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From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdic v. Bosnia

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From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdic v. Bosnia

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From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in *Sejdic v. Bosnia*

*Lindsey E. Wakely†*

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I. Introduction

On December 14, 1995, in Paris, France, parties to The Dayton Accords ushered in a segregated constitutional system for the people of Bosnia and Herzegovina.¹ Under the newly drafted Constitution, the Presidency and the Parliamentary Assembly’s House of Peoples were reserved for members of the Bosniak, Serb, and Croat minorities.² The reserved seats were meant to ensure a balance among the three ethnic groups after years of interethnic conflict.³ Now, nearly fifteen years later, that same constitutional

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³ See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 83 (2010).
system, while preserving the peace, has prevented a generation of Balkan citizens of Jewish, Roma, and “other” origins who do not identify as Bosniak, Serb, or Croat, from influencing their country’s national affairs.4

This disenfranchisement led Dervo Sejdić and Jakob Finci to apply to the European Court of Human Rights for relief under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”).5 In their application, Sejdić and Finci challenged “their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina . . . .”6 In a 14-3 decision, the European Court of Human Rights found that the applicants’ rights were violated under Article 14 of the European Convention7 and Article 1 of Protocol 12.8 Protocol 12, first adopted in 2000, added a new article to the European Convention generally prohibiting discrimination.9 The holding in Sejdić is the first instance in which the European Court of Human Rights found discrimination under Article 1 of Protocol 12 since it was enacted in 2005.10 Supporting commentators interpret the Court’s ruling as sending a strong message that “discrimination is repugnant . . . and [that] the Court would simply not set any precedent that could justify such inequality in some vaguely defined exceptional circumstances.”11 Critics of the decision have echoed the dissenting opinion, arguing that the constitutional provisions were not created arbitrarily, and the imperfect balance was necessary to prevent destabilization in a region wrought with conflict.12

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7 COUNCIL OF EUROPE, supra note 5, at 20.
8 Milanovic, supra note 2.
10 Milanovic, supra note 2.
11 Id.
This piece will review the historical development of the European Court of Human Rights’s six-step analysis of discrimination under Article 14. It will also evaluate how the Sejdić Court narrowed the requirement of proportionality and further limited the margin of appreciation granted to States. The Court’s holding continues the Court’s trend towards elimination of “discriminatory and coercive” policies. Furthermore, this piece will review the Court’s decision to incorporate the tests previously administered under Article 14 into the analysis under Article 1 of Protocol 12, and the ramifications for future Protocol 12 ratification. Though in force since 2005, Protocol 12 has yet to be signed and ratified by a number of major European powers.

II. Statement of the Case

The constitution of Bosnia and Herzegovina, as adopted in 1995, distinguishes between “constituent peoples” and “others.” Self-identified Bosniaks, Croats, and Serbs are considered “constituent peoples” while all other ethnic minorities and persons “who do not declare affiliation with any particular group because of intermarriage, mixed parenthood, or other reasons,” are considered “others.” The country itself is divided into two entities: the Federation of Bosnia and Herzegovina (“the Federation”) and the Republika Srpska. The federal government

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13 Id. See also Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Apr. 11, 1950, Europ. T.S. No. 5. [hereinafter 1950 European Convention].


17 CONSTITUTION OF BOSNIA AND HERZEGOVINA pmbl.


19 BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, Background Note: Bosnia and Herzegovina, U.S. DEPARTMENT OF STATE (June 3, 2010), http://www.state.gov/r/pa/ei/bgn/2868.htm. The Federation of Bosnia and Herzegovina is the result of a 1994 agreement between Bosnia’s two major ethnic groups: the Muslim
of Bosnia and Herzegovina is governed by a bicameral parliamentary assembly, presidency, and constitutional court. The forty-two members of the House of Representatives are directly elected with two-thirds of members stemming from the Federation and one-third from the Republika Srpska. Members of the much smaller Bosnian House of Peoples are not elected, but are appointed by the Federation and the Republika Srpska. The Constitution specifies that five Croats and five Bosniaks must be appointed by the Federation and that five Serbs must be appointed by the Republika Srpska. A similar ethnicity requirement is imposed on candidates for the Bosnia and Herzegovina Presidency. The Office of the Presidency is divided among three individuals: “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.” The Presidency retains the power to conduct foreign policy, execute decisions of the Parliamentary Assembly, propose the national budget, and coordinate with international and nongovernmental organizations in Bosnia and Herzegovina.

