



Master of Arts Thesis

Euroculture

**Palacky University, Olomouc
Jagiellonian University, Krakow**

April, 2010

Constitutional marginalization of national minorities in Bosnia and Herzegovina Study on political participation of national minorities with the special focus on the position of Jewish and Roma minorities

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Olomouc, 28. April 2010.

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Thesis Acknowledgements

First and foremost, I would like to thank my supervisors, Jaroslava Vitámvášová and Jolanta Ambrosewicz-Jacobs, for their unselfish and generous help with my thesis. I also owe my deepest gratitude to my professors and coordinators at Palacky University for helping me choose my area of interest, especially Antonín Kalous, Ondřej Kučera, Pavel Ptáček, Iva Tahová, Martin Elbel, Jitka Mašátová, Jana Hořáková, Pavla Slavičková, Jaroslav Miller, and Božena Bednaříková. I am heartily thankful to all my professors at Jagiellonian University, who helped me with my thesis research, especially Karolina Czerska-Shaw, Scott Simpson, Czesław Porebski, Marcin Galent, Zdzisław Mach, Halina Grzymala-Moszczyńska, and Joanna Sanetra-Szeliga. I would also like to show my sincere gratitude to my colleagues and supervisors at the European Center for Minority Issues, for introducing me to the area of minority issues and for letting me use their library, especially William McKinney, Maj-Britt Risbjerg Hansen, Ewa Chylinski, Tove Hansen Malloy and Gisa Marehn. I am indebted to Jakob Finci and Miralem Tursinović for the time they spared for my interviews. Moreover, I am grateful to the staff of Forum of Tuzla Citizens, especially Emina Babović-Gojačić, Vehid Šehić, and Mira Nišić-Jugović for inviting me to attend their events that were of crucial importance for the study. Lastly, this thesis would not have been possible if it were not for my family, especially my mother, grandmother and sister, and my friends, especially Genevieve Wickenden, Beatrice Guidote, Sarah Goler and Olena Chepurna, who have provided me with moral support throughout my studies.

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Chapter 1: Introduction

*The 'problem of minorities', with its numerous implications for both international theory and practice, has been a significant issue in international society for centuries. It has constituted an ongoing friction between states, a pretext for separatism, irredentism and intervention, and a direct and indirect cause of local and general wars.*¹

The question that follows from this statement is “Why?” Why have the minority problems constituted such an obstacle in societal progress throughout the centuries? Why have minority issues become such a crucial aspect in European politics and development, especially after the end of the Cold War? Why is adoption of minority protection documents, especially the Framework Convention for the Protection of National Minorities (FCNM), necessary for further integration of “new countries” in the EU nowadays? These and similar questions all carry one underlying message and that is the importance of minority rights in post-modern democratic societies. Respecting these rights is the last piece of the puzzle in the maze of human rights which is the pre-condition for establishing a truly democratic society of equals.

The first minority protection mechanism in Europe was formed in 1648, at the same time when modern state system was established around the continent². Taking this fact into consideration, one might say that after almost four centuries, Europe is the leading community in minority protection. But is it? Are the rights of minority members equally protected around Europe? Or, are they protected at all? Latter chapters will show that, depending on the region and the country where the minority question is at stake, the implementation and monitoring of minority protection varies deeply. It ranges from countries that promote ethnically neutral concepts of state which do not make difference between majority and minority groups, i.e. France, to countries that emphasize the ethno-national ideology, i.e. Germany.³ As an organization whose main objectives are protection of human rights, promotion of cultural diversity in Europe and the rule of law⁴, the Council of Europe (CoE) can also be considered as the leading force for the protection of minority rights on European soil. When we consider that the first legally binding minority rights documents, namely the Framework Convention

¹ Jennifer Jackson Preece, „Minority rights in Europe: From Westphalia to Helsinki,“ p. 89.

² Carole Fink, „Minority rights as an international question,“ p. 385.

³ Joseph Marko, “Constitutional recognition of ethnic difference – Towards an emerging European minimum standard?” in *The Framework Convention for the Protection of National Minorities*, A. Verstichel, A. Alen (eds.), p. 23.

⁴ Council of Europe, Council of Europe in brief, available at www.coe.int/aboutcoe/index.asp?page=nosobjectifs&l=en

for the Protection of National Minorities, is product of this organization, its activities and expertise become even more crucial. This is not to say that Council of Europe's minority rights provisions are flawless. On the contrary, FCNM is mostly characterized by experts as containing rather vague wordings and weak advisory provisions, just to name the few.⁵

After the collapse of the Communist regime and its block states, including former Yugoslavia, Council of Europe recognized that unfair position of minorities was becoming more and more "an obstacle to the democratic development" of the states in the region. Consequently, CoE, as well as Organization for Security and Cooperation in Europe, had to provide some sort of legal provisions that would recognize the importance of protecting minority rights.⁶ The EU's official stand is rather similar. In the official report on BiH, European Commission stated that BiH has made little progress on reforming the Constitution and the Election Law that represent one of the biggest obstacles for minority rights. Moreover, the report states that implementation of domestic and international laws protecting minority rights is of the utmost importance for the country.⁷

Now, where does Bosnia and Herzegovina belong on this scale of minority rights protection? And how does it treat its minority groups? The constitution and political ideology of BiH, and of other South-East European countries, considers people "as a collective identity which 'owns' the state as 'the nation' forming the 'nation-state' which must differentiate between those who belong to the nation and the others."⁸ A level of differentiation between majority and minority population is reasonable only when, due to this treatment, minorities are given legal and practical protection. Although, Bosnia and Herzegovina has adopted and ratified major international human and minority rights conventions and documents, the situation of minorities in the country is rather depressing.⁹ One of the reasons for such an unfair treatment of minorities rests in the fact that the political, cultural and economic eye of the society is cemented in the Dayton Peace Agreement, which contains the Constitution of the country, and

⁵ Pieter van Dijk, „A pan-European interpretation and application of the Framework Convention,“ in *The Framework Convention for the Protection of National Minorities*, A. Verstichel, A. Alen (eds.), p. 274.

⁶ Jennifer Jackson Preece, „Minority rights in Europe: from Westphalia to Helsinki,“ p. 89.

⁷ Commission of the European Communities, „Bosnia and Herzegovina 2009 Progress Report,“ p. 20.

⁸ Joseph Marko, „Constitutional recognition of ethnic difference – Towards an emerging European minimum standard?“ in *The Framework Convention for the Protection of National Minorities*, A. Verstichel, A. Alen (eds.), p. 20.

⁹ BiH constitution lists, among others, 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 1966 International Covenant on Civil and Political Rights, 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1992 European Charter for Regional or Minority Languages, 1994 Framework Convention for the Protection of National Minorities. Taken from OSCE official website <http://www.oscebih.org/overview/gfap/eng/annex6.asp> accessed on 25.01.2010.

is therefore focused only on the 3 constituent peoples, i.e. Bosniaks, Croats and Serbs. Moreover, “the composition of all common institutions (the Parliamentary Assembly, the Presidency, the Council of Ministers, etc) is based upon the two entities, three nations formula.”¹⁰

The political structure, starting from the highest office in the country, i.e. the Presidency, down to the local ones, reflects this division and disregard towards the members of national minorities. This exclusion of minorities as the most vulnerable groups in any country is even displayed in the BiH Constitution and it can be reflected in Ivanonić’s statement that says: “In the sense of Article 21(3) of the *Universal Declaration of Human Rights*, which stipulates that the “*will of the people will be the basis of the authority of the government*”, the Constitution bases itself on the will of “Bosniaks, Croats and Serbs, as constituent peoples (along the Others), and citizens of Bosnia and Herzegovina.” Thus, the basic idea of Dayton can be summarized as “one state – two entities – three constituent peoples.”¹¹ But where do national minorities fit in this rather ethnically divided image?

“Democratic” country of Bosnia and Herzegovina consists of - one may even say divides into - two entities, three constituent peoples and the “Others”. The crucial problem that many do not seem to notice is marginalization of the “Others”. Taking population into account, Bosnia and Herzegovina consists of 3 major ethnic groups (Bosniaks, Croats and Serbs) and 17 constitutionally recognized national minority groups.¹² These minority groups are the marginalized “Others” that no political force in the country seem to take into focus of their activities. Another reason for such a situation is the fact that these minorities and minorities in general are often considered to be “political outsiders whose identities do not fit the criteria defining political membership” in the country they live¹³ and “whose very existence challenges the prevailing principle of legitimacy.”¹⁴ If you take into account that the political situation of the state is tailored by the ruling elites that only strive to protect the “vital

¹⁰Zoran Pajić, “A critical appraisal of human rights provisions of the Dayton constitution of BiH,” p. 135.

¹¹ Dragan Ivanović, “Constitutional position of minorities in Bosnia and Herzegovina: A case of no majority,” in *Ethnic relations in South Eastern Europe: Problems of social inclusion and exclusion*, Nikolai Genov (ed.), p. 42.

¹² The law on protection of national minorities lists Albanians, Czechs, Germans, Hungarians, Italians, Jews, Macedonians, Montenegrins, Poles, Roma, Romanians, Russians, Russins, Slovaks, Slovenians, Turks and Ukrainians. Florian Bieber, *Bosna i Hercegovina poslije rata: Politički sistem u podjeljenom društvu*, p. 132.

¹³ Jennifer Jackson Preece, „Minority rights in Europe: From Westphalia to Helsinki,” p. 75.

¹⁴ Jennifer Jackson Preece, *Minority rights: Between diversity and community*, p. 182.

interests” of the three constituent groups, it is no wonder that members of national minorities are put aside.

As the country that is situated in one of the most turbulent regions of Europe, Bosnia and Herzegovina has always been a crossroad of different cultures and consequently religions. It has been the region where East and West clashed and created an abundant scope of countries, languages, alphabets, nations and religions. For many centuries, BiH existed as a state of different ethnic groups that nurtured “values of tolerance and coexistence of various ethnic groups.” Thus, BiH developed both as the country of all of its citizens and “social and political framework of development of cultural and ethnic identities of the Croats, Bosniaks and Serbs, together with members of minority ethnic groups.”¹⁵ Over the past decades, the political forces have managed to change this image of a multiethnic society that cultivates ideals of tolerance and living together. Instead, the struggle for one’s own national identity, which in this area equals to the struggle for one’s religion,¹⁶ has become the main driving force today. One can say that three main religions in the country, Islam, Catholicism and Eastern Orthodox Christianity, have actually tailored the society mostly politically, but economically and culturally as well.¹⁷

To prove the tight correlation between religion and politics in the country, two facts need to be presented. First, Bosnia and Herzegovina is run by three presidents each one representing one of the constitutional peoples (Bosniaks, Croats, Serbs), thus representing one of the religions.¹⁸ Second, one of the highest political bodies, i.e. the House of Peoples, is also comprised of only 5 members from each of the three constitutional peoples.¹⁹ Both of these provisions are legally guaranteed by the Constitution of Bosnia and Herzegovina, which is part of the international treaty that brought peace to the country, i.e. Dayton Peace Agreement (DPA).

¹⁵ Mirko Pejanović, *The political development of Bosnia and Herzegovina in the post-Dayton period*, p. 225.

¹⁶ As Schuman puts it, „In Bosnia and Herzegovina, people's religion is not just what they believe, it is also who they are. Their religion affects their identity, how they live and who they vote for.“ Michael A. Schuman, *Nations in transition: Bosnia and Herzegovina*, p. 74.

¹⁷ Ibid, p. 74

¹⁸ Art IV of BH Constitution

¹⁹ Art V of BH Constitution

Chapter 1.1: Problem statement

Now, the problem arises if and when people belonging not to one of the constituent peoples' but to national minorities' groups in BiH want to run for the office of the president or the House of the Peoples. Consequently, they are prevented to run for these offices only because of the fact that they are not Bosniaks, Croats or Serbs and therefore not Muslim, Catholic or Orthodox. According to this, the Constitution of BiH is directly violating two of the fundamental human rights: the right to political participation and the right to freedom of religion.

What can minority members do to change this inequitable situation? What can they do to alter their marginalized position? How can they voice their opinions and influence the decision-making process? According to some authors, the right to political participation is the crucial element that states need to focus on for the sake of developing a proper minority identity.²⁰ According to others, every citizen is equal when it comes to participation in decision-making process the society is involved in. Moreover, "individuals may not be excluded because they are members of minority groups nor because they propose particular measures."²¹ Accordingly, the state of BiH is strongly opposing these two arguments, which are the characteristics of liberal-democratic society, both in theory and practice.

Another human right that is in direct violation in BiH is the freedom of religion. As one of the focal characteristic that distinguishes minority members from majority, religion is consequently central in development of one's identity, in this case minority identity.²² Therefore, with its "unconstitutional" constitution, BiH is preventing the members of minority groups from developing their own identity, and is once again opposing one of the fundamental freedoms every democratic society strives for.

As the right to political participation is in the focus of the study, the religious aspect by which different ethnic groups identify themselves with will be used in certain arguments that will back up the central idea of amending the constitution and promoting political participation.

²⁰ Marc Weller, „Effective participation of minorities in public life,“ in *Universal minority rights – A commentary on the jurisprudence of international courts and treaty bodies*, Marc Weller (ed.), p. 479.

²¹ Steven Wheatley, „Non-discrimination and equality in the right of political participation for minorities,“ p. 5.

²² Zdenka Machnyikova, „Religious rights,“ in *Universal minority rights – A commentary on the jurisprudence of international courts and treaty bodies*, Marc Weller (ed.), p. 179.

Not only that minorities in BiH are not represented at all, they also have to deal with ethno-nationalistic ideologies of three leading groups of people in order to make their opinions heard. Moreover, Jews and Roma, as two oldest and most significant national minority groups in the country, are especially pressured since they are the most numerous ones and are most marginalized (Roma) and they tend to be the most active and most integrated in public life (Jews).²³

Chapter 1.2: Main hypothesis of the study

The main hypothesis of the work is that the Constitution of BiH needs to be amended, at least some of its articles, in order to provide for and protect equality of all BiH citizens and to guarantee some fundamental human rights to members of national minorities such as political and religious rights. Due to the fact that discussing the constitutional reform has been limited to articles written by certain legal scholars, the hypothesis will be based on the same.

What I will try to prove in the thesis is that the country of BiH is still run by ethnic elitist parties that do tend to bear “democratic” ideals, but only in their official party names, and are strongly influenced by one of the three religions and therefore protect the interests of one of the three constituent peoples. For instance, running for the president and entering the House of Peoples is only possible if you are a member of one of these parties and of one of these constituent groups.

After the end of the war, the Dayton Peace Agreement seemed to be the most reasonable solution that only took three warring groups into account. Now, when BiH is on its supposed way towards EU integrations, the time for changes has come. And those changes particularly refer to improving the status of national minorities in BiH, especially political one. As long as their voices are not heard, Bosnian society will not represent a whole, i.e. a unified society and consequently will not be able to move towards the EU. And to be able to do this, the country needs to make sure that minorities are allowed to run for political offices on all levels and to be represented in, at least, state-government bodies.

Chapter 1.3: Theoretical framework

In order to present more valid background for the arguments in the study, a cohesion between a theoretical approach and developing strategy will be used as theoretical framework of the

²³ Florian Bieber, *Bosna i Hercegovina poslije rata: Politički sistemi u podijeljenom društvu*, p. 9.

paper concerned. Thus, Emerson's "*Theory of Political Representation in the Public Sphere*" and Council of Europe's "*Social Cohesion Model*" is presented. Having in mind transcendentalism of Emerson's philosophical legacy, this theory will significantly help understand the importance of representation in post-modern democratic societies, especially the representation of minorities in multi-ethnic states. Strategy for social cohesion will, on the other hand, clarify and offer possible solutions for democratic societal structuring, especially for a society which tends to favor certain ethnic groups from others.

Chapter 1.3.1: Theory of political representation in the public sphere

Emerson's theory of political representation is centered on the idea that "representative men are individuals who represent the beliefs, values, and ways of life present in their communities."²⁴ One of the characteristics of successful democratic societies is political participation. Since neither political participation nor participation in public sphere can be direct, each community has to have representatives. Not only do these representatives arbitrate participation in the government, they also commence public discussions in which they promote ideas of their own communities.²⁵ Emerson depicts a participant in political and public deliberations as the one who truly represents his/her people. His essay "Literary Ethics" neatly sums up this argument, "The few scholars in each country, whose genius I know, seem to me not individuals, but societies; and, when events occur of great importance, I count over these representatives of opinion, whom they will affect, as if I were counting nations."²⁶ How can a representative count for the whole community? In his view, person who is representing others has the ability to unify different beliefs of the people. Moreover, because of the connection between the representatives and their people, the representatives can speak and think for their constituencies as well.²⁷ Connection with the community seems to be the focal point in having a valid representative. If the community does not regard the representatives as members of their own constituency, they will consequently lose the support of the group. Therefore, representatives need to see "what men want" and share their values.²⁸ Why is it so important to share common values and ideas? Would not that abolish diversity in each society? In Emerson's view, it is important to have similar or same set of

²⁴ Hans von Rautenfeld, „Thinking for thousands: Theory of political representation on the public sphere,” p. 184.

²⁵ Ibid, p. 184

²⁶ Ibid, p. 185

²⁷ Ibid, p. 186

²⁸ Ibid, p. 188

ideals and values in order to prevent an individual from exercising absolute power and “invent it in the people as a whole.”²⁹ A democracy which entails representative segment is “the best defense against the domination of any part of a society by any other.” It also represents the best mechanism for fighting “oppression by a dominant part of a society, which would prevent new social forms from arising and achieving representative expression.”³⁰

How can a multi-ethnic and multi-cultural society successfully implement theory of political representation? Would not that divide the society even more? Emerson had rather opposite point of view. According to him, political representation practice shows people how to accept different stands and in the same time how to do that with other people as well. The vast diversity of values and ideas “gives citizens enough distance from themselves and their own ideas to see that theirs are somewhat contingent and mutable, and not entirely universal and permanent.” This diversity will in turn “ward off the risk of domination.”³¹ What people must keep in mind, especially the ones in government, is that the forms of political game are constantly changing. There needs to be constant transformation of old rules and regimes in order to keep up with the new social developments that will in turn “ensure the continual health of the democracy.” Consequently, one of the most important provisions of democracy is the rotation of the representatives in the government, even in the highest offices.³²

This theory will be rather useful in explaining the importance of providing representatives, especially for the unrepresented minority groups, on different levels of the government, including the highest levels in the state, in order to protect and promote common values and ideals these groups have.

Chapter 1.3.2: Strategy for social cohesion

The focal idea that lies behind this strategy is that social cohesion represents “the capacity of a society to ensure the welfare of all its members” in order to avoid “polarization.” That kind of society is “a mutually supportive community of free individuals pursuing these common goals by democratic means.”³³ Moreover, it can never be expected of a society to be completely cohesive. Another important factor of this model is in the fact that social cohesion

²⁹ Ibid, p. 189

³⁰ Ibid, p. 190

³¹ Ibid, p. 192

³² Ibid, p. 194

³³ Council of Europe, „A new Strategy for social cohesion,“ Para. 1.

http://www.coe.int/dg3/socialpolicies/socialcohesiondev/source/RevisedStrategy_en.pdf

represents constant pursuit of the ideals that enable societies manage their diverse groups. It also means that in order to achieve such a harmony, the social cohesion “needs to be nurtured, improved and adapted.”³⁴ This especially holds true for societies such as Bosnian and Herzegovinian, in which deep polarization exists not only between majority and minority groups, but between majorities themselves. This strategy can also prove extremely helpful if we take into consideration that political, economic and cultural stagnation have been hampering the overall development of the country, especially the progress of minority protection. Taking into consideration current preoccupation of international community with minority rights and their protection mechanisms, it is exactly that segment of Bosnian society that needs immediate nurture and development. In order to fully provide for creation of a cohesive society, BiH government needs not only to provide equality and non-discrimination but also: a) possibility for every member of the society to fully participate in the society, b) freedom for every person to be responsible for their own progress, c) recognition of every individual’s capability to improve society’s progress regardless of their ethnic and religious background.³⁵ As the society provides equal protection and possibilities for its citizens, so do citizens begin to develop a sense of working and striving for greater ideals, for something that will bring prosperity to all of them. Therefore, social cohesion model considers a society cohesive only when “people accept responsibilities for one another”³⁶ and when they start developing “a sense of belonging, of commitment to shared social goals.”³⁷ This will naturally not be easy in a society that focuses only on major ethnic groups. And while protecting only constituent groups of people and providing for their prosperity, BiH is only moving away from the cohesion model. By steering away, the society only deepens and stigmatizes the differences that once led to bloodshed.

Besides listing children, young and elderly people, migrants and people with disabilities as the most vulnerable groups in a given society, the Council of Europe stated that integration of minorities into a society is of “utmost importance to social cohesion.”³⁸ Besides providing equality and non-discrimination for all its members, BiH could best improve minority integration by guaranteeing minority members equal access to political and government posts at all state levels and by providing them with legal rights for political participation.

³⁴ Ibid, Para. 3.

³⁵ Ibid, Para. 11.

³⁶ Ibid, Para. 32.

³⁷ Ibid, Para. 34.

³⁸ Ibid, Para. 15.

