CENTRAL EUROPEAN UNIVERSITY

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN SETTING STANDARDS ON ELECTORAL RIGHTS: Challenges in the United Kingdom and Bosnia and Herzegovina

by Šejla Hadžidedić

LL.M SHORT THESIS
COURSE: Political Rights in Comparative Perspective
PROFESSOR: Daniel Smilov
Central European University
1051 Budapest, Nador utca 9
Hungary

Abstract

The rights to vote and to stand for election are lately the center of attention of the European Court of Human Rights. The recent jurisprudence demonstrates the growing importance of participation rights in the Convention system and justifies further research of this trend. The Council of Europe member states have, in response to this trend, criticized the Court for becoming too activist and departing from the parties' intentions at the time Article 3 of Protocol 1 was adopted. Thus, the Court's legitimacy has often been called into question.

This thesis focuses on two very controversial judgments that are still not implemented, *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina*. The reasons for non-implementation lie not only with the political sensitivity of the issues in question, but also with the implications the judgments have in the countries concerned. This thesis identifies common points for criticism that might not be obvious from such diverse cases. In essence, I do not dispute the legitimacy of the European Court of Human Rights in setting minimum standards on electoral rights. Rather, I argue that the Court has not been consistent in the application of standards established by its early case law. In reviewing the restrictions on electoral rights in *Hirst* and *Sejdić*, the Court has given insufficient weight to legitimate aims behind those restrictions and invalidated them based on an obscure and unconvincing review of proportionality. Moreover, the Court has not been entirely clear in relying on evolutive interpretation and in narrowing the wide margin of appreciation.

Acknowledgements

I am thankful to my supervisor Professor Daniel Smilov for his useful advice and provoking my interest for electoral rights.

Writing this thesis, however, would be incredibly difficult without the assistance of Mr. Robin Bellers, to whom I am very grateful for his devoted time.

I would like to thank my colleagues from the Comparative Constitutional Law program for their support and incredible ideas that helped me in the process of finalization of this thesis.

Finally I would like to thank Dajana, Šenan and Vedad. They know why…

I dedicate this thesis to my parents, whose strength of character and joyful spirit I will always admire.

Table of Contents

Introduction

In recent years the Council of Europe member states have occasionally voiced strong opposition to the judgments of the European Court of Human Rights. Dzehtsiarou and Greene argue that the criticism of the Strasbourg Court lies more with "its actual judgments in sensitive cases"[1] rather than its "inability…to process all applications submitted to it."[2] This has been the case where the Court has pronounced itself on electoral rights by setting standards for political participation in the member states. Two cases in particular have caused an unprecedented political turmoil – *Hirst v. United Kingdom (No. 2)* in 2005 and *Sejdić and Finci v. Bosnia and Herzegovina* in 2009 (hereinafter *Hirst* and *Sejdić*).[3]

O'Boyle argues that after *Hirst* "[t]he issue of prisoners' voting rights was transformed into a national interrogation in the United Kingdom about the legitimacy of the European Court of Human Rights"[4], followed by mass media attention. Similarly, McCrudden and O'Leary have questioned the legitimacy of the ECtHR after *Sejdić*, when the Court changed its previous deferential approach to consociational arrangements.[5]

The fact that both judgments have not been implemented, despite the passage of years and several attempts of implementation, justifies further research of the Strasbourg approach towards electoral matters. While numerous authors have considered the implications of *Hirst*

[1] Kanstantsin Dzehtsiarou and Alan Greene, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners," *German Law Journal* 12 (2011): 1710.
[2] Ibid.
[3] Case of Hirst v. the United Kingdom (No. 2) (App.No. 74025/01),judgment of October 6, 2005 ECtHR (Grand Chamber), accessed January 18, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70442#{"itemid":["001-70442"]}
Case of Sejdić and Finci v. Bosnia and Herzegovina (App.Nos. 27996/06 and 34836/06), judgment of December 22, 2009 ECtHR (Grand Chamber), accessed January 18, 2014.
http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-96491#{"itemid":["001-96491"]}
[4] Michael O'Boyle, "The Future of the European Court of Human Rights," *German Law Journal* 12 (2011): 1863.
[5] Christopher McCrudden and Brendan O'Leary, "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements," *European Journal of International Law* 24, no. 2 (2013): 477–501.

v. United Kingdom (No. 2) and *Sejdić and Finci v. Bosnia and Herzegovina* separately (and based on a non-discrimination and human rights perspective), there has really been little effort to draw joint conclusions about the proper role of the Strasbourg Court in setting standards on electoral rights based on these two controversial cases.[6] The aim of the thesis is to do this by identifying common points for criticism that might not be obvious from such diverse cases, one dealing with the blanket restriction on prisoners' voting rights and the other dealing with a ban on minorities to stand for election at the highest level of (a consociational) state.

I will not dispute that the role of the Court is to set minimum standards that apply to elections, but these standards, although vague, must be applied in a consistent manner, especially because of the initial lack of consensus among the member states that electoral rights fall into "the traditional domain of human rights."[7] I will argue that the European Court of Human Rights has not been consistent in the application of standards pertaining to the restrictions of electoral rights, which have been established by early case law. Particularly, I will attempt to show, by reference to previous and subsequent jurisprudence, why the reasoning the Court provided in *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina* is not convincing. While equality of underrepresented categories of people (such as prisoners in *Hirst* and minorities in *Sejdić*) is an important goal to be achieved

[6] For Hirst see: Crg Murray, "Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom," *King's Law Journal* 22, no. 3 (October 2011): 309–334; Steve Foster, "Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote," *Human Rights Law Review* 9, no. 3 (2009): 489–507.
For Sejdić see: Celine Tran, "A Legal Resource for the International Human Rights Community: Human Rights in the Post-Conflict Context: Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdic and Finci v. Bosnia and Herzegovina," *Human Rights Brief* 18, no. 3 (2011): 1–12; Zlatan Begić and Zlatan Delić, "Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing Fair Solutions," *International Journal of Constitutional Law* 11, no. 2 (2013): 447–465.

[7] "Travaux Préparatoires for Protocol 1of the ECHR" 4TP140 cited in D. J. Harris et al., *Law of the European Convention on Human Rights*, ed. D. J. Harris, M. O'Boyle, and Colin Warbrick, 2nd ed. (Oxford: Oxford University Press, 2009), 712.

in electoral disputes, the Court should have been more "conscious of the heightened political sensitivity of questions surrounding the design and implementation of electoral systems."[8]

The complexity of the issue is also evident from the differing viewpoints of many authors that show a greater willingness to tolerate inconsistencies in the jurisprudence when such jurisprudence is based on equality and the elimination of discrimination. For instance, O'Connell argues that "[t]he ECHR protects the rights of everyone and the ECtHR should be particularly sensitive to claims that the political process marginalises minorities and other disadvantaged groups."[9] Similarly, Issacharoff, Karlan and Pildes point to the danger of a "[Court's refusal] to oversee the [political] process [by which] we risk leaving the power to shape the fundamental ground rules of politics in the largely unaccountable hands of existing officeholders. In many instances…the judiciary emerges as the sole branch of government capable of destabilizing an apparently unshakable lockup of the political process."[10]

Generally, I agree that this proposition is not without merit. However, in sensitive electoral issues before an international court, where "[t]here was a disagreement between the states about the propriety of framing a human right to free elections"[11] and where states enjoy a wide margin of appreciation, I am more in favor of a careful and deferential approach. Such an approach would have prevented the backfire from national authorities and the questioning of the Court's legitimacy.[12] Polimac also recognized the "risk of ECtHR rulings becoming empty shells if they do not get implemented by the respondent states."[13] One could add to this

[8] Ibid, 714.
[9] Rory O'Connell, "Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy," *Northern Ireland Legal Quarterly* 61 (2010): 266.
[10] Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structures of the Political Process* (Westbury, New York: The Foundation Press, 1998), 2.
[11] Harris et al., *Law of the European Convention on Human Rights*, 712.
[12] See criticism in: Michael Pinto-Duschinsky and Blair Gibbs, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011).
[13] Erna Polimac, "Execution of the Sejdić and Finci v. Bosnia and Herzegovina Case, the Reasons behind the Delay" (Tilburg University, 2014), 6: accessed March 10, 2014. http://arno.uvt.nl/show.cgi?fid=133395

that marginalized minorities and disadvantaged groups do not benefit from judgments that were decided in their favor but remain a dead letter of the law.

This thesis solely focuses on the right to vote and the right to stand for election. Other aspects of elections, such as the standards on the type of political parties that are allowed to compete on an equal basis and political propaganda, remain beyond this paper. The implementation of any of the judgments will not undermine the points of criticism regarding the inconsistency of the Court's approach in electoral case law up to this point.

The thesis contains three chapters. The first chapter provides an overview of the early jurisprudence and of the standards established in Article 3 Protocol 1 cases. This is necessary in order to understand the reasons why electoral rights are different from other rights in the Convention, and to set a background for the following chapters. The second chapter addresses the implications of *Hirst* and *Sejdić* and the tensions between national sovereignty and the ECtHR. This chapter also analyses the inconsistencies of the Court's reasoning in the two cases by comparison with other electoral jurisprudence of the ECtHR. The third chapter underlines common problems in electoral matters and draws the parallels between United Kingdom and Bosnia and Herzegovina. Furthermore, it offers proposals for the Court to regain its legitimacy that is undermined by the judgments in *Hirst* and *Sejdić*. In this chapter I take into consideration the viewpoint of authors that do not share my support to the deferential approach. I will argue that narrowing of the margin of appreciation, as suggested by O'Connell and Lang, must be based on the consent of the member states and on the common understanding that the right to vote and to stand for election acquired the same level of

significance as the rights where such a margin is already applied.[14] In the absence of such consent it is likely that the member states will continue to question the Court's legitimacy.

[14] O'Connell, "Realising Political Equality."Supra note 9 ; Edward C. Lang, "A Disproportionate Response: Scoppola v. Italy (No. 3) and Criminal Disenfranchisement in the European Court of Human Rights," *American University International Law Review* 28, no. 3 (August 2013): 835–71.

Chapter 1: General Overview of Political Participation under the ECtHR

Political participation is the key element of a modern democracy. According to Issacharoff, Karlan and Pildes "[t]he right of individual citizens to vote freely is undoubtedly one of the defining features of democratic legitimacy."[15] By analogy, the right to stand for election is equally important as it is the opposite side of the right to vote.