Prior to filing their application with the Court, Dervo Sejdić and Jakob Finci had both served in prominent government positions in Bosnia and Herzegovina. Sejdić, who identifies as Roma, served as a representative to the Roma Council of Bosnia and Herzegovina. Finci, who identifies as Jewish, is the former head of the State Civil Service Agency and current Ambassador to

Bosniaks and Croats. Id.

20 Id.

21 Id.

22 Sejdić, 2009-Eur. Ct. H.R. at 5. Delegates from the Federation are appointed by the House of Peoples of the Federation; in turn, members of the House of Peoples are appointed by the Cantonal Parliaments. Id.

23 Id. Elected representatives of The National Assembly appoint delegates from the Republika Srpska. Id.

24 CONSTITUTION OF BOSNIA AND HERZEGOVINA art. IV, § 2.

25 Id. art. V, § 1.

26 Id.


28 See id. at 9.

29 Id. The Roma Council is the highest representative body of the Bosnia and Herzegovina Roma community. Id.
Switzerland. Since neither Sejdić nor Finci self-identifies as Bosniak, Croat, or Serb, the Court found both “ineligible to stand for election to the House of Peoples . . . and the Presidency.”

Article 14 of the European Convention states that “the rights and freedoms set forth in [the] 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.” The limited applicability of Article 14 prohibits discrimination only in regards to those rights explicitly articulated in the Convention. Discrimination outside the scope of the Convention is not directly prohibited.

Sejdić and Finci alleged that the discrimination they experienced was within the scope of the European Convention because the discrimination touched on their rights under Article 3 of Protocol 1, which states that ratifying parties must “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Article 3 has not yet been found to require free election to both chambers in a bicameral system. The Court considers the powers held by the chamber at issue in determining Article 3 applicability. The House of Peoples of Bosnia and Herzegovina was found to have retained broad legislative authority. The Court noted that bicameral passage is required for legislation addressing: (1) revenue collection, (2) state spending, and (3) treaty ratification. Given the scope of the lawmaking authority granted to the body, the Court held that “[c]elections to the House of Peoples . . . falls

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30 Id.
31 Id. Finci received confirmation of his ineligibility in 2007. Id.
32 1950 European Convention, supra note 13.
33 Heringa & van Hoof, supra note 14, at 1029.
36 Id.
37 Id.
38 Id.
within the scope” of Article 3.\textsuperscript{39}

According to the Court, “discrimination means treating differently, without an objective and reasonable justification, persons in similar situations.”\textsuperscript{40} The presence of an “objective and reasonable justification” depends upon whether or not discrimination “pursue[s] a ‘legitimate aim,’” and has “a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised . . . ’.”\textsuperscript{41} As noted by the Court, the provision in Bosnia and Herzegovina’s Constitution limiting appointments to the House of Peoples to Bosniaks, Croats, and Serbs (constituent peoples) was defended by the State as necessary for “the restoration of peace”:\textsuperscript{42}

When the impugned constitutional provisions were put in place a very fragile cease-fire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and “ethnic cleansing.” The nature of the conflict was such that the approval of the “constituent peoples” (namely, the Bosniaks, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants’ preoccupation with effective equality between the “constituent peoples” in the post-conflict society.\textsuperscript{43}

While the Court gave some recognition to this argument,\textsuperscript{44} the Court nonetheless concluded the applicants’ continued ineligibility to the House of Peoples “lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.”\textsuperscript{45} According to the Court, there was not “a ‘reasonable relationship of proportionality between the means employed and the aim sought to be

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 32
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 34.
realised . . . ."  46

As stated earlier, Article 14 does not prohibit all
discrimination, only discrimination within the rights articulated by
the Convention.  47 There is no provision of the European
Convention similar to Article 3 of Protocol No. 1 that addresses a
vote for the executive branch.  48 Therefore, Article 14 does not
prohibit any discrimination in regards to elections for the
Presidency of Bosnia and Herzegovina.  49 Article 1 of Protocol
No. 12 was proposed and ratified to provide broader protection for
European citizens,  50 by prohibiting discrimination "by any public
authority on any ground . . . ."  51 The applicants alleged that they
were subject to discrimination under Article 1 of Protocol No. 12
when they were denied the right to be appointed to the Presidency
under the Constitution of Bosnia and Herzegovina.  52

