forms part of a member state's deeply felt constitutional identity. The democratic legitimacy criterion focuses on the political majorities backing the restriction and the inclusion of the allegedly discriminated group in decision-making. The argument is that courts should use more restraint if the rights limitation is result of an inclusive, democratic process that is supported by a cross-community consensus ideally backed by a qualified constitutional majority.

Democratic considerations have been integrated by the Court into its proportionality balancing. In *A, B and C* v *Ireland*, the Court seemed to put weight on surveys of public opinion that demonstrated the ongoing controversial nature of abortion in Ireland.[132] In certain Swiss cases, the Court implied that a lower level of judicial scrutiny is required when the people have the possibility to

[130] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) p. 236.

[131] O'Leary and McCrudden argued that the inclusive nature of the Belgian consociation usefully distinguishes it from the Bosnian case; *supra* n. 5, p. 138-142.

[132] ECtHR [GC] 16 December 2010, Case No. 25579/05, *A, B and C* v *Ireland*; discussed in Popelier and Van De Heyning, *supra* n. 15, at p. 260.

declare themselves in favour or against a certain policy.[133] In the Belgian cases, the Strasbourg Court gave particular importance to the fact that the intention behind Belgian language legislation 'clearly emerged from debates in the national democratic parliament' and was supported by 'massive majorities' of all groups in the country.[134] Democratic process considerations and popular will have been factors the Court took account of in its case law.

Democratic and constitutional consensus bends the latitude left to the legislator in discrimination cases that are salient at the national level. The Belgian Council of State opined that the legislator's room for manoeuvre in distinguishing between different categories of persons is all the larger the more it is based on a cross-community consensus.[135] A greater margin of appreciation should be accorded if the challenged law is based on a two-thirds majority, particularly if it enjoys support beyond the boundaries of a single group. If such reinforced constitutional majority is missing, the Strasbourg Court could consider whether the domestic courts found the challenged law to be essential for the country's institutional equilibrium.[136] The Belgian Constitutional Court argued that preserving peace through power sharing constitutes a 'superior public interest' that justified a more lenient judicial review.[137] Following case law and Belgian advice practice, the more political majorities across both language groups agree that certain situations do not amount to discrimination, the more rights restrictions are constitutionally and judicially acceptable. This means that discrimination cannot be defined *a priori* but depends on the breadth of political consensus for the norm at the law making stage. Qualified majorities buttressed by a cross-community support and, to a slightly lesser degree, national court decisions upholding a law as an essential element of the country's polity, should warrant a wider margin of appreciation.

The international dimension of a power sharing agreement points to a greater margin of appreciation, which should vary according to the breadth and inclusiveness of the process of democratic ratification. Northern Ireland and South Tyrol serve to illustrate this point. The Good Friday Agreement has been approved in a referendum in Northern Ireland and the Republic of Ireland, and the UK

[133] ECtHR [GC] 6 April 2000, Case No. 27644/95, *Athanassoglou and Others* v *Switzerland*; ECtHR [GC] 26 August 1997, Case No. 67/1996/686/876, *Balmer-Schafroth and Others* v *Switzerland* (in both cases the applicants unsuccessfully sought a judicial remedy against the Federal Council's decisions to prolong the licenses for nuclear power plants).

[134] ECtHR (plenary) *Mathieu Mohin,* para. 57. *See also* the partly dissenting opinion of Judge Terje Wold in *Belgian Linguistics* (merits).

[135] Belgian Council of State advice, n° 51.214/AG of 2 May 2012, parliamentary documents Senate n°1560/2 (2011/12), p. 6-7.

[136] *See* for instance Belgian Constitutional Court, 90/94, 22 December 1994 (paras B-4 to B-4.24)

[137] Belgian Constitutional Court, 23 May 1990, no. 18/90, at B.9.1, B.9.2.

Parliament has done so via the Northern Ireland Act. Not much different is the South Tyrolean case, where the constitutionally embedded power sharing agreement has been approved, next to the German-speaking minority party, by the Italian and Austrian parliaments (the latter as South Tyrol's legitimate 'protective power' in light of an international treaty annexed to the World War II Peace Agreement[138]). Overall, the Court can usefully integrate these democratic criteria into its proportionality test in cases that give rise to significant intergroup controversy.