Chapter 1.4: Methodology

The methodological approach used in this paper will be based on qualitative methods. Since the main focus of the study is political participation of minorities, the paper will be dealing with general minority rights as well. Therefore, the author will have to present and explain why and how some of the most important minority rights provisions and conventions were created and what their further impact in Bosnian society is. Framework Convention for the Protection of National Minorities, as the focal minority rights document in BiH, will be in the focus of study analysis. In a critical approach, the author will try to explain advantages and disadvantages of this legally binding document. Moreover, in order to present rather complex and unique political situation in Bosnia and Herzegovina not only when it comes to ethnic groups but also when it comes to national minorities, the study will have to focus on one of the main obstacles for minority participation in the country, namely the BiH constitution. The core of the thesis will be based mainly on primary sources such as conventions, constitutions and laws but it will also be based on secondary sources such as books and articles analyzing and presenting various standpoints regarding ethnic nationalism, constitutionalism and political participation of national minorities. The author will also incorporate couple of interviews and statements of the representatives of Jewish and Romani communities, who are actively striving to improve the situation of their minorities, as well as with civil servants whose main area of work deals with human and minority rights. The information obtained from various literary sources are used and analyzed in order to support the hypothesis that the Constitution of BiH needs to be amended in order to provide fundamental right of political participation and freedom of expression for members on national minority groups.

Chapter 1.5: Significance of the study

In the era of European integrations and enlargement, the question of minority rights protection represents one of the most significant aspects a country needs to provide for before it can even consider becoming a part of European family. Since Bosnia and Herzegovina has heroically decided to become member of the family, despite its political crisis, it is the question of respecting and implementing minority rights provisions that will come into the fore of international focus. Therefore the aim of the paper will be to provide better understanding of the minority rights problems in the country. The cases of Romani and Jewish community will not only be used because of their recent appeal to the European Court of Human Rights in the case *Sejdić and Finci versus Bosnia and Herzegovina* but because of their level of activity in

fighting for their fundamental rights. These cases will be used to show how the Bosnian government is (mis)treating members of minority groups and how the Bosnian constitution is violating some of the basic human, and minority, rights such as the right to political participation. The study will hopefully contribute to the situation that prevails in the public opinion and that focuses on the constitutional changes. As it will be presented later, the Constitution not only violates fundamental rights but it also obstructs and degenerates the creation of identity that is of crucial importance for the survival of these minority communities. While the ruling political elite might not see how important it is to right the wrongs that minorities have been going through, it is definitely in country's best interest not only to speak about this problem more but to find an immediate solution for it. Current constitution and violation of minority rights will only mean veering away from the European integration path.

Chapter 1.6: Structure of the paper

The introductory chapter gave background information on the situation of minority rights in the region and certain organizations that deal with them. It also provided basic input on the political situation in Bosnia and Herzegovina. Chapter Two provides critical assessment of the FCNM, first and foremost, due to the fact that BiH's Law on the Protection of National Minorities was primarily based on this legal document and because FCNM is regarded as one of the most important legal documents in the country. The problem of weak and vague wording that FCNM consists of is presented in a critical approach. Some possible solutions for such a problem are provided. Moreover, one of BiH's responsibilities as the member state of Council of Europe is to draft and submit state reports concerning position of minorities. Special focus is directed at position of Jewish and Romani communities according to those reports. Chapter Three presents a crucial insight into importance of political participation and representation in governmental bodies. It sets up several possible legal solutions regarding the specific political and ethnic situation in BiH. Chapter Four deals mainly with 1) the Constitution, as the main obstacle for creation of minority identity through political participation, and 2) Law on national minorities, as the main tool for protection and implementation of the basic minority rights in the country and Election law, as the main legal document that sets the rules regarding the electoral processes. In a critical approach, it analyzes constitutional provisions that established and promoted ethnic division and legal rights that minorities are granted. It suggests possible amendments necessary for protection,

promotion and implementation of basic political rights. Chapter Five is analysis of the minority situation regarding Jewish and Romani communities. Field work that consists of several interviews and media reports is used to present the current position of these two communities regarding the political situation in the country and their inability to participate in decision-making processes. Chapter Six presents the final summary, concludes the paper and gives possible solutions for future improvement of minority rights in the country.

Chapter 2: Political participation of national minorities

Every democratic society embodies different values, from pluralism and tolerance to freedom of expression and participation.³⁹ The right to political participation is regarded as one of the most fundamental human and minority rights in any liberal or democratic society. Any such society presupposes the idea that the decision-making process is indeed tailored by the needs of the public but it also has to reflect current population demographics. In most democratic societies, the majority is the main actor in political deliberations. Therefore, majority deliberations influence and shape all the aspects of public life, which can pose a threat and turn into exclusion of minority groups. In societies where ‘identity politics’ overpowers ‘issue politics’, which is the case with politics in BiH, minority groups certainly get discriminated against.⁴⁰ Current understanding of democratic society entails that the society is obliged to accept and promote the right of political participation, especially for minority groups. According to Susan Marks, recognition of such right is precondition for creating the “underlying principles of democracy: popular sovereignty and political equality.”⁴¹ For a society to be truly democratic creation, one needs to have freedom to directly or indirectly participate in the decision-making processes and to voice their opinions on matters regarding well-being of the citizens. Participating in such processes, individuals will strive for common social values and consequently start developing a sense of belonging to the society. Political participation also develops the creation of one’s identity by allowing them to present their opinions in various governmental bodies thus resulting in government taking into consideration and respecting all the different points of view and instead of suppressing them. For a country that is highly multicultural and consists of at least 20 different ethnic groups, which might or might not have the same values and ideals, Bosnia and Herzegovina should focus on promoting and implementing the principles of equality and political participation. By doing this, BiH can actually overcome ethnic differences that are deeply rooted in the society and that pose a serious threat to the development of a society. These differences are more than often sources of many arbitrary decisions and actions, especially regarding national minorities. What is the better way to reach a common goal than to allow all the members of different groups to present their respected points of view and discuss the issues that they think

³⁹ Yash Ghai, “Public participation and minorities,” p. 3.

⁴⁰ Marc Weller, „Effective participation of minorities in public life,“ in *Universal minority rights - A commentary on the jurisprudence of international courts and treaty bodies*, Marc Weller (ed.), p.477.

⁴¹ Susan Marks, „The riddle of all constitutions,“ cited in Steven Wheatley, *Democracy, minorities and international law*, p. 109 at p. 186.

are of importance for the future progress of the whole society? Promoting principle of equality and fostering political participation the country actually shows all its members that it respects, recognizes and acknowledges various different opinions. It is high time for Bosnian authorities to realize that having so many ethnic and minority groups in these times can only become advantage and a characteristic that not so many countries can say they have. In times when differences are highly appreciated, BiH should adopt inclusive approach in its political philosophy and cultural, economic and social matters.

The subsequent part of the chapter will focus mainly on the importance of promoting and protecting minority rights through political participation of minorities. Furthermore, the chapter will emphasize the significance of recognizing all the minority groups that reside in the country as a precondition for effective participation in political deliberations. Finally, the chapter will present different forms of political participation that range from formal to informal with the special emphasis on parliamentary participation (as the most direct form) and participation through advisory bodies.

Chapter 2.1: Importance of political participation and implementation problems

One of the most crucial things that the right to political participation of members of national minorities entails is creation of their minority identity. Besides FCNM and Article 15 that emphasizes the importance of creating minority identity through political participation, another document that is regarded highly important is OSCE's Lund Recommendations on the Effective Participation of National Minorities in Public Life, created in 1999. The main purpose of this document is to promote effective participation in public life and to emphasize its crucial importance in every democratic society. It also states that by integrating minorities in the society, the state will enable them to develop and strengthen their identity and characteristics. These Recommendations are based on internationally recognized human principles such as equality and non-discrimination. Moreover, every democratic state has an obligation to respect these international principles that enable the creation of cohesive and democratic civil society.⁴² Therefore, only by allowing minority members to take active part in decision-making processes will the citizens be able to protect their distinctive characteristics and consequently maintain their identity. Accordingly, Ghai notes that

⁴² Organization for Security and Cooperation in Europe, "The Lund recommendations on the effective participation of national minorities in public life," paras 1. and 2., available at http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf

minority groups can indeed build and protect their identity through participation. Furthermore, he adds, ensuring non-discrimination provisions is not enough. Securing minority participation is how these provisions become fully effective. Consequently, political participation may indeed prove the ability of minority members to put focus on issues relating to them. Moreover, they can defend their ideals and propose reforms for the betterment of the whole society.⁴³ Only by reaching this level of participation and influence on the political process will the society become fully cohesive and achieve its democratic progress. On the other hand, exclusion of minorities from “political, social and economic decisions” will only have negative effects not only on minority members but on society in general. And it can even lead to “missed opportunities, conflict and ruined lives.”⁴⁴

Not only that the right to political participation is essential to minority identity but also to the current understanding of minority protection in general.⁴⁵ Thus, it flows that by protecting and developing one’s minority identity in means of allowing and promoting political participation, one is also providing basis for protection of other minority rights, such as right to religious freedom, right to freedom of expression, right to equal protection by the law, etc. Therefore, the importance of minority participation only gains in its momentum. According to Florian Bieber, the significance of political participation of minorities can best be presented in two arguments. First, all the minority rights, which members of minority groups are trying to realize, “cannot be effectively ensured, unless the minority itself is actively partaking in the political decision-making processes which govern the protection of minority rights.”⁴⁶ It follows that with no participation, all other minority protection mechanisms are severely hampered. Second, without political participation minorities can be excluded from the political processes.⁴⁷ Consequently, creation of a cohesive democratic society in Bosnia and Herzegovina can thus be severely weakened if the minorities do not participate in its political processes. In a country that is highly focused on three majority groups only, which in turn influence the overall political decisions, trying to implement minority participation might pose some serious problems. Bosniaks, Croats and Serbs, as well as their leaders, would

⁴³ Yash Ghai, “Public participation and minorities,” p. 4.

⁴⁴ Ibid, p. 2.

⁴⁵ Ibid, p. 3.

⁴⁶ Florian Bieber, „Balancing political participation and minority rights: Experience of the former Yugoslavia,” p. 1.

⁴⁷ Ibid, p. 1.

seriously oppose this option of including minorities into decision-making process for the sake of preserving and protecting their own identity. However, this would not be the only obstacle.

According to Palermo and Woelk, three problems appear when trying to implement political participation of minorities. First, a problem arises when there is tension between majority principle and minority rights.⁴⁸ As it was already mentioned, the three groups that comprise majority in BiH do not necessarily support the argument of promoting minority rights in the country, let alone minority participation. Secondly, implementation of the political participation, and representation as well, in legal instruments does present an “exception to the equality principle.” Accordingly, this ‘problem’ can be solved by “properly accommodating needs stemming from equally protected constitutional values, with minority protection being one of them.”⁴⁹ This argument, which also supports the hypothesis of the study, reflects the need of having a constitution that would not only protect the rights of majority groups but of minorities as well thus providing same rights for everybody in BiH and giving every individual equal protection by the state. And thirdly, in order to provide for the right of political participation, the society needs to recognize two different notions of the concept of the nation: democratic concept, thus depicting the civic society in general and ethnic concept referring to the expression of different religious, traditional, linguistic and cultural characteristics.⁵⁰ Therefore, political participation will benefit and protect not only different ethnic groups and their ideals but it will also prosper the society as a whole.

Putting aside these problems, political participation is still regarded as one of the most important issues one democratic country as BiH needs to take into serious account. Without political participation of all groups in BiH, especially minority ones, the values of democracy can never be achieved. And without minorities participating in decision-making processes, no country is integrated and whole. Thus, Bieber notes that any government could function with the rule of law, but without political participation, as one of the underlying values of democracy, any government work is ineffective.⁵¹ Similarly, Ghai stresses out that a truly democratic society provides ground for its minorities to voice their opinion, present their problems thus setting the basis for deliberative democracy. The underlying idea is not to

⁴⁸Francesco Palermo and Jens Woelk, „No representation without recognition: The right to political participation of (national) minorities,“ p. 226.

⁴⁹ Ibid, p. 226.

⁵⁰ Ibid, p. 226.

⁵¹Florian Bieber, „Balancing political participation and minority rights: Experience of the former Yugoslavia,“ p.5.

provide minority groups with privileges but to put them at equal level as the majority members. Not only that states which promote participation become more stable but more prosperous as well.⁵² It follows that the only solution for the political stagnation BiH, which has been present in the past couple of years, is integration of minorities by means of allowing them political participation as equal actors as majority members. Thus, minority participation places “old policies in new contexts.” Moreover, it enhances dialogues among ethnic groups and reduces “ethnic conflicts borne out of misunderstanding or ignorance.”⁵³

Chapter 2.2: Minority recognition

One of the first preconditions necessary for implementation and practicing of minority participation is recognition, which can be such a powerful tool in shaping minority identity. According to Taylor, creation of our identity is somehow influenced by recognition of those differences but it can also be influenced by misrecognition, which in turn can cause harm, oppression and distortion of the real identity. Furthermore, Taylor finds that the most significant fact about recognition is that it shapes our identities through creating dialogues with the others.⁵⁴ This recognition entails high level of acknowledging different ethnic groups that inhabit BiH and that value and nurture various ideals. Moreover, it also entails development of sense of tolerance towards anybody and anything that is different than the three major ethnic groups. With establishing this level of recognition, BiH will be able to fully implement political participation of national minorities at all state levels. International understanding of minority recognition entails that this difference is not only “consistent with, but in fact a precondition for, the maintenance of a legitimate international order.” Moreover, Kymlicka notes that all the social, political, economic, cultural and democratic goals, which a society is trying to achieve, “depends on the recognition of minority and indigenous people.”⁵⁵ One of the crucial forms of recognition is definitely political recognition. Owen and Tully regard this recognition as recognizing the citizens as “free and equal persons or members of the polity.” Moreover, they emphasize that these persons can have religious and cultural differences “that are worthy of recognition and respect.”⁵⁶ Country’s cultural and

⁵² Yash Ghai, “Public participation and minorities,” p. 5.

⁵³ Ibid, p. 5.

⁵⁴ Charles Taylor, „The politics of recognition,“ in *Multiculturalism: Examining the politics of recognition*, Charles Taylor and Amy Gutmann (eds.), pp.25-34.

⁵⁵ Will Kymlicka, *Multicultural odysseys: Navigating the new international politics of diversity*, p.45

⁵⁶ David Owen and James Tully, „Redistribution and recognition:Two approaches“ in *Multiculturalism and political theory*, Anthony Simon Laden and David Owen (eds.), p. 266.

religious variety is by far the most valuable ideal that all should strive to protect and nurture. BiH already possesses this ideal. The logical step would be to acknowledge and protect these differences without arbitrary decisions that could lead to ethnic tension and conflict. According to Owen and Tully, conflict is a result of arguments over legal aspects that allow the people to recognize each other as equal members and that influence their actions. Thus, this struggle for recognition always focuses on the current norms of “reciprocal recognition”.⁵⁷ Since the current legal norms in BiH regarding recognition and protection of ethnic differences only relate to three constituent group, one would not be far from the truth to say that a chance for struggle over minority recognition becomes more factual every day. This is exactly the reason why members of Romani and Jewish minorities, namely Dervo Sejdić and Jakob Finci, appealed to the European Court for Human Rights against constitutional discrimination of minorities in BiH.⁵⁸ Consequently, this has given members of other national minorities in the country strength to start voicing their opinions more and to demand formal recognition by the government in order for them to become more active participants in political processes. As far as the legal recognition of national minorities in BiH is concerned, the achievement in this field is rather incomplete. The Law on the Protection of Rights of Persons Belonging to National Minorities does indeed recognize 17 national minorities in the country and gives them the right to proportional participation at all state levels.⁵⁹ On the other hand, the Constitution of BiH recognizes only the rights of constituent groups of people, which in turn poses major problem for minority participation in state offices.

Some scholars, like Palermo and Woelk, differentiate between two types of formal recognition of national minorities, international and domestic. International law provides for fundamental minority rights without “explicitly recognizing them.” On the other side, domestic legal documents achieve the level of recognition by identifying communities of people that will be beneficiaries of legal protection system of the state.⁶⁰ Bosnian government followed the exact example. By recognizing and protecting only three groups, local authorities made arbitrary decision that not only hampered the chance of national minorities of actively partaking in political processes of the country but it also seriously obstructed

⁵⁷ Ibid, p. 267.

⁵⁸ The following chapter will focus more on this appeal.

⁵⁹ Law on rights of national minorities, Articles 3 and 19 available at http://www.bhric.ba/dokumenti/legislativa/BHS_2_Zakon_o_manjinama.pdf. More on this law in subsequent chapters.

⁶⁰ Francesco Palermo and Jens Woelk, „No representation without recognition: The right to political participation of (national) minorities,“ p. 227.

creation of minority identity. Thus, Palermo and Woelk emphasize that the existence and, consequently, recognition of national minority groups represent “a question of fact and not of definition.”⁶¹ Besides legal recognition, there needs to be recognition of ethnic groups among themselves. Rainer Forst emphasizes the *respect conception*, where all the ethnic groups need to recognize one another in reciprocal way. He states that the social framework needs to be tailored by norms where everybody is recognized as equal and where there is no protection of only one ethnic group.⁶² In order to achieve these norms, one needs to develop a sense of respect for other people as equal citizens. This in turn entails that there need to be differentiations between a) the ideals a person fully respects, b) the beliefs a person trusts to be morally wrong but has to tolerate because other individuals find it morally right, and c) the principles that cannot be tolerated by any of the individuals.⁶³ In author’s opinion, the citizens and ethnic groups in BiH fail to differentiate between the last two norms. Each group only respects and recognizes its own ideals and values.

Why is recognition of not only minority groups but of all ethnic groups in one country through means of interactive debates so crucial and focal for its development? Owen and Tully propose at least four arguments to support this fact. First, principles of constitutionalism and democracy come into focus. Constitutionalism means that political power is practiced in the accordance with international principles. Democratic principle entails that people represent focal part of democratic governing by participating, directly or indirectly through representatives, in democratic processes of decision-making. Secondly, there is the norm of accepting mutual recognition. For the achievement of mutual recognition, one needs to start with its own identity. If the identity of an individual and the group are created and accepted as such rather than imposed upon, the mutual recognition can be achieved. Since representatives strongly influence the creation of minority identity, it is important to have reliable representatives.⁶⁴ Such representatives need to mirror the needs and values of the group that is represented. These individuals also have to protect and promote ethnic ideals while deliberating in decision-making processes. According to Emerson, such individual reflects the “ideas” of ethnic groups, such as “interests, sentiments, beliefs, values, principles,

⁶¹ Ibid, p. 227

⁶² Rainer Forst, „A critical theory of multicultural toleration“ in *Multiculturalism and political theory*, Anthony Simon Laden and David Owen (eds.), pp. 295-296.

⁶³ Ibid, p. 296.

⁶⁴ David Owen and James Tully, „Redistribution and recognition:Two approaches“ in *Multiculturalism and political theory*, Anthony Simon Laden and David Owen (eds.), p. 281.

preferences, ways of life, aspirations, aversions and political identities.”⁶⁵ Moreover, another precondition necessary for achievement of mutual recognition is “multilogue”, i.e. a series of dialogues of all ethnic groups that make one society.⁶⁶ In case of BiH, such a dialogue would have to be made between at least 20 ethnic groups, including both constituent and minority groups. Seeing how three constituent groups hardly make decisions, such a “multilogue” would indeed present a political challenge for Bosnian society. Thirdly, the notion of identity and norms of recognition are highly dependable on exchange of ideas by means of participating in dialogues, which provide space necessary to realize the struggle for recognition. Fourthly, mutual recognition also demands that all parties concerned have an “effective say” in the process. According to Owen and Tully, “a lone theorist, an elite court, and a distant ministry are in contrast probably least able to meet this requirement...”⁶⁷ This in turn supports the fact that without representative and minority participation, minority protection can never be completely achieved. And without amending the Constitution of BiH in order to allow minorities to participate at all levels, minority rights will not be completely realized in Bosnia and Herzegovina. In order to prevent this, minorities in BiH need to fight to be accepted equal to the constituent groups. One needs to bear in mind that the form of mutual recognition can never be final, which entails that it needs to be in constant dialogue with the peoples and open for reasons for and against it. This means that people as subjects under direct influence of recognition aspect can always question it and that they have to be active participants in interacting with those who govern. According to Owen and Tully, having an effective say over the issues that matter is the basic freedom an individual has in a democratic society.⁶⁸ Bosnian society will reach this level of democracy only when it formally recognizes all the ethnic groups as equals, when it provides legal protection for all individuals inhabiting the country and when it includes national minorities into decision-making processes that tailor the future development of the country.

Chapter 2.3: Different forms of political participation

Political participation of national minorities includes a wide spectrum of participatory forms in executive, judicial or legislative government. These forms range from parliamentary

⁶⁵ Hans von Rautenfeld, “Thinking for thousands: Emerson’s theory of political representation on the public sphere,” p. 187.

⁶⁶ David Owen and James Tully, „Redistribution and recognition: Two approaches“ in *Multiculturalism and political theory*, Anthony Simon Laden and David Owen (eds.), p. 281.

⁶⁷ Ibid, pp.282-283.

⁶⁸ Ibid, pp. 286-287

participation over minority councils to institutional bodies that protect minority rights and thus try to influence the political system of a state. For instance, many governments created bodies that promote anti-discrimination, minorities' ombudspersons, various commissions and advisory bodies that examine the difficulties those minorities face in order to "lobby for legislative or administrative reforms and to empower minorities."⁶⁹ The most crucial thing is that members of minority groups partake in decision-making processes one way or another. Moreover, participation can also be reflected in the forms of debates that lessen the differences between minority and majority groups. Besides formal bodies providing participatory roles, many non-formal bodies, i.e. non-governmental organizations can also help immensely in influencing decision-making processes. These organizations create many chances for social debates between minorities and the state.⁷⁰ The underlying message would be that regardless of formal or non-formal way of participation in political processes, minority members have to be active players in such deliberations in order to provide for the most efficient mechanism for protection of their rights. Two aspects need to be taken into account when considering representative government. Firstly, any state, in no way, should favor a certain ethnic group. Secondly, government should be comprised in such a way that it represents all the people of the state.⁷¹ Not only that the state of BiH favors constituent groups of people, its government consequently represents only them.