The Court determined that, "[n]otwithstanding the difference
in scope between [Article 14 and Article 1 of Protocol No. 12], the
meaning of [discrimination] in Article 1 of Protocol No. 12 was
intended to be identical to that in Article 14."  53 According to the

47 Heringa & van Hoof, supra note 14, at 1029.
48 See 1950 European Convention, supra note 13.
49 See Heringa & van Hoof, supra note 14, at 1029.
50 See Fried van Hoof, General Prohibition of Discrimination (Article 1 of Protocol No. 12), in THEORY & PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 989 (Pieter van Dijk et al. eds., Intersentia 4d ed. 2006). Article 14 cannot be invoked in areas of social life like housing and employment law. Id. at 990. The Explanatory Report on Protocol 12 emphasizes the need to introduce a "general substantive equality and non-discrimination clause." Id. It is important to note, however, that Article 1 of Protocol No. 12 is not meant to serve as a replacement to Article 14, only a supplement to the already existing limitations under Article 14. FRANCIS JACOBS & ROBIN WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 359 (Clare Ovey & Robin C.A. White eds., Oxford University Press 3d ed. 2002).
51 Protocol No. 12, supra note 9, art. 1(2).
53 Id. (citing Explanatory Report to Protocol 12 § 18). It has been suggested that the drafters of Article 1 of Protocol No. 12 intended to incorporate both the definition of discrimination promulgated under Article 14 of the European Convention along with the body of case law developed under Article 14 since the ratification of the European Convention. See van Hoof, supra note 50, at 990.
Court, the requirement that an individual declare affiliation with a “constituent people[s]” in order to be eligible for the Presidency violates the ban on discrimination under Article 1 of Protocol No. 12.54

III. The Development of Article 14 Jurisprudence

The overall body of case law on Article 14 is limited because of the Court’s frequent reluctance to address possible violations of the provision.55 When facing a claimed violation of both Article 14 and another substantive provision, the Court traditionally addresses the non-Article 14 provision first. The Court will only address Article 14 if no other violation exists.56 As a result, the Court has not specifically analyzed many instances in which a violation may have been present under Article 14.57

The Court moves through a two-part analysis in Article 14 cases.58 In the first part of the analysis, the Court begins by considering: (1) whether the complaint falls within the sphere of a protected right as enumerated by the Convention; (2) whether there is a violation of a substantial provision; and (3) whether there is differential treatment.59 The European Convention does not ban all forms of disparate treatment.60 The burden is on the applicant to show61 that the State “treats differently persons in analogous situations without providing an objective and reasonable justification.”62 In the second part of the analysis, the Court focuses on the purpose of the disparate treatment: (1) whether the treatment pursues a legitimate aim; (2) whether the means employed are proportionate to the legitimate aim; and (3) whether the difference in treatment goes beyond a state’s margin of appreciation.63 The Court has traditionally allowed the State

55 Heringa & van Hoof, supra note 14, at 1031.
56 Id.
57 See id.
58 See Jacobs & White, supra note 50, at 352.
59 Id.
60 Heringa & van Hoof, supra note 14, at 1035.
61 Jacobs & White, supra note 50, at 355.
62 Heringa & van Hoof, supra note 14, at 1036.
63 Jacobs & White, supra note 50, at 352. The margin allowed may vary
leeway in balancing (or appreciating) the public interest against the interest of affected individuals. However, the burden is on the State to show a reasonable and objective justification.

An early analysis of Article 14 appeared in what is commonly referred to as the Belgian Linguistics Case, 1 Eur. H.R. Rep. 252 (1968). In 1963, Belgium was divided into four linguistic regions. Only the predominant language of the region was taught in area public schools. Brussels was the only exception. In Brussels, children were taught in either Dutch or French, depending on their native language. Children graduating from private schools that taught languages other than the predominant language of the region were awarded only a “non-homologated degree,” which limited educational opportunities after graduation. Students from these schools desiring a homologated degree could only obtain one after further examination. The parents of French-speaking children living predominantly in the Dutch region filed an application with the European Court of Human Rights on behalf of their families and the families of over 800 affected children. French-speaking parents alleged that the law required them to either have their children instructed in Dutch, or send them to far-away schools in Brussels or in the francophone schooling region. The applicants alleged that the discrimination impacted the “right to education” under Article 2 of Protocol No. 1 depending on the nature of the government action. States are likely to be granted a greater margin of appreciation in economic regulation than regulations affecting essential freedoms and rights. Heringa & van Hoof, supra note 14, at 1045.