In the Bosnian cases, on the contrary, the weak democratic legitimacy is a helpful criterion distinguishing it from other power-sharing systems. The Bosnian Constitution is part of an international treaty, the Dayton Peace Agreement, and has not been ratified by the Bosnian parliament and its people. Croatia signed but never ratified and Yugoslavia had not ratified the Dayton Agreement until the last days of her existence.[139] To be clear, an appreciation of the internal and external security situation through independent experts seems necessary before narrowing the margin of appreciation in politically unstable or otherwise threatened states. This has been called for by O'Leary and McCrudden.[140] As the key idea behind *Sejdic* was to craft an effective political democracy in a sufficiently stable state, the Court could have anchored *Sejdic* to the weak democratic legitimacy of Bosnia's Constitution.[141]

*Second*, the legal consistency criterion: precedents should lead the Court to restraint, and decisions overturning precedent should be backed by a strong reasoning.

As a principle, the Court should take account of the procedural requirement that national courts need to faithfully discuss Convention rights and Strasbourg jurisprudence in order to be granted a margin of appreciation. This is, in essence, the Spano test. If the Strasbourg Court decides to overturn the national decision, it should forcefully explain why national courts got it wrong and set a new standard. As a rule, faithfulness to precedent is strongly linked to legal security and effectiveness of the Convention.[142] The Court should refer to tests of procedural rationality to better shield its legitimacy in salient cases.

[138] P. Hilpold, 'South Tyrol', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) p. 329.

[139] A. Zilic, 'The Dayton Agreement: Challenges of Change', presented at the international conference on Interethnic Relations in the Western Balkans. Berlin, 12-13 September 2003. The Dayton Agreement is legally valid but has limited democratic legitimacy.

[140] McCrudden and O'Leary, *supra* n. 96, p. 492-493.

[141] This is also one of the main suggestions of McCrudden and O'Leary, *supra* n. 96, p. 499-500.

[142] The Vice-President of the French Council of State expects the ECtHR to provide clear, consistent and well-reasoned case law positions. J. M. Sauve, 'Subsidiarity: a two-sided coin?' Strasbourg, 30 January 2015 (ECtHR seminar), <www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauvé_ENG.pdf>, visited 15 February 2016.

On the substantive side, a strong legal reasoning that justifies the departure from judicial precedent can ease implementation by argumentatively convincing the legal epistemic community as well as political actors. This will be illustrated by referring to some problematic issues in *Sejdic*.

The argumentative tissue in *Sejdic* was insufficiently woven in with other relevant case law precedents. It is important to remark that the Court did not discuss its own precedents on electoral discrimination in divided societies, chiefly the Belgian *Mathieu-Mohin* and the Cypriot *Aziz*[143] case. *Zdanoka* was quoted only by dissenting judges referring to a broader margin of appreciation for transitional societies.[144] The Court failed to discuss relevant elections case law when deciding the Bosnian cases.

The Court might intentionally have left case law consistency in the dark, in order to treat Bosnia as special case. This has allowed the Court to deal with Bosnia without explicitly overturning its elections case law. But there would have been other ways to treat Bosnia as a special case. The Court could, ideally, have relied on the democratic creeps of Bosnia's constitution or fallen back on the margin of appreciation doctrine, perhaps with reference to the specificities of Bosnia's constitutional identity (a tripolar ethnic federalist system based on parity between constituent peoples in key state institutions).

A court decision overturning precedent in such a sensitive domain should be equipped with a particularly strong reasoning, which *Sejdic* was not. Although disagreeing on the merits, both international judges of the Bosnian Constitutional Court found that *Sejdic* was a badly argued decision.[145] Feldman, building on the sibylline warning of his concurrence, wrote that the Court's decision was neither legitimate nor effective: 'if ever there was a case that required careful assessment of proportionality in the light of a margin of appreciation as a condition for both the legitimacy and the effectiveness of the Court, then *Sejdic* was it'.[146] Grewe remarked that the European Court 'does not elaborate systematically on any standards of justification, does not provide any guidance to the more general question what factual circumstances of dividedness may justify diversion from democratic equality, [and does not address] the problem of democratic inequality caused by quotas and the linking of ethnicity and territory.'[147] Both international judges of the Bosnian Constitutional Court, which had dealt with the issues giving

[143] ECtHR, 22 June 2004, Case No. 69949/01, *Aziz* v *Cyprus*.

