CONSTITUTIONS AND THE RIGHT OF THE NATIONAL MINORITIES TO PARTICIPATE IN THE ELECTORAL PROCESS

the Cases of *Bosnia and Herzegovina*, *Cyprus* and *Latvia*

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Abstract

Asides from being an element of Citizenship, political participation is also an important factor in the integration of ethnic minorities and in maintaining the stability in the multiethnic states. The rights 'to vote', 'to be elected', and 'to stand for office', are rights that most jurisdictions recognize and refer to in their constitutions. Placing restrictions on these rights, based on ethnic considerations, would clearly amount to discrimination.

The aim of this thesis is to analyze from a comparative perspective whether a constitution can classify persons according to their ethnic belonging and prevent them from participating in the electoral process. The argumentation will rely on the decision of the European Court of Human Rights in three cases triggering discrimination in political participation and a violation of the European human rights: Sejdić and Finci v. Bosnia and Herzegovina, Aziz vs. The Republic of Cyprus, and Podkolzina v. Latvia

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Introduction

Asides from being an element of Citizenship, political participation is also an important factor in the integration of ethnic minorities and in maintaining the stability in the multiethnic states. The rights 'to vote', 'to be elected', and 'to stand for office', are rights that most jurisdictions recognize and refer to in their constitutions. Placing restrictions on these rights, based on ethnic considerations, would clearly amount to discrimination.

The aim of this thesis is to analyze from a comparative perspective whether a constitution can classify persons according to their ethnic belonging and prevent them from participating in the electoral process. The argumentation will rely on the decision of the European Court of Human Rights in three cases triggering discrimination in political participation and a violation of the European human rights: Sejdić and Finci v. Bosnia and Herzegovina, Aziz vs. The Republic of Cyprus, and Podkolzina v. Latvia.

The topic is relevant for the field of Law, as it addresses both a human rights issue (Article 3 of Protocol 1 of the European Convention of Human Rights) and a constitutional one, (considering that the right to vote is mainly a constitutional process).

Numerous reports addressing the problem of the constitutions providing and maintaining the grounds for discrimination based on ethnicity have been drafted by national and international advisory bodies stressing on the necessity on behalf oh the respective states to take affirmative actions in order to change this situation.

The questions proposed by the thesis intend to create a clear picture of the legal and the institutional system of Bosnia and Herzegovina, Cyprus and Latvia, in order to provide a better understanding of the role of their constitutions to enforce the right of national minorities to participate in the electoral process.

What are the distinctive features of the three jurisdictions in the field of national minorities' rights protection? Here I will make a short description of the three jurisdictions, focusing on their particular constitutional provisions in the field of minorities' rights protection.

How does the right of the national minorities to participate in elections operate under the constitutions of Bosnia and Herzegovina, Cyprus and Latvia? Here I will make an analysis of the way in which the right to vote is described by the constitutions of the three states.

Do the three constitutions provide a ground for discrimination based on ethnic considerations? Here I will present the ECHR judgments in the three cases mentioned above and analyze the impact of the Court's decisions on the constitutional arrangement of the three jurisdictions.

The first two questions will be addressed in the first chapter of the thesis, while the second chapter will be dedicated to the case-law of the European Court of Human Rights regarding the right of the national minorities to participate in elections.

Chapter I - The Right of the National Minorities to Participate in Elections under the Constitutions of Bosnia and Herzegovina, Cyprus and Latvia

A. The rights of minorities under the Bosnian, Cypriot and Latvian Constitutions

The Constitution of Bosnia and Herzegovina, also known as the Dayton Agreement, was singed in 1995 as a part of the General Framework Agreement for Peace in Bosnia and Herzegovina. Article II of the Constitution refers the problem of human rights protection by enumerating the rights falling under its protection (Article II. 3.), by granting a non-discriminatory treatment to all persons in Bosnia and Herzegovina (Article II.4.), as well as by proclaiming the absolute supremacy of the Convention for the Protection of Human Rights and Fundamental Freedoms in these matters. Regarding the ethnic discriminations in elections, the provision showing the most relevance is to be found in the Preamble of the Constitution, which makes a distinction between the “constituent peoples" (Bosnians, Croats and Serbs), "citizens of Bosnia and Herzegovina" and "Others". Under the constitution, only the “constituent peoples” are allowed to participate in the parliamentary and presidential elections. The jurisdiction is relevant for our analysis as it offers an example of violation of the rights of an ethnic category to participate in elections, as it was decided in the 2009 by the European court of Human Rights in the case of Sejdić and Finci v. Bosnia and Herzegovina.

In the Preamble of the Bosnian Constitution, a distinction is made between the “Constituent Peoples” (the Serbs, Croats, and Bosniaks) and “Others”. According to Hodžić and Stojanović, “the ‘Others’ are (1) persons belonging to other peoples, nationalities, ethnic groups and the like, e.g. Roma, Jews, Albanians, Slovenians, Montenegrins, Czechs, Ruthenians, etc., (2) persons from so-called mixed marriages, (3) persons who for personal/ideological/principled reasons do not want to belong to any ethnically-defined

community (for instance, because they only want to be citizens of Bosnia and Herzegovina)"[1].