64 Heringa & van Hoof, supra note 14, at 1043.
65 Id. at 1044.
67 Id.
68 Id.
69 Id.
70 See Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case), 1 Eur. H.R. Rep. 252, 264 (1968) (explaining the extra requirements to obtain a legally recognized degree). See also HILLGRUBER & JESTAEKT, supra note 15, at 24. No subsidies were permitted to parents who preferred to send their children to regional private schools. Id. at 23.
72 See id. at 259.
73 See id.
of the European Convention.\textsuperscript{74}

The Court found no right to a particular kind of education establishment under the Convention, but did find that a State could not discriminate in the entrance requirements for an education establishment under Article 14.\textsuperscript{75} The Court noted that equality is violated "if the distinction has no objective and reasonable justification."\textsuperscript{76} However, the Court adopted a liberal view of what qualified as "objective and reasonable justification," stating that factual features and the character of a particular society cannot be disregarded.\textsuperscript{77}

In the \textit{Belgian Linguistics Case}, the State was not shy in asserting its intention to promulgate a Dutch-speaking majority.\textsuperscript{78} The goal of the Belgian government was "to rehabilitate 'Flemish language and Flemish culture' by developing an 'intelligentsia with a good knowledge of Dutch,' able to play a formative rôlé and, in a more general sense, to give to the country a stable structure based mainly on two large homogeneous regions and a bilingual capital."\textsuperscript{79}

The State’s argument was accepted as an objective and reasonable justification. The Court held that the linguistic divisions were not "so disproportionate to the requirements of the public interest" as to constitute impermissible discrimination under Article 14.\textsuperscript{80}

In his dissent in the \textit{Belgian Linguistics Case}, Judge Terje Wold disagreed with the majority’s approach of looking at the State’s internal dynamics: "The right to education must have exactly the same content in Belgium as in Norway or in Turkey and all the other states which have ratified the Convention."\textsuperscript{81} Judge Wold suggested that it would "be a very dangerous road to embark upon if the articles of the Convention were to be

\begin{itemize}
  \item \textsuperscript{74} See \textit{id.} at 296.
  \item \textsuperscript{75} See \textit{id.} at 283.
  \item \textsuperscript{76} \textit{Id.} at 284.
  \item \textsuperscript{77} \textit{Belgian Linguistics Case}, 1 Eur. H.R. Rep. at 284.
  \item \textsuperscript{78} See \textit{Hillgruber & Jestaedt}, \textit{supra} note 15, at 29.
  \item \textsuperscript{79} \textit{Belgian Linguistics Case}, 1 Eur. H.R. Rep. at 288. The legislation “succeeded in its attempt to exorcise ‘the grave national crises’ caused by ‘Flemish separatism.’” \textit{Id.}
  \item \textsuperscript{80} See \textit{id.} at 294.
  \item \textsuperscript{81} \textit{Id.} at 351.
\end{itemize}
interpreted in such a way as to allow the member States to regulate the Convention’s ascribed human rights ‘according to the needs and resources of the community.’”\(^8\)

In policing the legitimate aim and margin of appreciation, the Court in the Belgian Linguistics Case evinced a willingness to grant significant discretion to the State. Since the Belgian Linguistic Case, the body of case law has shifted towards less discretion. In the case of Abdulaziz, Cabales and Balkandali v. The United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 1 (1985), several female applicants who lawfully and permanently settled in the United Kingdom challenged a provision under the United Kingdom’s immigration law that permitted the wives and female fiancées of settled entrants to attain indefinite leave to enter, but limited the entrance of husbands and male fiancés.\(^8^3\) The law also distinguished between women born in the United Kingdom and women born abroad.\(^8^4\) Women who were born in the United Kingdom or who had a parent born in the United Kingdom did not have the same restriction and could have their non-national husband accepted for settlement.\(^8^5\)

The applicants claimed “unjustified differences of treatment . . . based on sex, race and also – in the case of [one applicant] – birth . . . .”\(^8^6\) The United Kingdom alleged that the aim of the legislation was to protect “the domestic labour market at a time of high unemployment by curtailing . . . immigration by someone who could be expected to seek full-time work in order to support a family.”\(^8^7\)

The European Court of Human Rights dismissed the allegations of racial discrimination given that the legislation did not structure the requirements for indefinite leave to enter to consider the race of the applicant.\(^8^8\) In regards to the United Kingdom’s policy to treat female entrants differently than male entrants, the Court held that while “States enjoy a certain ‘margin

\(^8^2\) Id.
\(^8^4\) See id. at 15.
\(^8^5\) See id.
\(^8^6\) Id. at 35.
\(^8^7\) Id. at 36.
\(^8^8\) Id. at 40.
of appreciation’ in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances . . . .”