[144] ECtHR [GC] 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdic and Finci* v *BiH*; partly dissenting and party concurring of judge Mijovic, joined by judge Hajiyev.

[145] Bosnian Constitutional Court, 29 September 2006, AP-2678/06 (*Pilav*); Grewe and Riegner, *supra* n. 54, p. 31.

[146] D. Feldman, 'Sovereignties in Strasbourg' in R. Rawlings et al. (eds.), *Sovereignty and the Law – Domestic, European, and International Perspectives* (Oxford University Press 2013) p. 213 at p. 223.

[147] Bosnian Constitutional Court, 29 September 2006, AP-2678/06 (*Pilav*); Grewe and Riegner, *supra* n. 54, at p. 31.

rise to *Sejdic* for many times in domestic constitutional adjudication, found the reasoning underpinning the judgment unconvincing.

*Third*, a step-by-step judicial intervention that gradually unwinds an ethnic system might be a good way to proceed. The South Tyrolean ethnic proportionality system is a point in case. In South Tyrol, every Italian citizen had to declare if he belonged to the German, Italian or Ladin-speaking group, as jobs in the public sector are distributed according to ethnic data in the population census. Following judgments of the Italian Council of State[148] and the Italian Constitutional Court,[149] every Italian citizen resident in South Tyrol, as well as other Italian and EU citizens under certain conditions, declares either to *belong,* or to *affiliate*, with the groups of Germans, Italians or Ladins. This system gives citizens who cannot or do not want 'belong' to one of the three groups the possibility to freely choose their group, forcing them nonetheless to 'affiliate' with one of the three main groups recognised by the Statute of Autonomy.[150] Such declarations can be modified but take effect only after some time to prevent abuse.[151] Surprisingly, no case was ever brought to the Strasbourg Court to test its Convention compatibility.[152] However, the ethnic edges of the South Tyrolean system have been consistently smoothed by decisions of Italy's top courts.[153] The South Tyrolean system does a fair job in matching individual choice and societal interests of group equality, and could be applied to Bosnia without requiring a fundamental overhaul of the current system.[154]

Such gradual intervention is warranted, because time and necessity determine whether a restriction amounts to discrimination or not. In *Zdanoka*, the Court

[148] Italian Council of State, judgment no. 439 of 7 June 1984.

[149] Italian Constitutional Court, judgments no. 285/1987, no. 768/1988 and no. 260/1993.

[150] Legislative decree modifying the Decree of the President of the Republic of 26 July 1976, n. 752, on the declaration of belonging or affiliation to a linguistic group in the Province of Bozen/Bolzano; <www.landtag-bz.org/de/datenbanken-sammlungen/bestimmungen-autonomiestatut.asp?somepubl_action=300&somepubl_image_id=115437>(German), visited 15 February 2016.

[151] E. Lantschner and G. Poggeschi, 'Quota System, Census and Declaration of Affiliation to a Linguistic Group', in J. Woelk et al., *Tolerance Through Law – Self Governance and Group Rights in South Tyrol* (Brill 2008) p. 219.

[152] J. Marko, 'The nature and implications of the judgment of the European Court of Human Rights in *Sejdic* and *Finci* v *Bosnia and Herzegovina*', paper presented at the conference *Place and role of the Others in the Constitution of Bosnia and Herzegovina and future constitutional solutions for Bosnia and Herzegovina*, University of Sarajevo, 3 February 2010, at 9.

[153] Lantschner and Poggeschi, *supra* n. 151. For instance, the Italian Supreme Court accepted that a candidate could declare his linguistic identity at the time when running for office. Before that, the right to run for office was restricted to the sole candidates who declared their identity jointly with the population census. In its proportionality analysis, the Italian Court found that the ad hoc declaration served the same purpose while being less burdensome for the applicant. (Corte di Cassazione, judgment no. 11048 of 24 February 1999, Ivan Beltramba).