The first and most important measure taken at the level of the State in the field of minorities' rights protection, was the adoption of the Law on Protection of Rights of Persons Belonging to National Minorities in 2003. The national minorities are defined in Art 3(1) of the Law, as: "a part of the population – citizens of Bosnia and Herzegovina not belonging to any of the three constituent peoples, and having the same or similar ethnic origin, the same or similar tradition, customs, belief, language, culture and spirituality, and close or allied history and other features".[2]

As presented in the next paragraph of the same article, the category of national minorities comprises seventeen categories: "Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks and Ukrainians"[3], as well as others "who fulfill the conditions from the paragraph 1 of this Article".[4]

As noted by the European Commission against Racism and Intolerance (ECRI) in its 2011 report, the "legislation necessary to implement the principles of this Law in practice has also now been adopted at Entity level: in December 2004 in the Republika Srpska and in July 2008 in the Federation of Bosnia and Herzegovina.[5]Acknowledging the good development of this legislation, The Advisory Committee on the Framework Convention for the Protection of National Minorities argued that several problems may arise in terms of putting the legislation

[1] Edin Hodžić and Nenad Stojanović, New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdić and Finci v. BiH, ed Edin Hodžić (Analtika – Center for Social Research, 2011), p.54.
[2] Law on the Protection of the Rights of Persons Belonging to National Minorities (2003), Art.3, para. 1, published in the Official Herald of Bosnia and Herzegovina, No. 12/03.
[3] Idem, para. 2.
[4] Ibidem.
[5] European Commission against Racism and Intolerance, Report on Bosnia and Herzegovina (fourth monitoring cycle),(8 Febr. 2011), para. 132, P.38.

into practice.[6] The main body, established by the Law within the Parliamentary Assembly of Bosnia and Herzegovina in order to address the problems regarding the protection of the national minorities' rights, was the Council of the National Minorities.

As noted in the 2011 ECRI report, from its creation in April 2008, "the Council has since followed issues of importance to national minorities, such as the implementation of the action Plan for Roma and of the Sejdic and Finci judgment". [7]

The Constitution of Cyprus, adopted in 1960, was highly concerned with protecting the rights of the two main ethnic communities: the Greek Cypriots and the Turkish Cypriots. Two constitutional provisions are the most relevant in this respect. One is Article 6, which places some restrictions on the Cypriot government, in order to prevent it from discriminating against the two ethnic communities. Another is Article 1, which establishes a Turk Vice-President and a Greek President for the Republic. Following the 1963 disputes between the Greek and the Turkish Cypriots, the constitution collapsed and the Republic got to be run by the Greek community alone. Regarding the rights of the Turkish Cypriots, residing in areas controlled by the Republic, to participate in elections, it has been only recently that they have been restored. This jurisdiction is relevant for our analysis, as it offers an example of discrimination based on ground of ethnic origin, as decided by the ECHR in the case of Ibrahim Aziz vs. Republic of Cyprus.

In the case of Cyprus, as Nicos Trimikliniotis and Corina Demetriou assert, "the Constitution does not recognize any groups as 'national minorities', [but] it recognizes only two 'communities' (Greek and Turkish) and three 'religious groups' (Latins, Maronites and

[6] Advisory Committee on the Framework Convention for the Protection of National Minorities, Second opinion on Bosnia and Herzegovina, (27 Apr. 2009), para 11.
[7] ECRI Report on Bosnia and Herzegovina (fourth monitoring cycle), (8 Febr. 2011), para. 133, P.39.

Armenians)".[8]According to Article 2 of the Constitution, the citizens of the Republic have to opt for belong either to the Greek or the Turk community.[9] The 'religious minorities' are defined in the same article as: "a group of persons ordinarily resident in Cyprus professing the same religion and either belonging to the same rite or being subject to the same jurisdiction thereof the number of whom, on the date of the coming into operation of this Constitution, exceeds one thousand out of which at least five hundred become on such date citizens of the Republic".[10]

Expressing its critique regarding this constitutional arrangement, the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), noted that "each person belonging to a religious group is, as an individual, entitled to make use of an opting out. However, in so doing, an individual may only choose to belong to the other community that is to the Turkish Cypriot community. The Advisory Committee considers that such arrangements, provided for by Article 2 of the Constitution, are not compatible with Article 3 of the Framework Convention, according to which every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such." [11]

As Nikolas Kyriakou and Nurcan Kaya assert, "the current system by which all citizens of the Republic of Cyprus are obliged to join either of the two communities is an anachronistic remnant of the 1960 arrangement, which does not reflect current approaches to citizenship,

[8] Nicos Trimikliniotis and Corina Demetriou, Evaluating the Anti-Discrimination Law in the Republic of Cyprus (Cyprus Review, 2008), Vol. 20, Issue 2, P.86.
[9] Constitution of Cyprus, Article 2.
[10] Idem.
11 First Opinion on Cyprus of the Advisory Committee of the FCNM, ACFC/INF/OP/I (2002) 004, adopted 6 April 2001.

civic duties and rights for individuals, irrespective of their distinguishing ethnic, religious, cultural or linguistic affiliation and their choice to belong or not to a particular group".[12]

The Constitution of Latvia (Satversme) is the fundamental law of the Republic of Latvia and was adopted by the Latvian people in 1922. Initially, a part of the bill addressed the question regarding the rights and obligation of citizens, but that part of the bill was voted down. After proclaiming its independence from the Soviet Union in 1991, most of the constitution was submitted for review and was reinforced in 1993. A 1988 Amendment introduced a chapter on fundamental rights. The jurisdiction is relevant as it offers an example of ethnical discrimination in political participation, as decided by the ECHR in the case of Podkolzina v. Latvia.

One of the most thorny and actual issues to address when discussing the rights of the national minorities in Latvia, is the situation of the Russian-speaking community. A question that needs to be addressed in this respect is whether the Russian linguistic community in Latvia is really a minority. According to Juris Dreifelds, "a paradoxical and inherently unstable situation has developed in Latvia wherein all ethnic groups can be considered a minority in one situation or another and all feel insecure and threatened".[13] Judging based on demographic figures and its dominance among the old arrangement of the Soviet Union in Latvia, the Russian-speaking community from Latvia can hardly be regarded as a national minority.

