

POLITICAL RIGHTS OF MINORITIES IN DIVIDED SOCIETIES
a comparative analysis of Bosnia and Herzegovina and South Tyrol, in Italy with
particular reference to the Council of Europe legal framework

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Table of Contents

Abstract	3
Introduction	4
I. Minorities in a nutshell	
i. (Non)existence of a definition	6
ii. International, regional and national framework on minorities protection ...	8
iii. Historical background on minorities in Europe	15
II. Political participation of minorities	
i. Importance of the right at stake	24
ii. ECtHR as a safeguard of political rights of minorities	25
III. Mechanisms for protection of the right to political participation.....	
i. FCNM and the scope of Article 15	28
ii. Monitoring implementation of the FCNM	31
iii. Participatory Mechanisms.....	32
Conclusion	35
Bibliography	36
Table of Cases	40

ABSTRACT

This thesis aims to explore international standards for protection of minorities, advocating that an effective participation of minorities in political and public life is crucial for maintenance and development of free and democratic society. The issue of political participation of minorities came to be crucial in terms of constitutional reform and further development of Bosnia and Herzegovina, which is still struggling with efficient protection of minorities, even though the country ratified the Framework Convention for the Protection of National Minorities in 2000. Limitation of political participation of minorities, in some cases even their complete exclusion, includes lack of participation in the second chamber of the Parliament (House of Peoples), as well as the highest executive body of the country (collective Presidency). On the other hand, Autonomy Statute of South Tyrol in Italy provides it broad legislative powers. The central question of this paper is identifying how inclusion can be reached in divided societies through effective enjoyment of political rights of minorities. Besides, I would like to investigate what are the existing mechanisms that ensure equality in political participation of minorities in other countries i.e. Italy and if a similar model could be applied in Bosnia and Herzegovina. I will focus on previous European Court of Human Rights (ECtHR) case-law in order to examine whether there is a good case practice that could be implemented in Bosnia and Herzegovina.

INTRODUCTION

One of the requirements that the states need to fulfill for the membership in the Council of Europe is the democratic setup and hence respect for the rule of law. Therefore, providing a framework which would ensure the representation of minorities in elected legislative bodies, is of the highest importance. In the *Sejdić-Finci* judgment, the European Court of Human Rights reinforced the aim of democracy as “society in which diversity is not perceived as a threat but as a source of enrichment”.¹ Today’s reality unfortunately shows how far away from fulfilling that aim we are. Effective participation of minorities in the political and public sphere is considered an indispensable initiator of change of their political and social status by authors such as Will Kymlicka, whom argues that there are certain groups who have been largely absent from elected political bodies, stressing the need of developing mechanisms aimed at ensuring that such groups be adequately included in representative bodies.² Weller highlights that “Among different forms of political representation, the participation of minorities in government would appear to be the most advanced form of minority inclusion in a country.”³ It is commonly observed that political representatives are most frequently drawn from the societal elites. Even when representatives are chosen through fair and democratic elections, it is often considered that legislative bodies remain “under-representative.”⁴ This particular concern has been addressed by Alexander Hamilton in the Federalist Papers, where he questioned whether a representative body composed of “landholders, merchants and men of the learned profession” could speak legitimately for all people, noting that “it is said to be necessary, that all classes of citizens should have some of their own numbers in the representative body, in order that their feelings

¹ *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, (2009), para. 43.

² Karen Bird “The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research”, p.5.

³ Mark Weller, *Political Participation of Minorities, A Commentary of International Standards and Practice*, 2010, Oxford University Press Inc., New York, p. 436.

⁴ *Ibid.*, p.2.

and interests may be better understood and attended to.”⁵ In modern liberal democracies, this is, however, occasionally being overlooked under the argument that power-sharing within the majority serves maintenance of the peace and stability in the society, which is of higher importance. This is the case in Bosnia and Herzegovina, a country representing a unique example of institutionalized discrimination of minorities, despite the having ratified the Framework Convention for the Protection of National Minorities in 2000. There, minorities are being denied the passive right to vote in terms of holding the Presidency office, as well as the second chamber of the Parliament, the House of Peoples. The discriminatory character of the country’s Constitution has been confirmed by the European Court of Human Rights in the 2009 judgment *Sejdić and Finci v. Bosnia and Herzegovina*⁶. The Court demanded amendments to the Constitution, but political will has not been strong enough to respond to the needs of society that should aim at progress. Autonomous Province of Bolzano/South Tyrol⁷, as a part of Italian Republic, obviously differs from the specific federal structure of Bosnia and Herzegovina. However, institutional organization is similar to a multinational setting, particularly power sharing. Still, unlike Bosnia and Herzegovina, South Tyrol is considered both a “quasi feudal reality” within Italian regional system, and a good case practice for resolving ethno-linguistic conflicts in a peaceful manner, through establishing a system of territorial autonomy.⁸ It has introduced a quota system for the political participation of German and Ladin speaking minorities. The central question of this paper is identifying how inclusion can be reached in divided societies through effective enjoyment of political rights of minorities. This paper will investigate the character and scope of influence on political participation of minorities by institutional mechanisms of domestic governance.

⁵ Alexander Hamilton, *The Federalist*, no. 35.

⁶ *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, (2009)

⁷ Hereinafter referred as South Tyrol.

⁸ Jens Woelk, “South Tyrol is (not)Italy: A Special Case in A (De)Federalizing system” in Michale Burgess and Soeren Keil (eds.) *Small Worlds: Constituent Units in Federal States and Federal Political Systems*, Journal of Studies on European Integration and Federalism, Nice, 2013, p.126.

I. MINORITIES IN A NUTSHELL

i. (Non) existence of a definition

For minorities to be able to make full and effective use of the rights that they are granted, they must fit into a certain definitional frame.

As Pentassuglia notes, “the importance of a definition lies at a practical level, in its capacity to delimit the subject matter to be dealt with and at a theoretical level, in the fundamental demand for the clarity and foreseeability of law, removing any possible doubts regarding the beneficiaries of minority rights.”⁹ According to Mancini and De Witte, most European constitutional systems do recognize the role that distinct groups play in forming and recognizing the identity of an individual. They use a twofold criterion in defining minority membership:

a) a subjective one (the voluntary identification of a person with a minority);

b) an objective one (the actual existence of such a minority).¹⁰

There have been numerous attempts to create an adequate definition of a minority. However, the most widely cited one up to date has been the definition ventured by Francesco Capotorti, former Special Rapporteur of the United Nations, in the study prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977.¹¹ He referred to minorities as a group numerically smaller to the rest of the population of the State, holding a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing them from those of the rest of the

⁹ Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study*, 2002, European Centre for Minority Issues, Flensburg, p. 56.

¹⁰ Susanna Mancini and Bruno De Witte, “Language Rights as Cultural Rights – A European Perspective” in Dorsen, N., Rosenfeld, M. et al. (eds.) *Comparative Constitutionalism – Cases and Materials*, 2010, 2nd ed. St. Paul, MN: Thomson/West. pp. 819 – 844;

¹¹ Jennifer Jackson-Preece, “Beyond the Non-Definition of Minority” in European Centre for Minority Issues, Issue Brief #30, 2014, p.5.

population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹² His definition contains objective and subjective elements as well. Objective element is the fact that the national minority is a part of the citizenship of a given State, numerically smaller than the rest of the population, in a non-dominant position, whose members have ethnic, religious or linguistic characteristics different from those of the rest of the population. Subjective element is the expression of solidarity of group members towards preserving their identity.¹³ This definition, as Capotorti himself accentuated, is not aiming at universality, since it is intentionally limited in its objective¹⁴ and based on the Article 27 of the International Covenant on Civil and Political Rights (ICCPR).¹⁵ Furthermore, at the time of the drafting of the study for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, he admitted the difficulty in drafting a definition that would in fact be universally accepted.¹⁶

Additionally, opinions of two United Nations experts, Jules Deschenes¹⁷ and Asbjorn Eide cannot be disregarded. Deschenes speaks of national minorities as:

“a group of citizens of a State, constituting a numerical minority and in a non- dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if

¹² Steven Wheatley, *Democracy, Minorities and International Law*, 2005, Cambridge University Press, p. 18.