Electoral rights differ from other rights in one important aspect. In addition to having an individual dimension, they impact on a state's internal political process, including the formation of its government. This is arguably the reason why these rights are so rarely expressed in explicit terms. In the U.S. Constitution there is no explicit provision that guarantees the right to vote, whereas the XV Amendment to the Constitution, for instance, provides reasons for which the vote cannot be denied.[16]

Similarly, participation rights pertaining to the electoral process are arguably different from other rights under the European Convention on Human Rights (hereinafter "ECHR"). There is nowhere an explicit mention of the right to vote or to stand for election. These rights are not part of the original Convention text, but rights contained in Article 3 of Protocol 1 (hereinafter "P1-3"). Harris et al and White, Ovey and Jacobs point to the lack of agreement of the member states about the content of P1-3, which was, as a compromise, formulated as a state obligation.[17] Article 3 of Protocol 1 stipulates:

> 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 their legislature.[18]

[15] Issacharoff, Karlan, and Pildes, *The Law of Democracy: Legal Structures of the Political Process*, 116.
[16] *United States Constitution*, Amendment XV, accessed March 10, 2014. http://www.law.cornell.edu/constitution/amendmentxv
[17] Harris et al., *Law of the European Convention on Human Rights*. Supra note 11; Robin C. A. White, Clare Ovey, and Francis Geoffrey Jacobs, *The European Convention on Human Rights*, 5th ed (Oxford; New York: Oxford University Press, 2010), 519.
[18] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, accessed March 11, 2014. http://www.refworld.org/docid/3ae6b38317.html

Marks and Napel argue that P1-3 was adopted in order to "defin[e] the [vague] concept of effective political democracy"[19], which is part of the Convention preamble aimed to safeguard the fundamental freedoms set in the Convention. The text of P1-3, however, is also vague and "an unsatisfactory…result of a compromise [that] continues to give rise to problems of interpretation."[20] P1-3 was the means for the member states to make the Convention system more democratic (or rather exclusively democratic) and to preserve what was already granted by the ECHR.[21]

The ambiguity as to what was really meant by P1-3 is still debated today, as the travaux préparatoires were revised so that "the word 'universal' was deleted from the original draft."[22] This suggests, on the one hand, that the member states never intended to go as far as recognizing universal suffrage through P1-3. On the other hand, in *X v. Federal Republic of Germany* (1967) the Commission held that universal suffrage was implied in P1-3 although "this did not mean that the right to take part in the elections was ensured to everyone without any restriction."[23] There is a degree of uncertainty, proposing that a contradiction exists between the preparatory works and the interpretation by the Commission. I am more convinced, however, that the Commission referred to the narrow concept of universal suffrage that applied to every citizen as an ordinary person, in contrast to the historic privileged elites. It is highly unlikely that the Commission could have meant anything more in 1967, and this is clearly visible from the reference to restrictions, which shows a deferential approach. Some of

[19] Susan Marks, "The European Convention on Human Rights and Its 'Democratic Society,'" *British Yearbook of International Law* 66, no. 1 (1995): 222; Hans-Martien ten Napel, "The European Court of Human Rights and Political Rights: The Need for More Guidance," *European Constitutional Law Review* 5, no. 3 (October 2009): 464.

[20] White, Ovey, and Jacobs, *The European Convention on Human Rights*, 519. Supra note 15.

[21] Democracy is the only acceptable model according to the ECHR. See:
Case of Ždanoka v. Latvia (App.No. 58278/00), judgment of March 16, 2006 ECtHR (Grand Chamber), Par 98, accessed February 13, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#{"itemid":["001-72794"]}

[22] Collected Edition of the 'travaux préparatoires' of the European Convention on Human Rights, Vol. VI, Dordrecht 1985, pp. 30 and 44, cited in: Peter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 4th ed (Antwerp: Intersentia, 2006), 916.

[23] Appl. 2728/66, X. v. Federal Republic of Germany, Yearbook X (1967), p. 336 (338) cited in:Ibid.

the implications in the recent (and criticized) judgments, though, might serve as an example suggesting that the ECtHR is on the way to recognizing a wider concept of universal suffrage on the basis of P1-3 (by narrowing the margin of appreciation and reviewing the limitations more strictly), despite the fact that results, following the Court's inconsistent reasoning, do not really support this conclusion.[24]

Van Dijk et al suggest that "[t]he formulation of Article 3 as a government undertaking to hold elections and not as an individual right, might [have given] rise to the assumption that this provision [could] only be the object of a complaint by a State and not of an individual complaint."[25] The same point was made by White, Ovey and Jacobs.[26] The first subchapter addresses how, despite the hesitant attitude of the member states, the Court derived from P1-3 the right to vote and to stand for election, making individual complaints on the basis of P1-3 possible.

1.1 Article 3 of Protocol 1 – from the "obligation" to the "right(s)"

In the 1960's there was indeed an institutional reluctance to treat the text of P1-3 as anything more than a state obligation. Harris et al note that the "early Commission decisions…held that Article 3 did not confer rights on individuals."[27] O'Connell further argues that many cases were declared inadmissible on that basis.[28] In what she called "[t]he journey from obscurity"[29] this attitude from the 1960's has gradually changed.

The Strasbourg Court in *Mathieu-Mohin and Clerfayt v. Belgium* (1987) accepted an earlier view of the Commission that P1-3 "evolved…[f]rom the idea of an 'institutional' right

[24] I will address this issue in Chapters 2 and 3.
[25] Van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 916.
[26] White, Ovey, and Jacobs, *The European Convention on Human Rights*, 520.
[27] Harris et al., *Law of the European Convention on Human Rights*, 712.
[28] O'Connell, "Realising Political Equality", 264.
[29] Ibid.

to the holding of free elections…to the concept of subjective rights of participation - the 'right to vote' and 'the right to stand for election to the legislature'."[30] Such an interpretation was adopted in order to give meaningful effect to P1-3. Based on the travaux préparatoires, the Court stated in paragraph 50 of the judgment that:

> [T]he inter-State colouring of the wording of Article 3 (P1-3) does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections.[31]

Paragraph 50 thus reveals that the Court intended to treat P1-3 as other (explicit) rights in the Convention. Despite the fact that the Court found no violation of P1-3 separately and in conjunction with Article 14, the case is significant for the Court's recognition that the rights to vote and to stand for election are implied in P1-3. These rights were later referred to as the "active…[and] passive aspect of the rights under Article 3 of Protocol No. 1."[32]

The facts of *Mathieu-Mohin and Clerfayt v. Belgium* are less famous than the principles that were established in the judgment. The applicants, both French-speaking Belgian citizens, argued that their inability to become members of the Flemish Council for the reason of taking their parliamentary oath in French (instead of Dutch) violated P1-3. The Court did not share this view. The Court stated in paragraph 52 of the judgment that "[t]he rights in question are not absolute. Since Article 3 (P1-3) recognizes them without setting them forth in express terms, let alone defining them, there is room for implied limitations."[33]

One might say that the Court sure has implied many concepts from a provision that is formulated as an obligation – implied rights and implied limitations. The recent and

[30] Case of Mathieu-Mohin and Clerfayt v. Belgium (App.No. 9267/81),judgment of March 2, 1987 ECtHR (Plenary Court), Par 51, accessed March 10, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57536#{"itemid":["001-57536"]}
[31] Ibid, Par 50.
[32] Ždanoka v. Latvia, Paras 105-6. See supra note 21.
[33] Mathieu-Mohin and Clerfayt v. Belgium, Par 52. See supra note 30.

controversial case law raises the question as to whether the inconsistencies in the electoral jurisprudence of the Court are also an implied result of the Court's reading of P1-3. It is highly unlikely that this is the case. While certain inconsistencies are the result of different electoral systems (and thus implied), there are some inconsistencies that are the result of the Court's reading of the standards applicable to P1-3 cases.

Therefore, I stand by my argument that the Court's deferential approach is more than desirable in situations where there was a lack of consensus from the very beginning – in this case the lack of consensus to form explicit electoral rights. As I have already stated in the introduction, the role of the Court is to set minimum standards that apply to the electoral process. The thesis does not criticize the initial standards as such, or the implied parts, but the inconsistent application and development of those standards in *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina*. The next subchapter provides an overview of these standards.

1.2 Standards established in the early cases

In *Mathieu-Mohin and Clerfayt v. Belgium* the Court developed standards that apply to the implied limitations of the rights to vote and to stand for election. The Court stated that "[states] have a wide margin of appreciation in [electoral matters], but it is for the Court to determine in the last resort whether the requirements of Protocol No.1 (P1) have been complied with."[34] The standard that the Court adopted was twofold. Limitations imposed on electoral rights had to be founded on a legitimate aim and the means for achieving that aim had to be proportionate. Paragraph 52 of the judgment provides:

> [The Court] has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair the very essence and deprive them of their effectiveness; that they are

[34] Ibid.

> imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of their legislature'.[35]

Moreover, "the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election"[36] was implied in the text of P1-3. However, there was no requirement on the state to provide a system in which the votes would carry the same weight.[37]

The standard set in *Mathieu-Mohin and Clerfayt v. Belgium* was reaffirmed in later cases. For instance in *Gitonas and Others v. Greece* the Court upheld a restriction on civil servants to stand for election. The Court ruled that such a restriction had a legitimate aim of "preserv[ing] the neutrality of the civil service, the independence of members of parliament and the principle of the separation of powers."[38] As to the proportionality, the Court upheld the Government's submission that the restrictions are "neither arbitrary nor irrational"[39] as "[t]hey were known in advance to prospective candidates thus enabling them to make appropriate arrangements."[40] *Gitonas* provides only one example of a legitimate restriction on the right to vote.

According to judge Bonello, "Strasbourg has, over the years [and on the basis of this standard], approved quite effortlessly the restriction of electoral rights (to vote in or stand for elections) based on the widest imaginable spectrum of justifications."[41] This thesis is founded on the argument that the standard has not been appropriately applied and that the restrictions have not been appropriately reviewed in *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci*

[35] Ibid.
[36] Ibid, Par 54.
[37] Ibid.
[38] Case of Gitonas and Others v. Greece (App.Nos. 18747/91, 19376/92 and 19379/92),judgment of July 1, 1997 ECtHR (Chamber), Par 37, accessed March 10, 2014.
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["gitonas v greece"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58038"]}
[39] Ibid, Par 34.
[40] See supra note 38.
[41] Case of Sejdić and Finci v. Bosnia and Herzegovina, Dissenting Opinion of Judge Bonello. See supra note 3.

v. Bosnia and Herzegovina. But before I address *Hirst* and *Sejdić*, it is necessary to address two important doctrines that lie at the heart of electoral disputes - the margin of appreciation doctrine and the doctrine of evolutive interpretation.

1.3 Margin of appreciation and evolutive interpretation

The margin of appreciation doctrine establishes the balance between the national systems and the standards developed by the ECtHR. According to Harris et al, the doctrine "means that the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right."[42] As noted above, the margin of appreciation is wide in electoral matters. This is for the reason that there are no explicit rights and limitations in the text of P1-3.[43] Furthermore, the margin of appreciation is the result of different electoral systems and the lack of consensus among member states. Letsas argues that the doctrine "is based on the idea that national authorities are *better placed* to decide certain human rights cases, most notably in cases where there is no *consensus* among Contracting States."[44]

The doctrine as applied in electoral matters, however, raised an important practical issue – how wide is the *wide* margin of appreciation? This was also the point of disagreement among the ECtHR judges. *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina* serve as examples where the Court should have examined this doctrine more carefully than it actually did. The particular circumstances in Bosnia and Herzegovina, as reflected in the *Sejdić* judgment, would justify an even greater deference than in *Hirst*. But the Court did not defer in *Hirst* or in *Sejdić*. This illustrates the problem of the margin of

[42] Harris et al., *Law of the European Convention on Human Rights*, 11.
[43] See for instance Articles 10 and 11 of the Convention for comparison.
[44] George Letsas, "Two Concepts of the Margin of Appreciation," *Oxford Journal of Legal Studies* 26, no. 4 (2006): 709.

appreciation. Harris et al argue that "[t]he difficulty lies not so much in allowing it as in deciding precisely when and how to apply it to the facts of particular cases."[45] I will argue in the second chapter that the ECtHR was not very consistent in reviewing the legitimate aim and the proportionality requirements against the wide margin of appreciation.