As already stated above, the most common form of participation is parliamentary representation. According to the Universal Declaration on Democracy, every democratic society entails presence of a parliament in which "all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action."⁷² In author's opinion, national parliaments need to mirror the variety of ethnic landscape a certain state consists of. According to Wheatley, instead of mirroring the society, national legislative bodies should remove the obstacles that prevent certain groups from participating.⁷³ Thus, the main obstacle for effective minority participation in BiH is the Constitution and only by amending it and giving equal status to minorities will this obstacle be removed. Unless BiH parliament, and especially House of

⁶⁹ Yash Ghai, "Public participation and minorities," p. 12.

⁷⁰ Ibid, p. 12.

⁷¹ Steven Wheatley, *Democracy, minorities and international Law*, p. 143.

⁷² Inter-Parliamentary Union, Universal Declaration on Democracy, para. 11. available at <http://www.ipu.org/Cnl-e/161-dem.htm>

⁷³ Steven Wheatley, *Democracy, minorities and international Law*, p. 141.

Peoples, does not include minorities in the decision-making processes, the state of BiH will be “unable to take into account the interests and preferences of members of national, ethnic, cultural, religious or linguistic minorities.”⁷⁴ Without effective participation of minorities in the parliament, the implementation of the international human and minority rights documents that BiH has ratified will seriously be hampered.

In order to implement participation as easy as possible, the government can use a set of approaches depending on whether they are reserved solely for minority members or they apply for all the groups. Participation can be facilitated by 1) lowering thresholds for entering parliament, 2) guaranteeing reserved seats, 3) reducing the quorum for registration of a party, 4) delimitating constituencies, in majority voting, and 5) funding for minority parties.⁷⁵ Considering the political situation in BiH and constitutional problem that minorities are facing when it comes to marginalization, first two approaches are of crucial importance for successful implementation of minority participation. Firstly, when considering parliamentary thresholds, the Election Law of BiH clearly states that when entering the Parliament, “candidates cannot participate in the allocation of mandates if they do not win more than 3% of the total number of valid ballots in an electoral unit.”⁷⁶ This threshold can be quite problematic for small minority groups residing in BiH.⁷⁷ On the other side, Frowein and Bank state that such thresholds are needed in order to prevent the parliament from splitting into extremely small groups, which could in turn make decision-making process rather long and complicated. And since minorities are often comprised of small number of members, there is a possibility that they become “deprived of any political representation.”⁷⁸ Thus, states should introduce lowered thresholds for members of minority groups. Secondly, the ‘reserved seats’ approach is a counterpart to threshold representation. The Election Law of BiH in its Article 9.1 states that, out of 42 seats, 12 compensatory mandates will be provided for BiH parliament⁷⁹ only if the political party or the candidate win more than 3% of the votes.⁸⁰ Knowing how ethnically divided BiH is, it is understandable to expect that ethnic groups will vote for their ethnic leaders. How can minorities expect to win any of those 12 seats then?

⁷⁴ Ibid, p. 142.

⁷⁵ J.A. Frowein, Roland Bank, „The participation of minorities in decision-making processes,“ p. 6.

⁷⁶ Election law of BiH, Art. 9.6 available at <http://www.izbori.ba/documents/ZAKONI/POIZpw110508.pdf>

⁷⁷ According to the last census there were 590 Czech and 526 Polish people residing in BiH. 1991 Population Census available at http://www.bhas.ba/arhiva/census1991/Etnicka_obiljezja_stanovnistv_bilten_233.pdf

⁷⁸ J.A. Frowein, Roland Bank, „The participation of minorities in decision-making processes,“ p. 6.

⁷⁹ Election law of BiH, Art. 9.1

⁸⁰ Election law of BiH, Art. 9.6

Moreover, Lijphart notes that in deeply fragmented societies, the election results are quite predictable because each ethnic group will vote for its party that protects and represents the values of its members and not the ‘Others’.⁸¹ On the other hand, some other countries guarantee reserved minority seats for minority representatives in their State parliaments. For instance, Slovenia reserves seats to certain minority group whose members directly elect their representative(s).⁸² Thus, each country, depending on its political nature, develops the parliamentary representation approach. According to Young, practice of reserved seats should be “a last resort and temporary option for representing otherwise excluded representatives.” The only justification in using this approach is that it reflects the will of people and their ideals.⁸³ On the contrary, the Advisory Committee’s opinion on Romania highly supported the fact that members of minority groups are given constitutionally guaranteed representation in Parliament.⁸⁴ This is an approach that Bosnian government should at least take into consideration.

Which approach should Bosnian government implement? Moreover, which minority groups are entitled to use these approaches? According to Kymlicka, one of the criteria that allows the claim for representation is if the members of minority groups are discriminated against in the political process.⁸⁵ Obviously, members of Jewish and Romani minorities, as well as other minority groups in BiH, are clearly discriminated against in a way that they are not allowed to run for the President of the country and for the House of Peoples as the Upper House of BiH Parliament. When considering whether proportional or threshold representation should be used, Kymlicka notes that it depends on the political nature of the state, i.e. if the state has adopted “consensual, consociational, super-majority or other kinds of compromise of decision-making rules. The more consensual the process, the more threshold representation may be sufficient.”⁸⁶ Considering the current state of political affairs in BiH and taking into account threshold, proportional and reserved seats approaches, the latter would represent the most viable solution for including minorities into political deliberations in the country.

⁸¹ Aarend Lijphart, „Self-determination versus pre-determination of ethnic minorities in power-sharing systems,“ in Steven Wheatley, *Democracy, minorities and international law*, p. 275 at p. 170.

⁸² Council of Europe, “Synthesis of the replies to the questionnaire on participation of minorities in decision-making processes,” para.3. available at [http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_DH-MIN\(99\)2_synthesis_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_DH-MIN(99)2_synthesis_en.pdf)

⁸³ Iris Marion Young, „Inclusion and democracy,“ cited in Steven Wheatley, *Democracy, minorities and international law*, p. 150 at p. 147.

⁸⁴ Council of Europe, “Advisory Committee’s Opinion on Romania,” ACFC/INF/OP/I(2002)001, para. 65. available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNDdocs/PDF_1st_OP_Romania_en.pdf

⁸⁵ Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights*, p. 144

⁸⁶ *Ibid*, p. 147

Therefore, if the House of Peoples is comprised of five delegates from each of the three constituent groups,⁸⁷ there needs to be amendment that will enable at least one delegate to represent all the minority groups in the country, thus strengthening the minority protection more.

According to Weller, if parliamentary participation is not possible, 'minority consultative bodies' become the next effective protection mechanism. Furthermore, he notes that these bodies "may offer all minorities a form of engagement with the government and legislature and early input into important decisions of relevance to them."⁸⁸ Besides parliamentary representation, Wheatley finds that advisory bodies can immensely influence the political decision-making process. According to him, the European examples have shown that the most effective way of including members of minority groups in political deliberations is the creation of advisory or consultative bodies. These bodies enhance the inclusion of minority members into decision-making processes.⁸⁹ Creation of the Council of National Minorities at the state level in BiH will accordingly only help in promoting and strengthening the participation of national minorities in political affairs and bodies, especially in the State Parliament. As an advisory body, the Council will provide the Parliament with all necessary opinions and suggestions regarding the position of national minorities. Moreover, this body is also entitled to propose delegates to variety of parliamentary commissions while discussing minority issues.⁹⁰ But reality is rather different. In a recent interview, the former president of Jewish Community in BiH, Jakob Finci, stated that the consultative role of this body is rather neglected due to the fact that no authorities ask for any advice while creating minority-oriented documents and activities. But he also adds that, even though this body's role is quite weak at the moment, its creation still represents improvement in minority position in BiH compared to 1995.⁹¹ Ideally, all representatives of seventeen national minority groups were supposed to be in the Council. Unfortunately, only ten of them applied for the representative positions, i.e. Albanians, Czechs, Hungarians, Italians, Jews, Macedonians, Poles, Roma, Slovenians and Ukrainians. According to the President of the Council, Nedžad Jusić, the future plans of this body will mainly be focused on creating programs for improving the

⁸⁷ Election Law of BiH, Art. 9.12

⁸⁸ Marc Weller, „Effective participation of minorities in public life,“ in *Universal Minority Rights - A commentary on the jurisprudence of international courts and treaty bodies*, Marc Weller (ed.), p.479.

⁸⁹ Steven Wheatley, *Democracy, minorities and international law*, p. 159.

⁹⁰ Roma Informative Center, "Council on National Minorities," available at http://www.bhric.ba/Romi_BiH.php

⁹¹ Interview with Jakob Finci conducted on 26.03.2010.

position of national minorities in BiH. Moreover, this body will strive to achieve equal status as all the other commissions with the Parliament. It will suggest creation of the Ministry of National Minorities as the highest state body that will protect the rights and position of national minorities in BiH.⁹² Currently, the Council on National Minorities represents the only institutional mechanism for the protection and promotion of minority rights in BiH. As such, the Council should push forward the promised activities and it should focus even more on amending the Constitution of BiH in order to enable equal status to national minorities and the right to efficiently participate in political matters of the country. President of the Council, Nedžad Jusić, emphasized that the most important objective of this body is to push the amendment regarding the election of representatives to the House of Peoples that would enable introduction of four more members from national minority groups who would be allowed to actively participate in decision-making processes. Furthermore, he stated that by introducing four minority representatives into the HoP, local authorities would remove discrimination against the non-constituent groups.⁹³ It is up to this body and its members to do their best to make this objective their reality in order to improve the general situation regarding human and minority rights in the country.

In democratic societies, principles of equality and political participation are focal to the political thought. Within such states, “citizens who are members of an ethno-cultural, national or any other type of minority group enjoy an equal right of political participation with all other members of the polity.”⁹⁴ Are such principles even present in BiH? Instead of cherishing the variety of ethnic groups residing on the ground of BiH, its political structure seems to protect only three ethnic groups. This discriminatory protection stems from the Constitution, which obviously violates fundamental human rights to equality and political participation. In order to solve these obstacles, local politicians will seriously have to consider amending the Constitution in order to provide and protect those fundamental rights. According to Wheatley, in states in which minority members are not represented, the government of that state is obliged to introduce measures that will promote minority participation. Moreover, it is of crucial importance that the minority interests and preferences are represented at all state levels.⁹⁵ Bosnia and Herzegovina will grow into a truly democratic society only when it opens

⁹² Interview with Nedžad Jusić, President of the Council on National Minorities available at http://www.bhric.ba/Intervju_Nedžad.php

⁹³ Nedžad Jusić, Round table: Citizens of BiH between equality and discrimination, 27.03.2010.

⁹⁴ Steven Wheatley, „Non-discrimination and equality in the right of political participation for minorities,“ p.3

⁹⁵ Ibid, pp. 8-9.

the door of all state offices, especially the highest ones, to the members of national minorities. This post-Dayton era might be the best possible period to introduce such measures in the country. Furthermore, it might be the time for the politicians to turn to deliberative democracy model. The central characteristics of such a model, and the ones that are completely lacking from political system of the country, are equality, political participation and consensus.⁹⁶ Bosnia and Herzegovina should strive to achieve these principles of deliberative democracy that would improve the position not only of minority members but of all individuals in the country. Moreover, these principles would lessen the hatred and tension that is present among ethnic groups and that threaten further development of the country. These principles of deliberative model would allow individuals to participate in political deliberations as equal players. Furthermore, BiH would become a country that is inclusive of all possible political deliberations and that asks “all reasonable persons as to what should be done.”⁹⁷ On its way towards becoming a member state of the EU, Bosnia and Herzegovina will have to adopt this or similar approach in order to be truly accepted as equal and respectable member among democratic states of the EU.

⁹⁶ Ibid, p. 11.

⁹⁷ Ibid, p. 16.

Chapter 3: International approach to minority rights: From binding convention to irresponsible implementation

The creators of the first legally binding minority rights document, i.e. FCNM, had to bear in mind that Europe, as one of the most diverse continents in the world, is a region where different cultures, religions, languages and traditions clashed and consequently shaped its “face” as we know it today. Due to this diversity, creation of a document that deals with such a sensitive issue that would be signed and ratified by the most member states was rather difficult task to achieve. As a result, FCNM’s provisions are rather weak and sometimes ambiguous. Besides signing and ratifying the FCNM, many states still do not regard it as binding document and do not comply with its provisions. What is the significance of the FCNM for Bosnia and Herzegovina then? First and foremost, the importance of the FCNM lies in the fact that it is embodied in the Constitution of BiH as one of the documents that provides for establishment of international human right standards. Moreover, the only domestic law that deals with the protection of minority rights, namely the Law on the Protection of Rights of Persons Belonging to National Minorities, was primarily created on the provisions that are guaranteed in the FCNM. Furthermore, this law proclaims that the FCNM shall be directly applicable as “an integral part of the legal system in BiH.”⁹⁸

The following part of the chapter will mainly focus on FCNM as one of the most important minority rights protection mechanism in the country that profoundly shapes domestic legal ways of protecting minority identity. Moreover, the chapter will focus on both advantages and disadvantages of such a system and will provide for possible solutions and improvements that will better the implementation of the treaty. The last part of the chapter will provide significant insight of a debate led between the local authorities and the Council of Europe’s Advisory Committee that oversees the implementation of the FCNM.

Chapter 3.1: Central pillar of the European minority rights system⁹⁹

Unlike post-1945 minority rights protection, which put jurisprudence into country’s domestic laws and political systems, the most recent era of minority protection, i.e. post-1989 period, has focused on international standards of protection in which many European countries agreed

⁹⁸ Law on rights of national minorities, Article 2 available at <http://www.ombudsmen.gov.ba/odjeli/Zakon%20o%20zastiti%20prava%20nacionalnih%20manjina%20-%20Sl.%20glasnik%20BiH%2012-03.pdf>

⁹⁹ The title was taken from the article by Bruno De Witte, „Introduction: Exploring a central pillar of the European minority rights system.“

about “common European standard which lays down a ‘floor of rights’ to be respected by all.”¹⁰⁰ This European ‘awakening’ and coming to terms with the fact that current situation of minority rights is the most important factor in European integration policy has enabled the FCNM to become the first binding legal document that protects minority rights. The Framework Convention for the Protection of National Minorities was adopted on 10 November 1994 as the “first multilateral treaty focused on the protection of minorities.” It entered into force on 1 February 1998.¹⁰¹ It has been signed by 43 and ratified by 39 states.¹⁰² Since it puts legal obligation on states to protect their minorities, a certain monitoring system had to be put into practice in order to check on states’ activities in protecting minority rights. The monitoring is implemented by the Committee of Ministers of the Council of Europe with the help of Advisory Committee.¹⁰³

What is of utmost importance when talking about minorities, their protection and promotion of their rights is the *social cohesion model*, which is becoming more and more important within the Council of Europe and consequently the FCNM.¹⁰⁴ This model is based on human rights approach that promotes legal protection of human and minority rights and equality of all people. The main goal of this model is creation of a society in which “people will accept responsibility for one another.” This would in turn mean that society is considered as a whole and that it belongs to all its peoples, both majorities and minorities.¹⁰⁵ In order to achieve this goal and create a society like this, it is “necessary to rebuild a sense of society, of belonging, of commitment to shared social goals.”¹⁰⁶ In an ethnically and deeply divided society, as is the case with BiH society, the task of building a feeling of belonging to a society as a whole and striving for common social values is of the biggest importance. Only then will there be room for promoting and protecting minority rights in such societies. In the process of doing this, it

¹⁰⁰ Bruno De Witte, „Introduction: Exploring a central pillar of the European minority rights system“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A. Verstichel, A. Alen, B. De Witte (eds.), p.1.

¹⁰¹ Gaetano Pentassuglia, “Monitoring minority rights in Europe: The implementation machinery of the Framework Convention for the Protection of National Minorities – With special reference to the role of the Advisory Committee,” p. 418.

¹⁰² Council of Europe, List of singatories and ratifications is available on http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Chart_Monitoring_en.pdf.

¹⁰³ Magdalena Syposz, „Framework Convention for the Protection of National Minorities: Opportunities for NGOs and minorities,“ p. 7.

¹⁰⁴ Asbjørn Eide, „Towards a pan-European instrument?“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument??*, A. Verstichel, A. Alen, B. De Witte (eds.), p. 10.

¹⁰⁵ Ibid, p. 10.

¹⁰⁶ Council of Europe, Revised strategy for social cohesion, para. 32.

http://www.coe.int/dg3/socialpolicies/socialcohesiondev/source/RevisedStrategy_en.pdf.

is also important to ensure, legally and practically, equality for all people while developing diversity in coherence with social cohesion model. And this is exactly what FCNM is trying to achieve with its provisions.¹⁰⁷ Turning to provisions, the next part will sum up both, good and bad, sides of a framework document which, although it is weakly worded, is still legally binding for all the states that have signed and ratified it.

Chapter 3.2: Positive aspects of the FCNM

As the pioneer minority document that imposes legal obligations on the signatory states, the FCNM was created in the time when debates about minority rights were in the center of international community's attention. Thus, the FCNM was available even for the countries that do not belong to the Council of Europe's Member States in order to improve the situation regarding position of minorities in Europe. Besides the facts that the FCNM is trying to set up ground for common values when it comes to minority issues in the region and that its provisions are legally binding, another positive point is the fact that all the provisions and principles contained in the document are to be fully realized at the domestic level,¹⁰⁸ thus taking each state's specific situation into consideration and giving it a level of freedom while striving to achieve the regulated principles. Therefore, the FCNM is not just a document that addresses minority problems, it is also "a framework of 'values' to guide European societies."¹⁰⁹ Thus, functioning as the EU machinery, the FCNM is creating minority standards that many European countries will be able to relate to and at the same time, it is giving them full jurisdiction in creating legal, political, economic and cultural conditions for implementing the minority standards. In other words, it is not imposing those standards on the societies by ordering certain actions to be taken in order to reach them. Therefore, numerous countries have signed, ratified and started implementing FCNM provisions. The focal values that would enhance minority position in the region can best be reflected in Articles 4, 5 and 15 of the FCNM.

¹⁰⁷ Asbjørn Eide, "Towards a pan-European instrument?" in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A. Verstichel, A. Alen, B. De Witte (eds.), pp. 10-11.

¹⁰⁸ Gaetano Pentassuglia, "Monitoring minority rights in Europe: The implementation machinery of the Framework Convention for the Protection of National Minorities – With special reference to the role of the Advisory Committee," p. 418.

¹⁰⁹ Sia Spiliopoulou Åkermark, "The Added value of the Framework Convention for the Protection of National Minorities" in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A. Verstichel, A. Alen, B. De Witte (eds.), p. 72.

Article 4 puts obligations on states to guarantee “right of equality before the law and equal protection of the law.” It strongly prohibits “any discrimination based on belonging to a national minority.” States are also obliged to take measures in order to promote “full and effective equality between persons belonging to a national minority and those belonging to the majority” in all areas of life, from political over economic and social to cultural. Accordingly, these measures will not be considered “an act of discrimination.”¹¹⁰ The strongest impact of the article can be felt in states’ obligations to promote such equality. By promoting equality, the state will hopefully develop people’s sense of sharing and striving for the same values and goods. Thus, it will also develop sense of belonging to one unified state – a precondition highly necessary for Bosnia’s democratic development towards European family.

Article 5 obliges states to promote conditions for development of minority culture, and to promote minority identity, “namely religion, language, traditions and cultural heritage.” States are forbidden from promoting practices that will “assimilate persons belonging to national minorities against their will.”¹¹¹ Thus, by promoting minority cultures, states acknowledge the importance of minority identity and willingness to protect and further develop minority traditions that enrich the cultural diversity of the state. When combined, these two articles give the FCNM special importance. These articles actually enable minorities to say: “We demand to be accepted and respected for what we are and at the same time we demand full equality in economic, social and political life.” According to Eide, it is state’s responsibility “to ensure conditions for ethnic, religious and linguistic pluralism.”¹¹² Having legal obligations stemming from ratifying the FCNM, BiH will hopefully realize the importance of cherishing pluralistic society in which being different than the majority can only be regarded as a gift and not a curse.

Article 15 is the crucial article regarding this study mainly because it promotes effective participation of national minorities. The article obliges states to “create conditions” in which this participation could take place. Moreover it promotes participation in “cultural, social and economic life and in public affairs”, especially those directly linked to and affecting members of national minorities.¹¹³ By having opportunity to freely participate in cultural, social,

¹¹⁰ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 4 available at [http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf).

¹¹¹ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 5 available at [http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf).

¹¹² Asbjørn Eide, „Towards a pan-European instrument?“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A. Verstichel, A. Alen, B. De Witte (eds.), p. 10.

¹¹³ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 15 available at [http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf).