¹³ Katarina Crnjaski-Vlajcic, “Position of National Minorities in Political System” in Damir Banovic and Sasa Gavric (eds.) *State, Politics and Society in Bosnia and Herzegovina*, 2011, IKD University Press, Sarajevo, pp. 163 – 164.

¹⁴ Jennifer Jackson-Preece, “Beyond the Non-Definition of Minority” in European Centre for Minority Issues, Issue Brief #30, 2014, p.5.

¹⁵ Article 27 of the ICCPR: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

¹⁶ Jennifer Jackson-Preece, “Beyond the Non-Definition of Minority” in European Centre for Minority Issues, Issue Brief #30, 2014, p.5

¹⁷ Jules Deschenes sat on the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities as a Canadian member.

only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."¹⁸

The subjective element is the basis for differing his definition from the one developed by Capotorti. Unlike Capotorti, the subjective element for Deschenes is the solidarity aiming at achieving factual and legal equality with the majority.¹⁹

According to Asbjorn Eide, member of the UN Sub-Commission on the Promotion and Protection of Human Rights:

*"minority is any group of persons resident within a sovereign State which constitutes less than half of the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population".*²⁰

Consequently, it is safe to conclude that until the present day there has been no universally accepted definition of a national minority, which created troubles regarding the limited personal scope of application of the instruments aimed at the protection of their rights.

ii. Legal framework on minorities protection

The interest in the issue of rights of national minorities increased in the aftermath of the Cold War and the era of rise of ethnical and religious conflicts worldwide. Although a significant number of international and regional treaties do recognize the need for the protection of the rights of minorities, that protection is often, as de Varennes frames it, far from comforting.²¹

¹⁸ Jules Deschenes, 'Proposal concerning a definition of the term "minority"', UN Doc. E/CN.4/Sub.2/1985/31 (1985), para. 181.

¹⁹ Katarina Crnjaski-Vlajcic, "Position of National Minorities in Political System" in Damir Banovic and Sasa Gavric (eds.) *State, Politics and Society in Bosnia and Herzegovina*, 2011, IKD University Press, Sarajevo, p. 164

²⁰ E/CN.4/Sub.2/1993/34

²¹ Fernand de Varennes "Using the European Court of Human Rights to Protect the Rights of Minorities" in Council of Europe Publishing (ed.) *Minority Issues Handbook: Mechanisms for the Implementation of Minority Rights*, 2004, European Centre for Minority Issues, p.83.

In the Article 1 of the United Nations²² General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²³, minorities are identified on the basis of their nationality, ethnicity and cultural, religious and linguistic affiliation. The same article specifies the States' obligation to protect minorities' existence and encourage conditions for the promotion of their identity.²⁴

a. Regional level – ECHR and FCNM

From a comparative constitutional law point of view, Europe offers a very wide variety of state constructions, from centralized states to centralized states with limited regional structures to truly regional states, to semi and fully federal states.²⁵ Advisory Committee²⁶ emphasized in a number of opinions that territorial autonomy is extremely important for preserving and promoting the distinct identity of minorities.²⁷

The 1953 European Convention on Human Rights²⁸ makes no explicit mention of minorities in its text, as in the time of the adoption it was heavily concerned with the protection of individual human rights and fundamental freedoms²⁹. The only specific reference to minorities in the ECHR is the non-discrimination provision in Article 14, referring to

²² Hereinafter referred as UN.

²³ Hereinafter referred as Declaration on Rights of Minorities.

²⁴ UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Article 1, February 1992, A/RES/47/135, available at: <http://www.refworld.org/docid/3ae6b38d0.html> [accessed 9 December 2015].

²⁵ Rainer Hofmann, Political Participation of Minorities, *European Yearbook on Minority Issues*, Vol. 5, 2007, p.10.

²⁶ Advisory Committee to the Framework Convention for the Protection of National Minorities.

²⁷ Rainer Hofmann, Political Participation of Minorities, *European Yearbook on Minority Issues*, Vol. 5, 2007, p.10.

²⁸ Hereinafter referred as ECHR.

²⁹ Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study*, 2002, European Centre for Minority Issues, p. 32.

“association with a national minority”, which represents an egalitarian effort in guaranteeing rights and freedoms set forth in the Convention for all.³⁰³¹

Even though the ECHR lacks a definition of minorities, it does not allow treatment of “any person, non-governmental organization or group of individuals” in a discriminatory manner with respect to one of the listed grounds, without reasonable and objective justification. However, as the ECtHR famously established in the *Belgian Linguistics* case, Article 14 is not a free-standing clause and it may be raised only in conjunction with an alleged violation of another right protected by the ECHR.³²

Prohibition of discrimination under the ECHR has further been strengthened by the adoption of Protocol 12, adopted in 2000 and entered into force in 2005, upon recommendation by the Council of Europe’s Commission Against Racism and Intolerance.³³

ECRI noted the need of incorporating a general clause against discrimination in the ECHR, reaching beyond “enjoyment of the rights and freedoms set forth in the Convention”³⁴, given the widespread racial discrimination and violence in a number of European countries at that time.³⁵ Thus, Article 1 to the Protocol 12 expands the scope of prohibition of discrimination to any right set forth by law of the State Party, even when such right does not fall within the ambit of the rights protected by the ECHR.³⁶³⁷

³⁰ Article 14 of the ECHR: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

³¹ Gaetano Pentassuglia, *The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?*, International Journal on Minority and Group Rights 19, 2012, p.1.

³² *“Relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium*, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (1968), p. 30, para.9.

³³ Further referred as ECRI.

³⁴ Article 14, European Convention on Human Rights

³⁵ Explanatory Report to the Protocol 12 to the European Convention on Human Rights, para.7, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce48> [accessed 9 February 2016].

³⁶ Protocol 12, Article 1 (1), European Convention on Human Rights

The Commentary on the provisions of the Protocol, included in the Council of Europe Explanatory Report to the Protocol 12 enumerates the cases for additional scope of protection offered by Article 1 to the Protocol 12. Accordingly, Article 1 to the Protocol 12 can *inter alia* be invoked in cases where discrimination exists:

- “1. in the enjoyment of any right specifically granted to an individual under national law;
- 2. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;”.³⁸

Sejdić and Finci v. Bosnia and Herzegovina was the first ECtHR case to be examined and subsequently decided under Protocol 12, where the ECtHR affirmed the general prohibition of discrimination that Protocol 12 incorporates. Furthermore, the Court held that since the meaning of the term “discrimination” was intended to be identical both in Article 1 to the Protocol 12 and Article 14 of the ECHR, the interpretation of notions of “discrimination” shall be made in the same manner regarding both provisions.³⁹

Additionally, as a result of the lack of general consensus on the interpretation of the term national minorities,⁴⁰ the foremost legal multilateral instrument with a binding force aimed at the protection of national minorities⁴¹, the Framework Convention for the Protection of National Minorities (FCNM) also does not contain a general definition of national minorities, since the Member States could not reach a unanimous solution. This was explicitly

³⁷ Explanatory Report to the Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

³⁸ Explanatory Report to the Protocol 12 to the European Convention on Human Rights, para.22, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800cce48> [accessed 9 February 2016].

³⁹ *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, (2009), paras. 55, 56.

⁴⁰ Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study*, 2002, European Centre for Minority Issues. p. 63.