Finally, the doctrine of evolutive interpretation allows the ECtHR to read the Convention in accordance with the contemporary social developments. In *Tyrer v. United Kingdom* the Court "recall[ed] that the Convention is a living instrument which…must be interpreted in the light of present-day conditions."[46] Nevertheless, Dzehtsiarou and Greene argue that the doctrine should signal "[e]volution, [n]ot [r]evolution…[and] that evolutive interpretation should be based on European consensus to avoid arbitrary judgments."[47] They argue that the Strasbourg Court should "ensure its legitimacy by clear, cogent reasoning and methodology [and] recognize its limitations and work with others in order to advance the human rights project."[48]

As noted above, the active and passive electoral rights have "evolved" from a state obligation.[49] *Hirst v.United Kingdom (No. 2)*, however, raises the question as to whether the Court was too evolutive in requiring that the United Kingdom amends its 1983 Representation of the People Act that prohibited all prisoners, irrespective of the length of their sentence, the right to vote. *Sejdić and Finci v. Bosnia and Herzegovina* raises a similar question with respect to the Bosnian Constitution, as part of the Dayton Peace Agreement, which discriminates against national minorities in the passive aspect of the right. In the next chapter, I will demonstrate that the shortcomings identifiable in *Hirst* and *Sejdić* can be explained by inconsistencies in both the margin of appreciation and evolutive interpretation doctrine.

[45] Harris et al., *Law of the European Convention on Human Rights*, 14.
[46] Case of Tyrer v. the United Kingdom (App.No. 5856/72),judgment of April 25, 1978 ECtHR (Chamber), Par 31, accessed March 5, 2014.
http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57587#{"itemid":["001-57587"]}
[47] Dzehtsiarou and Greene, "Legitimacy and the Future of the European Court of Human Rights", 1713.
[48] Ibid.
[49] See supra note 30.

Chapter 2: Non-implementation Challenging the Legitimacy of the ECtHR

The Strasbourg Court has in recent years faced numerous challenges. First of all, the Court was criticized for the immense "backlog of cases"[50], questioning the Court's ability "to offer an appropriate redress mechanism to individuals whose rights truly have [been] gravely violated."[51] On the other hand, the Court was criticized for going too far in its commitment to human rights. Such criticisms are visible from the implications following the judgments in *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina*. The two cases serve as the best examples of tensions that exist between national authorities and Strasbourg in electoral matters.

The fact that the United Kingdom and Bosnia and Herzegovina are so structurally different, but both oppose the review of their electoral laws, casts doubt on the authority of the ECtHR. Almost nine years have passed since *Hirst*, and almost five from *Sejdić*, but the principles established in the two cases remain a dead letter of the law in the countries concerned. This chapter addresses the implications of the two judgments and the reasons for non-implementation. As I will argue, the reasons lie not only with the political sensitivity and the complexity of the issues in question, but also with the inconsistencies in the Court's jurisprudence.

The chapter is divided in two subchapters. The first deals with the active aspect of the rights under P1-3, namely the right to vote. Hence, the first subchapter addresses *Hirst v. United Kingdom (No. 2)* and the controversial issue of prisoner enfranchisement. The second subchapter deals with the passive aspect of the rights under P1-3, namely the right to stand for

[50] Helen Keller, Andreas Fischer, and Daniela Kuhne, "Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals," *European Journal of International Law* 21, no. 4 (2010): 1028.

[51] Fiona de Londras, *The European Court of Human Rights, Dual Functionality, and the Future of the Court after Interlaken*, Working Paper (Dublin: University College Dublin, 2011), 3, accessed February 15, 2014. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773430.

election. Hence, the second subchapter addresses *Sejdić and Finci v. Bosnia and Herzegovina* and the constitutional power-sharing agreement that prevents minorities from being elected to the upper house of parliament (but also from being elected to the joint presidency).

2.1 Hirst v. United Kingdom (No. 2): The right to vote

Hirst v. United Kingdom (No. 2) is one of the judgments that was not very welcomed in the United Kingdom. Prior disagreements between the country and the ECtHR, particularly those dealing with British extradition laws, did not, however, result in the same level of resentment on the British side.[52] The prisoners' right to vote, despite being the center of attention since 2005, did not attain the necessary sympathy among politicians for the judgment to be implemented. Foster argues:

> The UK government's response to the decision in Hirst (No. 2) has been deeply frustrating; not only to prisoners, but also to the Joint Committee on Human Rights who feel that the government's prevarication and attitude in this area has both reneged on its international law obligations and betrayed the relationship of trust between the Committee and the government. It is clear, however, that unless and until the government takes a measured and appropriate response to the judgment and its implications, it will continue to be in breach of its strict obligation under the ECHR.[53]

The disenfranchisement of prisoners in the United Kingdom dates back to the 1870s and the concept of "civic death."[54] It was, hence, viewed as part of the punishment intended to "promot[e] civic responsibility."[55] Van Dijk et al note that the early Commission decisions on prisoners' voting were also not friendly to this group of people and that "the Strasbourg case

[52] See for instance: Case of Chalal v. the United Kingdom (App.No. 22414/93),judgment of November 15, 1996 ECtHR (Grand Chamber), accessed March 11, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":["001-58004"]}

[53] Foster, "Reluctantly Restoring Rights", 507.

[54] House of Lords and House of Commons, *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14* (London: The Stationery Office Limited, 2013), 7, accessed February 15, 2014. http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf.

[55] Hirst v. United Kingdom (No. 2), Par 50. See supra note 3.

law has long remained extremely restrictive."[56] The judgment in *Hirst*, however, serves as an example of the ECtHR's change of approach to prisoner disenfranchisement. The perception "that the opinions of convicted prisoners form no part of the 'opinion of the people'…[is] difficult to reconcile with modern penological views regarding the purposes of prison sentences."[57]

John Hirst was convicted for the manslaughter of his landlady. Due to a personality disorder he was sentenced to life imprisonment. In 2001 the applicant complained of being subject to a blanket ban on voting that applied to all prisoners. The case was first heard by the Chamber, which held unanimously that the United Kingdom was in breach of P1-3.[58] The Grand Chamber in 2005 upheld this view. The Court stated that "the right to vote is not a privilege [and that] the presumption in a democratic State must be in favour of inclusion."[59] The Court did not question the legitimate aim on which the restriction was based. The "enhanc[ement] of civic responsibility and respect for the rule of law"[60] were not *per s*e contrary to P1-3. Nonetheless, the Court found that the restriction "lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant."[61]

The judgment triggered criticism among conservative politicians, scholars and judges. In October 2012, the Prime Minister of the United Kingdom said: "The House of Commons has voted against prisoners having the vote – I am very clear about that…no one should be in any doubt: prisoners are not getting the vote under this Government."[62] Whatever the British

[56] Van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 922.
[57] Ibid, 923.
[58] Hirst v. United Kingdom (No. 2), Paras 1-5, Par 12 and 41.
[59] Ibid, Par 59.
[60] Ibid, Par 74.
[61] Ibid, Par 76.
[62] HC Deb., 24 October 2012, col. 923 cited in: House of Lords and House of Commons, *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14*, 22.

government says, prisoners will get the vote one way or another. Article 46 of the ECHR requires the member states "to abide by the final judgment of the Court."[63] The implications of the judgment and the consequences of non-implementation are discussed in the following section.

2.1.1 Implications: Parliamentary Sovereignty v. ECtHR

The implications of *Hirst* are much broader than the mere invalidation of the blanket disenfranchisement of prisoners. O'Connell pointed to "the political sensitivities of interfering in matters concerning the election of a legislature – matters which go to the question 'Who governs?'"[64] Indeed, the judgment resulted in a debate about who gets to decide about the electorate of the United Kingdom. Furthermore, it illustrated the strong conflict between the doctrine of parliamentary sovereignty and the ECtHR. Pinto-Duschinsky argues that parliamentary sovereignty as "the cornerstone of [British] democracy has been undeservedly attacked."[65]

The joint dissenters in *Hirst* took into account this concern, providing arguments that undermined the voice of the majority. The dissenters put forward several strong points, one of them being that "it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions."[66] The British government relied on this argument extensively in order to justify its noncompliance with the judgment.

The dissatisfaction of the British government with *Hirst* went even so far that the Government claimed it will leave the jurisdiction of the ECtHR. Letsas argued:

[63] Council of Europe, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Rome, Art 46, accessed January 11, 2014. http://www.echr.coe.int/Documents/Convention_ENG.pdf
[64] O'Connell, "Realising Political Equality", 265.
[65] Pinto-Duschinsky and Gibbs, *Bringing Rights Back Home*, 5.
[66] Hirst v. United Kingdom (No. 2), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, Par 6. See supra note 3.

> [T]he country's populist and illiberal forces have seized the opportunity to engage in another round of bashing of European institutions, calling for the withdrawal from the jurisdiction of the European Court of Human Rights. The justice secretary, Kenneth Clarke, who is otherwise known for his pro-European stance, stated publicly that the relationship between the Strasbourg [C]ourt and national authorities is in need of reform and that the government will work towards this direction.[67]

The withdrawal of the United Kingdom from the jurisdiction of the Court would have serious implications for the integrity of the Convention system as a whole. Pinto-Duschinsky argues "that a rejection of the authority of the Court by Britain would lead to similar moves by countries such as Russia."[68]

On the other hand, non-implementation of *Hirst* for such a long period without the imposition of any meaningful sanctions on the United Kingdom might encourage other states not to implement judgments that are rendered against them. In this sense, *Hirst* is a dangerous judgment, the full effects of which are still not known. In my opinion, the Court should have shown a deferential attitude to the issue of prisoners' right to vote, for the very practical reason that the Convention system should not be undermined by an entirely national question. Ultimately, nobody in Germany or in Croatia or in any other Contracting State will consider the United Kingdom less democratic for prohibiting prisoners the right to vote. In the United States prisoners convicted for felonies lose their right to vote permanently. The disenfranchisement remains valid even after release, which is not the case in the United Kingdom.[69] Nevertheless, no one questions that the United States is the leading example of a democracy.

Some of the criticism of Strasbourg that originated in the United Kingdom is exaggerated. Such are, for instance, the arguments of Pinto-Duschinsky that "[t]he competence of some of the judges is severely in doubt [and that] some of them represent

[67] George Letsas, "In Defense of the European Court of Human Rights", 2, accessed February 11, 2014, http://www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf.
[68] Pinto-Duschinsky and Gibbs, *Bringing Rights Back Home*, 64.
[69] See for instance: Richardson v. Ramirez 418 U.S. 24 (1974).

undemocratic countries with poor legal traditions."[70] I find that there are more persuasive and legalistic arguments that subject the judgment in *Hirst* to justified criticism. The next part of this subchapter deals with those arguments.