As Juris Dreifelds further asserts, after the proclaimed independence of Latvia, knowing that "they form a clear majority in all urban areas and can claim a two-thirds dominance in the

[12] Nikolas Kyriakou and Nurcan Kaya, Minority Rigts: Solutions to the Cyprus conflict, (Minority Rights Group International, 2011), p.14.
[13] Juris Dreifelds, "Latvia in Transition", (Cambridge University Press, 1996), p.142.

city of Riga"[14], the Russian-speakers became uncomfortable with the statute of "being a minority in a foreign land whose citizenship rights were left at the discretion of another ethnic group"[15].

B. Political participation of national minorities

In order to get a clear view of the way in which the question of political participation of minorities in Bosnia and Herzegovina has been addressed at the State's level, we should look at the arrangements made by the Constitution and the Electoral Law in this sense.
The distinction made in the preamble of the Bosnian Constitution between the "Constituent Peoples" and "Others", prevented the members of the national minorities from exercising their rights to vote and to stand for elections, attracting many critiques at the European level.

This situation was addressed by the European Court of Human Rights in 2009 in the case of Seidic and Finci v Bosnia and Herzegovina, when two citizens of Bosnia and Herzegovina (a Jewish and an ethnic Roma) complained to the Court that they were prevented to stand for parliamentary and presidential elections based on their ethnicity. As a consequence of the decision by the European Court of Human Rights in this case, which found a violation of the applicants' right to free elections, the Bosnian parliament initiated in 2011 a constitutional reform that would allow the national minorities to participate in the elections.

The Election Law of Bosnia and Herzegovina was amended in 2008 "to introduce new regulations concerning the election of candidates not identifying with one of the three constituent peoples"[16] in the sense that "where national minorities form more than 3% of the

[14] Juris Dreifelds, "Latvia in Transition", Cambridge University Press, 1996, p.142.
[15] Ibidem.
[16] ECRI Report on Bosnia and Herzegovina (fourth monitoring cycle), (8 Febr. 2011), para. 10, p.15.

electorate, based on the last (1991) census figures, they are entitled to a representative in the relevant municipal assembly or Council." [17]

However, as ECRI notes in its 2011 report, the national minorities' representatives "reported difficulties in exercising their right to run as national minority candidates in the 2008 municipal elections even where the threshold was met, due to unclear information from the Election Commission on the conditions for registering minority candidates" [18], as well as the fact "that they continue to be excluded from the possibility of standing for election to the Presidency and House of Peoples of Bosnia and Herzegovina, and, as no seats have been allocated to them in the committee set up to work on modifying the Constitution and electoral law in response to the Sejdic and Finci v Bosnia and Herzegovina judgment, they have little opportunity to influence the outcome of these discussions".[19]

ECRI recommendations addressed to the authorities of Bosnia and Herzegovina in this sense are to "review both the impact in practice of the 3% threshold for reserved minority seats in municipal assemblies in councils and the practical problems reported by representatives of national minorities in exercising their electoral rights in municipal elections"[20], and to "take all necessary measures to ensure that representatives of national minorities can participate directly not only in public debates but also in formal discussions on amendments to the State Constitution and electoral law".[21]

Regarding the political participation of the two major communities in Cyprus (the 'Greeks' and the 'Turks'), "the Constitution provides for a system of separate elections; separate majorities are required in both the executive (Council of Ministers) and legislature (House of Representatives) and both the Greek-Cypriot President and the Turkish-Cypriot Vice-

[17] ECRI Report on Bosnia and Herzegovina (fourth monitoring cycle), (8 Febr. 2011), para. 10, p.15.
[18] Idem, para. 11, p.16.
[19] Ibidem.
[20] Ibidem.
[21] Ibidem.

president have separate veto powers"[22], as well as for "a system of quota participation by the two major Cypriot Communities in all areas of public life"[23]. As for the political representation, "parliamentary seats are allocated by the Constitution on a 70% to 30% basis between the Greek and the Turkish communities"[24]

This separation introduced by the Constitution, along with the fact that the Turkish language ceased to be used at the State's level in 1963, made it difficult for the members of the Turkish-Cypriot community to participate in the public life, having a serious consequence on their political participation.

This situation was addressed in the case of Aziz v Cyprus, when a member of the Turkish-Cypriot community complained that based on the provisions of Article 63 of the Constitution he was not allowed to vote in the 2001 parliamentary elections. In 2004, under the provisions of Article 3 of Protocol No. 1 of the Convention, the European Court of Human Rights held that there was a violation of the applicant's right to free elections.

As a consequence the decision of the European Court of Human Rights in the case of Aziz vs. The Republic of Cyprus, the Cypriot Parliament enacted a law in 2006 which restored the right of the Turkish-Cypriots living in the southern part of the island to participate in elections. Therefore, as Nicos Trimikliniotis and Corina Demetriou note, "in the Parliamentary Elections of 21 May 2006, Turkish Cypriots voted for the first time since 1964"[25]. However, the situation of the Turkish-Cypriots living in the northern part of Cyprus in this respect remained unresolved.

[22] Nicos Trimikliniotis and Corina Demetriou, "EVALUATING THE ANTI-DISCRIMINATION LAW IN THE REPUBLIC OF CYPRUS: A CRITICAL REFLECTION.", (Cyprus Review, 2008), Vol. 20, Issue 2, pp.80-81.
[23] Ibidem.
[24] Ibidem.
[25] Idem, p.98.