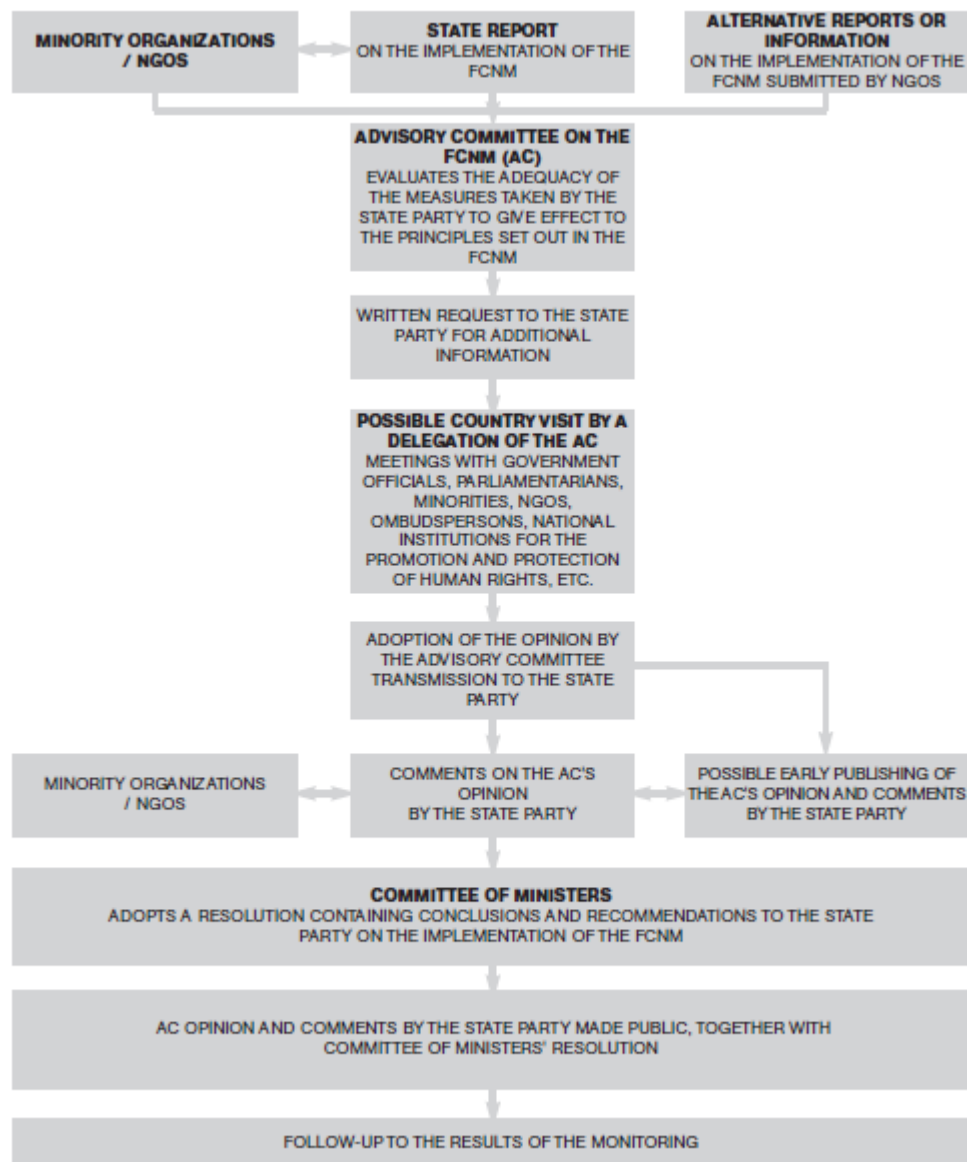
economic and especially political matters, members of minority groups thus voice their own opinions trying to influence and improve general situation in a society. The main aim of Article 15 is not only to make sure that minority concerns are taken into account but also to ensure “that their requirements for social cohesion can be heard and preferably met.”¹¹⁴

Another positive aspect of the Convention is definitely its monitoring system done by the Committee of Ministers assisted by the Advisory Committee (AC). As it was mentioned above, the states implement the FCNM provisions in accordance with their domestic laws. The only body that can actually “check the progress” of the states is the AC. Thus, the only possible way to make the FCNM truly function “lies no doubt in a satisfactory monitoring of its implementations.”¹¹⁵ While monitoring the implementation of the FCNM, the AC has to consider the information submitted not only by the state’s government but also by non-governmental organizations as well. Thus, the AC participates in a dialogue “with the Government of the contracting party concerned as well as with national minority groups.”¹¹⁶ After the dialogue has started, the AC actually opens the door for further communication between governmental and non-governmental institutions of the concerned state thus giving them the possibility to hear all the opinions regarding minority issues in the society and to work jointly in trying to overcome current and future issues. This aspect in particular is one of the most important installations in minority protection system and its mechanism can be seen in the table below.

¹¹⁴ Asbjørn Eide, „Towards a pan-European instrument?“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 11.

¹¹⁵ Gaetano Pentassuglia, “Monitoring minority rights in Europe: The implementation machinery of the Framework Convention for the Protection of National Minorities – With special reference to the role of the Advisory Committee,” p. 420.

¹¹⁶ *Ibid*, p. 425



Source: FCNM Secretariat of the Council of Europe

Taking into consideration the positive aspects of the FCNM, it can be concluded that this Convention is by no means of great importance for the improvement of minority rights position and protection in Europe. When there exists a constant communication and flow of information between the governments, minority groups and Advisory Committee, the improvement of the situation is undeniably possible. According to Åkermark, the real importance of the FCNM is in the fact that it can be used as “a platform for the start of discussions on minority issues in countries where such issues may be highly emotional and controversial and where and a priori international legal document offers a certain ‘neutral’

starting point for societal debate.”¹¹⁷ This statement depicts highly emotional and unstable situation in Bosnia and Herzegovina when it comes to ethnic groups. Relying on the FCNM, which promotes equality and non-discrimination among all the people of one country, Bosnian government and political elites can indeed use it as a starting point in discussing pressing issues considering minorities. Once the FCNM is used as the instigator of societal debates, the society will reach a viable solution through such discussions that all the minority and ethnic groups in question could be satisfied with.

Chapter 3.3: Negative aspects of the FCNM

Besides the fact that the FCNM is legally binding treaty concerning minority issues, the fact that it is the first document of this type leaves much space for criticism. According to Alfredsson, one of the biggest critics of the Convention, Council of Europe could have created a more “serious law-based approach to minority rights.” Alfredsson lists many negative aspects, which hamper the success of the FCNM, among which are: the programmatic formulation of the FC, the limited scope of the special measures that are supposed to eliminate discrimination and achieve equality, weak wording, a monitoring instance relying only on the examination of State reports, opening for States to arbitrarily identify minorities that the FCNM will protect, etc.¹¹⁸

In authors opinion, besides these shortcomings that Alfredsson strongly emphasized, the biggest problem with the FCNM lies in its lack of definition of minorities. By not providing an official definition of national minority, the FCNM let the states arbitrarily decide on which groups will be classified as minorities, implying that they will be protected by the FCNM, and which will not. Why does not the treaty of such importance for minority protection contain a definition as one of the basis for its implementation? According to the Explanatory Report to the FCNM, “[i]t was decided to adopt a pragmatic approach... [i]t was impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.”¹¹⁹ Does it imply that the importance of the definition was left out for the sake of member States

¹¹⁷ Sia Spiliopoulou Åkermark, „The added value of the Framework Convention for the Protection of National Minorities“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 89.

¹¹⁸ Gudmundur Alfredsson, „A frame with an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with international standards and monitoring procedures,“ p. 292.

¹¹⁹ Annelies Verstichel, „Personal scope of application: An open, inclusive and dynamic approach – The FCNM as living instrument“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 128.

adopting the FCNM? Thus, it means that adoption of the Convention was more important than its implementation and possible future achievements. Moreover, the AC fears that if the official definition is to be included in the Convention, there is a possibility or even a risk that such a definition “would reflect only the lowest common denominator, which would have implications on the scope of application of the FCNM and have the effect of depriving certain minorities of the protection that the FCNM offers.”¹²⁰ In order to defend its stand, the AC emphasizes the importance of promoting a more inclusive approach like they practice in their monitoring processes. Their approach, which is more inclusive than the traditional, includes Central and Eastern European definition of ethnic minorities - it usually refers to those groups which have a kin-state - and it also focuses on Roma as the minority without a kin-state as well as on indigenous people, non-citizens, religious and linguistic minorities.¹²¹ What can be plausible solution for this problem? In authors opinion, besides taking into account subjective criteria for defining minority, such as group’s feeling of inferiority and a “sense of solidarity”, objective criteria must comprise a crucial factor in defining minority group. The definition needs to include facts that states will not be able to neglect. For instance, a reliable definition must include facts such as numerical inferiority, non-dominant position, certain religious, cultural and linguistic characteristics that make minority groups stand out from majority, etc.¹²² Besides these facts, one needs to take into account historic connections with the state. Historic connections with the state, where minority groups live, can best be reflected in “firm, long-standing and lasting ties with the territory of the state.”¹²³ Roma and Jewish minorities represent “the major traditional minorities” in Bosnian society.¹²⁴ As such, these two minority groups have the strongest historic relations to Bosnia and Herzegovina, which in turn only prove Jewish and Roma striving to be part of the political, economic, cultural and social life throughout the centuries. Is there a better way to show gratitude for enriching Bosnian society

¹²⁰ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, „Opinion on Recommendation 1492(2001) of the Parliamentary Assembly of the Council of Europe,“ para.16. available at http://www.humanrights.coe.int/Minorities/eng/FrameworkConvention/AdvisoryCommittee/Other_Opinions/On_PACE_1492.htm

¹²¹ Annelies Verstichel, „Personal scope of application: An open, inclusive and dynamic approach – The FCNM as living instrument“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 141.

¹²² Athanasia S. Akermark, *Justifications of minority protection in international law*, p. 90.

¹²³ Annelies Verstichel, „Personal scope of application: An open, inclusive and dynamic approach – The FCNM as living instrument“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 148.

¹²⁴ Dragan Ivanović, “Constitutional position of minorities in Bosnia and Herzegovina” in *Ethnic relations in South Eastern Europe, Problems of social inclusion and exclusion*, Nikolai Genov (ed.), p. 40.

than by giving these minority groups right to fully and equally participate in decision-making processes?

According to international community and in times when minority protection is becoming one of the most pressing issues in Europe, a general definition is highly necessary in order to enable “meaningful communication” between institutions interested in protecting minority rights.¹²⁵ In order to offer a possible solution for this problem, a combined definition of national minorities is provided: *A minority is “a non-dominant, institutionalized group sharing a distinct cultural identity that it wishes to preserve.”*¹²⁶ *It is a group “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 only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.”*¹²⁷ The strongest point of this definition lies in the fact that it emphasizes equality and solidarity as its main features and that it does not dwell on citizenship criteria.¹²⁸

Another handicap with the Convention that seriously hampers its implementation is its programmatic nature. Not only that the provisions are weakly-worded, they are also presented in a very general, at times ambiguous manner. This only gives more flexibility to the states when implementing those provisions.¹²⁹ How can creators of such a Convention expect minority rights to be fully protected? And how can they assume that all minority groups will actually enjoy that protection? By creating the programmatic provisions, the FCNM showed that it is more focused on the states and their activities while implementing the provisions rather than on the actual rights, which are the essence of the Convention.¹³⁰ Moreover, these program-type provisions provide the states with a “margin of discretion in the implementation of the objectives.”¹³¹ It is logical that minority situation is different from country to country and that it demands different approaches. Rianne Letschert is of the opinion that these vague objectives and flexibility of actions “may possibly be used by parties to escape their

¹²⁵ Athanasia S. Akermark, *Justifications of minority protection in international law*, p. 87.

¹²⁶ *Ibid*, p. 96.

¹²⁷ Asbjorn Eide, “Citizenship and the minority rights of non-citizens,” p. 3, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/7cb70009369c90af802568f90058fb58/FILE/G9912189.pdf>

¹²⁸ Unlike most other Council of Europe documents, the Framework Convention for the Protection of National Minorities does not require citizenship. It only means that the FCNM’s provisions apply equally to all people living on the territory of a certain state, regardless of their citizenship. See Athanasia S. Akermark, *Justifications of minority protection in international law*.

¹²⁹ Gudmundur Alfredsson, „A frame with an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with international standards and monitoring procedures,“ p. 293.

¹³⁰ *Ibid*, p. 293.

¹³¹ Rianne M. Letschert, *The impact of minority rights mechanisms*, p. 19.

obligations.”¹³² So, not only that states are given full freedom to choose how to achieve the objectives set out in the FCNM, they also have a rather wide margin of discretion while choosing which minority groups to protect and which not. Can this approach be characterized as creating a hierarchy system in the minority population?

The last part of the FCNM that met severe criticism of international scholars is the implementation mechanism. As the main body that oversees the implementation of the FCNM, the Advisory Committee is usually regarded as one of the main targets for criticism. The part that is usually mostly criticized is the AC’s soft advisory approach. While monitoring the implementation, “the AC should never be satisfied with anything less than the highest level of standards and the complete information on relevant laws and facts which are applicable to these standards.”¹³³ Therefore, the AC should practice more strict approach while monitoring the implementation and protection of the FCNM provisions. It should not be as flexible as the Convention in order to create a rather balanced minority protection system with the FCNM as the soft tool on one side and the AC as the hard tool on the other. Pentassuglia regards that in order to make the implementation of the FCNM “as effective as possible, a ‘strong’ AC is no doubt necessary.”¹³⁴ What AC and FCNM have in common is weak wording. When the AC encounters certain irregularities in implementing the FCNM, such as State recognition of only one out of four minority groups, it nonetheless ‘advises’ the State in question to reconsider its actions.¹³⁵ It certainly does not demand recognition of all minority groups. How can this approach be of any help to minorities and their fundamental rights? According to Alfredsson, such state recognition is arbitrary and therefore should not

¹³² Ibid, p. 26.

¹³³ Gudmundur Alfredsson, „A frame with an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with international standards and monitoring procedures,“ p. 299.

¹³⁴ Gaetano Pentassuglia, “Monitoring minority rights in Europe: The implementation machinery of the Framework Convention for the Protection of National Minorities – With special reference to the role of the Advisory Committee,“ p. 459.

¹³⁵ For example, Denmark only recognizes the Germans in Southern Jutland as national minorities. The AC reacted in its opinion as follows: ‘(T)he personal scope of application of the FC in Denmark, limited to the German minority in Southern Jutland, has not been satisfactorily addressed. In particular, it notes that persons belonging to groups with long historic ties to Denmark such as Far-Oese and Greenlanders appear to have been excluded a priori from protection under the FC. Similarly, despite the historic presence of Roma in Denmark, they appear to have been a priori excluded from the protection of the Convention. Furthermore, the AC considers a limited territorial application, leading to the a priori exclusion of persons no longer residing in the traditional area of settlement, not to be compatible with the FC. The AC therefore considers that the Danish Government should, in consultation with those concerned, examine the application of the FC.’ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, “Opinion on Denmark,“ available at

<http://www.humanrights.coe.int/Minorities/eng/FrameworkConvention/AdvisoryCommittee/Opinions/Denmark.htm>

be accepted. Moreover, the Committee has to be more firm when faced with such actions and it should emphasize “that the existence of a minority is a question of fact, not law or government recognition.” Therefore, the AC needs to demand further clarifications about the groups that are not under the protection of the FCNM.¹³⁶ It flows from this that the AC should not allow double standards while monitoring implementation in Western states and in the rest of Europe.

Chapter 3.4: From theory to practice: Reflection of state reports

As it was already mentioned above, the FCNM was created in a way that it takes into consideration each country’s specific characteristics and allows it to implement provisions accordingly. Thus, the success of implementing those provisions and improving minority situation is completely in the hands of governments concerned. Therefore, in order to depict how monitoring mechanism functions in reality, the following part of the paper will present obligatory state reports concerning protection of national minorities in BiH and sequent advisory guidelines by the Advisory Committee.

Chapter 3.4.1: State reports

After Bosnia and Herzegovina ratified the Framework Convention on 24 February 2000, it also agreed to submit the First Report a year later even though the actual report was submitted only in 2004.¹³⁷ Since it was the first report, the creators, i.e. Council of Ministers and Ministry for Human Rights and Refugees, had to present a wider picture concerning legal, institutional and statistic information about the country. Consequently, less space in the report was provided for the actual minority problems, which were either justified by the current political structure and situation or legal provisions that ‘protect’ human rights in general. Ironically enough, one of the legal documents that was presented in the report as a document that protects human rights was the Constitution of Bosnia and Herzegovina, which strongly prohibits any kind of discrimination on grounds such as religion, race, political or other opinion, sex, color, national or social origin, association with a national minority, birth or

¹³⁶ Gudmundur Alfredsson, „A frame with an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with international standards and monitoring procedures,“ p. 301.

¹³⁷ Council of Europe, Chart of Signatures and Ratifications, available at http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Chart_Monitoring_en.pdf

other status.¹³⁸ A strong influence of major international human rights documents and treaties can be seen in the Constitution. But is this protection translated into reality? Two main legal documents that were presented as protecting the minority status are The Law on the Protection of National Minorities, which obliges BiH to provide a better integration of minorities in legislative and executive organs at all levels, and The Electoral Law of Bosnia and Herzegovina that guarantees minority representation at all levels.¹³⁹ What is common for the two laws is that, despite obvious discrimination of the “Others”, they guarantee equality of all members at all levels in the state. Nonetheless, while presenting the political structure, the ethnic division between three constituent groups in all legal and executive bodies is emphasized and that directly conflicts with two aforementioned laws that promote equality and non-discrimination.

When considering the application of equality clause under Article 4 of the FCNM, BiH government justifies the fact that the Constitution does not directly deal with national minorities by presenting the term “Others” that encompasses members of minority groups. Marginalizing national minorities by categorizing them as the “Others”, BiH representatives consider it as a rather positive step. The report states that such an approach is used in order to leave the space for creating methods of national minority identification and to “set measures to be taken by BiH towards protection and promotion of minorities rights in BiH.”¹⁴⁰ How can any of these measures be taken if the government representatives are focusing only on interests of three constituent groups? How can these discriminatory standards be changed? In author’s opinion, amending the Constitution and the laws in order to provide legal aspects for political participation is the basis for improving the status of national minorities in the society. But the current political forces do not see it the same way. According to the report, improvement of minority status is solely in the hands of members of national minorities and their institutional bodies. One of those bodies is National Minorities Council, whose main task is to “provide the Parliamentarian Assembly with its opinions, advises and proposals on all issues relevant to rights, position and interest of national minorities in BiH.”¹⁴¹ Moreover, the government considers that the main objective of the FCNM is to make members of

¹³⁸ Council of Europe, “First report submitted by Bosnia and Herzegovina pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities,” p. 18, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_SR_BiH_en.pdf

¹³⁹ These laws will be dealt with in more details in the following chapter.

¹⁴⁰ Council of Europe, “First report submitted by Bosnia and Herzegovina pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities,” p. 37.

¹⁴¹ *Ibid*, p. 39.

minority groups more active in improving their position and finding solutions for their problems.¹⁴² This only proves how interested the government is in improving and protecting minority rights in BiH. What is more important, reflection on Article 15 of the FCNM and political participation of national minorities has completely been left out of the state report, which only proves more that, if you do not belong to one of the three constituent groups, the government will hardly ever focus on your needs and problems as a minority member.

The Second Report was due in 2006 and surprisingly, it was submitted only a year after. What this report stressed out the most was state's efforts to improve minority status and to instigate intercultural dialogue. Since "national minorities represent its (country's) wealth and not a problem", Bosnia and Herzegovina is making efforts to promote such a vision in order to progress on its way towards becoming multicultural society.¹⁴³ Another important part is the fact that gathering of information necessary for this report has been extensive and included many non-governmental organizations dealing with minority issues, as well as government institutions.¹⁴⁴ Although this cooperation is in early stage, it still proves that the topic of minority issues within the country has finally been opened. The government is slowly showing its interest towards the "Others". Moreover, according to the report, citizens of BiH have constantly been informed about national minorities, their problems, traditions, activities and culture on various TV broadcasts.¹⁴⁵ Some other sources state quite the opposite. According to Council of Roma, both press and media act uninterested when it comes to presenting political or cultural issues of minority groups.¹⁴⁶ This statement seriously affects the viability of the report since it shows that not only minority and majority groups have different sources of information but also that they have still not engaged in serious debates about minority position in BiH.

When it comes to "Other-izing", the same issue, as was the case with the First Report, was presented. The term "Other" is embedded in the Constitution with the aim of giving freedom to legislations "to determine which national minorities exist in BiH and define their recognition as well as the measures to be taken in order to protect and promote the minority

¹⁴² Ibid, p. 40.

¹⁴³ Council of Europe, "Second report submitted by Bosnia and Herzegovina pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities," p. 5, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNDocs/PDF_2nd_SR_BiH_en.pdf

¹⁴⁴ Ibid, p. 6.

¹⁴⁵ Ibid, p. 32.

¹⁴⁶ Ibid, p. 78.

rights.”¹⁴⁷ The reliability of the very report decreases even more with this statement. The Second Report, besides some paragraphs, seems to be a copy of the First Report thus not presenting new information on position of minority rights or even possible improvement. To further strengthen this argument, in the conclusion of the report, another fact presented in the First Report was emphasized, namely the responsibility of national minorities for their situation and problems. According to the report, development of political and social situation in the country has enabled members of minority groups “to assume a higher degree of responsibility for their own position.”¹⁴⁸ In this sense, the statement can be understood as government’s recognition of discrimination of national minorities in the times when there were no legal protections concerning minority members. Not everything is so dim about this report. One of the concluding remarks was rather surprising. Instead of passing the ball to the other side, the government accepted the solution that both sides, i.e. majority and minority groups, need to cooperate in order to create “the political culture and raise the tolerance level, so that sensitive issues regarding a multiethnic and multicultural society may be discussed without nationalistic passion and euphoria.”¹⁴⁹ The importance of this statement can only be regarded viable if both sides start implementing it in real life for the sake of prospering not only minority situation but the situation of all people in Bosnia and Herzegovina.

Chapter 3.4.2: Advisory Committee Opinions

Since the Advisory Committee is a body that can only give suggestions and guidelines on how to implement provisions, it follows that these are not legally binding. It is solely state’s decision on whether to follow the guidelines or not. In its First Opinion on Bosnia and Herzegovina, the AC stressed out that it is not satisfied with the progress and that the main problem is the implementation of provisions, especially the ones regarding proportional representation. Moreover, it stated that more attention should be provided for interethnic dialogue in order to “encourage wider acceptance of those currently referred to as “Others” as part of the society of Bosnia and Herzegovina.”¹⁵⁰ In order to improve the integration of marginalized groups into Bosnian society, the AC also suggests political elites to move away

¹⁴⁷ Ibid, p. 78.

¹⁴⁸ Ibid, p. 82.

¹⁴⁹ Ibid, p. 82.