⁴¹ Alan Philips, “The Framework Convention for the Protection of National Minorities (FCNM)” in Council of Europe Publishing (ed.) *Minority Issues Handbook: Mechanisms for the implementation of minority rights*, 2004, European Centre for Minority Issues p. 109.

mentioned in the Explanatory Report to the FCNM.⁴² Therefore, each State Party to the FCNM is left with a wide margin of appreciation in assessing which groups of persons are to be covered by the Convention within their territory.⁴³

b. National level – Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina does not offer a definition of national minorities either. In its Preamble, it recognizes the three ethnic groups (Bosniaks, Croats and Serbs) as constituent peoples⁴⁴, explicitly differentiating them from the Others (all other citizens who do not fall within one of the three ethnic groups). Besides the issue of inequality of citizens of Bosnia and Herzegovina deriving from such provision, additional issue that arises is the problem of defining “Others”, since it is not clear whether the “Others” are declaring themselves as such due to their membership to a minority group or because they do not wish to be affiliated with one of the constituent peoples.⁴⁵ The constitutional structure of the country divides the power sharing between those three ethnic groups equally. This is the consequence of the lack of trust that ethnic groups mutually enjoy with one another after the mass atrocities in Bosnia and Herzegovina from 1992 until 1995. Hence, the Constitution places ethnicity on the pedestal, leaving the concept of citizenship with a secondary importance. In Bosnia and Herzegovina, a significant step in the area of minority protection

⁴² Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report, adopted February 1995, accessed February 7, 2016. [http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(95\)10_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(95)10_FCNM_ExplanReport_en.pdf)

⁴³ Alan Philips, “The Framework Convention for the Protection of National Minorities (FCNM)” in Council of Europe Publishing (ed.) *Minority Issues Handbook: Mechanisms for the implementation of minority rights*, 2004, European Centre for Minority Issues, p. 111.

⁴⁴ The Constitution of Bosnia and Herzegovina, Preamble.

⁴⁵ Davor Marko, “Definition of minorities and analytical approach” in Edin Hodzic and Tarik Jusic (eds.) *On the Margins: Minorities and Media in South-Eastern Europe*, 2010, Mediacentar, Sarajevo, p.142.

has been the adoption of the Law on Protection of Rights of Persons Belonging to National Minorities⁴⁶ in December 2003.

Article 3 of the Law defines national minorities as:

“a part of the population-citizens of Bosnia and Herzegovina that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics.”⁴⁷

Davor Marko suggested framing the definition of minorities by taking into consideration THE factual minorities as well. He argued that besides minorities enumerated in the Law on National Minorities, THE definition should include representatives of constituent peoples that are factually put in a minority position (e.g. Bosniaks and Croats in Republika Srpska, Bosniaks and Serbs in Western Herzegovina etc.). Accordingly, the definition of national minorities would contain the following factors:

- a. numerical position of population in a given geographical context;
- b) lack of (political) power;
- c) majority approach in the environment (which is often hostile)
- d) ignorance from the media, characterized by favoring the majority and its problems.⁴⁸

In Article 3, paragraph 2 of the Law on National Minorities, there is an open-ended list of national minorities legally recognized in Bosnia and Herzegovina, including: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas,

⁴⁶ To be referred to as “Law on National Minorities” from here forth.

⁴⁷ Law on the Protection of the Rights of Persons Belonging to National Minorities (2003), Art.3, para.1, published in the Official Gazette of Bosnia and Herzegovina, No. 12/03.

⁴⁸ Davor Marko, “Definition of minorities and analytical approach” in Edin Hodzic and Tarik Jusic (eds.) *On the Margins: Minorities and Media in South-Eastern Europe*, 2010, Mediacentar, Sarajevo, p.143

Romanians, Russians, Rusins, Slovaks, Slovenians, Turks, Ukrainians and *other who meet requirements referred to in paragraph 1 of Article 3*.⁴⁹

Thus, interestingly, this could mean that minorities in Bosnia and Herzegovina include not only those groups of persons who are enumerated in Article 3, but also all those individuals whose predominant identity is Bosnian and Herzegovinian.⁵⁰

c. National level – Italy

Article 6 of the Italian Constitution states that:

“The Republic protects the linguistic minorities with specific norms”⁵¹.

Hence, unlike in Bosnia and Herzegovina, where the concept of minority derives from their national and/or ethnic identity, the Italian Constitution links that concept to the linguistic feature. Until the Provisions to Protect the Historical Linguistic Minorities (also known as the Act 482/1999) entered into force, minority protection in Italy was provided only by specific agreements that the country had signed with the neighboring countries, aimed at the protection of their nationals in the Italian territory: Südtirol for Austria, Vallée d’Aoste for France and Slovenians in Gorizia and Trist.⁵²

In the Italian Fourth Country Report on the implementation of the Framework Convention for the Protection of National Minorities, it is noted that the significance of the Act 482/1999 lays in the recognition of plurality of cultural and linguistic forms of expression in Italian Republic, as well as emphasis to the role of autonomy in administrative decentralization, by

⁴⁹ Ibid. para. 2., emphasize added.

⁵⁰ Roberto Belloni, *State Building and International Intervention in Bosnia*, 2008, Routledge, p. 69.

⁵¹ Italian Constitution, Article 6.

⁵² Giovanna Campani, *Minorities Formation in Italy*, available at: <http://www.theslovenian.com/articles/campani.pdf> [accessed 3 December 2015].

allocation of fundamental tasks for implementation of relevant provisions to the local authorities.⁵³ From the title of the Act 482/1999 (Provisions to Protect the Historical Linguistic Minorities), it is evident that the Act refers only to historical national minorities: Albanian, Croatian, Catalan, German, Greek, Slovenian population, as well as the citizens who speak French, Franco-Provençal, Friuli, Occitan, Ladin and Sardinian, as enumerated in Article 2 of the Act.

iii. Historical context of national and linguistic minorities

The aftermath of the World War I led to the framing of the first “genuine” system of minority rights protection, under the League of Nations. The disintegration of the three multinational empires (Ottoman Empire, Austria-Hungary and Prussia) resulted in the alteration of regional boundaries, posing a difficult yet necessary question for national groups, which could not be given a state of their own. Thus, as non-dominant group members, it was necessary to provide them with protection in those newly established or enlarged states, where they found themselves.⁵⁴ The League System was based on the active involvement of both the League Council and the Permanent Court of International Justice (PCIJ). PCIJ was able to render advisory opinions, the most important one being the opinion in the case of Greek minority schools in Albania.

This was the very first time that a judicial organ categorically recognized the insufficiency of non-discrimination provisions and the need for differential treatment as a means to achieve *de facto* equality⁵⁵, concluding that:

⁵³ ACFC/SR/IV(2014)005, Fourth report submitted by Italy pursuant to Article 25, paragraph 2, of the Framework Convention for the Protection of National Minorities, received on 12 March 2014.

⁵⁴ Gaetano Pentassuglia, “Minorities in International Law” in Council of Europe Publishing (ed.) *Minority Issues Handbook*, Council of Europe, 2002, p.26.

⁵⁵ Athanasia Spiliopoulou Åkermark, “Minority Protection in the League of Nations” in *Justifications of Minority Protection in International Law*, Martinus Nijhoff Publishers, 1997, pp. 108 – 111.

“Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph 1 of Article 5. The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of this provision.”⁵⁶

Quickly moving into the future, a couple of decades ahead of the PCIJ Advisory Opinion, following the dissolution of the former Yugoslavia, the three and a half years long bloodshed war in Bosnia and Herzegovina urged the international community to (re)act. In the context of Bosnia and Herzegovina, diplomatic peace negotiations behind closed doors preceded constitution-making process. The international community was for different reasons and agendas exhaustively engaged and determined to ensure peace in the region and coerce the conflicting parties (i.e. Serbs and Croats and Bosnian Muslims) to compromise on a new institutional order. In doing so, little attention has been given to an inclusive and transparent drafting process. Consequently, in 1995, General Framework Agreement for Peace in Bosnia and Herzegovina, widely known as the Dayton Peace Agreement (DPA) was signed. It was by nature an international treaty containing the Constitution of Bosnia and Herzegovina in its Annex Four. The legitimacy of both the DPA and the Constitution itself rests on the international principle of state consent, and not on the constitutional law principle of popular sovereignty, since the text has never been approved by the representatives of the entire peoples of Bosnia and Herzegovina. Therefore, its legitimacy is often contested due to its

⁵⁶ PCIJ: Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) Nos. 64, 65.

unrepresentative and intransparent genesis, taken in conjunction with its imposed nature and the lack of sufficient organic grounds in Bosnia and Herzegovina.⁵⁷

DPA created most likely one of the most complex federal state constructions known to date. Bosnia and Herzegovina was divided into two entities: Federation of Bosnia and Herzegovina and Republika Srpska.