Regarding Latvia, after the creation in 1991 of the new, independent state, separated from USSR, one issue that required considerable attention was the situation of the so-called 'non-citizens'. In order to become Latvian citizens, these individuals who lost their Soviet citizenship in the process of separation had to fulfill several requirements. As Juris Dreifelds asserts, "naturalization requires knowledge of the Latvian language, the oath of allegiance and a minimal knowledge of the constitution and the history of Latvia."[26]

Considering that not many of the 'non-citizens' find themselves able to fulfill all these criteria, being especially unable to meet the language condition, it becomes obvious that their rights, and especially their right to participate in elections, become highly controversial.

Ever since Latvia was struggling to get its independence from the Soviet Union, language has become a delicate issue. The 1998 Latvian Constitution declared Latvian the official language of the state.[27] As Caroline Tube argues, "the legislation on state language and its implementation has become a topic of some urgency as naturalized Latvian Citizens - belonging to the Russian-speaking minority – begin to engage in politics".[28]

This situation was the best reflected in the case of Podkolzina v. Latvia, where a member of the Russian-speaking community filed an application to the European Court of Human Rights, complaining that she was excluded from the lists of candidates standing for parliamentary elections on the ground that she didn't have a sufficient command of the State's official language. Under the provisions of Article 3 of Protocol No.1 of the Convention, the Court found a violation of the appelant's right to free elections.

As a consequence of the decision made in 2002 by the European Court of Human Rights in the case of Podkolzina v. Latvia, the electoral law was amended in order to eliminate the language

[26] Juris Dreifelds, "Latvia in Transition", (Cambridge University Press, 1996), p.173.
[27] Constitution of Latvia (Satversme) (1922) Art.4, amended 2002.
[28] Caroline Taube, "Latvia: Political Participation of Linguistic Minorities", (International Journal of Constitutional Law, 2003), p.513.

requirement for standing in parliamentary elections. However, as Caroline Taube asserts, while "the amendment to the election law was a step toward a more inclusive approach to naturalization of citizens, […] this action was counterbalanced by constitutional amendments strengthening the position of Latvian as the state language".[29]

In response to this situation, the representatives of the Russian-speaking community in Latvia initiated a referendum proposing the introduction of the Russian language as the second official language of the state and the second working language for the local government institutions, by amending five Articles of the Latvian Constitution. The proposals submitted to referendum on 18 February 2012 were rejected by an overwhelming number of Latvians.

[29] Caroline Taube, "Latvia: Political Participation of Linguistic Minorities" (International Journal of Constitutional Law, 2003) p.515.

Chapter II – The Right of the National Minorities to Participate in Elections under the European Convention on Human Rights

A. Article 3 of Protocol No.1 of the Convention

Article 3 of Protocol 1 of the European Convention on Human Rights defines 'the right to free elections' as it follows: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[30]

An important shift in the interpretation of the Article was made in 1987, in the case of Mathieu-Mohin and Clerfayt v. Belgium. In *Mathieu-Mohin* v *Belgium,* dealing for the first time with complaints under Article 3 of Protocol No.1[31], the European Court of Human Rights gave a new meaning to the interpretation of the Article (P1-3), introducing the "subjective rights of participation - the 'right to vote' and the 'right to stand for election to the legislature'".[32] As mentioned in Mathieu-Mohin, the States had a wide margin of appreciation in establishing the limitations to these rights, implied by the provisions of Article 3 of Protocol No.1, but" it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with"[33]. According to Giorgi Badashvili, "in doing so the Court employs the free tier test"[34], having to "satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very

[30] European Convention on Human Rights, CoE Treaty Series, No.5.
[31] *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, Para.46.
[32] Idem, Para. 51.
[33] Giorgi Badashvili, "The Scope of Protection of Electoral Rights under Article 3 of Protocol no.1", (European Commission for Democracy through Law (Venice Commission), Strasbourg, 2007, p.5.
[34] *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, para.52.

essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate".[35]

As Rory O'Connell asserts, "while Mathieu-Mohin established that P1-3 recognized individual rights to run for elections and to vote, P1-3 case law continued to be somnolent for much of the 1980s and 1990s".[36]

Under this new meaning of Article 3 of Protocol No.1, the Court had to decide in cases involving the violation of 'the right to vote' of: prisoners (Hirst v The United Kingdom (no.2)), mentally challenged persons (Alajos Kiss v. Hungary), ethnic minorities (Aziz v. Cyprus and Sejdic and Finci v. Bosnia and Herzegovina), and vulnerable groups (Tanase v. Moldova).[37]

Regarding 'the right to stand for election to the legislature', the Court had to decide in cases like: Podkolzina v. Latvia (the right of a member of the Russian-speaking minority in Latvia to stand for parliamentary elections), Grosaru v. Romania, (the right of a member of the Italian minority in Romania to hold a seat in the Romanian Parliament), Yumak and Sadak v. Turkey (the right of a political party to obtain a seat in the Turkish Parliament without attaining the electoral threshold established by the Turkish electoral law) and Zdanoka v Latvia (the right of a former member of the Communist Party in Latvia to run for the Latvian Parliament)[38].

[35] *Mathieu-Mohin and Clerfayt* v *Belgium* (1987) 10 EHRR 1, para.52.
[36] Rory O'Connell, "Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy", (Northern Ireland Legal Quarterly, 2010), Vol.61, No.3, p.265.
[37] Hirst v. The United Kingdom (no. 2), Application no. 74025/01, ECHR (6.10.2005); *Alajos Kiss v. Hungary*, Application no. 38832/06, ECHR (20 May 2010); Aziz v Cyprus, App. no. 69949/01, ECHR(22.06.2004); Seidic and Finci v Bosnia and Herzegovina, Application no.27996/06, 34836/06 (22.12.2009); Tanase v. Moldova, App. no. 7/08, ECHR (27.04.2010).
[38] Podkolzina v. Latvia, Application no.46726/99, ECHR (9.04.2002, 2002-II); Grosaru v. Romania , Application no.78039/01, ECHR(2.03.2010), Yumak and Sadak v. Turkey, Applcation no. 10226/03, ECHR (30.01.2007), and Zdanoka v Latvia , Application no. 58278/00, ECHR (17.06.2004).