¹⁵⁰ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, „First opinion on Bosnia and Herzegovina,“ p. 3 available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_BiH_en.pdf

from focusing on ethnic origin towards an approach that focuses on individual rights.¹⁵¹ If we take into consideration the fact that several minority representatives find the term “Others” rather offensive and exclusive,¹⁵² the importance of this advice is nonetheless even more important. Accepting this inclusive approach that focuses on individuals and actually practicing it, Bosnian society will create conditions for all individuals to start developing a sense of belonging to the same society. This will also provide for equality of all its members in accessing different posts within the country.

When it comes to non-discrimination and equality, the AC states that there exist legal provisions that protect from discrimination. These provisions are reflected in Law on the Protection of Rights of Persons Belonging to National Minorities. The problem is that these provisions need to be more improved and put into practice.¹⁵³ The Advisory Committee seems to notice only the fact that these equality rights are severely violated against in two highest offices in the country. In addition, the AC makes no mention on possible solutions for such minority discrimination.¹⁵⁴ How can minority members expect the protection if the main monitoring body does not try to improve such acts of discrimination? Will AC adopt the stand of Bosnian government by saying that minorities are the only ones responsible for their situation?

The issues of political participation still remain the focal problem in BiH. The AC stated that constant focusing on representation of three constituent groups seriously hampers the implementation of Article 15 of the FCNM, which is aimed at improving participation of national minority members.¹⁵⁵ Furthermore, the AC notes that the BiH government “should” take into consideration present situation of minority representatives in government bodies and adopt changes to Electoral Law that would provide for political participation of minorities at all government levels.¹⁵⁶ It can be assumed that such weak advices from the AC will be taken lightly within BiH government considering the fact that only interests of three ethnic groups can be taken into serious consideration.

¹⁵¹ Ibid, p. 7.

¹⁵² Ibid, p. 11.

¹⁵³ Ibid, p. 12.

¹⁵⁴ Ibid, p. 13.

¹⁵⁵ Ibid, p. 28.

¹⁵⁶ Ibid, p. 29

The Second Report represents a step forward than the First one, as far as the strong wording is concerned. Focusing on the main problems in the country, the AC stated that ethnicity still plays the most important role in having access to participate in social, cultural, economic and public affairs, which in turn degenerates the progress toward social cohesion. The report also noted that protection of vital interests that political leaders are practicing seriously hampers the chances of making national minorities voice their opinion in public.¹⁵⁷ As it was already stated above, protection of the interests of three constituent groups was indeed important in the period when these groups were warring against each other. One would assume that as the country evolves, so do ethnic relations, especially after decade and a half. But in a country, such as BiH, these ethnic tensions last for centuries. And they bring nothing but stagnation. Would not this be the right time to turn the political page and start implementing and preaching another approach in the country? An approach that would protect not only constituent groups but every individual living in BiH, regardless of their ethnicity, religion and political belief? This is exactly the approach that the FCNM, with its provisions, is trying to promote in a country where ethnic division and hate speech can still be seen in the media and politics. Consequently, ethnic origin still plays a crucial role in accessing representation posts within elected bodies.¹⁵⁸ How can thus the same problem that led this country to war be a possible solution for the future?

Moreover, the Second Report included several accusations of BiH government that addressed some of the most important problems within the country. One of the accusations was serious discrimination of national minority members. The AC noted that this discrimination, which is supported by the law, disables minority members from accessing high-level positions, which in turn make those members feel like “second class citizens”¹⁵⁹ and by not participating in public matters, these members even feel “invisible.”¹⁶⁰ What degrading impact does this government approach have on minority members? It seems that centuries some of them spent on the soil of BiH account for nothing. It appears that their own striving to improve the situation in the society gains no respect. And how can it gain the slightest respect if these groups are marginalized even in the Constitution? From the point of view of the AC, this

¹⁵⁷ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, „Second opinion on Bosnia and Herzegovina,“ p. 5 available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_BiH_en.pdf

¹⁵⁸ Ibid, p. 5.

¹⁵⁹ Ibid, p. 6.

¹⁶⁰ Ibid, p. 23.

stigmatization is rather offensive and it enhances minority exclusion not only from public matter but from the whole society. And the strongest recommendation that the AC could give was for the authorities to consider introducing more inclusive terminology at the constitutional level.¹⁶¹ If this recommendation was used in the First Report and it produced no result at all, why does the AC expect that the same recommendation will be taken into consideration and be fruitful after repeating it in the Second Report?

Another of AC's serious recommendations is reflected in relation to Article 4 of the FCNM. Not only that the AC noted with concern that the current legal rules prohibit members of national minorities from accessing political posts, especially on state level, it also suggested the authorities to find possible solutions for this total exclusion. Moreover, "it invited the authorities to consider amending the Constitution of Bosnia and Herzegovina."¹⁶² This recommendation strongly affirms the hypothesis of this study and emphasizes the importance of amending the Constitution in order to overcome the discriminatory approach and to include all individuals as equal beneficiaries of the law protection. According to the AC, these legal discriminations are mostly incompatible with the equality and non-discrimination provisions set out in Article 4. Moreover, the Advisory Committee, together with the Venice Commission,¹⁶³ stated that by providing representation of constituent peoples, the state should not discriminate against those who do not belong to constituent peoples.¹⁶⁴ This recommendation should not be regarded as a word of advice from an international community, but rather as a legally binding requirement that needs to be implemented as soon as possible. The AC has put all its hopes into the Council of National Minorities, created in April 2008, to take the leading role in promoting minority rights, especially participatory and equality rights. Promoting and fighting for the implementation of the provisions set out in the FCNM, having the Advisory Committee on its side and instigating social debates between members of minority groups and government representatives, the Council of National Minorities is able to achieve important objectives in improving the position of national minorities in Bosnia and Herzegovina.

¹⁶¹ Ibid, p. 11.

¹⁶² Ibid, p. 14.

¹⁶³ See Venice Commission documents DL-AD (2005) 004 and CDL-AD (2006) 019 available at www.venice.coe.int/docs

¹⁶⁴ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, „Second opinion on Bosnia and Herzegovina,“ p. 14.

Chapter 4: Domestic legal approaches to problem of minority rights

Another issue that is crucial to minority protection is domestic legal setting where the real implementation of minority protection mechanism takes place. As it was mentioned in the previous chapter, implementation of the FCNM, despite the fact that it is legally binding minority rights document, depends heavily on “the status that the Convention enjoys under domestic law.”¹⁶⁵ It follows that even though the FCNM is a really powerful mechanism for the protection of minority rights, it can be a useless tool without strong domestic laws that protect and strive towards the ideals of a democratic society. Moreover, Palermo notes that even the domestic courts always emphasize the fact that the binding force of the FCNM completely depends on the Constitution of the country, its approach towards the international treaty law and, what is most important, on the “overall constitutional approach towards minority issues.”¹⁶⁶ If this is the case and if a constitution of a country completely neglects and even discriminates against minorities, it means that the FCNM has no implementation force. In Bosnia and Herzegovina, most of the laws are created in order to reflect ethnic affiliation and division between three constituent groups of people. It is clear that these legal provisions are the main obstacles that hamper the proper implementation of minority protection mechanisms. What would be a possible solution to such a problem of ineffective minority protection? How can a country find the way to protect not only its minority groups but all people inhabiting it? It is clearly understood that the most valuable and important legal document of any country is its constitution. In the same way the constitution can be an obstacle in achieving certain rights, it can also be a firm foundation for a very efficient way of implementing minority protection mechanism. As the stronghold of country’s sovereignty and independence, every constitution should, ideally, protect the rights of all its citizens and provide for their well-being. Since the case with Bosnian Constitution is rather opposite, in a way that it only protects its three ethnic groups, some changes regarding its Articles need to be made. According to European Commission for Democracy through Law or Venice Commission (VC), “the time seems ripe to start a process of reconsideration of the present constitutional arrangements in BiH... Constitutional reform is indispensable since present

¹⁶⁵ Francesco Palermo, „Domestic Enforcement and Direct Effect of the FCNM“ in *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 188.

¹⁶⁶ *Ibid*, pp. 194-209.

arrangements are neither efficient nor rational and lack democratic content.”¹⁶⁷ A constitution should not only reflect political situation and structure of the country, it should also depict individual rights and freedoms that are supposed to be granted in a democratic society. And it is this last aspect that the Bosnian Constitution lacks. Moreover, each constitution should primarily be regarded as a bill of rights that puts the well-being of an individual in the center of its purpose. When this is the case, not only that the implementation of minority protection mechanisms will be possible but the treaties on minority rights will not be necessary at all.

Besides the Constitution of BiH that is regarded as the crucial document for protection of minority rights, there are two main legal texts that are directly related to minority rights and issues of their protection in state bodies. These texts are namely the Law on the protection of persons belonging to national minorities and the Election law of BiH. The subsequent chapters will present these three legal documents in more details, including both its advantages and disadvantages. Possible legal solutions for the constitution reform and amendments for the other two laws will be provided.

Chapter 4.1: BiH Constitution and its discriminatory provisions

Every constitution represents country’s most important legal foundation necessary for proper political, social, and economic functioning. According to McLean and McMillan, constitution is “the set of fundamental rules governing the politics of a nation.”¹⁶⁸ Thus, every constitution sets the legal basis for further development of the country. Bieber notes that the significance of every constitution is in the fact that it “often measures the pulse of a society, or of its political leadership.”¹⁶⁹ In the case of BiH, the current constitution indeed reflects the political situation but it is rather an obstacle than the basis for development. Bieber states that many analysts actually agree that the Constitution of BiH is very troublesome and represents an obstacle on the country’s path towards social and economic development and European integration.¹⁷⁰ Moreover, Bieber regards that the constitutional changes would help Bosnia on its way toward the EU integration but he also adds that the failure of passing the amendments will reflect the problems that BiH is currently experiencing.¹⁷¹ These problems are mainly

¹⁶⁷ Venice Commission, „Draft opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative,“ CDL-AD(2005)021, para. 101, available at [http://www.venice.coe.int/docs/2005/CDL\(2005\)021-e.asp](http://www.venice.coe.int/docs/2005/CDL(2005)021-e.asp)

¹⁶⁸ Iain McLean and Alistair McMillan, *The Concise Oxford Dictionary of Politics*, p. 117.

¹⁶⁹ Florian Bieber, „Bosnia and Herzegovina: Tip My Hat to the New Constitution,“ p. 1.

¹⁷⁰ *Ibid*, p. 1.

¹⁷¹ *Ibid*, p. 1.

results of the ethnic and political division that the DPA has legitimized. According to Abazović, Bosnian constitution has created a “fertile soil for political interventions with an ‘ethnonational’ prefix.” Moreover, due to the constitution, “the national, ethnic (pseudo)collective element has acquired complete primacy over the civic one.”¹⁷² Consequently, the Constitution openly favors constituent groups of people and, as such, seriously discriminates against other ethnic groups, namely national minorities. Mansfield on the other hand represents the opinion that the Constitution of BiH only embodies a rather complicated ethno-political arrangements that are focused on protecting the ethnic identity and providing a political setting in which none of the ethnic groups will have the power to dominate the state structures.¹⁷³ But the Constitution still reflects the political atmosphere and discriminatory attitude of three constituent groups of people toward the rest of the population. Thus, it openly supports unjust treatment of ethnic groups that do not want to identify themselves with the constituent groups. One can even argue that this Constitution preaches unification through segregation. According to Mansfield, the ethnicity that is enshrined in the BiH Constitution only represents a legal paradox in a way that as a tool that should be used for integration of all people into unified BiH, the Constitution supports this integration on one thing that divides BiH and that is ethnicity.¹⁷⁴ It follows that the key to success in all matters lies in one’s ethnic background. What has caused such arbitrary emphasis on certain and complete negligence of other ethnic groups?

The answer lies in the Dayton Peace Agreement. The DPA is an agreement between Bosnia and Herzegovina, Croatia and Serbia that basically ended the war and secured peace in the country in 1995.¹⁷⁵ Since the Constitution is the product of the agreement between these three states, it is logical that the three groups of people who identify themselves with one of the three states will be in the focus of protection. Moreover, it is this agreement and its Annex 4 that contain the Constitution of BiH.¹⁷⁶ But why does DPA present a problem for implementing minority protection? As it was mentioned above, the DPA was clearly created in order to stop the bloodshed between three warring ethnic groups, namely Bosniaks, Croats

¹⁷² Dino Abazović, „Bosnia and Herzegovina: Ten Years after Dayton“ in *European Yearbook of Minority Issues*, Arie Bloed, Rainer Hofmann (eds.), p. 195.

¹⁷³ Anna Morawiec Mansfield, „Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina,“ p. 2057.

¹⁷⁴ *Ibid*, p. 2058.

¹⁷⁵ Zoran Pajić, “A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina,” p. 125.

¹⁷⁶ Office of the High Representative, The General Framework Agreement, Annex 4: Constitution of Bosnia and Herzegovina available at http://www.ohr.int/dpa/default.asp?content_id=372

and Serbs living in BiH. Since it is the part of the peace agreement, the Constitution was created and signed without the people of BiH as the direct beneficiaries and “without applying procedures which could have provided democratic legitimacy.”¹⁷⁷ It is clear that its underlying purpose and obvious interest in protecting the three groups from one another created insurmountable problems for people who do not belong to these groups, namely minorities. The problems of minority members have to be put aside in the country “where hate burns”, where every political process is tainted with ethnic feelings and where democracy can only be established in the long run.¹⁷⁸ To make the situation harder for minorities, the Constitution does not even consider them worthy of protection since they are put into category of the “Others”. The Constitution of BiH contains at least three problematic and highly discriminatory provisions, namely Preamble, Article IV and Article V.

Like many other constitutions, Preamble of Bosnian Constitution enshrines characteristics of a democratic society based on the rule of law and respect for human rights. Preamble notes that the Constitution’s crucial features are that it is “based on respect for human dignity, liberty and equality” and that it is “dedicated to peace, justice, tolerance and reconciliation.”¹⁷⁹ It could easily be assumed that a constitution that promotes equality and tolerance will hardly discriminate against certain ethnic groups and create obvious segregation in all aspects of life, from political to cultural ones. It seems striking enough that such a Constitution that is “inspired by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” can actually cause and support the negligence of minority members.¹⁸⁰ The fact that all governing institutions at the state level reflect the division between Bosniaks, Croats and Serbs only proves the argument that the current Constitution is under the submission of these three constituent groups.¹⁸¹ Finally, this fact is depicted in the Preamble that focuses on these three groups of people as constituent ones while only mentioning the “Others.” What would be a reasonable solution for

¹⁷⁷ Venice Commission, „Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative,“ CDL-AD(2005)004, para. 6, available at [http://www.venice.coe.int/docs/2005/CDL\(2005\)004-e.asp](http://www.venice.coe.int/docs/2005/CDL(2005)004-e.asp)

¹⁷⁸ Zoran Pajić, “A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina,” p. 127.

¹⁷⁹ Constitutional Court of BiH, Constitution of Bosnia and Herzegovina, Preamble available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf

¹⁸⁰ Ibid.

¹⁸¹ Anna Morawiec Mansfield, „Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina,“ p. 2058.

this marginalization and discrimination? In author's opinion, the only possible answer would be substituting the term "Others" with the term "national minorities" and providing for equal status to all the people in BiH and not only to Bosniaks, Croats and Serbs. This would only strengthen the objectives this Constitution bases itself upon, namely equality, justice, tolerance, liberty and peace. According to the Advisory Committee of the Council of Europe, Bosnian society should focus on replacing the emphasis on ethnic background with a rather inclusive approach that would center on individual human rights. Moreover, this approach should be accompanied with an "enhanced participation of all members of Bosnian society", especially of those who are marginalized, namely minority members.¹⁸² This would in turn prevent minorities from feeling like they are being excluded from Bosnian society.¹⁸³ Introducing the more inclusive approach and focusing on individual rights, BiH will start the process of gradually developing the sense of equality and respect among all its citizens which will eventually result in sharing some common values and feeling of belonging to a unified country. On the other hand, Mansfield regards that, in order for BiH to move forward democratic development, "the language of the Preamble must be understood" in way that BiH is a democratic state in which all its peoples equally participate in decision-making processes throughout the country.¹⁸⁴

Another part of the Constitution that is highly discriminatory is the Article IV. This article sets the framework for electing members into Parliamentary Assembly which consists of two chambers: the House of People (HoP) and the House of Representatives (HoR). Selection of members to the HoP is what poses a problem for members of national minorities. Article IV.1 states that "The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs)."¹⁸⁵ Consequently, only members of the constituent groups can be elected to this office. Thus, the Constitution of BiH is in direct violation of Article 15 of the FCNM that obliges states to provide political setting for effective participation of minorities. The HoP is one of the highest legislative offices on the State level that enacts legislations only if all three groups agree about it. It should therefore be accessible for all the people, regardless of their

¹⁸² Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, „Opinion on Bosnia and Herzegovina,“ ACFC/INF/OP/I(2005)003, para. 13.

¹⁸³ Ibid, para. 29.

¹⁸⁴ Anna Morawiec Mansfield, „Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina,“ pp. 2071-2072.

¹⁸⁵ Constitution of Bosnia and Herzegovina, Article IV.

ethnicity. Consequently, all the decision-making processes that take place in that office will only reflect the will and needs of the constituent groups. In author's opinion, besides these fifteen delegate seats for the members of Bosniac, Serb and Croat groups, there should be at least one seat reserved for the members of national minorities. In this way, they will be able to voice their opinions and give their share to the decision-making process. However, some regard that introducing one minority representative would not make much difference. For instance, Jakob Finci, the president of Jewish community in BiH regards that one representative could only provide for legal and not actual satisfaction of minority needs.¹⁸⁶ On the other hand, president of Council on National Minorities, Nedžad Jusić, regards that there have to be at least 4 minority representatives in the HoP in order to provide efficient protection of minority values.¹⁸⁷ However, it is rather clear that introducing minority representatives cannot be avoided anymore. According to Joseph Marko, "raising the numbers of representatives in both Houses is certainly a necessary step to improve the specter of political pluralism."¹⁸⁸ Other form of amendment to the Article IV that would enable political participation of minority members in the HoP is the one based on proportionality rule. This rule would be out of the question since it would not help the minority members to participate in this office. According to the population census from 1991, members of national minorities comprised less than 2% of the population.¹⁸⁹ This would mean that they would get less than one seat in the HoP and thus would not be able to partake in political deliberations. Another interesting proposal came from political leaders of Party for BiH who suggested that HoP should reserve three seats for members of national minorities.¹⁹⁰ The faith of this and other proposals is in the hands of political leaders who still regard protection of ethnic identity the main focus of their activities and decisions. Moreover, every democratic decision-making procedure entails that the "interests and perspectives of the minority be listened to and taken into account." According to Kymlicka, in legal settings where minorities have the right to be elected for an office and to present their political views, this is usually "sufficient to ensure that their interests receive a fair hearing."¹⁹¹ Kymlicka's argument only strengthens the

¹⁸⁶ Interview with Jakob Finci, conducted on 26.03.2010.

¹⁸⁷ Nedžad Jusić, Round table: Citizens of BiH between equality and discrimination, 27.03.2010.

¹⁸⁸ Joseph Marko, „Constitutional reform in Bosnia and Herzegovina 2005-06“ in *European Yearbook of Minority Issues*, Arie Bloed, Rainer Hofmann (eds.), p. 215.

¹⁸⁹ Federal Institute of Statistics, BiH Population Census, 1991 available at <http://www.fzs.ba/Dem/Popis/NacStanB.htm>

¹⁹⁰ Party for BiH, opinion presented on Federal Television, TV show „Pošteno Govoreći“ with the topic „Position of National Minorities in BiH,“ aired on 29. 01. 2010.

¹⁹¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p. 131.

position that the BiH Constitution should be amended in order to secure fair political participation of national minorities in offices at all state levels. Only the offices that allow and secure participation of various ethnic groups in the country will reflect the real multiethnic character of the society. In its opinion on constitutional situation in BiH, Venice Commission notes that an office, such as HoP, that only allows members of three constituent groups to be elected does not truly represent the federal character of the state but a mere “additional mechanism favoring the interests of constituent peoples.”¹⁹²

Another discriminatory article of the BiH Constitution is Article V that establishes legal rules for the election of a collective, three-member presidency. Article V clearly states that “the Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.”¹⁹³ It follows that running for seats in the highest office in the country is strictly forbidden for members of national minorities and every other individual who does not belong to one of the constituent groups. Venice Commission regards this provision to be “an inadmissible discrimination.”¹⁹⁴ Moreover, Venice Commission finds this collective presidency to be inefficient and not functional. It also regards that this presidency only reflects the emphasis on three constituent groups that is present in the country.¹⁹⁵ This emphasis deepens the ethnic division even more and steers the country away from its progress towards the EU. On the contrary, the Constitutional Court in its Partial Decision on Constituent Peoples finds that these representations based on ethnicity do not reflect the ethnic and territorial division of the constituent peoples in the country.¹⁹⁶ Even if this were the case, the obvious ethnic origin that plays the crucial role in running and getting elected for the offices at the state level clearly reflects the discrimination against those who do not belong to constituent groups. Consequently, the members of national minorities cannot relate to any of the three elected presidents since they obviously represent and protect the values and identities of three constituent groups only. The Constitutional Court thinks quite the opposite. It states that the any member of the Presidency is elected either by the citizens of

¹⁹² CDL-AD(2005)021, para. 35.

¹⁹³ Constitution of Bosnia and Herzegovina, Article V.

¹⁹⁴ Venice Commission, „Draft opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative,“ CDL-AD(2006)027, para. 29, available at [http://www.venice.coe.int/docs/2006/CDL\(2006\)027-e.asp](http://www.venice.coe.int/docs/2006/CDL(2006)027-e.asp)

¹⁹⁵ CDL-AD(2005)021, para. 39.