The fact that the disparate treatment was based on the sex of the applicant carried weight with the Court. A narrow margin of appreciation was granted because the Court viewed gender equality as an important aspiration of the Council of Europe.

The Court did not accept the State’s argument that immigrant husbands had a greater impact on the United Kingdom’s labor market than immigrant wives and rejected the relevance of data suggesting that men of working age are more “economically active” than women of working age. The Court questioned whether greater economic activity (employment, self-employment, or active pursuit of employment) among men as a whole translated into immigrant husbands having a greater impact on the labor market than immigrant wives. In particular, the Court noted that immigrant wives vastly outnumbered immigrant men. The Court did find the State’s aim—protecting the domestic labor market—legitimate, but rejected the State’s argument that gender based discrimination was necessary to justify the aim.

The husband of applicant Sohair Balkandali, a divorcée who received her lawful residency through a prior marriage, was also denied permission to remain in the United Kingdom because neither Mrs. Balkandali nor her parents were born in the United Kingdom. The State argued that women born in the United Kingdom, or daughters of individuals born in the United Kingdom, are entitled to greater protection because these women would suffer greater hardship if forced to move abroad to reside

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90 See Heringa & van Hoof, supra note 14, at 1047.
91 See id.
93 See id.
94 Id.
95 Id. at 37.
96 Id.
97 See id. at 27-28.
with their husbands than women with lesser ties to the country.\textsuperscript{98} The Court gave credit to this argument, finding that there are "general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it."\textsuperscript{99} The Court found that the disparate treatment had an "objective and reasonable justification" proportional to the legitimate aim of the State.\textsuperscript{100} Therefore, there was no discrimination under Article 14 in regards to the applicant's nation of origin.

Demonstrating some similarity to Sejdic and Finci's application in \textit{Aziz v. Cyprus}, (No. 69949/01), 2004-Eur.Ct. H.R. 2, a resident of Cyprus challenged a constitutional provision that segregated the Turkish and Greek Communities on two different electoral rolls.\textsuperscript{101} Under Article 62 of the Cypriot Constitution, seventy percent of House seats were allocated to the Greek community, and thirty percent to the Turkish community.\textsuperscript{102} Members of the Turkish community could not vote for candidates for the Greek seats, and members of the Greek community could not vote for candidates for the Turkish seats.\textsuperscript{103} Subsequently, Turkish representatives withdrew from the government and formed their own administrative state, the Turkish Republic of Northern Cyprus, on the northern portion of the island.\textsuperscript{104} The applicant was a member of the small Turkish community remaining in Cypriot-controlled territory.\textsuperscript{105}

Article 31 of the Cypriot Constitution, in conflict with Article 62, said that "[e]very citizen has ... the right to vote in any election held under this Constitution or any such law."\textsuperscript{106} The applicant alleged that the suspension of Turkish participation in parliament voided Article 62 and deprived the applicant of any opportunity to elect members of the Cyprus House of
Representatives. Similar to Sejdić, the applicant challenged the constitutional limitations under Article 3 of Protocol No. 1. The Court vigorously agreed that the applicant’s disparate treatment “resulted from the very fact that the applicant was a Turkish Cypriot.”

The Cypriot government asserted that there was no violation of Article 14 because “the applicant was not in a comparable situation to voters who were members of the Greek community and voted in this capacity for the candidates from their community,” (emphasis added). This argument was rejected by the Court for failure to justify the “difference on reasonable and objective grounds.” The Court placed particular emphasis on the fact that under existing conditions, members of applicant’s minority community were “prevented from voting at any parliamentary election.” The Court determined that the unequal access of the Turkish Cypriot community to the electoral rolls violated Article 14 of the Convention.