The transfer of the constituent power to the international community has been considered a legitimacy deficit, which has impaired the Constitution's ability to fulfill important constitutional functions. The wording of the Preamble to the Bosnian Constitution implicitly rejects the concept of a single state, as well as the system of minority protection.⁵⁸

Evidently, this provision of the Preamble deposits the whole constituent power exclusively in the hands of the three ethnic groups (Bosniaks, Croats and Serbs), demonstrating the less important quality that it gives to the Others by putting them into brackets.⁵⁹ Constitutional Court of Bosnia and Herzegovina clarified that "taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH [thus] distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state that, by the way, remained undisputed by the parties."⁶⁰ Constitution of Bosnia and Herzegovina undeniably contains a number of undemocratic implications, such as the monopoly that the constituent people enjoy regarding the passive voting right in terms of the collective Presidency of Bosnia and Herzegovina and the House of Peoples.

Historically, Italy has always been a linguistically and culturally divided society as well.

Thus, even today there is an intense concentration of minorities in the areas affected by the

⁵⁷ Steiner and Ademovic, *Constitution of Bosnia and Herzegovina, Commentary*, Konrad Adenauer Stiftung, p. 30.

⁵⁸ "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows: ..."

⁵⁹ Edin Šarčević, "Völkerrechtlicher Vertrag als „Gestaltungsinstrument“ der Verfassungsgebung: Das Daytoner Verfassungsexperiment mit Präcedenzwirkung?", AVR 39 (2001), p. 308.

⁶⁰ Decision of the Constitutional Court of Bosnia and Herzegovina, U 5/98 (2000), para. 53.

conflicts of 20th century.⁶¹ In terms of minority rights protection in Europe, a particular interest and importance is always shown towards South Tyrol, an Autonomous Province in Italy (currently populated by the three linguistic groups: German (69%), Italian (26%) and Ladin (4.5%)⁶²), for being a good case practice and a successful model of legal regulation of majority – minority relations. For centuries, the territory of South Tyrol has been a homeland for approximately 287 500 German-speaking and 18 500 Ladin-speaking individuals, who have struggled for autonomy, that would allow them to live in harmony and tolerance, without imposing a threat to each other or to Italy itself. However, the struggle of linguistic minorities in this area did not always take the peaceful discourse.

Still, as Alcock states, “the lessons learnt from it as regards issues of identity, language, territory and territorial stability and self-determination make the history of South Tyrol Autonomy very illuminating in the search for solutions to problems in other areas of Europe with culturally divided communities.”⁶³

The existence of German linguist group in South Tyrol goes back to the Middle Ages and the conflicts between Germany and Austria with Italy. The reason for the conflict was roughly always the struggle for domination over the Brenner Pass, an important mountain pass through the Alps and a significant traffic route at the crossroads between the northern and southern Europe. Its vital geographical position understandably made it a subject of power struggle between the neighboring countries.⁶⁴

⁶¹ Minorities: South Tyrol in Italy, Available at:

<http://www.radwb.eu/files/Minorities%20in%20Italy%20-%20The%20Case%20of%20South%20Tyrol,%20short%20info%20note.pdf>

⁶² Data from the census in 2011. More information available at: South Tyrol in figures 2014, Provincial Statistics Institute ASTAT, available at

<http://www.provincia.bz.it/astat/de/service/suche.asp?q=census+&cmd> = [accessed 25 February 2016].

⁶³ Antony Alcock, *The South Tyrol Autonomy: A Short Introduction*, 2001, University of Ulster, County Londonderry, Bozen/Bolzano, available at: <http://www.buergernetz.bz.it/en/downloads/South-Tyrol-Autonomy.pdf> [accessed 15 November 2015].

⁶⁴ Nives Mazur-Kumrić, *Legal Status of the German Language Group in the Italian Province of South Tyrol*, Pravni vjesnik, No. 3-4 (Osijek: Faculty of Law Osijek, 2009) p.28.

The end of the First World War led to the termination of the Austro-Hungarian Empire with the signing of the Treaty of Saint-Germain-en-Laye in 1919. For the understanding of the historical context of the linguistic minorities in South Tyrol, it is important to emphasize that after the end of the First World War, Italy acquired both Trento, an area predominantly inhabited by Italians and South Tyrol, with an 89% of the German linguistic group present at its territory. Taking into consideration Woodrow Wilson's Fourteen Points from the 1918, designed as an advice for the world peace, which stated that Italian borders should be redrawn according to the clearly recognizable nationality lines, thus separating Italian and German ethnicities, German linguistic group in South Tyrol called for that rearrangement. However, their demand never saw the light of the day for a couple of reasons.

First, Italy did not consider itself bound by Wilson's Fourteen Points. Second, Italy argued that both Trento and South Tyrol formed a geographically indivisible territory and that Brenner Pass served as a natural tier along the Alps, where the Italian linguistic group constituted majority. Therefore, it had greater rights to decide upon the destiny of the area in question. Third, Italy referred to the contested theory of Ettore Tolomei, an ethnographer and one of the most radical Italian nationalists, who contested the right of the German linguistic group for the rearrangement according to their preferences, arguing that they were not even the descendents of the Germans who had immigrated to South Tyrol after the fall of the Roman Empire. Instead, he claimed that they represented domicile, i.e. Italian population germanised over time by the dominant German administration and educational system. In 1921, an independent referendum has taken place as an attempt of the German linguistic group to reach a unification with Austria. But, Italy and the Allies strictly refused to recognize the referendum results, since they had not even authorized the referendum in the first place.⁶⁵

⁶⁵ Ibid., p. 64-68.

What has been the legal foundation for the protection of linguistic minorities and a basis of today's autonomy of South Tyrol is the Gruber-De Gasperi Agreement of 1946, whose provisions influenced the Italian Constitution of 1948. Namely, the bilateral agreement between Italy and Austria contained guarantees of a legislative autonomy of South Tyrol, as well as guarantees of protection of linguistic rights of the population, i.e. a full equality between German and Italian linguistic groups residing in Bolzano and neighboring bilingual municipalities in the Trentino Province. As Woelk frames it, these obligations that Italy had undertaken in the Agreement are considered a “mortgage on the disputed territory”⁶⁶, since Italy and Allies did not consider returning the territory of South Tyrol to Austria. Two years following the Agreement, in 1948, the Italian Constitution and the Autonomy Statute entered into force and they established a special Region with autonomous powers, as a result of the obligations stemming from the Agreement of 1946.⁶⁷

Italian Constitution in its Article 5:

“The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation”⁶⁸,

tries to reconcile the “one and indivisible” character of the Italian Republic, with the principles of autonomy and decentralization. As a sign of recognition of distinct history and reality of three Alpine regions with linguistic minorities, they received a special status

⁶⁶ Jens Woelk, “South Tyrol is (not)Italy: A Special Case in A (De)Federalizing system” in Michale Burgess and Soeren Keil (eds.) *Small Worlds: Constituent Units in Federal States and Federal Political Systems*, Journal of Studies on European Integration and Federalism, Nice, 2013, p. 128.

⁶⁷ Jens Woelk, “South Tyrol is (not)Italy: A Special Case in A (De)Federalizing system” in Michale Burgess and Soeren Keil (eds.) *Small Worlds: Constituent Units in Federal States and Federal Political Systems*, Journal of Studies on European Integration and Federalism, Nice, 2013, p. 127 - 128.

⁶⁸ Italian Constitution, Article 5.

confirmed by Autonomy Statutes, which were essentially Basic Laws of constitutional rank, containing legislative powers.⁶⁹

Woelk argues that the implementation of the South Tyrolese autonomy reflects that gradual evolution of Italian regionalism to a certain extent. 1948 Autonomy Statute was contested by the German linguistic group, since they remained a minority as opposed to the Italians in Trentino. Thus, German speakers were not welcoming to the Gruber-De Gasperi Agreement. It took years of protests and bombing, followed by two UN Resolutions for Italian government to accept establishment of a consultative commission with German speakers and start the negotiation procedure with Austria.