¹⁹⁶ Constitutional Court of Bosnia and Herzegovina, Constituent Peoples' Partial Decision 3, U-5/98, para. 64, available at <http://www.ccbh.ba/eng/odluke/index.php?src=2>

the Federation of BiH or the Republika Srpska. That means that, for instance, Serb Member of the Presidency “represents neither the Republika Srpska as an Entity nor the Serb People only, but all the citizens of the Republika Srpska. The same also hold for the Bosniac and Croat Members to be elected from the Federation.”¹⁹⁷ Will the members of national minorities see eye to eye with this decision? Even if the members of Presidency do represent all the citizens of BiH why is their ethnic origin crucial in running for that office? Furthermore, Venice Commission also supports this inconsistency stating that ethnic identification is difficult to justify if the members of the Presidency indeed represent all the citizens inhabiting BiH.¹⁹⁸ What would pose a reasonable amendment to this Article? The ideal amendment would be the one that introduces single instead of three-member Presidency. Another one, introduced by the VC supports the idea of collective Presidency consisting of one President and two Vice-Presidents. But this ideology seems rather politically impossible regarding the current tensions in the country.¹⁹⁹ The most advanced amendment for the current situation in BiH is the one that would maintain collective Presidency but this one would not mention any ethnic criteria for possible candidates. Venice Commission finds that by removing the ethnic requisite, discrimination would be removed as well. This would indeed “constitute a step forward.”²⁰⁰ Another amendment to this Article seems to be the most complex one. It regards introducing the fourth member of the collective Presidency. This President will obviously represent members of national minorities. According to local politicians, proposal of introducing the fourth member to the collective Presidency is more than welcome for the discussion between the political leaders in BiH. In one of the political shows on the Federal Television, Slavko Jovičić, member of Coalition of Independent Social Democrats, stated that in order to make such a decision, parties need to make sure if that same decision will better the situation in BiH.²⁰¹ What these parties also need to take into account is the position of the national minorities in the country while trying to amend the Constitution in order to bring BiH back on the route towards EU integrations.

It is hardly imaginable that the Constitution, which is inspired by some of the most important human rights documents and declarations, as it was mentioned above, can infringe upon

¹⁹⁷ Ibid, para. 65.

¹⁹⁸ CDL-AD(2005)021, para. 69.

¹⁹⁹ CDL-AD(2006)027, paras. 43 and 44.

²⁰⁰ Venice Commission, „Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina,“ CDL-AD(2006)004, para. 9, available at [http://www.venice.coe.int/docs/2006/CDL\(2006\)004-e.asp](http://www.venice.coe.int/docs/2006/CDL(2006)004-e.asp)

²⁰¹ Federal Television, TV show „Pošteno Govoreći“ with the topic „Position of National Minorities in BiH“

human rights, especially of minority members. According to Venice Commission, one of the most important characteristics of any constitution entails equality of voting rights and non-discrimination.²⁰² Bosnian Constitution, however, does not promote values of equality and non-discrimination, even though it is based on the same. Moreover, the Constitution is rather a paradoxical creation. Since the Constitution proclaims that the European Convention for the Protection of Human Rights is the single legal document that is of the utmost importance,²⁰³ it means that such emphasis entails a very strong opposition towards discrimination. Rather surprisingly, all the state institutions are created in such a way that they represent only members of three constituent groups and not the citizens in general creating quite the opposite effect than the one in the Constitution. It follows that “people are forced to artificially identify with one of the three peoples” in order to enjoy the benefits of state protection and to participate in political deliberations that affect their positions.²⁰⁴ The end result of such creation will be further division along ethnic lines which will obstruct the progress of the country even more. As it was mentioned above, the DPA was primarily created in order to stop the conflict between the three warring groups. But that was a decade and a half ago.

Now, a time for change has come. Those changes entail amending the Constitution of BiH in order to provide for more inclusive approach that will focus on protection of individual human rights and thus minority rights as well. Since BiH is a member country of Council of Europe, it is necessary that it “be assessed according to the yardstick of common European standards.” It is very clear that minority protection, which many relate to stability and peace in the region, represents one of the most important standards in the era of European integration. These standards will also entail creation of a political system that is not a mere “reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups.” Moreover, this system will only be legitimate if it provides for a fair representation of all ethnic groups in the country.²⁰⁵ Considering all the above, the only reasonable step would be a proper constitutional reform in which members of political parties would agree on the fact that the time of ethnic (exclusive) ideology has ended and the period of individual (inclusive) approach has come.

²⁰² CDL-AD(2005)021, para. 73.

²⁰³ Constitution of Bosnia and Herzegovina, Article II.2.

²⁰⁴ CDL-AD(2005)021, para. 43.

²⁰⁵ Ibid, para. 75.

Chapter 4.2: Legal documents as tools for improving the minority situation?

As it was aforementioned, although it is based on and inspired by international human rights documents, the Constitution of BiH clearly discriminates against members of national minorities and all those who do not want to identify themselves with one of the three constituent groups. But on the other hand, certain legal documents seem to be paving the way for the implementation of minority protection provisions set forth by the FCNM. These are namely the Law on rights of national minorities and the Election law. These laws, as many others in the country, are not flawless and they still need a lot of improvement. Nevertheless, these are one of the rare legal provisions that directly or indirectly deal with national minority rights and that present a beacon of hope for the implementation of minority rights provisions.

Chapter 4.2.1: Law on rights of national minorities

First and foremost, the Law on rights of national minorities is the only domestic legal document that directly promotes and protects the rights of minority members. According to Bieber, this law, although it was based on the Framework Convention, will be difficult to implement because of the financial difficulties stemming from the fact that political elite's attention is focused mainly on three constituent groups.²⁰⁶ Adopted on 12 April 2003, the Law proclaims the FCNM as the most important mechanism for minority protection and as "an integral part of the legal system in BiH."²⁰⁷ As such, this Law, together with the FCNM, establishes the first legal mechanism for the protection of minority rights and it represents an important step forward for the society since it entails that political leaders in BiH are slowly, but surely, adopting the more inclusive approach towards individual rights, and putting aside the exclusive approach based on one's ethnic background. As mentioned above, this certainly does not mean that the Law fully corresponds to international standards since it is the first of this kind that was drafted in BiH. Basic provisions of the law set the fundamental rules for establishing and implementing protection of minority rights. Thus, Article 1 clearly states that the rights and obligations of both, members of minority groups and government of BiH, are "to respect and protect, preserve and develop the ethnic, cultural, linguistic and religious identity of each member of national minorities in BiH, who is a citizen of BiH."²⁰⁸ Considering the fact that some minority groups, namely Roma, are usually marginalized and

²⁰⁶ Florian Bieber, *Bosna i Hercegovina poslije rata: Politički sistemi u podjeljenom društvu*, pp. 42-43.

²⁰⁷ Law on rights of national minorities, Article 2.

²⁰⁸ Ibid, Article 1.

can barely provide for their most basic existence, it is clear that most of them do not even possess basic identification documents and thus are not regarded as citizens of BiH. This in turn entails that the Law does not protect their rights. In author's opinion, the citizenship clause should be removed and a more case-to-case approach should be taken into account. Venice Commission similarly finds that the citizenship requirement should be abolished in order that the Law can be applied to non-citizens as well.²⁰⁹ Article 3 seems to be following the same citizenship-line. It defines national minority as "a part of the population-citizens of BiH 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." Moreover, the article includes equality provision for members of 17 national minority groups. Accordingly, this list is exactly the same as the list made during the last population census in 1991.²¹⁰ The fact that Venice Commission welcomed the most about the list is that it is open-ended and that it does not exclude possible further inclusion of other ethnic groups.²¹¹

One of the most important parts of this Law, which can have the most positive impact on minority situation, is the participatory provision. Since the political power is divided between the members of constituent groups, the exclusion of minority members from partaking in political deliberations can have negative drawbacks on Bosnian society. Therefore, Venice Commission finds that legal provisions that enable political participation of members of national minorities "in the legislative and executive bodies at all levels are therefore of the utmost importance."²¹² Article 19 of the Law clearly sets the obligation for the state to enable the members of minority groups to be proportionally represented at all state levels according to the last census.²¹³ How much, and will at all, this proportional representation provision help improve the minority position in Bosnia and Herzegovina? According to the 1991 census, less than 2% of the overall population consisted of members of national minorities. Consequently, proportional representation would only be possible if all national minority groups would agree on having one representative who would protect and promote their ideals. Accordingly,

²⁰⁹ Venice Commission, "Draft opinion on the draft law on rights of national minorities of Bosnia and Herzegovina," CDL(2001)071, p.3 available at [http://www.venice.coe.int/docs/2001/CDL\(2001\)071rev-e.asp](http://www.venice.coe.int/docs/2001/CDL(2001)071rev-e.asp)

²¹⁰ Law on rights of national minorities, Article 3. This list includes Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks, Ukrainians.

²¹¹ CDL(2001)071, p. 2.

²¹² Ibid, p. 7.

²¹³ Dragan Ivanović, "Constitutional Position of Minorities in Bosnia and Herzegovina," in *Ethnic Relations in South Eastern Europe, Problems of Social Inclusion and Exclusion*, Nikolai Genov (ed.), p. 44.

Article 20 indeed states that “representatives of national minorities in the structure of authorities shall be the representatives of all national minorities and shall be obliged to protect interest of all national minorities.”²¹⁴ This would not embody a proper minority representation which entails that each minority group has at least one representative. Moreover, if the recent conflict and its bloody outcomes are taken into account, the situation concerning the numerical position of certain minority members have probably changed drastically with some groups decreasing and some other increasing in their size. It follows that the data provided by the last census cannot be regarded as the reflection of the current minority situation in the country. Accordingly, the proportionality clause should also be abandoned. In order to provide for a more efficient clause, the amendment regarding reserved seats for minorities in state offices should be taken into account. The most important creation established by the participatory provision is the Council on National Minorities that was discussed in earlier chapters. Articles 21 and 22 oblige the state to create this advisory body that will “give opinions, advice and proposals to the BiH Parliamentary Assembly on all matters regarding the rights, status and interest of national minorities in BiH.”²¹⁵ Regarding that all the previous provision concerning participation of national minorities are rather weak and do not provide setting for efficient participation, one can assume that the most powerful tool that national minorities have with regard to this Law is the Council of National Minorities and its advisory influence on the Parliamentary Assembly. It seems that in order to achieve the full capacity of this Law, many amendments need to be regarded with respect of including non-citizens as the protected beneficiaries of the protection and enabling for a more efficient participation by guaranteeing reserved seats for members of national minorities.

Chapter 4.2.2: Election law of BiH

The Election law of BiH is another legal document, which could be used as a tool for protecting minority rights and identity. The document consists of set of rules for electing political representatives and election procedures on state and local levels. Adoption of this law was a precondition for BiH to join the Council of Europe. The law was adopted on 23rd August 2001 in both houses of BiH Parliament.²¹⁶ The main purpose of this law is to promote

²¹⁴ Law on rights of national minorities, Article 20, para. 3.

²¹⁵ Ibid, Article 22.

²¹⁶ Venice Commission, “Draft opinion on the Election law of Bosnia and Herzegovina,” CDL(2001)106, paras. 1 and 2, available at [http://www.venice.coe.int/docs/2001/CDL\(2001\)106-e.asp](http://www.venice.coe.int/docs/2001/CDL(2001)106-e.asp)

“free, fair and democratic elections and to ensure the achievement of democratic goals.”²¹⁷ Elections are considered to be democratic and fair only if the provisions stemming from electoral law ensure that every individual, regardless of his/her religion, ethnic background and political opinion, is allowed to run for the offices on all state levels. Accordingly, such a law directly promotes values of equality and non-discrimination in the country. Only provisions in the law that do not set ethnic background as the focal condition for election to the offices and that do not oppose the international human rights standards are articles regarding election to the House of Representatives of the Parliamentary Assembly of BiH, election to the House of Representatives of the Federation of BiH, election to the National Assembly of Republika Srpska and election to Cantonal and Municipal Chambers.²¹⁸ Two provisions that seem to disregard the international documents on protection of human and minority rights, which are directly applicable in BiH, are contained in chapters 8 and 9. These chapters are particularly important when it comes to political participation due to the fact that they deal with rules concerning election of the members of Collective Presidency and members of Parliamentary Assembly of BiH, i.e. election of members to the highest offices in the country. Article 8.1 clearly states that three members elected to the Collective Presidency shall be one Bosniak, one Croat and one Serb, which clearly discriminates against other people who do not declare themselves as belonging to these ethnic groups that in turn prevents them from running for the office of the President.²¹⁹ As it was mentioned above, Constitutional Court of BiH finds this article in accordance with international human and minority rights standards since it proclaims that these presidents are clearly elected by all citizens of BiH and thus represent interests of all ethnic groups in the country. Surprisingly, Venice Commission does not mention this discriminatory provision in its 2006 report. It only sets certain technical advice concerning the wording of the article.²²⁰ However, in its other opinion both Venice Commission and Office for Democratic Institutions and Human Rights stated their serious concern relating to this article that clearly limits the right to be elected to three ethnic groups only. They also affirmed that such open discrimination is caused by the Constitution of BiH and emphasized that amending both of these legal documents should be

²¹⁷ Election law of Bosnia and Herzegovina, Preamble available at <http://www.izbori.ba/documents/ZAKONI/POIZpw110508.pdf>

²¹⁸ CDL(2001)106, para. 11.

²¹⁹ Election law of Bosnia and Herzegovina, Article 8.1.

²²⁰ Venice Commission, “Draft law on amendments to the Election law of Bosnia and Herzegovina,” CDL-EL(2006)013, para. 63 available at [http://www.coe.ba/pdf/CDL-EL\(2006\)013-e.pdf](http://www.coe.ba/pdf/CDL-EL(2006)013-e.pdf)

prioritized.²²¹ Venice Commission also notes that a multi-ethnic society, such as BiH, must provide for legal provisions that will ensure that state offices reflect the multiethnic and multicultural features of the country.²²² Indeed, these features that confirm country's multi-ethnic status should only be used as tools for improving and bettering the overall situation in BiH and certainly not as obstacles as many politicians see them.

Another provision that seems to be problematic because of its focus on ethnic origin is the one concerning election of members to the House of Peoples of Parliamentary Assembly. This chamber consists of 15 delegates, which means that each constituent group has 5 representatives.²²³ It is clear that one of the highest legislative offices in the country will represent and protect the ideals of constituent groups only. In author's opinion, the Election law should promote equality provision regarding election of delegates to this chamber. The equality requirement will be satisfied only when members who do not identify themselves with three constituent groups are allowed to run and be elected to this office as well. This article goes as far as to legally prevent the "Others" from participating in electing the delegates to this chamber. Article 9.12a clearly states that Bosniak and Croat delegates will be elected only by Bosniak and Croat members of the House of Peoples of the Federation of BiH. Moreover, this article prohibits Serb delegates and all the others from the mentioned chamber to participate in electing Bosniak and Croat delegates. On the other hand, regarding the election of Serb delegates, members of National Assembly of Republika Srpska are all allowed to elect their representatives regardless of their ethnicity.²²⁴ Venice Commission finds that these rules, which are direct consequence of the Constitution, are rather problematic, especially with regard to the Federation and their way of electing representatives. Moreover, Venice Commission notes that it is rather difficult "to find a legal rationale for this different treatment of the same election in the two Entities."²²⁵ Constitutional Court of BiH finds this difference in selecting representative for the House of Peoples quite striking. Moreover, it only states that such election of delegates in Republika Srpska guarantees the same rights to

²²¹ Venice Commission and Office for Democratic Institutions and Human Rights, "Joint opinion on amendments to the Election law of Bosnia and Herzegovina," CDL-AD(2008)012, para. 7 available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)012-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)012-e.asp)

²²² CDL(2001)106, para. 17.

²²³ Election law of Bosnia and Herzegovina, Article 9.12

²²⁴ Ibid, Article 9.12a.

²²⁵ Venice Commission, "Opinion on the Electoral law of Bosnia and Herzegovina," CDL-INF(2001)021, para. 19 available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)021-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)021-e.asp)

all members to partake in selection of five Serb delegates to the House of People of BiH.²²⁶ However, rather disappointingly, the Constitutional Court makes no mention of electing members of national minorities to the House of People, thus clearly approving of such discriminatory provision contained in the Election law and the Constitution as well. Thus, it follows that a reform regarding amending these two legal documents need to be taken into serious consideration. Therefore, Venice Commission recommends that these discriminatory provisions that are based only on individual's ethnicity need to be removed. Furthermore, the Commission clearly states that "all citizens of BiH should have the right to stand for any office or to vote on equal terms."²²⁷

Political participation of all members of the society, including national minorities, is of the utmost importance for the prosperity of the country. Local political authorities in BiH need to take this idea into serious consideration in order to provide legal basis for creating a society where all people will be equal and free to vote and run for the office regardless of their ethnic background. Leaders of ruling parties in BiH must take Law on rights of national minorities and its proper implementation into account in order to prevent negative drawbacks that Bosnian society could experience as it moves more and more towards the EU. On the other hand, the Election law and the Constitution still pose as an obstacle on this way. As long as these and any other legal document in the country are based on promoting interests of constituent groups only, the principles of equality and non-discrimination will not be achieved. Without these principles the country will be in the state of stagnation that can only cause larger division between ethnic groups in the country. Amending these discriminatory documents in a way that every individual will be treated the same and allowing members of national minorities equal participation in the decision-making processes, Bosnia and Herzegovina will be able to fight against and remove the ethnic hatred that has been present in the country for so long and that is the major obstacle in achieving international standards regarding human and minority rights.

²²⁶ U-5/98, para. 66,

²²⁷ CDL-AD(2008)012, para. 8.

Chapter 5: Problems of social and political inclusion of Roma and Jewish minorities in BiH

As much as minority rights implementation and framework mechanisms that enable their protection can improve and progress the situation concerning social position of an individual in a society, they are also able to cause and provoke a rather unstable and hostile social setting to live in. This especially holds true if the region concerned is one of the most ethnically diverse region in Europe, namely the Balkans. This region has been a scene where different religions, cultures, languages, traditions and even alphabets have intertwined for centuries. It is, in a way, reasonable that such a variety and diversity in promoting and protecting one's ideals and values cause certain tumults in social surroundings. These outbreaks are considered to be the only way to protect the well-being of one's own ethnic identity. It becomes clear that protecting and fighting for your own ethnic identity is the main factor that influences all aspects of life in the region from cultural, over social to political. What is the position of Romani and Jewish minority groups then regarding the centuries-long oppression by ruling elites? Do they enjoy any special rights and protection? In order to understand the position and reality these minorities are facing with, it is important to present minority situation in the Balkans. Bosnian legal and political setting is deeply influenced by the divisions that were and still are present in the region. These divisions as it will be shown later in the chapter shaped the minority protection systems that are focused mostly on minorities that originate from one of the countries on the Balkan Peninsula.

The subsequent part of the chapter will focus mainly on problems and position of minority rights in the Balkans due to the fact that minority situation in BiH is not significantly different than in the rest of the region. It is necessary to present the specific situation of minority groups in the Balkans in order to provide a clearer understanding of the minority problems in BiH. It will try to present common problems that members of the minority groups are experiencing in order to give clearer understanding of current issues that Romani and Jewish minority communities are dealing with. Moreover, the chapter will present activities of these minority groups that are aimed at improving the situation. Interviews with certain members of these communities, as well as with representatives of non-governmental organizations, will be included in order to present their viewpoints on the current minority situation in the country. Due to a rather different but yet difficult situation these minorities find themselves in, the chapter used rather different approaches in depicting the situation of these two minorities.

Since the Jewish community is in a rather better position when compared to the situation of Roma community, the chapter will focus more on identity creation through non-political activities. On the other hand, a rather depressing situation of Roma community caused a rather different approach where governmental activities aimed at improving their situation will be presented in more detail. Moreover, the chapter will also give analysis of the recent decision of the European Court of Human Rights in the case *Sejdić and Finci versus Bosnia and Herzegovina* that will serve as international community's point of view regarding problem of Jewish and Roma communities and of minority protection in BiH. On the other hand, chapter will depict opinions of several prominent persons in BiH on the current constitutional situation in order to present their viewpoints regarding minority discrimination.

Chapter 5.1: Regional legacy and minority rights in the Balkans

Throughout history, the region of Balkans has always been a place that many foreign oppressors wanted to put under their control. This constant struggle to achieve dominance in the Balkans resulted in creation of a mosaic of vast cultures where different ethnic groups live and try to protect their cultural, economic, religious and political identities. The question that poses itself in such a situation is: if such a region is already populated by a vast number of groups, where religion and ethnic origin play significant role in shaping your future position and rights, how can members of minority groups, which are numerically inferior and culturally different than the usual groups, claim their rights? How can groups that have been marginalized through centuries achieve their basic human rights? Is their position significantly worse? Is their struggle for establishing minimum human standards far more difficult? It is clear that not being a member of majority puts an individual in a rather ungrateful position and makes any attempt of voicing one's opinion in order to influence and shape the society quite weak. This situation is indeed taking place in the Balkans and accordingly in BiH. One of the most significant reasons for such treatment of traditional minorities is the fact that "all the constituting nations of the former Yugoslav federation were minorities in absolute terms."²²⁸

Many historical factors have shaped the present face of the Balkans and made it the region with the biggest number of minority groups in Europe. Vladimir Ortakovski states that one of the crucial factors is the fact that the Balkan region has always been a place that is "marked

²²⁸ Andrey Ivanov, *The Balkans divided: Nationalism, minorities and security*, p. 13.

by conflicting and intercrossed interests and influence on the part of different peoples, cultures, ideas, ideologies, which brought about a great population mix.”²²⁹ This population mix refers mostly to constituent groups of people who make a majority in their country but who, after moving to another, become a minority. Thus, it is not surprising that debates on minority issues deal usually with these types of minorities and disregard typical minority groups, such as Jews and Roma. Moreover, Ortakovski states that many European and Asian colonial powers occupied this region because of its obvious strategic, political and economic significance thus hampering the progress of state and ethnic formation in the region. Religion did and still “exerts important influence on the situation and the confessional division (and on the confessional minorities) in the Balkans.” Besides the division between Orthodox and Catholic churches that happened in 1054, the Ottoman invasion caused another division between Christians and Muslims. As Ortakovski notes, compared to other European countries where religious and ethnic divisions still exist, “these divisions are more pronounced in the Balkans.”²³⁰ Thus it is only reasonable that governmental and political attention in BiH is focused on these three religions and consequently three ethnic groups that enjoy constituent rights. On the other hand, it is fairly unjust that minorities, such as Roma and Jews, who do not belong to one of these constituent groups, are exposed to so many ways of open discrimination on a daily basis. This discrimination that even found its way to be legally accepted in Bosnian Constitution stems from the communist period. During that regime, members of minority groups were allowed to choose between two options: they had to choose either to refrain from their rights or to face repression directly or indirectly.²³¹ Fortunately, the situation started changing after 1989 when people became free to claim their ethnic rights. Consequently, promoting, protecting and identifying with one’s own identity became the leading force in all aspects of life. One of the most influential ways of doing this was through political means. Thus, “predominance of politics and its overrepresentation in all aspects of life” became the focal characteristic of the region. Moreover, politics became such a powerful tool in a way that it “determined economics, geography and even history” in a way that is more obvious than in any other European region.²³² Accordingly, Bosnian political system inherited this legacy of allowing politics ruled by ethnic and religious elites to determine all the aspects of life in the country in a way that it seriously endangers the existence of minority

²²⁹ Vladimir Ortakovski, *Minorities in the Balkans*, p. 383.