[154] Phone interview with a former judge of the Bosnian Constitutional Court, 20 August 2015. On file with the author.

ordered Latvia to ease restrictions to the right to stand as a candidate in elections as soon as conditions permitted it and failure to do so would be sanctioned by the Court: 'the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end… Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court'.[155] In Sejdic, on the other hand, the Court was convinced that the situation had improved and that 'time has come' to change the system. A certain weight in the judgment was given to the prior opinions of the United Nations Human Rights Committee and the Venice Commission, which had earlier found Bosnia's Constitution incompatible with international human rights norms.[156] For South Tyrol, academics predict that the measurable decrease in the region's ethnic conflict might justify an unwinding of its power-sharing system in the close future.[157] The factual dividedness of a society at a certain point in time determines, rightly so, whether restrictions to the right to vote are discriminatory or not.

Always relating to a softer judicial intervention are examples of judicial dialogue with the legislator. For instance, the Bosnian Constitutional Court has recently decided that the constitutions of Bosnia's entities violated the Convention,[158] but suspended the effect of its decision until a political agreement on broader discrimination issues in Bosnia's legal order can be found.[159] The Belgian Constitutional Court similarly declared discriminatory electoral laws unconstitutional, but gave the legislator ample time to implement it.[160] Such a 'creative' approach is not always easy to reconcile with the rule of law, as it might conflict with procedural rules a court is bound to and give rise to ambiguities in implementing the judgment. Although these examples of more careful judicial intervention are not without risks, they go in the direction of balancing the rights and the democracy principles.

*Fourth*, judges have to show a keen sense of political judgment. In other words, they should be able to anticipate if their decision is situated within an 'interval of tolerance' acceptable for the political authority charged with implementing

[155] ECtHR [GC] 16 March 2006, Case No. 58278/00, *Zdanoka* v *Latvia,* para. 135.

[156] *Sejdic*, para. 19-23.

[157] G. Pallaver, 'South Tyrol's Consociational Democracy: Between Political Claim and Social Reality', in Woelk et al., *supra* n. 151, p. 303.

[158] CC U-14/12 of 26 March 2015, para. 75. *See* M. Dicosola, 'The Constitutional Court of Bosnia and Herzegovina declares the system of ethnic federalism of the Entities inconsistent with the principle of non-discrimination: much ado about nothing?', *Diritticomparati*, 2 July 2015, <www.diritticomparati.it/2015/07/the-constitutional-court-of-bosnia-and-herzegovina-declares-the-system-of-ethnic-federalism-of-the-e.html#sthash.6EKtDjrf.dpuf>, visited 15 February 2016.

[159] *Ibid.*

[160] Belgian Constitutional Court, 73/2003 of 26 May 2003.

the judgment.[161] A decision that is too costly for political actors to implement is more likely to inflame rather than diffuse a tense political atmosphere between communities. Although these elements might appear elusive, they are certainly present in judges' minds. Hirschl found that an 'overwhelming body of evidence suggest that extrajudicial factors play a key role in constitutional court decision making patterns'.[162] Mann and Hübner Mendes argued that courts are 'acutely aware' of external constraints, but prefer to leave them in the dark so as to sustain the judicial myth of pure principled adjudication.[163] Madsen opined that current Strasbourg Court faces a legitimacy crisis because its 'young judges' lack the required diplomatic experiences when deciding hard cases.[164] When courts touch upon political questions, they should handle them with due care.[165]

Courts should consider the possibility of non-implementation when making judgments in politically sensitive areas of the law. Epstein and others have argued that courts in non-mature democracies should factor into their calculation the cost of a non-implementation.[166] But judgments that go against the strategic interests of political actors in sensitive domains are controversial not only in transitional democracies. The controversial *Hirst* judgment on prisoner voting rights remains unimplemented by the UK even ten years after the Grand Chamber's judgment. The 1968 violation finding concerning the 'communes a facilités' in *Belgian Linguistics* has never been implemented.[167] Non-implementation of politically sensitive judgments is an issue not only in defective or transitional democracies.

In consociational democracies there is a risk that implementation falls victim to lacking inter-community consensus or ethnic outbidding, particularly when implementation requires constitutional change. Ethnic outbidding or insufficient

[161] L. Epstein et al., 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', 35 *Law & Society Review* (2001) p. 1.