In 1969, the Package was created, that incorporated a number of measures in order to find a compromise. The autonomous Region Trentino-South Tyrol stayed in place. However, its powers were delegated to its two Provinces, which were upgraded to Autonomous Provinces, i.e. quasi-Regions with legislative power. Consequently, German speakers became a majority in South Tyrol. This gave them the right to exercise their own autonomous power. In 1972, 80 out of 137 provisions of the Autonomy Statute of 1948 were amended. The Statute envisaged special procedures for adopting “enactment decrees” on grounds of negotiations in joint commissions comprised of State, Province and equal representation of linguistic groups. Woelk stresses that Gruber-De Gasperi Agreement represent the external foundation of the autonomy system, whereas the 1972 Autonomy Statute equals the internal foundation, since it was approved by the South Tyrolean People’s Party (SVP), representing the interests of German linguistic group.⁷⁰ But before reaching to the 1972 Autonomy Statute, it is necessary to mention that the vague provisions of the Gruber-De Gasperi Agreement were further elaborated in the first Autonomy Statute of 1948 which was regarded

⁶⁹ Jens Woelk, “South Tyrol is (not)Italy: A Special Case in A (De)Federalizing system” in Michale Burgess and Soeren Keil (eds.) *Small Worlds: Constituent Units in Federal States and Federal Political Systems*, Journal of Studies on European Integration and Federalism, Nice, 2013, p. 128.

⁷⁰ Ibid., p.130.

as a controversial document. This was due to the fact that the Italian government showed a willingness to ensure adequate cultural autonomy of the German linguistic group. However, the level of autonomy granted by this Statute ended up being much lower than expected. Region Trentino-Alto Adige was constituted by two Provinces, Bozen/Bolzano and Trento. Trento was inhabited by 99% of Italians, who constituted two thirds of the population in the Region, which affected Region's administration. The Region was competent for all economic sectors and was not obliged to delegate its power to the Provinces. German linguistic group was adversely affected by the fact that German was not recognized as an official language in South Tyrol, despite the foundations for such recognition existed in the Gruber-De Gasperi Agreement. This encouraged German linguistic group to demand revision of the Statute. Ignorance to their demand led to a violent outcome, from protesting to bombing. Further escalation of the conflict prompted Austria to present its conflict with Italy before the UN General Assembly, which adopted two resolutions of historical importance.⁷¹

After the final settlement of issues between Austria and Italy in 1992, following the approval by the SVP, Provincial government of South Tyrol started to demand the extension of its autonomy, inter alia in areas of education, employment, transport, finance, European integration etc. As a result of this, in 2001 a reformed Autonomy Statute has come into effect as part of a constitutional reform in Italy. It granted significant improvements for both the South Tyrolean provincial government and the Trentino provincial government. Both provinces no longer formed subordinate units of the Region Trentino-South Tyrol and gained legislative and administrative powers that were broader than those powers on the regional level. Unlike the Autonomy Statute of 1972, the Statute of 2001 explicitly recognizes the internationally guaranteed nature of the autonomy of South Tyrol. Besides, given the fact that

⁷¹ Nives Mazur-Kumrić, *Legal Status of the German Language Group in the Italian Province of South Tyrol*, Pravni vjesnik, No. 3-4 (Osijek: Faculty of Law Osijek, 2009) p.29.

the Statute enjoys the constitutional power, inviolability of South Tyrol's autonomy is thus strengthened. The Statute transferred the legislation in the area of elections to the complete competence of the provinces. It also gave the provinces the power to amend the Statute without the involvement of the Region. Italian parliament does not have the discretion of amending the Statute without consultation with the provinces' representatives anymore. Power sharing agreement has also recognized the representation of Ladin linguistic minority in the presidency of the regional and provincial assemblies and regional government.⁷²

Both Bosnia and Herzegovina and South Tyrol, being divided societies required features of consociational power sharing, a well-known mechanism of conflict resolution.⁷³ It has been first defined and argued in favor of by Lijphart. His definition of consociational democracy is based on four characteristics: grand coalition of political leaders, mutual veto, proportionality in representation and a high degree of segmental autonomy.⁷⁴

⁷² Stefan Wolff, "Complex Power Sharing as Conflict Resolution: South Tyrol in Comparative Perspective" in Jens Woelk, Francesco Palermo and Joseph Marko (eds.) *Tolerance through law: Self-governance and Group Rights in South Tyrol*, Martinus Nijhoff, Leiden/Boston, 2008.

⁷³ Stefan Wolff, "Complex Power Sharing as Conflict Resolution: South Tyrol in Comparative Perspective" in Jens Woelk, Francesco Palermo and Joseph Marko (eds.) *Tolerance through law: Self-governance and Group Rights in South Tyrol*, Martinus Nijhoff, Leiden/Boston, 2008, p. 2.

⁷⁴ Arendt Lijphart, *Democracy in Pluralist Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977, p. 25.

II. POLITICAL PARTICIPATION OF MINORITIES

i. Importance of the right at stake

Representative democracy presupposes that individuals are being represented by those who ensure that their opinions and interests are taken into account. Hence, dominant groups are very likely to be efficiently represented in the formal law-making bodies, i.e. legislative bodies, as well as deliberation in the public sphere e.g. the media. However, the same rarely applies for the minority groups. This calls for facilitation of representing minority interests by the minorities themselves. Consequently, space should be created for the proportionate representation of the plural identities within a given country both in legislative branch, as well as (when it is possible) the executive one.⁷⁵

Weller emphasizes the intrinsic value of the right to full and effective participation of minorities in public affairs and cultural, social economic life in the context of the modern, democratic and constitutional state. He mentions the notion of structural disenfranchisement that minorities might experience, should they be left out of the democratic decision-making process.⁷⁶ Some scholars claim that political participation should be regarded as an instrument of minority rights protection, rather than a right itself.⁷⁷

The aim of effective political participation of minorities is, as framed by Hofmann, to enhance the stability of peaceful majority-minority relations, as well as to preserve and

⁷⁵ Steven Wheatley, *Deliberative Democracy and Minorities*, EJIL 14 (2003), p. 515.

⁷⁶ Mark Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, 2005, p. 430.

⁷⁷ Florian Bieber, *Balancing Political Participation and Minority Rights: The Experience of the former Yugoslavia*, European Centre for Minority Issues, Konrad Adenauer Stiftung, 2003.

promote the distinct identity of minorities.⁷⁸ This right of the minorities strengthens their voice and gives them an opportunity to engage in the issues that directly affect them.

Bieber argues that discrimination against minorities cannot be combated unless they take part in the political decision-making processes governing the protection of minority rights. Besides, he stresses that special protective measures towards minorities are essential in order to avoid their exclusion from the political system, having in mind the tendency of ethnic voting in countries with mobilized ethnic nationalism.⁷⁹

Participation of minorities can, inter alia, be performed in many ways, from consultation and the maintenance of a dialogue between the state authorities and minorities⁸⁰

ii. ECtHR as the minorities' safeguard

Even though the role of the ECHR and the Court itself is often disregarded in view of the FCNM, the judicial machinery of the ECHR system, as well as Article 14 and Protocol 12 offer a somewhat safe harbor for the protection of minorities, since cases regarding them do enter the area of non-discrimination. In 2006, the Constitutional Court of Bosnia and Herzegovina was called upon to decide a case on differential treatment of different ethnic groups within Bosnia and Herzegovina. The Court concluded that at that time, there was still an objective and reasonable justification for such differential treatment, due to “the specific nature of the internal order of Bosnia and Herzegovina that was agreed upon by the Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the

⁷⁸ Rainer Hoffman, Political Participation of Minorities, European Yearbook on Minority Issues, Vol. 6, 2006/7, p. 7.