2.1.2 Inconsistencies with subsequent case law: Was *Hirst* a bad judgment?

Even though *Hirst* is more criticized for its political implications, I believe the judgment should be more criticized for the lack of consistency in the ECtHR's application of standards established by the early case law. While it remains undisputed that the role of the Court is to set minimum standards in electoral matters, its application of the twofold test (legitimate aim and proportionality) and the margin of appreciation and evolutive interpretation doctrines in *Hirst* led to much more than a bare minimum. *Hirst* does not fit either with previous or subsequent case law. While it departed from the previous case law, the subsequent cases question the authority of *Hirst* as the Court in those cases upheld more restrictive kinds of prisoners' disenfranchisement. Could it be that the Court in *Hirst* was too ambitious and that it, following the intense criticism from the British, decided not to go too far again?

One must notice how the Court applied the twofold test in *Hirst*. While it did not dispute that the aim for the restriction served a legitimate purpose, it held the restriction was disproportionate as it affected all prisoners.[71] By its brief reference to the legitimate aim it seems that the Court gave insufficient weight to crime prevention and enhancement of civic responsibility. Proportionality was given much more weight, but I am not convinced by the

[70] Pinto-Duschinsky and Gibbs, *Bringing Rights Back Home*, 11.
[71] See supra note 61.

Court's argument that the "automatic blanket ban imposed on all convicted prisoners…was arbitrary in its effects."[72]

First of all, it is difficult to speak about arbitrariness of a measure that was prescribed by law and that has been legitimately applied for years in British courts. In an earlier case heard by the Commission, *Holland v. Ireland*, the applicant "was disenfranchised because the law simply did not foresee a right for prisoners to vote."[73] Nevertheless, as Van Dijk et al argue:

> [T]he Commission referred to its case law and held that the fact that all of the convicted prisoner population cannot vote does not affect the free expression of the opinion of the people in the choice of the legislature. It added that the position under Irish law could not be considered to be arbitrary in view of the margin of appreciation and the jurisprudence of the Convention organs.[74]

If the omission of prisoners from the electoral law was not arbitrary, then it does not make sense to claim a law, clearly defining their status, is arbitrary in its effects. The Government claimed:

> [Disenfranchisement] only affected those who had been convicted of crimes sufficiently serious…to warrant an immediate custodial sentence, excluding those subject to fines, suspended sentences, community service or detention for contempt of court as well as fine defaulters and remand prisoners. Moreover, as soon as prisoners ceased to be detained, the legal incapacity was removed.[75]

The Court, however, did not find this argument sufficient to uphold the proportionality of the restriction, which I consider to be a flaw.

With respect to the margin of appreciation, *Hirst* resembles the problem that I addressed in Chapter 1 – the uncertainty as to the wideness of the margin of appreciation. The

[72] Hirst v. United Kingdom (No. 2), Par 76.
[73] Appl. 24827/94, Holland v. Ireland, cited in: Van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 922.
[74] Ibid.
[75] Hirst v. United Kingdom (No. 2), Par 51.

majority recognized that it was "wide [but] not all-embracing."[76] The dissenters, however, provided a more convincing argument:

> In our opinion, this categorical finding is difficult to reconcile with the declared intention to adhere to the Court's consistent case-law to the effect that Article 3 of Protocol No. 1 leaves a wide margin of appreciation to the Contracting States in determining their electoral system. In any event, the lack of precision in the wording of that Article and the sensitive political assessments involved call for caution.[77]

The problem of the margin of appreciation was also evident from the subsequent case *Frodl v. Austria*.[78] In this case the Court held:

> Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law but by the decision of a judge following judicial proceedings.[79]

The British MPs argued that "the Court appeared to narrow the margin of appreciation open to States almost to vanishing point, finding that the Austrian law that all those convicted of crimes involving intent and sentenced to more than one year in prison should lose the right to vote was also in breach of [P1-3]."[80]

The margin of appreciation, as applied by the Court both in *Hirst* and in *Frodl*, suggests the Court went further than it did in *Mathieu-Mohin*. The Court also did not provide any guidance as to how the judgment in *Hirst* should be implemented, and left this to the United Kingdom.[81] This fact has been used to argue that the Court did not go too far. Letsas stated that "there are many possible legislative schemes that meet [the] requirement [of]…

[76] Ibid, Par 82.
[77] Hirst v. United Kingdom (No. 2), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, Par 5.
[78] Case of Frodl v. Austria (App.No. 20201/04),judgment of April 8, 2010 ECtHR (First Section), accessed February 19, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98132#{"itemid":["001-98132"]}
[79] Ibid, Par 28.
[80] House of Lords and House of Commons, *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14*, 17.
[81] Hirst v. United Kingdom (No. 2), Par 52.

tailor[ing] the ban to the nature of the offense or the duration of the sentence."[82] This argument, while predictable, is not convincing. I believe that in electoral matters, the wide margin of appreciation should not only be applied to the issue of *how*, but also to the issue of *when* prisoners (or any other group) should be enfranchised. The British hesitant attitude towards prisoners' enfranchisement is evident from the thousands of applications submitted after *Hirst* and the pilot judgment procedure applied in *Greens and M.T. v. the United Kingdom*.[83] The United Kingdom, hence, is not yet ready to accept prisoners as part of the electorate.

Hirst also raises the issue of the Court's "dual functions of constitutionalism and adjudication."[84] While its adjudicatory function is seriously undermined by *Hirst*, because the applicant in any case would not be entitled to vote (the restriction, whether blanket or narrowly tailored, would not make a difference for him due to his life imprisonment), *Hirst* emphasized the Court's constitutional function, which subjected it to greater criticism and resentment. While both functions are justified in theory, I am less convinced that the Court should assume the constitutional function when its ultimate judgment would not make any difference for the individual applicant.[85]

The decision the majority reached in *Hirst* might be only explained by evolutive interpretation. I have referred above to the "modern penological views"[86] that undermine the justification of the blanket restriction. The dissenters argue, though, that "[a]n 'evolutive' or 'dynamic' interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be

[82] Letsas, "In Defense of the European Court of Human Rights", 2.
[83] See: Case of Greens and M.T. v. the United Kingdom (App.Nos. 60041/08 and 60054/08),judgment of November 23, 2010 ECtHR (Fourth Section), accessed February 11, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101853#{"itemid":["001-101853"]}
[84] Londras, *The European Court of Human Rights, Dual Functionality, and the Future of the Court after Interlaken*, 7.
[85] Hirst v. United Kingdom (No. 2), Par 52.
[86] See supra note 57.

achieved."[87] No such consensus, according to the dissenters, was reached with respect to prisoners' voting rights.

The UK Government also provided statistical evidence, showing that there were thirteen countries in which "prisoners were barred from voting or unable to vote."[88] Lang argues that "all but the United Kingdom are former Soviet states without a strong history of democracy and the rule of law, having joined the Convention in the last twenty years."[89] In this sense, one could suggest that the Court imposed a greater burden on the United Kingdom, than it would do in case of any of the other States that applied a blanket restriction. Hence, the United Kingdom was to set a new standard the others could then later follow. Furthermore, it seems that the Court added another requirement in reviewing a ban on voting – the requirement of "substantive debate by members of the legislature"[90], which was, according to the Court, lacking in the United Kingdom. One might wonder how many times the national legislature has to review the law in question for it to satisfy the *substantive* requirement, considering that the Court admitted "the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand."[91]

Finally, one would expect that the standard adopted in *Hirst* would lead to more lenient restrictions on the prisoners' right to vote, as required by the "presumption… in favour of inclusion."[92] The Court, however, in *Scoppola (No. 3) v. Italy* (hereinafter *Scoppola*) upheld a more restrictive ban on prisoners' voting than the one invalidated in *Hirst*.[93] The Italian Criminal Code imposes a penalty of permanent disenfranchisement for prisoners who

[87] Hirst v. United Kingdom (No. 2), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, Par 6.
[88] Hirst v. United Kingdom (No. 2), Par 33.
[89] Lang, "A Disproportionate Response", 858.
[90] Hirst v. United Kingdom (No. 2), Par 79.
[91] Ibid, Par 82.
[92] See supra note 59.
[93] Case of Scoppola v. Italy (No. 3) (App.No. 126/05), judgment of May 22, 2012 ECtHR (Grand Chamber), accessed March 10, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044#{"itemid":["001-111044"]}

commit particular crimes against the state and to those who were sentenced to more than five years.[94] The Court stated that "[it] cannot conclude that the Italian system has the general, automatic and indiscriminate character that led it, in the *Hirst* case, to find a violation of Article 3 of Protocol No. 1."[95] While the Court found the Italian system less restrictive than the one in United Kingdom for the reason that "there is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years' imprisonment"[96], there is less concern expressed for those sentenced to five years and more. Such persons would be enfranchised automatically upon release in the United Kingdom, while in Italy they would remain permanently disenfranchised unless they applied for rehabilitation.[97]

Lang argues that "the analysis of proportionality in *Scoppola* is inconsistent with the analysis employed by the Court in *Hirst*."[98] He further argues that "[i]f the Court had applied the proportionality analysis consistently, it would have found the Italian law just as disproportionate as the British law was seven years prior."[99] The dissenting judge Björgvinsson claimed that "the judgment in [Scoppola (No. 3)] has now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners' voting rights in Europe."[100] Lang adds to this that "Scoppola (No. 3)…can be viewed as a kind of devolutive judgment, removing the protections seemingly guaranteed by Hirst (No. 2)."[101]

While this is one way to look at it, one can also deduce that *Hirst* was a bad judgment. *Scoppola* might reveal the (more desirable) Court's deferential approach that should have also been applied in *Hirst* as well as in *Frodl*. It seems that the ECtHR in *Scoppola* respected to a

[94] Ibid, Par 36.
[95] Ibid, Par 108.
[96] Ibid.
[97] Ibid, 109. Also see supra note 75.
[98] Lang, "A Disproportionate Response", 853.
[99] Ibid, 857.
[100] Case of Scoppola v. Italy (No. 3), Dissenting Opinion of Judge David Thór Björgvinsson.
[101] Lang, "A Disproportionate Response", 860.

greater extent the "wealth of differences…in historical development, cultural diversity and political thought."[102] The result in *Scoppola* might also be a strategic move of the Court to reduce the challenges to its legitimacy.

In conclusion, there is no need to pick sides as to what judgment was right or wrong. This subchapter has demonstrated that the ECtHR was not consistent in applying the standards set in *Mathieu-Mohin*. Pitea argues that "[t]he Court's reasoning shows a primary concern to ensure continuity in the jurisprudence [by invalidating blanket bans], but it is somehow obscure and not entirely convincing."[103] While I am personally convinced that *Hirst* should have been decided differently, I leave it to the reader to reach an independent conclusion. In the next subchapter I address the issue of the restriction on minorities to stand for election for the upper house of parliament in Bosnia and Herzegovina and the implications of *Sejdić and Finci v. Bosnia and Herzegovina*.