[162] R. Hirschl, *Comparative Matters – The Renaissance of Comparative Constitutional Law* (Oxford 2014) p. 166.

[163] R. Mann and C. Hübner Mendes, 'What Judges Don't Say – Judicial Strategy and Constitutional Theory', *Law Log – WZB Rule of Law Center*, February 2015, <https://lawlog.blog.wzb.eu/2015/02/09/what-judges-dont-say-judicial-strategy-and-constitutional-theory/>, visited 15 February 2016.

[164] M. Madsen, 'The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights' in M. Bobek (ed.), *Selecting Europe's Judges* (Oxford 2015) p. 259-278.

[165] R. Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?', XIII *Juridica International* (2007) p. 47 at p. 59.

[166] Epstein et al., *supra* n. 161.

[167] *See* Council of Europe Parliamentary Assembly, Resolution 1301 (2002), para. 23, 'calling on the Kingdom of Belgium to fully implement, *without further delay*, the judgment of the European Court of Human Rights of *23 July 1968* …' (author's emphasis). The last effort to implement the judgment stems from 2014 (Belgian Chamber, doc. 54K0151).

inter-community consensus might limit the central government's ability to implement the judgment.[168]

Belgium serves as an example. The *Belgian Linguistics* case will probably never be implemented, not least because changing so called special-majority laws requires an overall two-thirds parliamentary majority including a majority of both language groups. Similar considerations would apply had the Court found a violation in *Mathieu-Mohin*: while the dissenters have a strong legal point, the question is whether a supra-national court should apply the least restrictive means test in such a sensitive area of constitutional law. Cross-community negotiations shaping Belgium's state structure have been long, difficult, complex and passed a very high constitutional threshold. In addition, the judgment of the dissenters in *Mathieu-Mohin* would have run counter to the constitutional evolution of Belgium. Court judgments requiring constitutional or quasi-constitutional revision in highly sensitive policy areas face a high risk of non-implementation.

The Bosnian cases would equally require constitutional reform to be implemented. Bardutzky found the *Sejdic* judgment very promising, but admitted that it is very challenging to implement.[169] Feldman wrote that anyone with knowledge of the local political context could have reasonably foreseen that *Sejdic* would remain unimplemented.[170] The window of opportunity for improving Bosnia's main human rights concerns closed when (the first and only) constitutional reform attempt with success chances failed by a mere two votes in 2006.[171] Implementation of judgments unwinding a power-sharing system is difficult because of the possible lack of a constitutional moment for implementation and the high majorities required for it.

As a principle, judges should implicitly weigh whether the 'right' at stake trumps the present and future costs of non-implementation to their judicial legitimacy and society at large.

*Fifth*, courts should consider whether their judgments contribute to the integration of society. More broadly, the European Court of Human Rights should pay attention to why a state is discriminating and the reasons behind it. The Strasbourg Court, or highest courts at national level, when faced with an equally plausible alternative between a constitutional choice that builds bridges between

[168] M. Bogaards, *Democracy and Social Peace in Divided Societies – Exploring Consociational Parties* (Palgrave 2014).

[169] Bardutzky defined the judgment as promising but difficult to implement. This holds particularly true for the presidency, which has control over armed forces. Bardutzky, *supra* n. 70, p. 333.

[170] D. Feldman, 'Sovereignties in Strasbourg' in R. Rawlings et al. (eds.), *Sovereignty and the Law – Domestic, European, and International Perspectives* (Oxford University Press 2013) p. 213 at p. 223.

[171] J. Marko, 'Constitutional Reform in Bosnia and Herzegovina 2005-2006', 5 *European Yearbook of Minority Issues* (2006/07) p. 207.

the country's different nations and one that divides them, should opt for the former. This integrative consideration carries particular weight when it touches upon essential notions of justice, such as reversing policies that led to elimination of difference in the form of 'right peopling' a particular territory such as expulsion, secession and political homogenisation in the form of assimilation.[172] The South African example is telling in that regard, as courts are constitutionally obliged to interpret the Bill of Rights in such a way as to promote the values of an open and democratic society based on 'human dignity, equality and freedom'.[173]

The question for the European Court of Human Rights is: does the judgment promote equality and integration? Nikolaidis argued that the function behind the equality principle in Strasbourg case law is to eradicate prejudice and stereotyping.[174] Although it is not spelled out clearly, this principle is already the rationale behind many Strasbourg decisions,[175] including *Sejdic* and *Zornic*.[176]

## Conclusion

The question that drives this article is to uncover how the Court dealt with, and how it should deal with, the tension between the 'rights' and the 'democracy' principle in first-order challenges.