⁷⁹ Florian Bieber, *Balancing Political Participation and Minority Rights: The Experience of the former Yugoslavia*, European Centre for Minority Issues, Konrad Adenauer Stiftung, 2003.

⁸⁰ Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities on Denmark, ACFC/INF/OP/I(2001)005, Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/INF/OP/I(2002)008.

opposing parties.”⁸¹ The Constitutional Court went further to state that restrictions imposed were “proportionate to the objectives of general community in terms of preservation of the established peace, continuation of dialogue and consequently creation of conditions for amending the mentioned provisions of the Constitution of Bosnia and Herzegovina and Election Law.”⁸² Concurring Judge Feldmann emphasized the temporary character of this justification, noting at the same time “that the time has not yet arrived when the State will have completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.”⁸³ Not everyone on the bench agreed with such view. Judge Grewe claimed that “the current situation in Bosnia and Herzegovina does not justify at this moment the differential treatment of the appellant’s candidacy in relation to the candidacy of other candidates...”⁸⁴ She accepted the necessity of specific measures but also carefully stressed the need of the Dayton Agreement to adapt to the different states of evolution in Bosnia and Herzegovina.⁸⁵

Sejdić-Finci case reached the ECtHR subsequently. It signaled that ethno-representative model of governance through complete exclusion of the Others might have had justifications back in the day when the Constitution was drafted (1995). Now, however, such justifications are not in place.⁸⁶ Having in mind the case-law of the Strasbourg Court, the Contracting States enjoy a wide margin of appreciation in designing their electoral systems in light of the “differences in historical development, cultural diversity and political thought.”⁸⁷ However,

⁸¹ Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678-2006, para. 21.

⁸² Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678-2006, para. 22.

⁸³ Concurring Opinion of Judge Feldmann to the Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678-2006, para. 3.

⁸⁴ Concurring Opinion of Judge Grewe to the Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678-2006,

⁸⁵ Concurring Opinion of Judge Grewe to the Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678-2006

⁸⁶ *Sejdić and Finci v. Bosnia and Herzegovina*, Application Number (2009), para. 45.

⁸⁷ *Zdanoka v. Latvia*, Application No. 58278/00 (2006)

referring to *Timishev v. Russia*, the Court contested the justification of differential treatment based on ethnicity stating that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures”.⁸⁸ Intervening in *Sejdić and Finci* with amicus curiae brief, Venice Commission noted that justification of a system based on ethnic discrimination can only be justified under truly exceptional circumstances, despite the large margin of appreciation of the Contracting States in relation to organizing their election systems.⁸⁹ In its jurisprudence, the Court took the stand of perceiving minorities as particularly vulnerable groups. Hence, it not only prohibits direct and indirect discrimination against them, but also requires protective measures from the Contracting Parties.⁹⁰ The Court also referred to the Opinions of the Venice Commission, which “clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities.”⁹¹

⁸⁸ *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, (2006), para. 56.

⁸⁹ Venice Commission, Amicus Curiae Brief in the cases of *Sejdić and Finci v. Bosnia and Herzegovina*, CDL-AD(2008)027, para.23.

⁹⁰ *D.H. and Others v. The Czech Republic*, Application No. 57325/00 (2007), para. 214.

⁹¹ *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06 (2009), para. 48.

iii. MECHANISMS FOR PROTECTION OF THE RIGHT TO POLITICAL PARTICIPATION

i. FCNM and the scope of Article 15

The FCNM is a result of the impressive renaissance of international efforts to safeguard the rights of persons belonging to national minorities. Consequently, both the Conference for Security and Co-operation in Europe (CSCE)/Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE), as the two most relevant international organizations in the human rights field in Europe have, since the early 1990s, been actively engaged in an attempt to stabilize majority – minority situations that have potential to result in ethnic violence or even civil strife and war.

The Parliamentary Assembly of the Council of Europe, affirming the need for a truly binding instrument and recognizing the “topical nature and the urgency of minority problems”, submitted in 1993 a Draft Protocol on the rights of minorities to the ECHR, which was not accepted- The suggested protocol included detailed affirmative standards with a mandatory system of judicial enforcement

Instead, the Committee of Ministers of the Council Europe adopted FCNM, the first multilateral legally binding document in the area of minority protection in 1995. It entered into force three years later.

At the outset, the name “framework convention” mirrors the specific character of the FCNM, meaning that State Parties to FCNM are not under legally binding obligation to ensure the direct applicability of FCNM before their administrative or judicial authorities. They are only legally obliged to ensure the compatibility of their domestic legislation and its practical

application with the principles enshrined in the FCNM.⁹² Therefore, the concept of the “framework” concept of the FCNM means that it designates a set of principles whose clarification and implementation are to be fundamentally achieved at the domestic level. That is reflected in the Preamble to the FCNM, which states that State Parties are “determined to implement the principles set out in this framework Convention through national legislation and appropriate Governmental policies.”⁹³

The FCNM has been ratified by 39 European countries⁹⁴ to date, which have thereby recognized a broad set of international obligations incorporated in the document.

At the time of its adoption, the FCNM has been heavily criticized as a mere window-dressing operation. However, as De Witte stated it has defended its authority and efficiency through a dynamic monitoring practice of its Advisory Committee and the readiness of many states to “play the game”.⁹⁵

The starting point in defining the scope of the term ‘political participation’ is Article 15 of the FCNM, as the only hard law provision applicable to most European states.

Actual text of Article 15 of the FCNM is limited in clarifying the scope of the term ‘political participation’. However, the Explanatory Report to the FCNM and the practice of the Advisory Committee certainly shed more light on the matter.

⁹² Mark Weller, *Political Participation of Minorities, A Commentary of International Standards and Practice*, 2010, Oxford University Press Inc., New York, p.5.

⁹³ Preamble to the Framework Convention on the Protection of National Minorities.

⁹⁴ Countries that have ratified the FCNM are: Albania (1999), Armenia (1998), Austria (1998), Azerbaijan (2000), Bosnia and Herzegovina (2000), Bulgaria (1999), Croatia (1997), Cyprus (1996), Czech Republic (1997), Denmark (1997), Estonia (1997), Finland (1997), Georgia (2005), Germany (1997), Hungary (1995), Ireland (1999), Italy (1997), Latvia (2005), Liechtenstein (1997), Lithuania (2000), Malta (1998), Moldova (1996), Montenegro (2006), Netherlands (2005), Norway (1999), Poland (2000), Portugal (2002), Romania (1995), Russian Federation (1998), San Marino (1996), Serbia (2001), Slovak Republic (1995), Slovenia (1998), Spain (1995), Sweden (2000), Switzerland (1998), The former Yugoslav Republic of Macedonia (1997), Ukraine (1998), United Kingdom (1998).

⁹⁵ Bruno De Witte, Introduction: Exploring a Central Pillar of the European Minority Rights System in A. Verstichel, A. Alen, B. De Witte and P. Lemmens (eds.) *The Framework Convention for the Protection of National Minorities: a Useful Pan-European instrument?*, 2008, Intersentia, Antwerp – Oxford – Portland, p.1.

Explanatory Report on the FCNM puts in place a set of measures that State Parties to the Convention could promote to create necessary conditions for effective participation of minorities in cultural, social and economic life, and in public affairs. Those measures *inter alia* include:

- “– consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;
- involving these persons in the preparation, implementation and assessment of national and regional development plans and programs likely to affect them directly;
- undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;
- effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels;
- decentralized or local forms of government.”⁹⁶

Whatever measures are exercised, it is up to the State Parties to develop appropriate methods of participation for persons belonging to minorities, which can enable them to have an actual say in the relevant decision-making process.⁹⁷

⁹⁶ Explanatory Report to the FCNM, p.22.