IV. Argument

A. Advancing the European Court of Human Rights Analysis of Article 14

1. Proportionality

As noted in the opinion in Sejdić, the presence of an “objective and reasonable justification” depends upon whether discrimination “pursue[s] a ‘legitimate aim,’” and has “a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised . . . ‘.” The Court concluded that the applicant’s continued ineligibility to the House of Peoples “lacks

107 Id. at 5.
108 Protocol No. 1, supra note 34, art. 3.
110 Id. at 9.
111 Id. at 10.
112 Id.
113 Id. at 11.
an objective and reasonable justification and has therefore breached Article 14. The Court did not analyze whether or not a legitimate aim existed; rather, the Court found no “objective and reasonable justification” based on a lack of proportionality. The Court found a lack of proportionality based on: (1) the positive developments made towards peace in Bosnia and Herzegovina since The Dayton Accords; (2) the Court’s belief that power-sharing can be achieved in such a way as to also include disenfranchised “others”; and (3) Bosnia and Herzegovina’s own commitment to reform pursuant to their E.U. ascension.

The strict stance on proportionality in this case shows that the Court is requiring a narrow relationship between the policy and the aim sought to be realized. The Court has not always required such a narrow relationship; in the Belgian Linguistics Case, the Court permitted Belgium to engage in what the State admitted was a “discriminatory and coercive” policy aimed at encouraging linguistic conformity. The Court found Belgium’s unequal treatment of francophone citizens not so “disproportionate to the requirements of the public interest” as to constitute impermissible discrimination.

The existence of “alternatives” materialized as an important factor to the Court’s decision in Sejdić. According to the Court, “there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities... the possibility of alternative means achieving the same end is an important factor in this sphere...” The Court did not similarly consider alternative policies to achieve linguistic conformity in the Belgian Linguistics Case. It is possible that the State could have achieved its goals through alternative means that may not have resulted in

115 Id. at 34.
116 Id. at 33.
117 Id. at 33-34.
118 Id. at 32.
119 HILLGRUBER & JESTAEDT, supra note 15, at 28.
120 Id. at 27.
122 Id.
123 Id. at 28.
differential treatment of regional linguistic minorities, but it was not required by the Court to do so.\textsuperscript{124}

In \textit{Abdulaziz}, the Court rejected the disparate treatment of women seeking to have their husbands lawfully and permanently settled in the United Kingdom because it was "disproportionate to the purported aims."\textsuperscript{125} The State argued that immigrant husbands had a greater impact on the United Kingdom's labor market than immigrant wives, and thus limitations on their entrance were reasonably justified.\textsuperscript{126} In effect, discrimination in immigration policy was justified because of economics.\textsuperscript{127} The gap between means and ends was not so great in \textit{Sejdi\'c}; ethnic preferences were justified to prevent ethnic conflict.\textsuperscript{128} However, important factors existed in \textit{Sejdi\'c} that did not exist in \textit{Abdulaziz}, for example, the existence of other international commitments to end the existing discrimination.\textsuperscript{129} This may suggest that there is not such a marked change between the Court's view of proportionality in \textit{Sejdi\'c} and \textit{Abdulaziz}.

In \textit{Sejdi\'c}, the Court recognized that the constitutional provisions were put in place "to end a brutal conflict,"\textsuperscript{130} yet the Court still held that the applicants' continued ineligibility "lacks an objective and reasonable justification..."\textsuperscript{131} One other possible distinguishing characteristic between \textit{Sejdi\'c} and the earlier described cases is duration of the differential treatment. The Court's decision regarding proportionality hinges, in part, on the "significant positive developments in Bosnia and Herzegovina"\textsuperscript{132} through recognition that "progress might not always have been consistent and challenges remain."\textsuperscript{133} Since signing The Dayton Accords, conflicting ethnic groups had "surrendered their control over the armed forces... and Bosnia

\begin{footnotes}
\item[124] See id. at 28-31.
\item[126] Id. at 36.
\item[127] Id. at 37.
\item[129] Id.
\item[130] Id.
\item[131] Id. at 34.
\item[132] Id. at 33.
\item[133] Id.
\end{footnotes}
and Herzegovina joined NATO’s Partnership for Peace;” and that progress has been made in advancing Bosnia and Herzegovina as a candidate for EU membership.\textsuperscript{134} Furthermore, the Court noted that Bosnia and Herzegovina’s State Constitution had been amended on a previous occasion.\textsuperscript{135} In effect, there had been time for progress, and progress had occurred.\textsuperscript{136} At the time of the Court’s decision, nearly fifteen years had passed since the signing of The Dayton Accords.\textsuperscript{137} Time appeared equally important in \textit{Aziz}: Special attention was paid to the fact that particular conditions were the byproduct of thirty years of deterioration and that the applicant had not been able to vote in a country where he had “always lived.”\textsuperscript{138}