In all these cases, except the case of Yumak and Sadak v. Turkey, the Court found a violation of Art.3 of Protocol No.1.

B. ECHR case-law

1. The case of Sejdić and Finci v Bosnia and Herzegovina

*In **Sejdić and Finci v Bosnia and Herzegovina***, the European Court of Human Rights had to deal with two applications (27996/06 and 34836/06) filed against Bosnia and Herzegovina, by two citizens of Bosnia and Herzegovina. Jacob Finci and Dervo Sejdić (one having a Jewish origin, and the other being an ethnic Roma) complained to the Court "of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin"[39]. This situation was made possible under certain provisions of the electoral law, and especially of the Constitution, which in its Preamble makes a distinction between the "constituent peoples" (Bosnians, Croats and Serbs), "citizens of Bosnia and Herzegovina" and "Others". Under the constitution, only the "constituent peoples" are allowed to participate in the parliamentary and presidential elections.

The judgment, issued by the Grand Chamber of the European Court of Human Rights on 22 December 2009, held "by fourteen votes to three that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina"[40] and" by sixteen votes

[39] *Sejdic and Finci* v *Bosnia and Herzegovina* (2009) 22 BHRC 201, para.2.
[40] *Idem*, para 5.

to one that there has been a violation of Article 1 of Protocol No. 12 as regards the applicants' ineligibility to stand for election to the Presidency of Bosnia and Herzegovina"[41].

Analyzing the admissibility of the case, regardless of the fact that it didn't receive any objection from the respondent State regarding its competence ratione personae, the Court still considered it necessary to submit it to scrutiny[42]. In this sense, the Court addressed two issues: whether the applicants should be considered victims, and whether the respondent State should be considered responsible. Regarding the first issue, considering that standing for elections would be a coherent option for the applicants, as active participants in public life, the Court decided that the applicants qualify for the status of victims[43]. Regarding the second issue, acknowledging the fact that the Constitution is an annex of an international treaty, the Court held that the responsibility of the respondent State in this case doesn't necessarily arise in the context of establishing the controversial constitutional provisions, but in terms of maintaining them[44]. Relying on the above-mentioned arguments, the Court declared the complaints admissible[45].

The Court's assessment focused on the two situations raising the question of ethnic discrimination in elections: the elections for the House of Peoples of Bosnia and Herzegovina, and the elections to the presidency of Bosnia and Herzegovina. Regarding the first situation (the election for the House of Peoples), as "the applicants relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone and Article 1 of Protocol No. 12"[46], the Court examined the complaint under each of these provisions. Regarding the prohibition of discrimination provided by

[41] *Sejdic and Finci* v *Bosnia and Herzegovina* (2009) 22 BHRC 201, para.7.
[42] Idem, ara.27.
[43] Idem, para.29.
[44] Idem, para.30.
[45] Idem, para.31.
[46] Idem, ara.38.

Article 14, the Court held that applicability of Article 14 in this case, "extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols require each State to guarantee [and] applies also to those additional rights falling within the general scope of any Convention article, for which the State has voluntarily decided to provide"[47].

Considering that the House of Peoples may exercise wide legislative powers, that it is one of the authorities deciding upon the financial issues of the State institutions (revenues, budget), and that the ratification of treaties cannot be made without its consent, the Court decided that in this case Article 14 in conjunction with Article 3 of Protocol No.1 applies.[48]

In analyzing the compliance with the above-mentioned Article, the Court begun by condemning the discrimination based on ethnicity and race, stressing on the necessity of having an objective and reasonable justification for applying a different treatment in this respect.[49] However, the Court further noted that the objective and reasonable justification for applying a different treatment based on ethnicity and race should be subjected to the highest level of strict scrutiny[50]. Although it acknowledged that the rule for excluding the people who are not affiliated with a "constituent people" from standing for elections to the House of Peoples "pursued at least one aim which is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace"[51], the Court however didn't consider it necessary to decide whether maintaining this rule could be considered as serving a "legitimate aim", as long as "the maintenance of the system in any event does not satisfy the requirement of proportionality"[52]. Finally, considering that although Bosnia and Herzegovina may not have a binding obligation under the Convention to abandon its power-sharing mechanisms involving a discriminatory

[47] *Sejdic and Finci* v *Bosnia and Herzegovina* (2009) 22 BHRC 201, para.39.
[48] Idem, para. 41.
[49] Idem, para.42-43.
[50] Idem, para.44.
[51] Idem, para. 45.
[52] Idem, para. 46.

treatment, the Court held that the State still disposes of alternative measures, enabling it to avoid excluding other communities from standing for election to the House of People.[53] Resting on the above-mentioned reasons, the Court decided that "the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1". [54]

As for the other Articles invoked by the applicants in their complaints, resting on the previous findings, the Court considered "that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12 as regards the House of Peoples".[55]

Regarding the second situation raising the question of ethnic discrimination in elections, the elections to the Presidency of Bosnia and Herzegovina, the Court analyzed it in the context of Article 1 of Protocol no. 12. Looking at the interpretation of the term "discrimination" in the jurisprudence of Article 14 of the Convention and of Article 1 of Protocol No. 12, the Court noted that even if the there is a difference in scope, the meaning of the term is identical and it decided to follow the same interpretation in the present case[56]. Relying on the arguments used to declare a violation of Article 14 amounting to discrimination in elections for the House of People, and considering that the meaning of the term "discrimination" under the two articles has been interpreted as being identical, the Court concluded that "the impugned pre-condition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12".[57]

[53] *Sejdic and Finci* v *Bosnia and Herzegovina* (2009) 22 BHRC 201, para.48.
[54] Idem, Para. 50.
[55] Idem, Para.51.
[56] Idem, Para. 55.
[57] Idem, Para. 56.