⁹⁷ Gateano Pentassuglia, State sovereignty, Minorities, Self-Determination, International Journal on Minority and Group Rights 9, Kluwer Law International, 2002, p. 318

ii. Monitoring implementation of the FCNM

The task of monitoring the implementation of the FCNM by the State Parties has been entrusted to the Committee of Ministers of the Council of Europe⁹⁸, who is dependent on the assistance of the Advisory Committee comprised of experts in the field of minority rights protection.⁹⁹

Monitoring procedure is exercised through periodic reports by State Parties, containing information on legislative and other appropriate measures that the States have taken to give effect to the principles from the FCNM, which are being evaluated by the Committee of Ministers and the Advisory Committee. The objective of such mechanism is to encourage State Parties to implement the principles enshrined in the FCNM accurately and properly, rather than sanction them for not acting accordingly. Interestingly, the FCNM lacks a complaint procedure and judicial character of the monitoring mechanism. This is considered a ramification from the hesitancy of State Parties to “secure enforcement procedures based on adjudication and redress.”¹⁰⁰

Parliamentary Assembly has been strictly critical to the consequential FCNM monitoring mechanism, noting that:

“The implementation machinery of the FCNM is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to the governments.”¹⁰¹

⁹⁸ Framework Convention for the Protection of National Minorities, Article 24, para.1.

⁹⁹ Ibid., Article 26, para.1.

¹⁰⁰ Gaetano Pentassuglia, *Monitoring Minority Rights in Europe*, International Journal on Minority and Group Rights 6, Kluwer Law International, p. 422.

¹⁰¹ Recommendation 1255 (1995) on the protection of the rights of national minorities, para.7.

Thus, envisioning the compulsory assistance of the Advisory Committee to the Committee of Ministers, pursuant to Article 26, is considered fundamental “to ensure the efficiency of the monitoring of the implementation of the Convention.”¹⁰²

iii. Participatory Mechanisms

One way of including minorities into the political participation of a given state is recognizing their right to be represented in the legislative body. This area is broadly influenced by certain non-discrimination practices, such as allowing the establishment of minority political parties, or eliminating language barriers for standing as a candidate on elections.

According to the Advisory Committee, providing equal voting rights and integration of persons belonging to minorities in general party lists do not necessarily ensure effective participation in elected bodies. Hence, the Advisory Committee has called upon the State parties to adopt special measures.¹⁰³

These special measures, welcomed by the Advisory Committee range from exemptions from threshold requirements¹⁰⁴, benign gerrymandering through creating boundaries of electoral districts in favor of minorities, reserved seats or quotas¹⁰⁵. As such, they have not raised any concerns regarding their compatibility with the principle of equality.¹⁰⁶ In its opinion on Bosnia and Herzegovina, the Advisory Committee suggested the introduction of such

¹⁰² Explanatory Memorandum to the Framework Convention on the Protection of National Minorities, para. 95.

¹⁰³ Rainer Hofmann, Political Participation of Minorities, European Yearbook on Minority Issues, Vol. 5, 2007, p.13.

¹⁰⁴ State Report of Italy submitted to the AC, para.72.

¹⁰⁵ Ibid., para. 71.

¹⁰⁶ Rainer Hofmann, Political Participation of Minorities, European Yearbook on Minority Issues, Vol. 5, 2007, p.13.

mechanisms (i.e. reserved seats for members of minority groups) on all territorial levels (national and entity)– not only local level.¹⁰⁷

Even though the Advisory Committee criticized withdrawal of special measures (i.e. reserved seats for members of minority groups) by certain State Parties¹⁰⁸, it hesitated in recommending their first-time introduction in others.¹⁰⁹

Advisory Committee has also welcomed the mechanisms of proportional representation or quotas in elected bodies as a means of achieving effective participation of minorities.

However, it has also expressed its concerns regarding certain aspects of their implementation in view of the Article 3 of the FCNM¹¹⁰, such as obligatory declarations of candidates standing for elections on their ethnic affiliation, as in Bosnia and Herzegovina,¹¹¹ which is similar to South Tyrolean obligation of giving an anonymous declaration of linguistic origin at the time of the decennial census, in order to make full use of the system of ethnic proportions.¹¹² Historical context of such measures and their necessity should not be overlooked. However, since change is the only constant, such measures should be under constant review, as Hofmann indicates. If they do not serve the legitimate aim that they were introduced for, they should be abolished.¹¹³

¹⁰⁷ ACFC I - Art 15 – July 2011 Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle (Opinion on Bosnia and Herzegovina), p. 13.

¹⁰⁸ ACFC I - Art 15 – July 2011 Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle (Opinion on Ukraine), p. 75.

¹⁰⁹ ACFC I - Art 15 – July 2011 Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle (Opinion on Lithuania), p. 45.

¹¹⁰ Article 3 (1) of the FCNM reads: Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

¹¹¹ ACFC I - Art 15 – July 2011 Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle (Opinion on Bosnia and Herzegovina), p. 13.

¹¹² Anthony Alcock, “The South Tyrol Autonomy: A Short Introduction”, (Bozen/Bolzano: University of Ulster, 2001, p. 16.

¹¹³ Rainer Hofmann, Political Participation of Minorities, European Yearbook on Minority Issues, Vol. 5, 2007, p.14.

Besides representation in legislative body, consultative mechanisms also represent a form of participation of minorities. These bodies represent forums, which empower minorities to advise government authorities, engage in dialogue, initiate legislation and formally comment on legislative issues affecting them. Advisory Committee declared that such consultation process should take part on a regular basis.¹¹⁴ It has also stressed that at least 50% of the members of such bodies must be selected by the minorities themselves, whereas the remaining amount may be appointed by the state authorities. Advisory Committee also emphasized that the state authorities must ensure democratic pluralism by not favoring some minority organizations over others and making sure that numerically smaller minorities are included in the consultation process. 115

Another form of participatory mechanisms is the mechanism of co-decision.

That exists when legislative bodies cannot decide on a matter without minority consultative councils reviewing the draft legislation of a particular interest to them and having an opportunity to share their views. On another hand, if minority members of the legislative body or minority consultative bodies have certain veto rights in terms of adoption of legislation that has particular interest for minorities, we are talking about the hard form of co-decision.¹¹⁶

As Joseph Marko notes, in ethnically divided societies, ethnic quotas combined with such veto powers might block the entire political process and turn democracy into ethnocracy.¹¹⁷

¹¹⁴ Kiran Auerbach, *Political Participation of National Minorities, Standards and State Practice in the Implementation of Article 15 of the CoE FCNM*, Analitika, 2011, p. 20.

¹¹⁵ ACFC I - Art 15 – July 2011 Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle (Opinion on Austria), p.7.

¹¹⁶ Rainer Hofmann, *Political Participation of Minorities*, European Yearbook on Minority Issues, Vol. 5, 2007, p.15.

¹¹⁷ Joseph Marko, *Effective Participation of National Minorities. A Comment on Conceptual, Legal and Empirical Problems*, Council of Europe Document

CONCLUSION

Last centuries' turmoils and turbulences have developed ethnically, linguistically and culturally rich, yet divided societies in Europe, due to the plentiful migrations taking place on the European soil. Collapse of European communist regimes and the rise of severe nationalism both resulted in mayhems and conflicts around Europe. Consequently, the position of minorities was under the largest threat, as it often resulted in a discriminatory treatment following the tension in majority-minority relations. This in particular, together with the apocalyptic fear of diminishing peace and security in Europe as a whole, not only the affected countries, has urged the Council of Europe to enhance the importance of protection of national minorities on its agenda.

Apart from the European Convention on Human Rights, the European Social Charter and the European Charter for Regional or Minority Languages, text that is dealing to a great detail with the issue of minority protection is the Framework Convention for the Protection of National Minorities.

Although European Convention on Human Rights does not make an explicit mention of minorities, besides Article 14 and the general prohibition on discrimination contained in Article 1 of Protocol 12, the Convention is still an important safeguard to the minority rights, due to the judicial system, which FCNM on the other hand does not contain. Still, monitoring mechanism envisaged by the FCNM system, namely Advisory Committee review of State Reports gives an incentive to states to provide wider guarantees for the minorities within their territory. Still, electoral representation of minorities per se might not always be effective, i.e. in cases of numerically smaller minorities, unable to achieve sizable electoral representation. Therefore, states should consider alternative means of fulfillment of effective participation of minorities in political life, through e.g. consultative mechanisms.