2.2 Sejdić and Finci v. Bosnia and Herzegovina: The right to stand for election

The judgment in *Sejdić and Finci v. Bosnia and Herzegovina* has, as I have argued previously, "turned the whole constitutional order [of the country]…upside down."[104] While the judgment is momentous for invalidating the discriminatory provisions of the Bosnian Constitution, which prohibited minorities "political participation and representation at the

[102] Hirst v. United Kingdom (No. 2), Par 61.
[103] Cesare Pitea, "Scoppola v. Italy (no. 3): The Grand Chamber faces the 'constitutional justice vs. individual justice' dilemma (but it doesn't tell)," *Strasbourg Observers*, accessed March 24, 2014. http://strasbourgobservers.com/2012/06/20/scoppola-v-italy-no-3-the-grand-chamber-faces-the-constitutional-justice-vs-individual-justice-dilemma-but-it-doesnt-tell/
[104] Šejla Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina." (Final paper, Central European University, 2014), 6.

highest level of state governance"[105], there are significant shortcomings of the judgment that, similarly to the ones in *Hirst*, question the authority and legitimacy of the ECtHR. Idrizović argues that the judgment "has not eased, but rather added to the complexity of the situation in light of the country's constitutional framework and its effort to constitute a modern liberal democracy."[106]

In order to comprehend the problems that are raised by *Sejdić*, one must first become aware of the political circumstances in Bosnia and Herzegovina, particularly of those in the 1990s. The war in Bosnia and Herzegovina was the consequence of the dissolution of Yugoslavia and ethnic tensions that culminated after the republics that formed it opted for independence. It lasted for almost four years and ended with a peace treaty, Annex 4 of which forms the Bosnian Constitution. The General Framework Agreement for Peace or the Dayton Peace Agreement (hereinafter "DPA"), drafted in Dayton, Ohio, and signed in Paris, France in the end of 1995, divided the territory of Bosnia and Herzegovina into two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.[107] The Preamble to the Constitution identifies three constituent peoples: Bosniacs and Croats, who represent the majority in the Federation of Bosnia and Herzegovina, and Serbs, who represent the majority in the Republika Srpska. Minorities and those who do not wish to declare affiliation with any of the constituent people, i.e. persons from mixed marriages, are referred to as "the Others."[108] Bosnia and Herzegovina is, hence, a consociational state, territorially divided on ethnic lines.

While citizenship is granted to all constituent peoples and the members of minorities, there is an important (discriminatory) distinction that the Constitution makes between the constituent peoples and minorities at the highest level of state. Namely, only members of the

[105] Ibid, 5.
[106] Kenan Idrizović, "Consociation as an Impediment to EU Accession" (Central European University, 2013), 1.
[107] General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Rep. Yugo., Dec. 14, 1995, 35 I.L.M., accessed February 19, 2014.
http://www.ohr.int/dpa/default.asp?content_id=380
[108] Ibid, Annex 4 (Constitution of Bosnia and Herzegovina), Preamble.

three constituent peoples can stand for election for the Presidency of Bosnia and Herzegovina, and become members in the House of Peoples, the upper house of parliament at the state level.[109] Article IV of the Constitution states: "The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs)."[110] Article V of the Constitution stipulates: "The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska."[111] One must be aware that the Bosnian Constitution treats the constituent peoples as minorities in one of the entities through the strict territorial division. For instance, Serbs cannot stand as presidential candidates in the Federation of Bosnia and Herzegovina and the same rule applies for the membership in the House of Peoples. In this sense it is not only necessary that a person belongs to one of the constituent peoples, but also the address of the person plays an important role. For minorities the territorial division makes no difference.

The reason behind Articles IV and V "was to prevent each of the three constituent peoples from dominating over the other two [and] to stop further atrocities and ethnic cleansing."[112] Hence, the DPA aimed to ensure a peaceful coexistence but, as noted by Tran, "[it] was never designed to be an efficient instrument of government."[113] The flaws of Dayton became more apparent in recent years. Before *Sejdić*, there was a case before the Bosnian

[109] The length of this paper precludes a deeper analysis of the legislative bodies at the entity level and cantonal level in the Federation of Bosnia and Herzegovina. The reader might want to know that the structure of the Bosnian legislature and other branches is far more complex than revealed in this thesis.
[110] The Bosnian Constitution, Article IV. See supra note 108.
[111] Ibid, Article V.
[112] Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina", 3.
[113] Tran, "A Legal Resource for the International Human Rights Community: Human Rights in the Post-Conflict Context: Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdic and Finci v. Bosnia and Herzegovina," 6.

Constitutional Court in which the applicant challenged the discriminatory provisions of the Constitution, specifically the strict territorial division as applicable to constituent peoples.

> Mr. Ilijaz Pilav, a Bosniac living in the territory of Republika Srpska, challenged the territorial division that prevented him as a Bosniac in Republika Srpska from running for the presidency. However, the case did not reach the ECtHR, and the Constitutional Court ruled in 2006 that such territorial restrictions are necessary to sustain the political power-sharing agreement.[114]

Mr. Dervo Sejdić, a Bosnian Roma, and Mr. Jakob Finci, a Bosnian Jew, both members of national minorities, are thus the first applicants who challenged Articles IV and V of the Bosnian Constitution before the ECtHR, stating that "their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin […] amounted to racial discrimination."[115] Their claim was based on Article 14 of the ECHR, Article 3 of Protocol No. 1 ("P1-3") and Article 1 of Protocol No. 12 (hereinafter "P12-1").

The applicants relied on the principle that "[d]iscrimination on account of one's actual or perceived ethnicity is a form of racial discrimination"[116], which the Court set in *Timishev v. Russia*. One must note that *Sejdić* is an interesting case, as the attention is focused on discrimination rather than on electoral rights. Apart from *Timishev*, dealing with the applicant's right to liberty of movement, the applicants in *Sejdić* have also invoked *D.H. and Others v. Czech Republic*, a case dealing with the segregation of Roma children in schools.[117] Finally, the applicants relied on *Aziz v. Cyprus*, which bore some similarities with *Sejdić*, as it

[114] Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina," 4.
See: Decision on Admissibility and Merits, Party for Bosnia and Herzegovina and Mr. Ilijaz Pilav, Case No. AP-2678/06, September 29, 2006, accessed February 21, 2014; see English version at:
http://www.ccbh.ba/eng/odluke/

[115] Case of Sejdić and Finci v. Bosnia and Herzegovina, Par 26.

[116] Case of Timishev v. Russia (App.Nos. 55762/00 and 55974/00),judgment of December 13, 2005 ECtHR (Second Section), Par 56, accessed February 21, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71627#{"itemid":["001-71627"]}

[117] Case of D.H. and Others v. The Czech Republic (App.No. 57325/00), judgment of November 13, 2007 ECtHR (Grand Chamber), accessed February 21, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256#{"itemid":["001-83256"]}

dealt with the constitutional restriction on "members of the Turkish-Cypriot community [to] be registered on the Greek-Cypriot electoral roll."[118]

As a response to the applicants' submission, the Bosnian government invoked the "peace-keeping argument."[119] In its submission to the ECtHR, the Government argued that "time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina."[120] Additionally, the Government argued that *Aziz* was distinguishable from *Sejdić* as "citizens of Bosnia and Herzegovina belonging to the group of 'others'…were entitled to stand as candidates for election to the House of Representatives of Bosnia and Herzegovina and the Entities' legislatures [whereas] Turkish Cypriots…were prevented from voting at any parliamentary election."[121]

The majority of the Court did not find these submissions persuasive. The Court held that the restriction on minorities' representation in the House of Peoples violated P1-3, as this house has exercised wide legislative powers.[122] Furthermore, the Court found the requirement that minorities declare affiliation to one of the constituent peoples disproportionate. The ECtHR, nonetheless, "did not pronounce itself on whether the exclusion of minorities still served a legitimate aim"[123], thus avoiding to address the Bosnian reality. With respect to the restriction on minorities to stand as candidates for the Bosnian presidency, the Court found a violation on the same grounds, but invoking P12-1 because P1-3 applies only to the

[118] Case of Aziz v. Cyprus (App.No. 69949/01), judgment of June 22, 2004 ECtHR (Second Section), Par 11, accessed February 21, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61834#{"itemid":["001-61834"]}
[119] Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina", 5.
[120] Case of Sejdić and Finci v. Bosnia and Herzegovina, Par 34.
[121] Ibid, Par 35.
[122] Ibid, Par 41.
[123] Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina", 5.

legislature.[124] One must note the significance of *Sejdić* as the ECtHR for the first time applied and found a violation of Protocol No. 12, and it did so on an entirely sovereign question – the presidential elections. The Court, hence, invalidated part of an international peace treaty and shook the consociational power-sharing agreement in order to ensure equality of minorities.

The particular circumstances of the case, I will argue, required much more prudence on the Court's side, as Bosnia and Herzegovina is a unique case and the Court should have shown a deferential approach. In addition to the political sensitivity and complexity of the issue, the Court again departed from its case law and assigned very little importance to recent and relevant cases, the proper application of which might have resulted in a different judgment. But before I come to this, I will discuss the implications of the judgment and the consequences of non-implementation in the following section.

2.2.1 Implications: Dayton v. ECtHR

Sejdić and Finci v. Bosnia and Herzegovina is, as I have argued, "an unprecedented victory for minority rights."[125] Nevertheless, the judgment has caused political chaos in the country and all attempts of implementation have failed. Polimac argues that "[t]he implementation of *Sejdić and Finci v. Bosnia and Herzegovina* [is] a perfect case study of the many pitfalls that remain after the judgment has been delivered."[126] The Venice Commission provided assistance and made several proposals to the Government, but all meaningful efforts

[124] See supra note 18.
[125] Hadžidedić, "The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina", 6.
[126] Polimac, "Execution of the Sejdić and Finci v. Bosnia and Herzegovina Case, the Reasons behind the Delay", 6.

to implement *Sejdić* and to bring the Constitution in compliance with the ECHR have failed.[127]

While I agree with the Court that discrimination of minorities should be eliminated even when it follows from the Constitution, I believe that a case as complex as *Sejdić* required caution. First of all, matters involving elections are politically sensitive in countries that are less complex and in societies that are less divided than Bosnia and Herzegovina. *Hirst* is an example. Second, Bosnia and Herzegovina is a consociational state and the discriminatory provisions are part of an international peace treaty. Hence the provisions the Court invalidated were difficult to agree upon in the first place. McCrudden and O'Leary argue that in such circumstances they "favour consociational bargains being unwound only by the parties themselves."[128]

While the judgment has far-reaching implications for those who rely on it before the ECtHR based on P12-1, in Bosnia and Herzegovina it still causes many problems. First of all, the Council of Europe might expel Bosnia and Herzegovina from its membership due to non-implementation, as it announced in 2013. A procedure has already been launched for reducing the national allocation of IPA funds for €47 million as a sanction for non-implementation. Thus, there will be less money for law enforcement, education, refugees, demining and etc.[129]

Second, the implementation of the judgment is crucial for the country's accession to the European Union. The non-implementation of *Sejdić* reveals the country did not make any progress in the last four years. Upon a recent visit, Mr. Štefan Füle, the European

[127]On the efforts of the Venice Commission see: Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina endorsed by the Commission at its 66th plenary session (Venice, 17-18 March 2006), accessed February 23,2014. Available at:
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)004-e
See further: European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission staff working document (Brussels: European Commission, 2013), accessed February 13, 2014.
http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf.