2. The case of Aziz vs. the Republic of Cyprus

The case of ***Aziz vs. the Republic of Cyprus***, "originated in an application (no. 69949/01) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mr. Ibrahim Aziz ("the applicant"), on 25 May 2001".[58]

Relying on Article 3 of Protocol No. 1 (right to free elections) and on Article 14 of the Convention (prohibition of discrimination), the applicant complained "that he was prevented from exercising his voting rights on the grounds of national origin and/or association with a national minority".[59]

During the parliamentary election from 2001, Mr. Aziz was unable to vote, as his registration on the electoral roll was denied by the Ministry of the Interior, based on the fact that he was a member of the Turkish-Cypriot community. Regarding the refusal to enroll the applicant, "the Ministry specified that, by virtue of Article 63 of the Constitution (providing for separate electoral list for the two communities), the members of the Turkish-Cypriot community could not be registered on the Greek-Cypriot electoral roll".[60]

Regarding the violation of Article 3 of Protocol no.1, the applicant referred to the right to vote of all citizens, as enshrined in Article 31 of the Constitution, as well as to the fact that during the previous judgment he was treated by the Supreme Court as a Turkish-Cypriot, although in that part of Cyprus the ethnic communities ceased to exist and their constitutional organs of the State ceased to operate for a long time[61]. The applicant further compared his case with Mathieu-Mohin and Clerfayt v. Belgium and held that they are completely distinct, in the sense that he only had a theoretical right to vote and not a mechanism that would

[58] The case of Aziz v Cyprus, Application no. no. 69949/01, ECHR (2004), para.1.
[59] Idem, para.3
[60] Idem, para. 11.
[61] Idem, para.16.

enable him to put his right to vote into practice, as it was the case in Mathieu-Mohin and Clerfayt v Belgium[62].

In response to the alleged violation of Article 3 of the Protocol No. 1, the Government argued that "there was no obligation under Article 3 of Protocol No. 1 to introduce a specific system for appointing the legislature and that Contracting States had a wide margin of appreciation in this respect".[63] The State further mentioned Article 2 of the Constitution (in the sense that "citizens of the Republic had to belong to either the Greek or Turkish community"[64]) and Article 62 of the Constitution (in the sense that "Individual members of each of the two communities had to vote and elect representatives from their own community in their capacity as members of that community"[65]). Moreover, the State alleged that "it had not been the electoral system as such that had prevented the applicant from voting for the legislature, but rather the absence of the majority of the Turkish community that had prevented him from voting, in his capacity as a member of the Turkish community, for candidates who were members of that community"[66]and that "any action of the government to enable members of the Turkish community living in the non-occupied part to participate in some form of election would have constituted a departure from a constitutional system devised for the purpose of granting special political rights to the Turkish community and might have been misunderstood as an attempt to impose a new system to the disadvantage of that community, at a time when the whole political situation could have been described as delicate"[67]. Finally, the State held that "because of the deliberate non-participation in elections of the Turkish

[62] The case of Aziz v Cyprus, Application no. no. 69949/01, ECHR (2004), para.17.
[63] Idem, para.18.
[64] Idem, para.19.
[65] Idem, para.20.
[66] Idem, para 21.
[67] Idem,para.22.

community, under Article 62 § 2 the applicant could not have voted for the House bearing in mind its composition"[68].

Regarding the violation of Article 3 of Protocol No.1, the Court firstly noted that although under the 1960 Cypriot Constitution the Turkish-Cypriots had the right to participate in the parliamentary elections on separate electoral lists (Article 63), after 1963, their participation was suspended and "the relevant Articles of the Constitution providing for the parliamentary representation of the Turkish-Cypriot community and the quotas to be adhered to by the two communities became impossible to implement in practice"[69]. The Court further noted that although the States beneficiated of "considerable latitude" in making their own rules regarding the composition of their parliaments and the election of their members, these rules should not be discriminatory[70]. Finally, the Court held that due to the complicated political situation in the northern part of the country following the Turkish occupation and the lack of legislation addressing these issues, the applicant "was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived".[71]Relying on the above-mentioned arguments, the Court decided that "the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was impaired".[72]

Regarding the violation of Article 14 of the Convention, the applicant argued that the laws passed by the Cypriot government since 1964 provided exclusively for the rights of the Greek Cypriots, while the rights of the Turkish Cypriots were completely ignored.[73]

[68] The case of Aziz v Cyprus, Application no. no. 69949/01, ECHR (2004), para.24.
[69] Idem, para.26.
[70] Idem, para.28.
[71] Idem, para.29.
[72] Idem, para. 30.
[73] Idem, para. 32.

The Government argued that "no issue arose under Article 14 of the Convention, because the applicant was not in a comparable situation to voters who were members of the Greek community and voted in this capacity for the candidates from their community"[74].