2. The Margin of Appreciation

“In general, the Court leaves a wide margin of appreciation to the national authorities in appreciating the weight of the public interest concerned as compared with the individual interests at stake.”\textsuperscript{139} The theoretical margin of appreciation assisted the Court in upholding State policy in the \textit{Belgian Linguistics Case} and the United Kingdom’s regulations based on national origin in \textit{Abdulaziz}.\textsuperscript{140} However, it appears that the same margin of appreciation did not apply in \textit{Sejdić} because of the suspect classification.\textsuperscript{141} The \textit{Sejdić} Court held that “where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.”\textsuperscript{142} The Court’s view that racial and ethnic classifications require “special vigilance and a vigorous reaction” suggests that a margin of appreciation cannot be applied.\textsuperscript{143}
Divisions based on race or ethnicity “do not need a simple justification, but ‘very weighty reasons.’”\textsuperscript{144} This argument is parallel to the argument regarding gender discrimination in \textit{Abdulaziz}.\textsuperscript{145} In \textit{Abdulaziz}, a smaller margin was granted because the Court viewed gender equality as an important aspiration of the Council of Europe.\textsuperscript{146} \textit{Sejdić} affirms the Court’s rule in \textit{Abdulaziz} that suspect classifications will not be extended the same margin of appreciation as other classifications.\textsuperscript{147}

Both \textit{Sejdić} and \textit{Aziz} addressed ethnicity as a suspect classification. In \textit{Aziz}, where the ethnicity of the voter was also at issue, the State alleged that as a member of the Turkish community, the applicant was not in a position to vote for a representative of the Greek community.\textsuperscript{148} Aside from evidence that this classification was mandated under Article 62 of the Cypriot Constitution, the State alleged no modern justification for the discrimination.\textsuperscript{149} However, as the dissent in \textit{Sejdić} notes, the circumstances in \textit{Sejdić} were not parallel to \textit{Aziz}.\textsuperscript{150} The State argued in \textit{Sejdić} that the imperfect balance was presently necessary to prevent destabilization in a region wrought in conflict.\textsuperscript{151} In contrast to \textit{Aziz}, reservation of power for “constituent people” was argued to be necessary to preserve the \textit{current} (relative) peace within a nation still struggling with “mono-ethnic political parties.”\textsuperscript{152}

The totality of the discrimination could have played an important role as well in overcoming the suspect classification to find a margin of appreciation available to the State.\textsuperscript{153} In \textit{Aziz}, the Court noted that the “applicant’s right to vote, as guaranteed by Article 3 of Protocol No. 1, was impaired.”\textsuperscript{154} With a complete

\textsuperscript{144} Heringa & van Hoof, \textit{supra} note 14, at 1043.
\textsuperscript{145} See id. at 1047.
\textsuperscript{146} \textit{Id.}
\textsuperscript{149} See id.
\textsuperscript{151} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 8.
ban on voting for candidates on the Greek electoral roll, and no Turkish candidates serving in parliament, Turkish Cypriots were completely disenfranchised from voting for members of the national legislative body.\textsuperscript{155} As the State tried to distinguish in \textit{Sejdić}, Sejdić and Finci’s right to vote was not entirely impaired.\textsuperscript{156} “Others” in Bosnia and Herzegovina could be openly elected to serve in the House of Representatives as well as the other directly elected regional legislative bodies.\textsuperscript{157} The State further alleged that the difference in treatment of individuals appointed to the House of Peoples and the Presidency was justified in this “particular circumstance.”\textsuperscript{158} This is in contrast to the general prohibition on voting in \textit{Aziz}.\textsuperscript{159}

\textbf{B. Defining Article 1 of Protocol 12 and the Impact on Future Ratification}

Article 1 of Protocol 12 states: “[t]he enjoyment of any right set forth by law 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.”\textsuperscript{160} The operative language of Protocol No. 12 addresses any “right set forth by law”\textsuperscript{161} as opposed to Article 14’s assertion of any “rights and freedoms set forth in this Convention.”\textsuperscript{162} In its expansive language, Article 1(2) clarifies that “[n]o one shall be discriminated against by any public authority on any ground.”\textsuperscript{163} The Protocol was adopted in 2000 and entered into force in 2005.\textsuperscript{164} In \textit{Sejdić}, the European Court of Human Rights decided for the first time that the analysis of discrimination under Article 1