The premise therefore is that there is a 'problem'. For states, the Strasbourg Court invaded their 'democratic' terrain through a burgeoning minority rights jurisprudence. The fierce and lasting criticism from some convention states induced scholars and judges to find a new balance between the rights and democracies principles. Proceduralist theories identified 'interesting golden means' to maintain principled judicial decision making while at the same time loosening the grip on member states.[177] This intervention is situated in that broader framework.

The paper discusses human rights challenges to internal political structures, a tiny but incredibly explosive subset of cases that Strasbourg judges find on their

[172] B. O Leary, 'The Elements of Right-Sizing and Right-Peopling the State', in B. O'Leary et al. (eds.), *Right-Sizing the State – The Politics of Moving Borders* (Oxford University Press 2001) p. 15 at p. 28.

[173] Section 39 of the Constitution of South Africa.

[174] C. Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance* (Routledge 2014).

[175] Marko, *supra* n. 48.

[176] In *Sejdic*, the Court put some weight on the opinion of the Venice Commission, which had found that Bosnia's ethnic system did not produce integration but ethnic entrenchment. 'Amicus Curiae Brief in the Cases of *Sejdic* and *Finci* v *Bosnia-Herzegovina* pending before the ECtHR', 483/2008, Strasbourg, 22 October 2008, para. 33. *See also* the remarks of Pallaver on South Tyrol, *supra* n. 157.

[177] *See*, inter alia, Popelier, *supra* n. 127, at p. 260.

benches from time to time. The Bosnian cases *Sejdic-Finci* and *Zornic* are noteworthy because the Court applied its 'burgeoning' anti-discrimination case law to an area generally off-limits for international courts. Such courts, as a precautionary measure, stay clear of the mined terrain of internal political structures. Prudence had hitherto been the *leitmotiv* of the Court's election case law.

At odds with these expectations, a nearly unanimous Court laid down strong legal principles in the Bosnian cases. These include that the legislator has to take account of an individual's identity choice when designing the electoral system. This seems to partially overrule *Mathieu-Mohin* v *Belgium,* where a comfortable Court majority found no problem in externally imposed limits to self-classification. The broader practical challenge is to translate legal principles into politically acceptable and viable solutions. Tom Ginsburg similarly reasoned that the Bosnian cases force us to think about the deep tension between what is principled and what is possible.[178]

The principles laid down in the Bosnian cases could be applied by courts in the context of other power-sharing systems. For instance, in Belgium candidates for election need to declare themselves as French- or Dutch-speakers and in South Tyrol (Italy) everyone, including candidates for political office, needs to affiliate with either the Italian, German or Ladin language group. *Mutatis mutandis,* the same applies to Northern Ireland and Bosnia. Seen in this light, the principles developed by the Court cast a shadow on other political systems that are built on politically salient group identities, as a consociational democracy is conceptually difficult to reconcile with full freedom of self-classification.

Human rights courts and bodies have arrived at a crossroads. For Christine Bell they wrestle with two equally unsatisfying options: deference or 'muddling through'.[179] The aim of the integrative democratic tolerance approach is to open a third way, one in which (inter)national court decisions on such first-order challenges are firmly couched in democratic, legal and integrative principles. It is not a closed package, but a series of considerations that the Court should put on the scale when balancing rights with public interests in these difficult cases. The approach incorporates both procedural and substantive criteria as well as the necessary flexibility to reconcile what is principled with what is possible. It deserves listeners.

[178] Ginsburg, *supra* n. 105.

[179] C. Bell, 'Power-sharing and human rights law', 17(2) *International Journal of Human Rights* (2014) p. 204 at p. 229.

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