Regarding the alleged violation of Article 14, "the Court notes that the applicant is a Cypriot national, resident in the government-controlled area of Cyprus. It observes that the difference in treatment in the present case resulted from the very fact that the applicant was a Turkish Cypriot. It emanated from the constitutional provisions regulating the voting rights between members of the Greek-Cypriot and Turkish-Cypriot communities that had become impossible to implement in practice"[75]. Regarding the State's arguments, the Court considered "that they cannot justify this difference on reasonable and objective grounds, particularly in the light of the fact that Turkish Cypriots in the applicant's situation are prevented from voting at any parliamentary election". [76] Resting on these considerations, the Court concluded that "there is a clear inequality of treatment in the enjoyment of the right in question, which must be considered a fundamental aspect of the case. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1."[77]

3. The case of Podkolzina v. Latvia

The case of ***Podkolzina v. Latvia*** "originated in an application (no. 46726/99) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the

[74] The case of Aziz v Cyprus, Application no. no. 69949/01, ECHR (2004), para.32.
[75] Idem, para.36.
[76] Idem, para.37.
[77] Idem, para.38.

Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mrs. Ingrīda Podkolzina ("the applicant"), on 25 February 1999"[78].

Relying on Article 3 of Protocol No. 1 (right to free elections), as well as on Articles 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the Convention, the applicant complaint "that the removal of her name from the list of candidates at the general election for insufficient knowledge of Latvian, the official language in Latvia, constituted a breach of the right to stand as a candidate in an election"[79].

As she was not a native Latvian speaker (being "a member of the Russian-speaking minority in Latvia"[80]), after registering as a candidate in the 1998 parliamentary elections in Latvia and after providing all the documents required by the Central Electoral Commission (including a language certificate proving her knowledge of Latvian), the applicant was submitted to an additional, unannounced examination by an official examiner, who during the conversation aimed at assessing her competence in Latvian, also questioned the applicant about her political orientation.[81] The examiner concluded that "that the applicant did not have an adequate command of the official language at the "third level", the highest of the three categories of competence defined in Latvian regulations"[82] and issued a report which resulted in the exclusion of the applicant from the list of candidates registered for the election of the Latvian Parliament[83].

Regarding the violation of Article 3 of Protocol No.1, the Government held firstly that although the Contracting States, relying on the limitations implied by Article 3 of Protocol No.1, beneficiated from a wide margin of appreciation in imposing conditions on the right to

[78] Podkolzina v Latvia, ECHR (2002), para. 1.
[79] Idem, para. 3.
[80] Idem, para. 8.
[81] Idem, para 10.
[82] Idem, para.11.
[83] Idem, para.13.

stand for elections, these conditions should not impair the very essence of the electoral rights and therefore they have to be proportionate and pursue a legitimate aim[84]. The Government further argued that the language requirement in this case pursued a legitimate aim ("meeting the need for electors to communicate with their elected representatives and for MPs to carry on normally the work that voters had entrusted to them"[85]) and was proportionate to the that aim (as anyone who wishes to stand as a candidate but doesn't have the required level of language command, could always work to improve that in order to qualify for standing in the elections[86]). Relying on the arguments that the examination was not arbitrary, (as the test evaluated the applicant's current level of language command, which may have been different from the one held at the moment of receiving the certificate), and the removal of the applicant's name from the electoral list was made in accordance with the provisions of the Parliamentary Elections Act, the Government finally held that Article 3 of Protocol No. 1 was not violated.[87]

The applicant complained that her removal from the candidates list was disproportionate, as being a representative of the Russian-speaking minority whose members are not Latvian native speakers, her insufficient knowledge of Latvian wouldn't have prevented her from coping satisfactorily with her Parliamentary duties[88]. The applicant further contested the necessity of the measure taken by the State Language Inspectorate, considering that no other national authority questioned the validity of her language certificate[89]. The applicant finally argued that her additional examination had no legal basis in the domestic law, especially that it relied on a discriminatory treatment (only a part of the candidates presenting a language certificate were submitted, without any justification, to an additional examination), and

[84] Podkolzina v Latvia, ECHR (2002), para. 26.
[85] Idem, para. 27
[86] Idem, para 28
[87] Idem, para 29.
[88] Idem, para 30
[89] Idem, para. 31.

therefore the measure violated her right to stand for elections under Article 3 of Protocol No.1.[90]

The Court held that although the States have a broad discretion in establishing the conditions regarding the right to stand for elections, these conditions should be proportionate and pursue a legitimate aim, and moreover, they should follow the fundamental principle laid in Article 3.[91] The Court further held that the Government's language requirement was legitimate and "requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim"[92]. Regarding the proportionality of the decision to eliminate the candidate from the electoral list, the Court held that although the State has a wide margin of appreciation in dealing with this situation, it should nevertheless follow the principle of rights effectiveness, by taking a series of measures aimed at preventing arbitrary decisions[93]. The Court also expressed its doubts regarding the legality of the re-examination measure, considering that the Latvian authorities did not question the validity of the applicant's language certificate, that the Government offered no explanation for the distinction made between candidates in applying the measure, and that the applicant was questioned about her political orientation during the linguistic examination[94]. Relying on the above-mentioned arguments, the Court concluded that the decision to eliminate the applicant from the list of candidates is not proportionate to the established legitimate aim and therefore amounts to a violation of Article 3 of Protocol No.1.[95]

[90] Podkolzina v Latvia, ECHR (2002), para.32.
[91] Idem, Para. 33.
[92] Idem, Para. 34.
[93] Idem, Para.35.
[94] Idem, Para. 36.
[95] Idem, Para. 38.