²³⁰ *Ibid*, pp. 383-385.

²³¹ Andrey Ivanov, *The Balkans divided: Nationalism, minorities and security*, p. 11.

²³² *Ibid*, p. 17.

groups in means of disabling them to achieve their rights and consequently protect their ethnic identity. This open favoring of certain ethnic groups undoubtedly leads to uprisings and conflicts. According to Ivanov, most conflicts are usually not caused by religious or ethnic factors but by political ones and they all share “nationalistic component.” Moreover, political elites ensure public support by playing ‘nationalistic card’ and appealing to issues of nationalism “to which the Balkan peoples are extremely susceptible.”²³³ Taking into consideration years of neglecting rights of Jews and Roma people in the region, one could assume that issues pertaining to their ethnic origin cannot lead to a conflict although they are as sensitive as the ones of constituent peoples, if not more. This does not however justify the fact that rights of Jewish and Roma minorities are neglected and infringed upon. Moreover, these nationalistic appeals have tremendously influenced and changed countries in the Balkans, including BiH, in a way that everything is created and done according to the ethnic key. These misuses of nationalism create as the end result nothing more but “deepening of cleavage lines and the fragmentation of multiethnic societies.”²³⁴ The old proverb ‘Divide and conquer’ finds its practical use in this region where ethnicity is used to divide groups and alienate them from one another in order to gain political power. Such a behavior can only be classified as barbaric and primordial. Many authors state that Balkan societies are “tribal societies” where rule of emotions is more important and powerful than rule of intellect. Moreover, these emotions are “primitive, atavistic, and not those shaped by late twentieth-century liberal values.”²³⁵ It seems that the values of equality, non-discrimination, justice, freedom of speech and political participation deserve nothing more but a second-hand importance in this region. This entails that not even minimum standards regarding minority protection in the Balkans are assured. These standards flow from international human rights treaties and conventions that BiH and other countries in the region signed and ratified and they usually bring about principles of equality and non-discrimination. On the other hand, members of minority groups, while enjoying these rights, also have many obligations towards the state they live in. Vladimir Ortakovski provided a list of rights that states should provide and obligations that minorities should respect. Two of the most important rights are the “right to factual and legal recognition of the minority” and the “right to full equality of members of minorities to unimpeded economic, political and cultural development.”²³⁶ In author’s

²³³ Ibid, p. 12.

²³⁴ Ibid, p. 127.

²³⁵ Ibid, p. 21.

²³⁶ Vladimir Ortakovski, *Minorities in the Balkans*, 2nd edition, p. 340.

opinion, the best and most efficient way to achieve this rights would be allowing members of minorities to be politically active thus enabling them to directly influence the decision-making processes that are connected with the well-being and progress of their groups. Another right that could significantly improve the minority situation in BiH and the Balkans is the “right of the members of minorities to live in a society where the propagation of racial, religious or ethnic intolerance and hatred is prevented.”²³⁷ On the other hand, members of minorities should also respect certain obligations that enjoyment of these rights entails. Thus, minority members need to show their loyalty to the state they live in and they must not do anything that would endanger state sovereignty, political independence and sociopolitical order.²³⁸ This is exactly what political elites in BiH are afraid of when it comes to granting members of minorities their rights. They support the assumption, even though not openly, that granting minority rights and allowing minority participation could only cause bigger division and threaten stability in the country that is already on shaky ground. They do not seem to take into account centuries that Jewish and Roma minorities have spent in BiH, which only shows their undoubted loyalty to the country.

Therefore, it is very significant that political elites in BiH and in the region realize that minority rights and their protection are crucial prerequisite for integration into EU. Ortakovski states that one of the most fundamental principles – principle of non-discrimination – can be incorporated into state policy in order to protect minority rights and improve their situation.²³⁹ The only fact that promises certain future for minorities in the region is streaming of Balkan countries towards European integration. These countries, as the participants of the Stability Pact for South Eastern Europe, agreed to preserve multiethnic and multicultural diversity of the region, to make just democratic decisions and to protect minorities, just to name the few. These obligations could, according to Ortakovski, significantly improve the position of members of national minorities and advance their rights. If not respected, these obligations and minority discrimination can cause major problems for BiH regarding international development. For instance, “the state that violates the basic human rights of the members of minorities can be excluded from the membership in the EU, be stripped of the status of most favored nation and can find itself worse off than its neighbors.”²⁴⁰ Thus, minority problems and discrimination that are widely present in BiH need to be taken with serious consideration

²³⁷ Ibid, p. 341.

²³⁸ Ibid, p. 341.

²³⁹ Ibid, pp. 341-342.

²⁴⁰ Ibid, pp. 345-346.

as to find a proper solution that would not endanger the position of constituent ethnic groups but that would also provide for basic minority rights that enable them to promote and protect their identity and consequently, culture and tradition.

Chapter 5.2: Jewish minority in BiH: From the past to the present

Jewish community in BiH represents one of the oldest and most traditional minority groups in the country. Thus, it follows that, as a community with abundant cultural richness, Jewish minority group has had a tremendous influence on Bosnian society. Jews from BiH originate from Spain. Following King Ferdinand's edict that gave them four months to leave Spanish Kingdom, Sephardic Jews started migrating in 1492 to countries under Ottoman rule since the sultans treated Jews with most respect.²⁴¹ The Jewish refugees have indeed been "recognized as a separate millet by the Ottoman authorities and remained after the liberation of the area from Ottoman rule."²⁴² First record of Jews living in Bosnia dates to 1565 when two Jewish merchants filed a complaint against people who owed them money. Less than two decades later, a Jewish ghetto was built. What is important about this ghetto is the fact that it was set up on the demand of Muslim people living in Sarajevo who were complaining about their Jewish neighbors being too loud and not respecting rules of conduct.²⁴³ However, Moše Atijas stated that creation of this ghetto happened only because Jewish members wanted to live together as to make many celebrations and social gatherings easier.²⁴⁴ Besides this instance, setting up a ghetto in Bosnia was relatively unknown fact, unlike in the rest of Europe.²⁴⁵ This evidence only emphasizes the fact that BiH was a country where many ethnic groups, including minority ones, lived together in harmony and thus appreciated each other's differences. This feature of multiethnic society was what BiH separated from other countries in the Balkans and it should be this same feature that political elites and citizens need to promote and practice nowadays. Another historian confirmed Atijas' argument, namely Samuel Grayzel. He stated that the Jewish people always preferred to live next to one another in a group. Furthermore, he stated that local authorities not only gave them protection but full

²⁴¹ Vladimir Ćorović, "About the history of Jews in BiH." available at <http://www.benevolencija.eu.org/content/view/208/72/>

²⁴² Hugh Poulton, *The Balkans: Minorities and states in conflict*, p. 205.

²⁴³ Vladimir Ćorović, "About the history of Jews in BiH."

²⁴⁴ Moše Atijas, "Istoria de los žudios de Bosna." cited in "The Place of the Bosnian Sepharadi Community in the Sepharadi Communities of Europe and the Mediterranean," Muhamed Nezirović available at <http://www.benevolencija.eu.org/content/view/152/72/>

²⁴⁵ Muhamed Nezirović, "The Place of the Bosnian Sepharadi Community in the Sepharadi Communities of Europe and the Mediterranean."

understanding which helped BiH to have a very well developed sense of justice and tolerance.²⁴⁶ Jewish people continued to live in the ghetto until the Austro-Hungarian government came to power in 1878. Succession of Ottoman laws in the 19th century provided emancipation of Jews in BiH. After BiH joined Yugoslavia, the Jewish community became part of all-Yugoslav Federation of Jewish Religious Communities. Jewish community had to reconstitute itself after the World War II when regaining a sense of Jewish identity was extremely difficult. Following the collapse of Yugoslavia and war in BiH many Jews fled the country. Nonetheless, Jewish people retained their unique Sephardi customs and tradition along with the Ladino language.²⁴⁷ Since the last population census was conducted in 1991, it is hard to tell how many Jewish people live in BiH at the moment. In 1991, there were 426 Jews inhabiting BiH.²⁴⁸

As it was already mentioned, Jewish people integrated successfully into Bosnian society mainly because of the fact that they improved and organized better Bosnian trading system and introduced new capitalistic methods. Since Sarajevo was the place where all Jews would come in the first place, it still has the biggest population of Jewish people in the country. It can also be assumed that they significantly improved development of Sarajevo as the capital city of the country.²⁴⁹ Muhamed Nezirović emphasized that at that time, Sarajevo resembled famous multicultural centers of Europe such as Toledo and Amsterdam only due to its human factor and culture that enabled flourishing of many traditions.²⁵⁰ It follows that in a society where differences are met with open mind and where various cultures are nurtured and encouraged to prosper, that society can only expect unquestionable loyalty of its citizens. One of the main characteristics of Jewish communities in former Yugoslavia was the fact that they were striving to create a sense of belonging to their group, which in turn has influenced their “quest for identity” in the most crucial way. The sense of belonging to one of the communities was the “focus of Jewish identity” that enabled conceptualization of Jewishness.²⁵¹

²⁴⁶ Samuel Grayzel, “Histoire des Juifs .” cited in “The Place of the Bosnian Sephardi Community in the Sephardi Communities of Europe and the Mediterranean,” Muhamed Nezirović.

²⁴⁷ La Benevolencija, “History of Jewish Community in BiH.” available at <http://www.benevolencija.eu.org/content/view/1/1/>

²⁴⁸ Federal Office of Statistics, 1991 population census available at http://www.fzs.ba/Dem/Popis/Nacionalnost_opcine_Popis_1991.pdf

²⁴⁹ Behija Zlatar, “Arrival of Jews to Sarajevo.” available at <http://www.benevolencija.eu.org/content/view/53/35/>

²⁵⁰ Muhamed Nezirović, “The Place of the Bosnian Sephardi Community in the Sephardi Communities of Europe and the Mediterranean.”

²⁵¹ Yitzhak Kashti, “A Quest for Identity. Post War Jewish Biographies.” cited in *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, Ari Kerckanen, p. 196.

Consequently, with progress of civil society, so will the development of a cohesive society, where all citizens will mutually support each other and share common ideals, become a possibility rather than an ideal. Accordingly, one of the main characteristics of Jewish community in BiH is the strong passion and pride that all community members shared towards their country.²⁵² In 1992, while celebrating 500th anniversary of expulsion from Spain, the president of Jewish Community, Ivan Čerešnješ, emphasized this loyalty to the country they all live in and stated that “the same blood is in our veins, and we are, first of all, loyal only to one – to our Bosnia and Herzegovina.”²⁵³ While participating in societal development, members of Jewish community integrated their customs and ideals into Bosnian system of values. In a way they were creating their own identity within the borders of the new country they inhabited. Jewish identity is according to Predrag Finci much different than identities of any other ethnic groups. This is due to the fact that Jews have been proclaimed both ‘chosen ones’ and ‘cursed ones’ that create a very special social status this community finds itself in. Every Jew identifies himself or herself with their own population. Moreover, general prejudices are crucial factors when characterizing Jewish persons. Thus, feeling responsible for the whole group is the end result of this characterization. It can be assumed that Jews as an ethnic group do share very strong ties that make their group very coherent and harmonic. On the other hand, Jews have always been marginalized because of their customs, their ever presence and their alleged religious sins. Thus, they had to repent for the ‘sins’ that their ancestors have committed and had to bear the burden of their past on their shoulders.²⁵⁴ Creation of ethnic identity has always been a very complex process. Besides customs, tradition, language and religion that mostly influence identity establishment of a certain ethnic group, many outside factors that are directly linked to the social and political setting of the country have to be taken into account. Jewish communities throughout former Yugoslavia were specific due to the fact that they were striving simultaneously to integrate into the socialist setting while preserving their distinct Jewish identity. While trying to diminish the “dichotomy between themselves and the dominant power structure”, the boundaries between Jewish and the identity of the majority group slowly began to disappear.²⁵⁵ But after

²⁵² Muhamed Nezirović, “The Place of the Bosnian Sepharadi Community in the Sepharadi Communities of Europe and the Mediterranean.”

²⁵³ “Sefarad 92, Sarajevo 11.09. – 14.09, Collection of works.” cited in *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, Ari Kerkanen, p. 152.

²⁵⁴ Predrag Finci, “Jewish Question and about Identity,” available at <http://www.benevolencija.eu.org/content/view/148/72/>

²⁵⁵ Paul Benjamin Gordiejev, *Vocies of Yugoslav Jewry*, p. 417.

Yugoslavia has disintegrated, Jews regained interest in their own identity. Rather than identifying as Yugoslavs, they turned to “rediscovery of Jewish roots and renewal of Jewish identification.”²⁵⁶ While trying to reestablish their ethnic identity in BiH, they integrated their traditional ethnic characteristics into the culture of the country, which has enabled them to become very respectable ethnic group. But many people have a rather different approach to the multiculturalism in a given society. According to Goebbels, every culture’s ultimate goal is domination rather than democracy. Moreover, he noted that such a goal is usually followed by creation of hostility towards everything that is different. The propagators of such an idea see the salvation of their societies in discriminating minority groups. This infringement upon minority rights clearly shows the real face of the ruling political elite.²⁵⁷ Is this the approach that Bosnian politicians are using while trying to ‘protect’ their own constituent groups? Is Bosnian society turning into totalitarian one by neglecting and discriminating against one of its most valuable minority groups? How can this discrimination be fought against and minority situation improved? Only by letting minority members take active part in political deliberations in the country that would enable them to legally protect their identity and regain the social position they used to have in the past. According to Ivanović, Jewish minority was a very active community at the end of the nineteenth and the beginning of the twentieth century. Its activities regarding promotion of their culture contributed profoundly to the modern arts and urban culture, as well as to industrial development of BiH.²⁵⁸ Thus it follows that if Jewish members are prohibited from participating in political life of the country, their identity and well-being of their community will be highly vulnerable. As such, they will not be able to participate in public life and moreover, the lack of their activities will only result in downgrading of cultural, political and economic industries of the country. Local authorities obviously do not give much significance to this or any other minority group’s activities even though it is precisely these activities that made Bosnian society so rich in numerous cultures and traditions.

According to Freidenreich, Jewish community in Sarajevo was the most vibrant, active and respected community in former Yugoslavia.²⁵⁹ How can this same community play an active

²⁵⁶ Ari Kerckanen, *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, p. 152.

²⁵⁷ Paul J. Goebbels, “Diary (1942-1943)” cited in “Jewish question and about identity,” Predrag Finčič.

²⁵⁸ Dragan Ivanović, “Constitutional position of minorities in Bosnia and Herzegovina: A case of no majority.” In *Ethnic relations in South Eastern Europe, Problems of social inclusion and exclusion*, Nikolai Genov (ed.), p. 41.

²⁵⁹ Harriet Pass Freidenreich, “The Jewish community of Yugoslavia” in *The Balkan Jewish Communities, Yugoslavia, Bulgaria, Greece and Turkey*, D.J. Elazar (eds.), p. 33.

part in public life of BiH, if they are legally forbidden to actively partake in decision-making processes and if the Constitution of the country they inhabit clearly discriminates against and violates their basic human rights? The possible answer to such discrimination is unity and cohesion of minority groups. Only if members of national minorities are well organized can they improve their situation and fight for their rights. Jewish Community of BiH (JCBH) is an umbrella organization of all Jewish communities in the country that was established in 1992. JCBH is in close coordination with some of the regional and world Jewish organizations, such as European Jewish Congress, European Council of Jewish communities and World Jewish Congress.²⁶⁰ It can be assumed that the JCBH is trying to improve the minority situation of its community regardless of country's lack of interest for these groups. 'La Benevolencija' is Jewish humanitarian association that was established in 1892 and is one of the most active organizations in promoting the general welfare of people in BiH. One of its boldest activities was realized during the war in BiH when La Benevolencija gave out food and medicine not only to the members of their community but to all people regardless of their ethnicity. In a way, this organization was the only connection to the outside world for all people struck by the war.²⁶¹ If Jewish community did not take ethnicity into account in the times of need, why do the same people who were probably saved by that community have to take ethnicity seriously when protecting their own ethnic groups and not allowing others to participate in political matters in times when the whole country needs to be unified? The organization of the community and the developed sense of belonging to it is what enabled Jewish community to keep its identity. According to Kerckanen, "the organized community structure" was the factor that preserved the Jewish community. This feature that has been inherited from the old Yugoslav regime enabled the very existence and continuation of Jewish life in the recent years.²⁶² Each ethnic group that values its community and coherence should indeed be allowed and moreover encouraged to take participation in political deliberations in order to protect their ethnic identity. Each country that nurtures its multiethnic nature and variety should promote active partaking of all its ethnic groups in order to preserve its cultural richness rather than discriminate against those who are not considered to be constituent and consequently who do not deserve to be protected. The latter one is precisely what BiH

²⁶⁰ Interview with Jakob Finci, president of JCBH (13.03.2000) in *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, Ari Kerckanen, p. 149.

²⁶¹ Ivica Čerešnješ, "Čerešnješ Papers: Report about activities from 1991-1995." cited in *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, Ari Kerckanen, pp. 161. at 163.

²⁶² Ari Kerckanen, *Yugoslav Jewry: Aspects of post-World War II and post-Yugoslav developments*, p. 196.

authorities are doing with the pretext of protecting the ethnic interests of constituent groups. According to Gordiejev, a state is a significant actor that profoundly influences the creation of Jewish identity. Moreover, the creation of one's identity is dictated more by political elites than by ethnic groups that are directly linked to such a process.²⁶³ Thus, it follows that the only interest of BiH would be to legally allow political participation of minorities at all levels of government which would entail factual and not only formal recognition. If the local authorities do not do so, the current situation can seriously hamper the progress and visibility of Jewish minority.

The recent interview conducted with Jakob Finci, president of Jewish Community in BiH, revealed some very interesting viewpoints. As a person who, together with Roma member Dervo Sejdić, filed a complaint against BiH at the European Court of Human Rights, Finci has contributed significantly to the current debate on constitutional reform in BiH. He firmly believes that after the Court's decision, the situation concerning human and minority rights in the country will be significantly improved.²⁶⁴ After the implementation of the decision that obliges BiH to make amendments to the current constitution in order to remove discrimination against those who do not belong to constituent groups, the question of implementing non-discrimination provisions in reality will remain to be answered. Finci regards that the current constitution does indeed protect and promote the rights of constituent groups while it does not recognize status of national minority members. Moreover, he adds that the freedom to declare yourself as member of national minority or not is based on individual's free will and that it should not be forbidden.²⁶⁵ It also seems that by protecting the rights of constituent groups only, the constitution indirectly tells the others to declare themselves as members of one of the three groups if they want to be protected and regarded as equals. Another interesting fact regards Finci's view on political situation and participation of minorities in decision-making processes. He states that the Law on the protection of persons belonging to national minorities does indeed protect and promote the right of minorities to participate in all offices. However, the authorities failed to implement this right during the 2004 election because of the lack of implementation provisions in the law. Regardless of that, Finci is still optimistic when it comes to participation on local levels. This is mainly because 38 minority representatives have been elected to Community councils and although it is still early to estimate their

²⁶³ Paul Benjamin Gordiejev, *Voices of Yugoslav Jewry*, p. 419.

²⁶⁴ Interview with Jakob Finci conducted on 26.03.2010.