[128] McCrudden and O'Leary, "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements", 499.

[129] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, 6.

Commissioner for Enlargement and European Neighborhood Policy, expressed his disappointment with the attitude of the leaders of the main political parties to the international obligation to implement *Sejdić*.[130]

Finally, the next elections in Bosnia and Herzegovina are due to be held in autumn 2014, meaning that the judgment has to be implemented by May 2014, as the Electoral Law prohibits any significant changes to be made in the last six months before the elections are due.[131] If the judgment is not implemented by that time, the elections will be invalid. Considering all the implications of the *Sejdić* judgment, the dissenting judge Bonello was correct in saying that the case "may appear to be the simplest the Court had to deal with…but…concurrently, among the more insidious."[132] It is simple in addressing discrimination, but insidious in its effects.

In the following section I address the inconsistencies of *Sejdić* with previous case law. While I am deeply in favor of equality, I will argue that the Court in *Sejdić* should have shown deference, even more than in *Hirst*, and that it should have imposed a time limit for the amendment of the discriminatory provisions. Such time limit would eventually require eliminating discrimination of minorities at the highest level of state, but it would not have such detrimental effects on a country that still requires international assistance.

2.2.2 Inconsistencies with previous case law: Was *Sejdić* decided too soon?

Sejdić and Finci v. Bosnia and Herzegovina, despite its positive implications for minorities, has significant shortcomings from the perspective of electoral rights that were

[130] See: Štefan Füle, "Bosnia-Herzegovina - EU: Deep Disappointment on Sejdić-Finci Implementation" (European Commission, 2014), accessed March 1, 2014. http://europa.eu/rapid/press-release_MEMO-14-117_en.htm?locale=en.
[131] See Electoral Law of Bosnia and Herzegovina, Official Gazette 20/02 from August 3, 2002, accessed February 22, 2014. Available in Bosnian at: http://www.izbori.ba/Documents/documents/ZAKONI/Sl_gl_BiH_20_02/IZ-Sl_gl_20-2-hrv.pdf
[132] Case of Sejdić and Finci v. Bosnia and Herzegovina, Dissenting Opinion of Judge Bonello.

recognized by the dissenters but also by other authors. McCrudden and O'Leary argue that "[t]he Court's recent decision in *Sejdić and Finci* has significantly altered the approach it previously took to judicial review of consociational agreements in the Belgian cases."[133] The reasons behind the change of approach lie with:

> the developments that occurred between the Belgian cases and the Bosnian case: the growth of a considerably more robust approach to discrimination and the status of minorities by the Council of Europe and the ECtHR; the increasing adoption of the liberal critique of consociations by other human rights organizations, in particular the Venice Commission; and the particular features of the Bosnian situation itself, in particular Bosnia's commitments to the Council of Europe and the EU.[134]

Nevertheless, I am not convinced that such an approach is justified. While the Court attached much importance to the country's progress since the DPA, it failed to acknowledge that most of the progress occurred due to international assistance. Judge Mijović, in her separate opinion, joined by Judge Hajiyev, points to numerous facts the majority did not take sufficiently into account when it rendered the judgment. She argued that "[t]he State has been run by political parties bearing nationalist flags and using nationalist rhetoric, that [m]any war-crime suspects are still free [and] [j]udicial and prosecutorial authorities are still supervised and instructed by international judges and prosecutors."[135] Judge Mijović also pointed that "[t]he 2006 elections showed that most voters still preferred nationalist rule because they felt safe being led 'by their own people' [and that] cities that had a mixed population before the war are still divided."[136]

All these circumstances required the majority of the Court to take a more cautious approach. In *Mathieu-Mohin and Clerfayt v. Belgium* the ECtHR stated:

> In any consideration of the electoral system in issue, the general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects

[133] McCrudden and O'Leary, "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements", 477.
[134] Ibid, 490.
[135] Case of Sejdić and Finci v. Bosnia and Herzegovina, Partly Concurring and Partly Dissenting Opinion of Judge Mijović, joined by Judge Hajiyev.
[136] Ibid.

> 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.[137]

The political context and the consociational arrangement in Bosnia and Herzegovina certainly justify the wide margin of appreciation. Additionally, the Dayton Peace Agreement is part of an incomplete process and it requires amendments. With respect to the margin of appreciation, McCrudden and O'Leary argue that "[i]n contrast with the Belgian cases, the Court took a highly interventionist approach [in *Sejdić*]…through the weakening of the 'margin of appreciation doctrine'."[138] Finally they note the difference in the standard applied. They argue:

> [I]n contrast with the Belgian cases, there was a high intensity standard of review adopted in the application of the non-discrimination norm. This essentially amounted to a test of strict scrutiny, given the Court's approach of regarding ethnic discrimination as being practically impossible to justify. In contrast with the Belgian cases, little weight was accorded by the Court to the legitimacy of the purposes sought to be achieved by the impugned measures, as defined by the Bosnian government.[139]

Such strict scrutiny is incompatible with the wide margin of appreciation that the states enjoy in electoral matters. Furthermore, as judge Bonello stated in his dissent, there were countless and less serious circumstances the Court found "sufficiently compelling…to justify the withdrawal of the right to vote or to stand for election [but regrettably] a hazard of civil war [was according to the majority not one of those circumstances]."[140] In conclusion, he argued that he "cannot endorse a court that sows ideals and harvests massacre."[141]

The concerns expressed by both Judge Mijović and Judge Bonello are not without merit. The nationalist rhetoric is clearly visible even in 2014, almost five years after the judgment. One could argue that politicians have never been more divided. In the political focus is now the idea of establishment of a third, Croatian-majority entity, as the Federation is

[137] Mathieu-Mohin and Clerfayt v. Belgium, Par 57.
[138] McCrudden and O'Leary, "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements", 491.
[139] Ibid, 491-2.
[140] Case of Sejdić and Finci v. Bosnia and Herzegovina, Dissenting Opinion of Judge Bonello.
[141] Ibid.

(more) dominated by Bosniacs and the Republika Srpska by Serbs. Hence, the minorities are removed from the center of attention, due to the fact that one of the constituent peoples seems to be less equal than the other two. Due to the recent events in Crimea, there have also been comparisons made of the situation in Crimea to the one in Republika Srpska.[142] All this suggests the Court in *Sejdić* did not only go too far in narrowing the margin of appreciation but it also acted prematurely.

The ECtHR, in contrast, could have adopted a similar approach as it did in *Ždanoka v. Latvia*.[143] In *Ždanoka*, the Court required the Government to review constantly the legislation restricting former communist members to stand for election. The Court further stated that the Latvian Parliament should establish a time limit for the restriction, beyond which the ECtHR would find the country in violation. The Court stated:

> Even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under [P1-3], it is nevertheless the case that the Latvian Parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration.[144]

One wonders why the Court did not take a similar approach in *Sejdić*, particularly because the judgment is founded on the argument that Bosnia and Herzegovina progressed since 1995.[145] If the Court was concerned that "[t]he unresponsiveness of an electoral system [was] a matter of a lock up by self-interested incumbents or of the calcification of institutional arrangements when there is insufficient political will for change"[146], how persuasive is then the argument that the country indeed progressed? Personally, I believe that there is a contradiction. A time

[142] See: "Zvonko Jurišić for Klix.ba: Čović Seeks an Entity for Himself, Not the Bosnian Croats (Zvonko Jurišić za Klix.ba: Čović traži entitet za sebe, a ne za Bh. Hrvate)," *Klix.ba*, accessed March 20, 2014, http://www.klix.ba/vijesti/bih/zvonko-jurisic-za-klix-ba-covic-trazi-entitet-za-sebe-ne-za-bh-hrvate/140320047; "Does Milorad Dodik Wait for His Own Crimea? (Čeka li Milorad Dodik svoj Krim?)," *Klix.ba*, accessed March 13, 2014, http://www.klix.ba/vijesti/svijet/ceka-li-milorad-dodik-svoj-krim/140313054.
[143] Ždanoka v. Latvia. See supra note 21.
[144] Ibid, Par 135.
[145] Case of Sejdić and Finci v. Bosnia and Herzegovina, Par 47.
[146] Samuel Issacharoff, "Democracy and Collective Decision Making," *International Journal of Constitutional Law* 6, no. 2 (2008): 265.

limit, however, would have been desirable regardless of whether Bosnia and Herzegovina progressed or not (I leave it to the reader to decide which argument is more persuasive), because the Court would not face attacks on its legitimacy.

In conclusion, one must admit that *Sejdić* is a remarkable case and a true challenge the Court took upon itself. Nevertheless, the Court was too ambitious in its goal of ensuring equality by ignoring the wide margin of appreciation and its previous case law dealing with consociations. Even more than *Hirst*, this judgment questions the legitimacy of ECtHR and criticizes the Court for assuming a constitutional role.[147] In the last chapter, I provide a brief overview of *Hirst* and *Sejdić* together and discuss the ways the ECtHR can regain its legitimacy.

[147] See supra note 84.

Chapter 3: A Way Ahead for the ECtHR: Regaining Legitimacy

The role of the ECtHR in electoral matters has been thoroughly discussed after *Hirst* and *Sejdić*. The two cases are extremely controversial and, despite arising from very different political circumstances, challenge the Court's legitimacy on similar grounds. The analysis of both cases shows that the ECtHR, in reviewing restrictions on the active and passive electoral rights, gave insufficient weight to legitimate aims behind those restrictions and invalidated them based on an obscure and unconvincing review of proportionality. Furthermore, the Court was excessive in narrowing the margin of appreciation and unclear in using evolutive interpretation. Thus, the Court departed from its established standards and failed to recognize the proper line between change and consistency. In the following section I propose solutions that might enhance the Court's consistency and lessen the degree of criticism it has recently faced.

3.1. Lessons learned from *Hirst* and *Sejdić*

The legitimacy crisis the ECtHR has faced in regard to its recent electoral jurisprudence requires the Court to adopt a more careful and deferential approach. Dzehtsiarou and Greene argue:

> In circumstances when the legitimacy of its judgments is constantly questioned, the ECtHR must base its validity on a consistent application of the ECHR and Protocols, clear rulings, dialogue between ECtHR and national authorities, and by providing clear guidance to Contracting Parties. To some extent, the future of the ECtHR depends on its ability to enhance its legitimacy and authority among these Parties. In short, the willingness of the ECtHR, national states, and legal and academic communities to cooperate can help to enhance the ECtHR's legitimacy.[148]

[148] Dzehtsiarou and Greene, "Legitimacy and the Future of the European Court of Human Rights", 1710-11.

Hirst and *Sejdić* reveal that there is a need for the Court's greater insight into political circumstances of the countries concerned and that there is a need for clearer application of the standards established by early case law.