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item Id. at 29.
\item Id.
\item Id.
\item Protocol No. 12, supra note 9, art. 1.
\item Id.
\item Protocol No. 12, supra note 9, art. 1.
\item See id.
\end{enumerate}
\end{footnotesize}
of Protocol No. 12 would replicate the analysis for Article 14.165

Article 1 of Protocol No. 12 has been interpreted as requiring applicants to show that there is "differential treatment in the enjoyment of any right set forth in national law."166 There is no indication that Article 1 of Protocol No. 12 distinguishes between rights under state statutory or constitutional provisions, under common law, or under international law.167 In finding that Bosnia and Herzegovina discriminated against Sejdic and Finci in denying them eligibility to the Presidency, the Court has found discrimination in a number of government actions outside the scope of the Convention also to be directly prohibited.168

Through this holding, the Court has sent a clear signal that discrimination, in particular discrimination based on ethnicity, will not be tolerated.169 However, the Convention articulates specific rights to be enjoyed by citizens of contracting states.170 No similar narrow application exists under the Article 1, Protocol 12 prohibition.171 Where and when discrimination may be tolerated in pursuit of a legitimate aim in any governmental lawmaking or adjudication remains unclear.

To date, twenty states have signed and eighteen have ratified the Protocol.172 The United Kingdom, France, Denmark, Poland, Sweden, and Switzerland have all failed to sign and ratify Protocol 12.173 Officials from the United Kingdom have expressed concern

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166 JACOBS & WHITE, supra note 50, at 359-60.

167 Id.


169 See id.

170 European Convention, supra note 162.

171 See Protocol No. 12, supra note 9, art. 1.

172 Protocol No. 12 Signatory Status, supra note 16.

173 See id.
over the Protocol’s failure to specify “rights set forth by law,” and over the failure of the Protocol to address positive measures that may be used to assist a historically disadvantaged group. More specifically, the United Kingdom has expressed concern that Protocol 12:

    does not follow the case law of the European Court of Human Rights in allowing objective and reasonably justified distinctions. . . . The government recognizes that under current case law of the European Court of Human Rights, objective and reasonably justified distinctions do not constitute discrimination . . . [b]ut it is anxious about the possibility that the Court’s interpretation might evolve, and it is not bound by previous judgments.

The Court attempted to address that concern by holding that “Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct ‘factual inequalities’ between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article.”

V. Conclusion

The Court’s holding in Sejdić may pose a challenge for advancing further ratification of Protocol 12. Sejdić dealt particularly with Bosnia and Herzegovina’s constitution; however, the Court did not suggest that a different analysis would apply to legislation passed by national or regional parliaments. This may serve as a disincentive for the United Kingdom because a question remains as to the impact on certain ethnic based distinctions recently codified in other European Countries. France and Switzerland have both received international media attention for policies limiting religious dress in schools, and limiting the new


\footnotesize{Id. at 1-2.

construction of religious institutions. It is unclear how these kinds of religious or ethnic distinctions, likely subject to strict scrutiny, might hold up under Article 1 of Protocol 12.

As noted by the Court, the Constitution of Bosnia and Herzegovina has been amended once before. Amending the Constitution to bring it in line with the European Court's holding will require the Bosnian, Croat, and Serb political blocks to formulate a new political agreement to balance power. It is unclear if the Court's holding can apply the effective political pressure that has thus far been lacking—even with the existing EU accession requirements. As a result, ethnic minorities in Bosnia and Herzegovina, while receiving certification of their mistreatment from the Court, may have an uphill battle in achieving actual representation within the country. Meanwhile, Sejdić has advanced existing case law for ethnic minorities—as well as other minority groups—in favor of prohibiting ethnic discrimination for all but the rarest of circumstances under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court's ruling suggests that proportionality will be viewed narrowly and that the margin or appreciation granted to states to determine the weight of the public interest will be exceedingly limited when suspect classes are involved, regardless of the particular circumstances. Furthermore, the Sejdić Court has taken an important first step in clarifying the practical implications of Article 1 of Protocol 12. However, future cases will need to define what circumstances will justify some limited discrimination in favor of public interest. Regardless, Sejdić is likely to play an important role in expanding electoral rights and political protections to minority groups living across the European continent.

178 Id.
179 Milanovic, supra note 2.
180 Id. ("Bosnia in many ways still remains profoundly illiberal, and skepticism should be the default option when it comes to assessing the will and the ability of the current crop of its political leaders"). Id.