Regarding the alleged violation of Articles 13 and 14 of the Convention taken together with Article 3 of Protocol No. 1, the Court considered it unnecessary to examine the complaints under these articles separate from the complaint under Article 3 of Protocol No.1.[96]

As for the application of Article 41 of the Convention, the Court dismissed the applicant's claim of award, considering that that "no causal link has been established between the alleged pecuniary loss and the violations found".[97]

C. Analysis of the implications of the ECHR judgments

Regarding the case of Sejdic and Finci v Bosnia and Herzegovina, as Samo Baradutzky asserts, "the judgment is of great interest for two reasons. It is the first case before the Court in which the provisions of Protocol 12 were (successfully) invoked, giving indications as to the nature of the anti-discrimination protection mechanism under this protocol. Moreover, the findings of the Court touch upon the sensitive post-war constitutional settlement of Bosnia and Herzegovina".[98]

However, Bosnia failed to implement the measure recommended by the European Court of Human Rights in this judgment.

As noted in the 2012 Human Rights Watch Report on Bosnia, "political gridlock, including failure to form a government one year after general elections, meant the parliamentary body charged with proposing constitutional amendments had yet to be formed and a similar ministerial-level body had yet to meet at this writing."[99]

[96] Podkolzina v Latvia, ECHR (2002), para 42;45.
[97] Idem, Para. 49.
[98] Samo Baradutzky, "The Strasbourg Court on Dayton Constitution Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009. "(European Constitutional Law Review, 2010) Vol. 6, Issue 2, p.309.
[99] Human Rights Watch, Bosnia and Herzegovina (Country Report), Jan, 2012, p.1.

According to Lucy Claridge, "the decision also offers important protection for minorities who lack electoral rights in other ECHR states, in providing a legally binding judgment that can be relied upon against their own governments"[100]. As she further assess, "the case is also highly significant on an international level as it is the first time that the ECtHR has considered how Protocol 12 of the ECHR should be applied to potentially discriminatory situations."[101]
In her opinion, "the implementation of this judgment, which will require the government to allow all citizens full participation in the political process, thereby ensuring that elections are democratic, should be closely monitored by all members of civil society and the international community. By supporting and promoting citizenship in this way, it is hoped that the judgment will facilitate the building and consolidating of consensus among the people of Bosnia and Herzegovina."[102]

The decision in the case of ***Aziz v The Republic of Cyprus*** is particularly important as it conducted to the restoration in 2006 of the right to vote of the Turkish-Cypriots living in the southern part of the island, enabling them to participate in the 2006 Parliamentary Elections. As Nicos Trimikliniotis notes, "pursuant to the decision of the European Court of Human Rights (ECtHR) in the case of Aziz vs. The Republic of Cyprus, a law came into force in 2006 which granted Turkish Cypriots residing in the south the right to vote and to stand for election. As a consequence, in the Parliamentary Elections of 21 May 2006, Turkish Cypriots voted for the first time since 1964."[103]
The most important consequence of the Court's decision in the case of ***Podkolzina v Latvia***, was the elimination of the language condition for standing in elections in 2002.

[100] Lucy Claridge, "Discrimination and political participation in Bosnia and Herzegovina. *Sejdic and Finci v. Bosnia and Herzegovina"*, Minority Rights Group International (briefing), p. 1.
[101] Ibidem.
[102] Idem, p. 5.
[103] Nicos Trimikliniotis and Corina Demetriou, "EVALUATING THE ANTI-DISCRIMINATION LAW IN THE REPUBLIC OF CYPRUS: A CRITICAL REFLECTION.", (Cyprus Review, 2008), Vol. 20, Issue 2, pp.98-99.

As mentioned in a 2003 report of the Latvian Centre for Human Rights and Ethnic Studies assessing the protection of the human rights in Latvia Human rights "on 9 May 2002, the Saeima (parliament) adopted amendments to the Saeima Election Law and the Law on City Council, District Council and Parish Council Elections, lifting the state language proficiency requirement".[104] Yet, this measure was doubled by a number of constitutional amendments meant to strengthen the dominance of the Latvian language. In this context, the problem of the minority rights still remains in question.

[104] Latvian Centre for Human Rights and Ethnic Studies, "Human Rights in Latvia in 2002" (March 2003), pp.8-9.

Conclusion

In the previous chapters I have presented three cases of discrimination in elections based on ethnicity. Although they have in common the same type of discrimination, the three cases differ in terms of the constitutional provisions conducting to the discriminatory treatment, as well as in terms of their consequences. While in Bosnia and Herzegovina the discrimination was based on a constitutional distinction made between two categories of citizens, in the other cases the grounds were provided by the requirement of voting on different lists for the members of the two ethnic communities in Cyprus, and by a language condition imposed on the members of a linguistic community in Latvia. Moreover two of the cases involved the right of vote (Bosnia-Herzegovina and Cyprus), while the case of Latvia involved the right to stand for elections.

The three cases differ also in terms of the 'affirmative actions' they triggered. In Bosnia and Herzegovina, the case of Sejdic and Finci led to the proposal of amending the constitution in order to eliminate the discriminatory provisions and to enforce the rights of the national minorities. Nevertheless, the proposed amendments have not been implemented so far. In the case of Cyprus, the decision in Aziz had a positive finality for the members of the Turkish-Cypriot community living in the southern part of the island who regained their right to vote by a law adopted in 2004. However, the members of the same community living in the other side of the island still cannot vote. Regarding the case of Latvia, the ruling of the European Court of Human Rights in Podkolzina had a positive consequence on the rights of the Russian-speaking minority, as the language requirement for public office was abolished. However, this measure was counteracted by the newly-proposed constitutional amendments aimed at strengthening the dominance of Latvian as the official language of the state.

Relying on the above arguments, we can draw the conclusion that although some progress has been made in the field of minorities' rights protection under the constitutions of the three states, the concrete measures meant to redress the situation didn't go all the way.

Therefore we could argue not only that a constitution can incorporate discriminatory provisions, but also that changing this situation can be an extremely difficult thing to do.

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