First of all, the the political circumstances in the United Kingdom and Bosnia and Herzegovina have not been thoroughly reviewed. With respect to United Kingdom, the Court failed to acknowledge that disenfranchisement was an additional punishment on prisoners, and it continued to be the Government's policy from 2000, when it removed the punishment of disenfranchisement for remand prisoners.[149] One must note that disenfranchisement in the United Kingdom also served the purpose of a moral conviction, and with respect to morals there is no need to have a consensus in the Convention system.[150] The Court also did not find it relevant that "two thirds of the British public oppose[d] any change to the existing ban."[151] O'Boyle argues that the Court should be "wary of second-guessing the national choices made by a freely-elected legislature."[152] Judge Levits in his dissent to the *Ždanoka* Chamber judgment stated:

> When examining applications under [P1-3], the Court always faces a certain dilemma: 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.[153]

It seems that the Court in *Hirst* did attribute greater importance to the protection of individual rights and that it did second-guess the obvious national policy.

[149] House of Lords and House of Commons, *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14*, 10.
[150] Case of Handyside v. the United Kingdom (App.No. 5493/72),judgment of December 7, 1976 ECtHR (Plenary Court), accessed March 18, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":["001-57499"]}
[151] House of Lords and House of Commons, *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14*, 43.
[152] Michael O'Boyle, *Electoral Disputes and the ECHR: An Overview* (Strasbourg: European Court of Human Rights, 2008), accessed January 15, 2014.
http://www.riigikohus.ee/vfs/789/Report%20(O%60Boyle%20-%20EIK%20praktika).pdf.
[153] Case of Ždanoka v. Latvia (App.No. 58278/00),judgment of June 17,2004 ECtHR (First Section), Dissenting Opinion of Judge Levits, Par 17, accessed February 13, 2014.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-61827"]}

The political circumstances in Bosnia and Herzegovina, being more serious than the ones in the United Kingdom, required even greater attention and analysis by the Court. As noted by McCrudden and O'Leary, the majority in *Sejdić* assigned too much weight to the findings of the Venice Commission. They dispute that the "Venice Commission's fact-finding process [was] sufficiently rigorous to bear the weight that the Court placed on it."[154] Judge Mijović and judge Bonello, namely, pointed to several facts that the majority should have taken into account.[155]

Furthermore, Engelhart argues that "[t]he stakes are high, [because] amending the constitution so that someone who is Jewish or Roma can run for president will require a far-reaching overhaul of the country's entire post-Dayton governance model."[156] While many authors were convinced by the time factor the Court relied on[157], "Bosnian lawyers had a different take on their post-Dayton history, [arguing] that [the] same conditions that rendered the discriminatory provisions necessary in 1995 are still in place today."[158] Thus, "the government's arguments cannot be dismissed offhand as a crude effort to uphold a prejudicial status quo."[159]

Consequently, the first lesson learned from *Hirst* and *Sejdić* is that the ECtHR should take the political circumstances more seriously and review the implications more thoroughly. This can be achieved by engaging in more systematic fact-finding, in the sense that the Court should consider not only the findings of the Venice Commission, but also the findings of

[154] McCrudden and O'Leary, "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements", 492-3.
[155] See supra notes 135 and 140.
[156] Katie Engelhart, "Bosnia's Three-Headed Beast: Sejdić and Finci v. Bosnia and Herzegovina and the Case for 'Reasonable' Discrimination" (presented at the Dahrendorf Programme for the Study of Freedom, Oxford: St Antony's College Oxford, 2013), 3, accessed March 5, 2014. http://www.sant.ox.ac.uk/esc/dahrendorffreedom.html.
[157] See for instance: Lindsey E. Wakely, "From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdić v. Bosnia," *NCJ Int'l L. & Com. Reg.* 36 (2010): 233–54.
[158] Engelhart, "Bosnia's Three-Headed Beast: Sejdić and Finci v. Bosnia and Herzegovina and the Case for 'reasonable' Discrimination", 14.
[159] Ibid.

other NGO's and the Government. This is particularly important for judgments such as *Sejdić*. While some improvements are expected to take place due to adoption of Protocol No. 16, which extends the ECtHR's competence to give advisory opinions, and thus obliges it to examine the political circumstances with more scrutiny, it still remains to be seen whether the Court will take an active part in fact-finding in actual cases before it.[160]

Furthermore, the Court has to be consistent in the application of its standards pertaining to electoral rights. *Hirst* and *Sejdić* demonstrate that the legitimate aims were undermined by the Court's review of proportionality. One would expect that in electoral matters the Court attaches the same level of significance to elements of the twofold test, yet in *Hirst* and *Sejdić* this was not the case. Not only did the Court attach more significance to proportionality, but it was also inconsistent as to this part of the twofold test. For instance, in *Scoppola* the ECtHR upheld a more burdensome restriction on the prisoners' right to vote than in *Hirst*. In *Sejdić* the Court departed from *Ždanoka*, where it upheld the restriction on the right to stand for election for former communist-party members despite the fact that the democratic order in Latvia was less endangered than in Bosnia and Herzegovina.

Since the Court already attaches more weight to proportionality than to the legitimate aim for a restriction, it should at least attempt to ensure consistency on the basis of the results that follow from the its judgments. So far the Court has been unsuccessful in doing so. The proportionality requirement should not be used to uphold more restrictive measures, as this goes against the idea of inclusion that is present in electoral matters.[161] Furthermore, it is noticeable that the Court refers to the wide margin of appreciation, but in both *Hirst* and *Sejdić* it narrows the margin on the basis of proportionality. In the next subchapter I address the reasons for the narrowing the margin of appreciation.

[160] Council of Europe, *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, accessed March 13, 2014.
http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf
[161] See supra note 59.

3.2. Narrowing the margin of appreciation: A way to explicit electoral rights?

Narrowing the margin of appreciation in electoral matters can be explained by the "more robust approach to discrimination"[162] and the idea that "[t]he ECHR protects the rights of everyone and [that it] should be particularly sensitive to claims that the political process marginalises minorities and other disadvantaged groups."[163] While it is normatively desirable to eliminate discrimination in electoral matters, their political sensitivity requires the establishment of a consensus among the member states that the right to vote and to stand for election acquired the same level of significance as the explicit rights where the narrow margin is already applied. The reactions to *Hirst* and *Sejdić* demonstrate that such consensus will be difficult to achieve in the near future.

Nevertheless, establishing such consensus would not be the end of the story. In order to provide greater legitimacy to the ECtHR in electoral cases, it would be desirable, as Lang argues, to amend the Convention and "add an explicit limitations clause to [P1-3]."[164] Personally, I would go even further and suggest the amendment of the entire Article, so that the rights to vote and to stand for election are explicitly incorporated. This would remove any doubts as to the Court's legitimacy, even in the most controversial cases. In any case, I find Lang's proposal more persuasive than the one suggested by O'Connell. She argues that the positive obligations in P1-3 "can be [further] developed by analogy with positive obligations recognised in other areas of ECtHR jurisprudence."[165] Even though O'Connell supports the narrowing of the margin of appreciation, the recognition of additional positive obligations in electoral matters would, in my opinion, still not justify its application.

[162] See supra note 134.
[163] See supra note 9.
[164] Lang, "A Disproportionate Response", 868.
[165] O'Connell, "Realising Political Equality", 264.

In conclusion, the legitimacy of the ECtHR in electoral matters can be ensured through the Court's greater involvement in reviewing the political circumstances and through the consistent application of the existing standards. Alternatively, the narrowing of the margin of appreciation would be acceptable in the future, should the member states agree to adopt an explicit provision recognizing the rights to vote and to stand for election. Since this is not yet on the agenda in the Council of Europe, the way the P1-3 text is formulated today still justifies the wide margin of appreciation and supports the deferential approach. The absence of consensus with regard to electoral matters should be taken seriously by the Court, and it should defer from intruding too much into national policies.

Conclusion

The Strasbourg Court has lately faced serious challenges to its legitimacy. These challenges have also been present since the Court delivered the judgments in *Hirst v. United Kingdom (No. 2)* and *Sejdić and Finci v. Bosnia and Herzegovina*. Thus, the role of the ECtHR in setting standards on electoral rights has been in the focus of attention for the last couple of years. I have not disputed that the Court's role is to set minimum standards in order to give effect to Article 3 of Protocol 1 to the Convention. Neither have I criticized the Court for its early judgments. In those early judgments the Court showed the deferential approach that resembles the intentions of the member states when Protocol 1 was adopted.

In this thesis I have argued instead that the Strasbourg Court has not been consistent in the application of standards pertaining to electoral rights in more recent judgments. *Hirst* and *Sejdić*, although being very different, served as examples to prove this point. *Hirst* dealt with the general ban on prisoners to vote, while *Sejdić* dealt with the constitutional restriction on minorities to run for the highest positions during state elections. I have chosen these particular judgments for the reason that they are still not implemented, despite the passage of years and many attempts of implementation. My goal was also to provide a new perspective on electoral rights by comparing the implications in *Hirst* and *Sejdić*. There have been little or no attempts by other authors to do so. Additionally, I have demonstrated that criticism of the Strasbourg Court does not only follow from developed countries such as the United Kingdom, but also from countries in transition such as Bosnia and Herzegovina. This confirms that electoral rights are still a politically sensitive topic in the Council of Europe member states.

My analysis of *Hirst* and *Sejdić* reveals that the ECtHR has given insufficient weight to the legitimate aims for the restriction on the active and passive aspects of the rights under Protocol 1. The promotion of civic responsibility in *Hirst*, and maintaining peace in *Sejdić* were, hence, aims not compelling enough to uphold the restrictions. The Court rather focused

on the proportionality of the measures in question. The comparison with previous and subsequent electoral jurisprudence shows, however, that the Court was obscure in applying the proportionality test. After *Hirst*, the Court has upheld more restrictive bans on prisoners' voting rights (*Scoppola*), thus suggesting that the judgment in *Hirst* might have been wrong. There is also an inconsistency in *Sejdić* in the Court's finding of the restriction disproportionate, considering that the Court upheld the proportionality of equally burdensome measures in less serious circumstances than those in Bosnia and Herzegovina (*Ždanoka*).

Finally, I have argued that the Court should review the political circumstances more thoroughly in electoral matters in order to regain its legitimacy. With respect to proportionality the Court should take into account the results that follow from its judgments. If the Court wants to be consistent then the application of the proportionality test should lead to more lenient restrictions in the future. *Hirst* and *Sejdić* demonstrate that the Court's judgments in electoral matters can have far-reaching implications. The resistance of member states to implement the judgments casts doubt on the whole integrity of the Convention system and the authority of the ECtHR. Therefore, in the absence of explicit electoral rights, the Court should respect the wide margin of appreciation.

Bibliography

Begić, Zlatan, and Zlatan Delić. "Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing Fair Solutions." *International Journal of Constitutional Law* 11, no. 2 (2013): 447–65.

Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, accessed March 11, 2014. http://www.refworld.org/docid/3ae6b38317.html

Council of Europe, *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, accessed March 13, 2014. http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf

Council of Europe, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Rome, accessed January 11, 2014. http://www.echr.coe.int/Documents/Convention_ENG.pdf

De Londras, Fiona. *The European Court of Human Rights, Dual Functionality, and the Future of the Court after Interlaken*. Working Paper. Dublin: University College Dublin, 2011. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773430.