BIBLIOGRAPHY

CONSTITUTIONS, LAWS, CONVENTIONS

Constitution of Bosnia and Herzegovina (1995)

Constitution of Italy (1948)

European Convention on Human Rights (1953)

Framework Convention for the Protection of National Minorities (1994)

Law on the Protection of the Rights of Persons Belonging to National Minorities (2003)

UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 1992, A/RES/47/135, available at:

<http://www.refworld.org/docid/3ae6b38d0.html>

EXPLANATORY REPORTS, STATE REPORTS, AMICUS CURIAE BRIEFS

ACFC/SR/IV(2014)005, Fourth report submitted by Italy on the Framework Convention for the Protection of National Minorities

Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention – First Cycle, ACFC I – Article 15, July 2011

Council of Europe Parliamentary Assembly Recommendation 1255 on the Protection of the Rights of National Minorities, 1995

Explanatory Memorandum to the Framework Convention on the Protection of National Minorities

Explanatory Report to the Protocol 12 to the European Convention on Human Rights,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce48>

Helsinki Decisions, 1992

Venice Commission, Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina, CDL-AD(2008)027

BOOKS AND BOOK CHAPTERS

BELLONI, ROBERTO “State Building and International Intervention in Bosnia”, (New York: Routledge, 2008)

Council of Europe Publishing, *Minority Issues Handbook: Mechanisms for the implementation of minority rights*, European Centre for Minority Issues 2004.

MANCINI, SUSANNA and DE WITTE, BRUNO “Language Rights as Cultural Rights – A European Perspective” in DORSEN, N., ROSENFELD, M. et al. (eds.) *Comparative Constitutionalism – Cases and Materials*, 2nd ed. (GRAD: St. Paul, MN: Thomson/West., 2010)

PENTASSUGLIA, GAETANO, “Minorities in International Law: An Introductory Study” (Flensburg: 2002, European Centre for Minority Issues, 2002).

PENTASSUGLIA, GAETANO “State sovereignty, Minorities, Self-Determination” *International Journal on Minority and Group Rights* 9 (GRAD: Kluwer Law International, 2002)

SPILIOPOULOU AKERMARK, ATHANASIA “Minority Protection in the League of Nations” in *Justifications of Minority Protection in International Law* (Martinus Nijhoff Publishers, 1997)

VERSTICHEL, ANNELIS et al. (eds.), “The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?” (GRAD: Intersentia, 2008).

WELLER, MARK “Political Participation of Minorities” in *A Commentary of International Standards and Practice* (New York: Oxford University Press Inc., 2010).

WOLFF, STEFAN “Complex Power Sharing as Conflict Resolution: South Tyrol in Comparative Perspective” in Jens Woelk, Francesco Palermo and Joseph Marko (eds.) *Tolerance through law: Self-governance and Group Rights in South Tyrol* (Leiden/Boston: Martinus Nijhoff, 2008).

ARTICLES

ALCOCK, ANTHONY “The South Tyrol Autonomy: A Short Introduction”,

(Bozen/Bolzano: University of Ulster, 2001)

BIEBER, FLORIAN “Balancing Political Participation and Minority Rights: The Experience of the former Yugoslavia”, European Centre for Minority Issues (Konrad Adenauer Stiftung, 2003)

BOCHSLER, DANIEL “Electoral Rules and the Representation of Ethnic Minorities in Post-Communist Democracies”, (European Yearbook of Minority Issues, Vol. 7, 2010)

CRNJASKI-VLAJČIĆ, KATARINA “Position of National Minorities in Political System” in BANOVIĆ DAMIR and GAVRIĆ SAŠA (eds.), *State, Politics and Society in Bosnia and Herzegovina* (Sarajevo: IKD University Press, 2011).

DE VARENNES , FERNAND “Using the European Court of Human Rights to Protect the Rights of Minorities“ in Council of Europe Publishing (ed.) *Minority Issues Handbook: Mechanisms for the Implementation of Minority Rights* (European Centre for Minority Issues, 2004) pp

GREWE, CONSTANZE and RIEGNER, MICHAEL “Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia- Herzegovina and Kosovo Compared” in VON BOGDANDY, A. and WOLFRUM, R. (eds.) *Max Planck Yearbook of United Nations Law*, Vol. 15 (Koninklijke Brill N.V., 2011)

HOFMANN, RAINER “Political Participation of Minorities” in *European Yearbook of Minority Issues Vol. 6* (Publisher, 2005)

JACKSON-PREECE, JENNIFER “Beyond the Non-Definition of Minority” in *European Centre for Minority Issues, Issue Brief #30* (2014)

MARKO, DAVOR “Definition of minorities and analytical approach” in HODŽIĆ, EDIN and JUSIĆ, TARIK (eds.) *On the Margins: Minorities and Media in South-Eastern Europe* (Sarajevo: Mediacentar, 2010).

- MARKO, JOSEPH “Effective Participation of National Minorities. A Comment on Conceptual, Legal and Empirical Problems” Council of Europe Document
- MAZUR-KUMRIĆ, NIVES “Legal Status of the German Language Group in the Italian Province of South Tyrol” *Pravni vjesnik*, No. 3-4 (Osijek: Faculty of Law Osijek, 2009)
- PENTASSUGLIA, GAETANO, “Monitoring Minority Rights in Europe” *International Journal on Minority and Group Rights* 6 (Kluwer Law International, 1999).
- PENTASSUGLIA, GAETANO, “The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?” in *International Journal on Minority and Group Rights Vol. 19* (Martinus Nijhoff Publishers, 2012)
- ŠARČEVIĆ, EDIN “Völkerrechtlicher Vertrag als „Gestaltungsinstrument“ der Verfassunggebung: Das Daytoner Verfassungsexperiment mit Präzedenzwirkung?”, *AVR* 39 (2001)
- WHEATLEY, STEVEN “Non-Discrimination and Equality in the Right to Political Participation for Minorities” (Flensburg: European Centre for Minority Issues, 2002).
- WHEATLEY, STEVEN “Democracy, Minorities and International Law” (Cambridge University Press, 2005)
- WOELK, JENS et al. (eds.), *Tolerance through law: Self-Governance and Group Rights in South Tyrol* (Martinus Nijhoff Publishers, 2008)
- WOELK, JENS “South Tyrol is (not)Italy: A Special Case in A (De)Federalizing system” in Michale Burgess and Soeren Keil (eds.) *Small Worlds: Constituent Units in Federal States and Federal Political Systems*, *Journal of Studies on European Integration and Federalism* (Nice: CIFE, 2013)
- ZEITOUN M., MIRJANA and JURLINA, PETRA (eds.), *Minorities for Minorities: Legal Frameworks and Examples of Good Practice of Inter Ethnic-Relations in the Western Balkans and the European Union* (Zagreb: Centre for Peace Studies, 2010)

ELECTRONIC SOURCES

CAMPANI, GIOVANNA “Minorities Formation in Italy” in:

<http://www.theslovenian.com/articles/campani.pdf>;

Minorities: South Tyrol in Italy, available at:

<http://www.radwb.eu/files/Minorities%20in%20Italy%20-%20The%20Case%20of%20South%20Tyrol,%20short%20info%20note.pdf>

South Tyrol in figures 2014, Provincial Statistics Institute ASTAT

<http://www.provincia.bz.it/astat/de/service/suche.asp?q=census+&cmd>

TABLE OF CASES

National cases:

Bosnia and Herzegovina:

Decision of the Constitutional Court of Bosnia and Herzegovina AP-2678 (2006)

Decision of the Constitutional Court of Bosnia and Herzegovina, U 5/98 (2000)

ECtHR cases:

Timishev v. Russia, Application nos. 55762/00 and 55974/00, 13 March 2006

Zdanoka v. Latvia, Application No. 58278/00, 16 March 2006

D.H. and Others v. The Czech Republic, Application No. 57325/00, 13 November 2007

Sejdić and Finci v. Bosnia and Herzegovina, Application nos. 27996/06 and 34836/06, 22 December 2009