"Does Milorad Dodik Wait for His Own Crimea? (Čeka Li Milorad Dodik Svoj Krim?)." *Klix.ba*. Accessed March 13, 2014. http://www.klix.ba/vijesti/svijet/ceka-li-milorad-dodik-svoj-krim/140313054.

Dzehtsiarou, Kanstantsin, and Alan Greene. "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners." *German Law Journal* 12 (2011): 1707–15.

Engelhart, Katie. "Bosnia's Three-Headed Beast: Sejdić and Finci v. Bosnia and Herzegovina and the Case for 'reasonable' Discrimination." 1–24. Oxford: St Antony's College Oxford, 2013. http://www.sant.ox.ac.uk/esc/dahrendorffreedom.html.

European Commission. *Bosnia and Herzegovina 2013 Progress Report*. Commission staff working document. Brussels: European Commission, 2013. http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf.

Foster, Steve. "Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote." *Human Rights Law Review* 9, no. 3 (2009): 489–507.

Füle, Štefan. “Bosnia-Herzegovina - EU: Deep Disappointment on Sejdić-Finci Implementation.” European Commission, 2014. http://europa.eu/rapid/press-release_MEMO-14-117_en.htm?locale=en.

Hadžidedić, Šejla. “The ECHR Has Helped to Improve the Status of Minorities in the Convention Member States, While Judgments of the Court Have Also Been Instrumental in Precipitating Legal and Political Change in the Countries Concerned; a Case-Study of Bosnia and Herzegovina.” Final paper, Central European University, 2014.

Harris, D. J., M. O’Boyle, E.P. Bates, and C.M. Buckley. *Law of the European Convention on Human Rights*. Edited by D. J. Harris, M. O’Boyle, and Colin Warbrick. 2nd ed. Oxford: Oxford University Press, 2009.

House of Lords, and House of Commons. *Draft Voting Eligibility (Prisoners) Bill: Session 2013-14*. London: The Stationery Office Limited, 2013. http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf.

Idrizović, Kenan. “Consociation as an Impediment to EU Accession.” Central European University, 2013.

Issacharoff, Samuel. “Democracy and Collective Decision Making.” *International Journal of Constitutional Law* 6, no. 2 (2008): 231–66.

Issacharoff, Samuel, Pamela S. Karlan, and Richard H. Pildes. *The Law of Democracy: Legal Structures of the Political Process*. Westbury, New York: The Foundation Press, 1998.

Keller, Helen, Andreas Fischer, and Daniela Kuhne. “Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals.” *European Journal of International Law* 21, no. 4 (2010): 1025–48.

Lang, Edward C. “A Disproportionate Response: Scoppola v. Italy (No. 3) and Criminal Disenfranchisement in the European Court of Human Rights.” *American University International Law Review* 28, no. 3 (2013): 835–71.

Letsas, George. “In Defense of the European Court of Human Rights.” Accessed February 11, 2014. http://www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf.

———. “Two Concepts of the Margin of Appreciation.” *Oxford Journal of Legal Studies* 26, no. 4 (2006): 705–32.

Marks, Susan. “The European Convention on Human Rights and Its ‘Democratic Society.’” *British Yearbook of International Law* 66, no. 1 (1995): 209–38.

McCrudden, Christopher, and Brendan O’Leary. “Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements.” *European Journal of International Law* 24, no. 2 (2013): 477–501.

Murray, Crg. “Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom.” *King’s Law Journal* 22, no. 3 (2011): 309–34.

O’Boyle, Michael. *Electoral Disputes and the ECHR: An Overview*. Strasbourg: European Court of Human Rights, 2008. http://www.riigikohus.ee/vfs/789/Report%20(O%60Boyle%20-%20EIK%20praktika).pdf.

———. “The Future of the European Court of Human Rights.” *German Law Journal* 12 (2011): 1862–77.

O’Connell, Rory. “Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy.” *Northern Ireland Legal Quarterly* 61 (2010): 263–79.

Pinto-Duschinsky, Michael, and Blair Gibbs. *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*. London: Policy Exchange, 2011.

Pitea, Cesare. “Scoppola v. Italy (no. 3): The Grand Chamber Faces the ‘constitutional Justice vs. Individual Justice’ Dilemma (but It Doesn’t Tell).” *Strasbourg Observers*. Accessed March 24, 2014. http://strasbourgobservers.com/2012/06/20/scoppola-v-italy-no-3-the-grand-chamber-faces-the-constitutional-justice-vs-individual-justice-dilemma-but-it-doesnt-tell/.

Polimac, Erna. “Execution of the Sejdić and Finci v. Bosnia and Herzegovina Case, the Reasons behind the Delay.” Tilburg University, 2014. http://arno.uvt.nl/show.cgi?fid=133395.

Ten Napel, Hans-Martien. “The European Court of Human Rights and Political Rights: The Need for More Guidance.” *European Constitutional Law Review* 5, no. 3 (October 2009): 464–80.

Tran, Celine. "A Legal Resource for the International Human Rights Community: Human Rights in the Post-Conflict Context: Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdic and Finci v. Bosnia and Herzegovina." *Human Rights Brief* 18, no. 3 (2011): 1–12.

Van Dijk, Peter, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak. *Theory and Practice of the European Convention on Human Rights*. 4th ed. Antwerp: Intersentia, 2006.

Venice Commission, Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina endorsed by the Commission at its 66th plenary session (Venice, 17-18 March 2006).

Wakely, Lindsey E. "From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdić v. Bosnia." *NCJ Int'l L. & Com. Reg.* 36 (2010): 233–54.

White, Robin C. A., Clare Ovey, and Francis Geoffrey Jacobs. *The European Convention on Human Rights*. 5th ed. Oxford ; New York: Oxford University Press, 2010.

"Zvonko Jurišić for Klix.ba: Čović Seeks an Entity for Himself, Not the Bosnian Croats (Zvonko Jurišić Za Klix.ba: Čović Traži Entitet Za Sebe, a Ne Za Bh. Hrvate)." *Klix.ba*. Accessed March 20, 2014. http://www.klix.ba/vijesti/bih/zvonko-jurisic-za-klix-ba-covic-trazi-entitet-za-sebe-ne-za-bh-hrvate/140320047.

ECtHR Cases

Case of Hirst v. the United Kingdom (No. 2) (App.No. 74025/01),judgment of October 6, 2005 ECtHR (Grand Chamber), accessed January 18, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70442#{"itemid":["001-70442"]}

Case of Sejdić and Finci v. Bosnia and Herzegovina (App.Nos. 27996/06 and 34836/06), judgment of December 22, 2009 ECtHR (Grand Chamber), accessed January 18, 2014. http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-96491#{"itemid":["001-96491"]}

Case of Ždanoka v. Latvia (App.No. 58278/00), judgment of March 16, 2006 ECtHR (Grand Chamber), accessed February 13, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#{"itemid":["001-72794"]}

Case of Mathieu-Mohin and Clerfayt v. Belgium (App.No. 9267/81),judgment of March 2, 1987 ECtHR (Plenary Court), accessed March 10, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57536#{"itemid":["001-57536"]}

Case of Gitonas and Others v. Greece (App.Nos. 18747/91, 19376/92 and 19379/92),judgment of July 1, 1997 ECtHR (Chamber), accessed March 10, 2014. http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["gitonas v greece"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58038"]}

Case of Tyrer v. the United Kingdom (App.No. 5856/72),judgment of April 25, 1978 ECtHR (Chamber), accessed March 5, 2014. http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57587#{"itemid":["001-57587"]}

Case of Chalal v. the United Kingdom (App.No. 22414/93),judgment of November 15, 1996 ECtHR (Grand Chamber), accessed March 11, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":["001-58004"]}

Case of Frodl v. Austria (App.No. 20201/04),judgment of April 8, 2010 ECtHR (First Section), accessed February 19, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98132#{"itemid":["001-98132"]}

Case of Greens and M.T. v. the United Kingdom (App.Nos. 60041/08 and 60054/08),judgment of November 23, 2010 ECtHR (Fourth Section), accessed February 11, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101853#{"itemid":["001-101853"]}

Case of Scoppola v. Italy (No. 3) (App.No. 126/05), judgment of May 22, 2012 ECtHR (Grand Chamber), accessed March 10, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044#{"itemid":["001-111044"]}

Case of Timishev v. Russia (App.Nos. 55762/00 and 55974/00),judgment of December 13, 2005 ECtHR (Second Section), accessed February 21, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71627#{"itemid":["001-71627"]}

Case of D.H. and Others v. The Czech Republic (App.No. 57325/00), judgment of November 13, 2007 ECtHR (Grand Chamber), accessed February 21, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256#{"itemid":["001-83256"]}

Case of Aziz v. Cyprus (App.No. 69949/01), judgment of June 22, 2004 ECtHR (Second Section), accessed February 21, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61834#{"itemid":["001-61834"]}

Case of Ždanoka v. Latvia (App.No. 58278/00),judgment of June 17, 2004 ECtHR (First Section), accessed February 13, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-61827"]}

Case of Handyside v. the United Kingdom (App.No. 5493/72),judgment of December 7, 1976 ECtHR (Plenary Court), accessed March 18, 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":["001-57499"]}

Commission Decisions

Holland v. Ireland (Appl. 24827/94), decision on admissibility of April 14, 1998 European Commission of Human Rights, as cited in *Theory and Practice of the European Convention on Human Rights*.

X. v. Federal Republic of Germany (Appl. 2728/66), decision of October 6, 1967, European Commission of Human Rights, Yearbook X of the European Convention on Human Rights, as cited in *Theory and Practice of the European Convention on Human Rights*.

Other Sources

The United States Constitution, Amendment XV, accessed March 10, 2014. http://www.law.cornell.edu/constitution/amendmentxv

Richardson v. Ramirez 418 U.S. 24 (1974), accessed March 9, 2014. http://international.westlaw.com/find/default.wl?cite=418+U.S.+24+&rs=WLIN14.01&utid=25&vr=2.0&rp=%2ffind%2fdefault.wl&sp=intceu2-000&fn=_top&mt=LawSchoolPractitioner&sv=Split

General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Rep. Yugo., Dec. 14, 1995, 35 I.L.M., accessed February 19, 2014. http://www.ohr.int/dpa/default.asp?content_id=380

Electoral Law of Bosnia and Herzegovina, Official Gazette 20/02 from August 3, 2002, accessed February 22, 2014. Available in Bosnian at: http://www.izbori.ba/Documents/documents/ZAKONI/Sl_gl_BiH_20_02/IZ-Sl_gl_20-2-hrv.pdf

Decision on Admissibility and Merits, Party for Bosnia and Herzegovina and Mr. Ilijaz Pilav, Case No. AP-2678/06, September 29, 2006, accessed February 21, 2014; see English version at: http://www.ccbh.ba/eng/odluke/

Collected Edition of the 'travaux préparatoires' of the European Convention on Human Rights, Vol. VI, Dordrecht (1985) as cited in *Theory and Practice of the European Convention on Human Rights*.