²⁶⁵ *Ibid.*

influence on political deliberations, Finci emphasizes that certain discriminatory provisions have been removed.²⁶⁶ These discriminatory provisions that are directly connected to participation on local level are indeed removed but prohibition of participation in some of the highest offices in the country still remains the main problem that not only promotes discrimination against minorities but degrades their well-being and position in the country. Finci also regards that introducing only one minority representative into the House of Peoples would not change minority situation at all but it would, however, remove the discrimination when electing members to the HoP or the Presidency. Moreover, he notes that political determination and participation depends only on every individual's striving for such activities. The fact is that members of Jewish community have never tried to organize themselves in political terms mainly because of the relatively small number, which is around 1000 members, and because they usually have different political attitudes and opinions. But when it comes to protection of their ethnic principles, all the members share common viewpoints. Instead of being more politically active, Jewish community mainly focuses on preserving and protecting their 500-year old cultural heritage and striving to satisfy social needs of its members.²⁶⁷ This however does not mean that Jakob Finci and other members of JCBH diminish the importance of preserving and protecting their ethnic identity through the means of political participation. They rather leave it as every individual's own affiliation. Regardless of that, every democratic country should not allow such negligence towards their minorities. Finci finds that position of minority members BiH is definitely not a primary problem on country's way towards the EU. But, respecting minority rights and rights of every citizen in BiH is one of the necessary preconditions for the integration. Such incompetence of the state organs that is reflected in authorities' inefficiency to implement the decision of European Court of Human Rights will seriously endanger our integration path.²⁶⁸

One thing has to be taken into account when referring to Jews in BiH and that is the lack of government's activities concerning the position of Jewish community. When compared to the position of Roma, the Jewish community enjoys rather a different and better treatment by the authorities concerning many social aspects of life such as housing, employment, education, etc. This is probably the reason why most activities regarding improvement of the Jewish position is rather realized by the JCBH itself. The improvement of Jewish position in BiH

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

consists mainly in promoting and protecting cultural heritage of the centuries-old Jewish community through various exhibitions, book promotions and social gatherings rather than through political activities and participation in public affairs. For instance, “Jewish voice”, which is the official publication of JCBH, mainly focuses on activities of Jewish assembly and community and on people and organizations that helped improve the situation of Jewish community in BiH.²⁶⁹ According to Jakob Finci, the political affiliation of each member of Jewish community is his or her personal choice that everyone should respect.²⁷⁰ And that is probably due to the fact that Jewish community represents one of the best organized minority communities in the country, which in turn enabled reaching such a rather good position in comparison with other minority communities in the country, especially the Roma one.

Chapter 5.3: Roma minority in BiH: Problems of exclusion

According to some data, Roma minority represents one of the oldest and numerically biggest minorities in BiH. Although it is regarded as the largest minority group in the country, Roma community is still “socially the most endangered minority according to all parameters measuring and determining the status of any social group.”²⁷¹ According to the last census, there were as many as 8.864 Roma in the country although these data cannot be regarded to reflect the actual numerical situation in BiH.²⁷² Some other reports present unofficial data that estimate there are from 40.000²⁷³ to 80.000 members of Roma inhabiting BiH.²⁷⁴ Taking into consideration the fact that many of them do not want to declare themselves as Roma because of fear of discrimination, the unofficial data presents a source that reflects the real situation better.

As a national and historic minority and due to their multinational identities, Roma people represent a very special group. They are nomadic people who originate from India and who started inhabiting Europe in 14th century. Numerous migrations they had to go through influenced their way of life in the most profound way. Not only that they had to preserve their

²⁶⁹ “Jewish Voice.” Official publication of Jewish community in BiH, February edition, pp. 2-12.

²⁷⁰ Interview with Jakob Finci.

²⁷¹ Roma Decade, “Action plan of Bosnia and Herzegovina for addressing Roma issues in the field of: employment, housing and health care,” p. 2. available at http://www.romadecade.org/files/downloads/Decade_Documents/Introduction_-_Decade_National_Action_Plan_BiH.pdf

²⁷² Federal Office of Statistics, 1991 population census

²⁷³ United States Department of State. “2009 Human Rights Report: Bosnia and Herzegovina,” available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136023.htm>

²⁷⁴ Medina Vantić-Tanjić, “History, culture and tradition of Roma,” p. 17.

way of life and traditions, they were also supposed to adjust to the local way of life.²⁷⁵ Besides the fact that Roma people do try to adjust and integrate themselves to societies they live in, this nomadic way of life is one of the main causes of prejudices local people have for them and consequently, discriminatory treatment Roma people are exposed to on a daily basis. The fact that they looked and spoke differently also influenced such arbitrary behavior of others toward them. Since they were mainly blacksmiths, many people accused Roma to be the ones who made nails for crucifying Jesus.²⁷⁶ This alleged crime committed against Jesus is the thread that connects both Roma and Jewish communities in one of the main causes of their marginalization. In a country where religion plays such an important role from establishing one's ethnic identity to determining the political deliberations, these accusations can and did hamper development and improvement of social status of these minorities. Regardless of the country they inhabited, the high levels of marginalization and discrimination were integral part of their every day life. Anti-Roma policies continued to be present and propagated throughout Europe for centuries. The policies of two ruling empires in the Balkans, namely Austro-Hungarian and Ottoman, significantly influenced the position of Roma communities in the region. One of the main policies during Austro-Hungarian rule was to abolish their nomadic way of life and to integrate them completely into societies. During the Ottoman rule, the movement of Roma was allowed and policies toward them were less strict. Roma community suffered a great deal of human losses during the Second World War. Most socialist authorities also strived to assimilate Roma communities in order to lessen the differences between various ethnic groups. However, former Yugoslavia had a more relaxed approach and even allowed Roma to be formally declared as nationality.²⁷⁷ After the collapse of Yugoslavia, "the massive population movements during and after the war, and the collapse and then re-building of state structures", Roma found themselves in a highly vulnerable situation and were denied many socio-economic rights.²⁷⁸ If they were given this status and denied some rights that other citizens were guaranteed, what caused such discrimination and anti-Roma sentiment in the post-war years? According to the UNDP in a recent study, main reasons for discrimination and social exclusion in BiH, that are partly legacies of the past regimes, were "poverty, dependency on social welfare and a disinterest in adopting proactive

²⁷⁵ Ibid., p. 15.

²⁷⁶ Ibid., p. 15.

²⁷⁷ Dena Ringold, *Roma and the transition in Central and Eastern Europe: trends and challenges*, p. 5.

²⁷⁸ United Nations High Commissioner for Refugees in Bosnia and Herzegovina. "Final Report, Conference on the National Strategy on Roma in Bosnia and Herzegovina – Development of Action Plans," p. 4 available at <http://www.unhcr.ba/protection/roma/Final%20Roma%20Report%206.pdf>

life strategies.”²⁷⁹ What are other reasons for social exclusion and anti-Roma sentiment? Can different culture and the fear of the same be the reason for discrimination against Roma as well?

Concerning the culture of Roma community, it can be assumed that even this part of their lives is deeply influenced by their nomadic way of life. The main characteristics of Roma culture is loyalty to the family, believing in God and faith and ability to adjust to extremely different conditions. According to Vantić-Tanjić, Roma culture is the main obstacle that prevents full and equal integration into local community, as well as proper education and employment. On the other hand, minority culture is clearly influenced by majority attitude towards it. Therefore, Roma culture should be regarded as local authorities’ responsibility as well.²⁸⁰ This, however, is not the case in BiH. Is it the fear of different culture that prevents locals to accept Roma community as part of BiH society? Or is it the fact that they are able to highly adjust to any way of living without losing touch with their own culture? Culture as a social feature represents one of the most important characteristics of any society. As such, cultural variety and richness that ethnic groups use in order to express their identity should be nurtured and protected by authorities. Moreover, these differences should be promoted as one of the most valuable features of any community. However, there is not a single cultural institution for Roma community in BiH that would enable their members to develop the culture, their language and way of life. There are Roma organization that do promote culture but they need to be supported by the government even more than the major cultural institutions and organizations that mainly promote cultures of Bosniaks, Croats and Serbs.²⁸¹ This lack of treatment of Roma culture by local authorities can only degrade members of their community and it can force them to turn more to majority cultures in order to improve their social position. Not only that Roma people are discriminated against in cultural but in political and legal terms as well.

As it was already mentioned, BiH constitution clearly prevents members of Roma and other minority communities from holding high political offices in the country and, consequently, it treats them as “second-class people.” Due to this legal discrimination, members of Roma community are experiencing abuses of their civil, social, political and economic rights on a

²⁷⁹ United Nations Development Program. “The Roma in Central and Eastern Europe: Avoiding the Dependency Trap,” UNDP Regional Human Development Report, p. 7 available at <http://europeandcis.undp.org/Home/show/62BB4D48-F203-1EE9-BC5BD7359460A968>

²⁸⁰ Medina Vantić-Tanjić, “History, culture and tradition of Roma,” p. 21.

²⁸¹ Interview with Miralem Tursinović conducted on 30.03.2010

daily basis. There is also “entrenched anti-Romani sentiment in BiH” that sparks violations of fundamental human rights of Roma members.²⁸² What can cause such a negative sentiment towards Roma population? According to Slavo Kukić, one of the main reasons, besides historical circumstances that have made Roma be scattered around the world, is the fact that Roma people do not have “a primary homeland.”²⁸³ Taking rather specific political situation in BiH, it can easily be assumed that this is not the only reason for such discrimination. The fact that legal and political parties focus their attention and activities mainly on members of their own ethnic groups clearly influence the way authorities treat Roma minority. Thus, in a situation where only the needs of constituent ethnic groups are taken care of, national minority members are unjustly forgotten and completely marginalized.²⁸⁴ Due to this highly discriminatory treatment of Roma and other minority communities, Bosnia and Herzegovina is “the only country in Europe in which Roma are barred by law from holding key high political offices, including the Presidency.”²⁸⁵ In author’s opinion, there seems to be another cause for such arbitrary treatment of Roma minority. As it was already mentioned, members of Roma community are highly adaptable and can exist together with members of other ethnic groups. While living side by side with other groups, they slowly start to adopt elements of other ethnic traditions. This was especially heightened during the recent war, when members of Roma community joined armies of those ethnic groups that were majority in that place. Consequently, “this resulted in internal divisions and additional displacement.”²⁸⁶ Unlike members of Jewish community in BiH, who were highly organized and kept together in times of need, which resulted in their post-war high level of internal organization, members of Roma community were scattered over the country, which negatively resulted in internal divisions that are still present. According to Miralem Tursinović, program coordinator of Helsinki Citizens Assembly in Tuzla, the internal division of Roma community represents one of the main obstacles they are facing with. Furthermore, Tursinović notes that this division can be so drastic sometimes that even members of certain Roma communities feel distrust toward their leaders.²⁸⁷ On the other hand, the Action plan for addressing Roma issues presents a rather different situation regarding Roma organization. According to this report, the

²⁸² European Roma Rights Center, “The non-constituents: Rights deprivation of Roma in post-genocide Bosnia and Herzegovina, Executive summary,” pp. 1-2. available at <http://www.errc.org/cikk.php?cikk=112>

²⁸³ Slavo Kukić, “Bosnia and Herzegovina and the position of Roma,” p. 150.

²⁸⁴ Ibid. p. 150.

²⁸⁵ European Roma Rights Center. “The non-constituents: Rights deprivation of Roma in post-genocide Bosnia and Herzegovina, Country report 2004,” p. 51.

²⁸⁶ Ibid, p. 151.

²⁸⁷ Interview with Miralem Tursinović.

first Assembly meeting of Romani NGOs in BiH was held in 2001 that can be regarded as turning point for the community. During this meeting, the BiH Council of Roma was elected as a “representational institution of the Roma non-governmental sector in BiH.” It follows that this body presents and protects the values and needs of the members of the community.²⁸⁸ However, lack of experience in running the NGOs and multiplicity of interests that can hardly be harmonized is what presents the major problem of this and other bodies that are striving to promote and protect Roma minority groups.²⁸⁹ Can this lack of strong internal organization downgrade the efforts that the members of Roma community are making in order to improve their social status? What are the government’s plans when addressing the problems of Roma community?

In July 2005, the Council of Ministers adopted the National strategy on Roma. First and foremost, this strategy emphasizes the importance of taking actions in order to improve the social and economic status of Roma in BiH. In order to put this into practice, local authorities need to start implementing rights guaranteed in domestic and international legal documents. The strategy noted that the FCNM, as the international legal document for protecting minority rights, is a very “powerful weapon in the hands of authorities to fight for a change of economic, social, political, educational, cultural, information, housing, health care and other status and situation of national minorities in BiH, primarily Roma.”²⁹⁰ The only problem with the FCNM and all the other minority documents is the level of how much the members of Roma community are informed about it. Considering the very bad conditions that many Roma live in and their difficult social position, it can easily be assumed that not many actually know about the FCNM and their internationally guaranteed rights. Ironically enough, this strategy also listed the BiH constitution as one of the domestic legal documents that authorities can use in order to improve the position of Roma in BiH.²⁹¹ How can the constitution be used for improvement if it is already used by local politicians as a tool for deepening ethnic division in the country? However, the Council of Ministers firmly believes that this strategy “should bring about an overall improvement of the social status of Roma community in BiH.”²⁹² This strategy addresses several fields in which significant improvement needs to be achieved. This

²⁸⁸ Roma Decade, “Action plan of Bosnia and Herzegovina for addressing Roma issues in the field of: employment, housing and health care,” p. 4.

²⁸⁹ Interview with Miralem Tursinović.

²⁹⁰ United Nations High Commissioner for Refugees in Bosnia and Herzegovina, “Roma strategy in Bosnia and Herzegovina,” p.1 available at <http://www.unhcr.ba/protection/roma/Roma%20Strategy.pdf>

²⁹¹ Ibid., p. 1.

²⁹² Ibid., p. 2.

list includes improvement with regards to education, employment, housing, health care, social security, civil registration and identification documents, participation in and partnership with authorities, organization and networking of Roma NGOs, improving cultural identity by promoting and protecting religion, tradition, music, language and art of Roma communities, etc.²⁹³ Concerning the political participation of Roma, the strategy finds that it is more than modest. According to the last elections, members of Roma community participated in only three municipal councils. It is clear then that there are no Roma representatives in Parliamentary Assembly. The Council of Ministers found that the only solution to such a lack of representation in state offices would be proper implementation of the Law on Protection of Rights of Members of National Minorities.²⁹⁴ It follows that local authorities will try to pass the ball from one level to another in order to avoid the proper implementation of this law that will enable them to keep the status quo regarding the well-being of constituent groups and degradation of minority ones.

Another important event that was realized as a follow-up activity was the Conference on the National Strategy on Roma in BiH in July 2006 that was organized by UNHCR BiH and supported by Ministry for Human Rights and Refugees and Council of Europe and that focused on development of action plans aimed at improving the situation of Roma in the country. The conference stressed out the importance of implementing three action plans on employment, housing and health clearly showing that these are the three fields where Roma members face the biggest discrimination.²⁹⁵ Furthermore, giving significant importance to the right to political participation, one of the main findings of the conference was the problem of access to civil and political rights. According to the European Roma Rights Center Country Report, BiH is the only country in Europe where Roma, and consequently other national minority members, are legally prohibited from holding certain high political offices, such as the Presidency and the House of Peoples.²⁹⁶ Thus, it clearly showed that such discriminatory legal treatment is highly condemned. Since they are treated as the second class people, it is no wonder that their political, civil and social rights are violated. Supported by the legal

²⁹³ Ibid., p. 2.

²⁹⁴ Ibid, p. 10.

²⁹⁵ United Nations High Commissioner for Refugees in Bosnia and herzegovina, "Conference on the national strategy on Roma in BiH," UNHCR Protection Documents available at <http://www.unhcr.ba/protection/Roma.htm>

²⁹⁶ European Roma Rights Center, "The non-constituents: Rights deprivation of Roma in post-genocide Bosnia and Herzegovina, Country report 2004," p. 51.

exclusion from certain political offices, the level of marginalization becomes even higher.²⁹⁷ There are many other problems that Roma are facing and that even emphasize levels of discrimination against Roma in various institutions. One of the problems is the lack of official identification documents. Most children and minor persons do not have such documents mainly because of the costly process of obtaining those documents, especially birth certificates.²⁹⁸ Another area problematic for members of Roma community is related to accessing social and economic rights. Since poverty is omnipresent in most Roma communities, it is obvious that they cannot afford proper housing and education for their children.²⁹⁹ Moreover, the unemployment rate according to some data reaches 52%. Compared to 30% of all other BiH citizens, Roma unemployment rate is worryingly high. This devastating fact is mostly caused by inadequate employment opportunities.³⁰⁰ Thus, it seems that even employment opportunities depend on your ethnic background and affiliation. In one of its reports, UNDP stated that one of the main reasons for such a high level of Roma unemployment is ethnic affiliation that is accompanied by overall bad economic situation in the country.³⁰¹ This lack of employment brings about problem of health care as well. Employed persons usually have access to health care through their employers. Unemployed persons on the other hand, enjoy health care benefits that are provided to them by the employment bureau. Since many Roma members lack identification documents, which could help them get benefits from these employment offices, they are even prevented from obtaining the minimum level of health care.³⁰² It thus follows that discrimination against Roma and violation of their fundamental human rights are not present only in legal domestic documents but in other aspects of life from political to social and economic. Considering that the right to education represents one of those fundamental rights, it can easily be assumed that Roma children cannot even achieve this right as well. Many Roma children do not even finish primary, let alone secondary, school since they usually start working at the age of 15 or 16. Some reports state that there are less than 15% of Roma children who attend and finish

²⁹⁷ Ibid, p. 54

²⁹⁸ United Nations High Commissioner for Refugees in Bosnia and Herzegovina. "Final report conference on the national strategy on Roma in BiH – Development of action plans,," p. 13.

²⁹⁹ Ibid, p. 13.

³⁰⁰ United Nations Development Program, "At Risk: Roma and the Displaced in Southeast Europe, UNDP Report," p. 17. available at <http://europeandcis.undp.org/poverty/show/1F158B1F-F203-1EE9-B8384A4FF5BF9916>

³⁰¹ United Nations Development Program, "The Roma in Central and Eastern Europe: Avoiding the dependency trap, Regional Human Development Report," p. 3. Available at <http://europeandcis.undp.org/Home/show/62BB4D48-F203-1EE9-BC5BD7359460A968>

³⁰² United Nations High Commissioner for Refugees in Bosnia and Herzegovina, „Final report conference on the national strategy on Roma in BiH – Development of action plans,," p. 16.

schools.³⁰³ The aforementioned problems that members of Roma community are facing with are mainly caused by the lack of official identification documents and a very difficult financial position most members of the community live in. The adopted action plan for addressing Roma issues clearly focuses on improving the position of Roma by presenting government activities that could improve the situation in fields of employment, housing and health care that are presented as the major problems regarding Roma community. The main purpose behind the creation of this document was inclusion and participation of members of Roma community who were legally elected from various Roma NGOs in order to address activities that could help improve the current situation.³⁰⁴ Regarding the three major problems, the Action plan provides a rather vague description of the government's future plans. Firstly, the authorities plan to significantly decrease the high unemployment rate by 2015. It will do so by creating socio-economic and political conditions for increasing the employment rate of Roma. It will also strive to raise the awareness of the BiH society to approach and address Roma unemployment without any discrimination.³⁰⁵ Regarding the employment of Roma, BiH government provided EUR 350.000 in order to decrease the unemployment rate last year. Nedžad Jusić, president of the Council of National Minorities and of Roma association 'Euro Rom' stated that the only problem with the money is the lack of political will that causes creation of employment programs that do not meet the need of Roma people.³⁰⁶ Secondly, the problem of housing will try to be solved either by building "new housing units" that will have all the necessary infrastructure for normal living or by "legalizing the existing illegally constructed housing buildings." Thirdly, the authorities will try to provide optimal health care for every member of Roma community.³⁰⁷ In creating these action plans, it seems that the authorities are trying to pass the responsibility from one public office to another in order to avoid being blamed for the possible failure of the plans. Moreover, one of the most important activities that they want to focus in the future period is raising the awareness of all the citizens of BiH to diminish the discrimination and prejudice that are widely accepted against members of Roma community. One of the other goals is to

³⁰³ European Commission against Racism and Intolerance, "Report on Bosnia and Herzegovina," p. 28. available at http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/BIH-CbC-III-2005-2-ENG.pdf

³⁰⁴ Roma Decade, "Action plan of Bosnia and Herzegovina for addressing Roma issues in the field of: employment, housing and health care," p. 9.

³⁰⁵ Ibid, p. 11.

³⁰⁶ B. Turković, "There is money for employment but there is no will," Dnevni Avaz, 27.03.2010, Topics section.

³⁰⁷ Roma Decade, "Action plan of Bosnia and Herzegovina for addressing Roma issues in the field of: employment, housing and health care," p. 11.

promote the importance of inclusion of Roma members in all activities and developments in the country. By doing so, the authorities hope to “change public attitude and perception of the Roma issue in BiH society.”³⁰⁸ What would be of greater importance than the change of political attitude towards members of Roma community and all the other national minority members? Once the political elites stop protecting and working for their own ethnic group and start promoting values of all people living in BiH, the situation will change for better and not only for members of national minorities but for all citizens of BiH. Another step that is regarded as the government’s determination to improve the rather decaying situation of Roma in BiH is the adoption of Decade of Roma Social Inclusion.

The Decade entails political will of South-East European states to help solve the problem of Roma communities using the institutions of each country. Its ultimate goal is to significantly decrease discrimination against Roma members and to improve their socio-economic status. As such, the Decade represents an international project that, in a very unique way, gathers government representatives, international governmental and non-governmental organizations and representatives of Roma communities with the aim of bettering the life standards of Roma in Europe.³⁰⁹ BiH signed the Decade on 4th September 2008. During the manifestation of adopting the Decade, the president of the Council of Ministers of BiH, Nikola Špirić, stated that Roma question is the main priority of the country together with the problems of other national minorities. Moreover, Špirić noted that the Decade should be regarded as the political obligation of the government that needs to remove the discrimination and exclusion of Roma in BiH society.³¹⁰ But, the fact that BiH still legalizes constitutional discrimination is most definitely the main obstacle in the process of removing and diminishing levels of discrimination and exclusion of Roma and members of other national minorities. More importantly, the president of Council of Roma, Dervo Sejdić, stated that besides implementing Decade’s provisions, local authorities should focus on making institutional and legal conditions for allowing Roma participation in political deliberations in the country.³¹¹ Creating the conditions for political participation of national minorities, BiH authorities will make the implementation of the action plans and the aims of the Decade easier and their effects stronger.

³⁰⁸ Ibid, p. 12.

³⁰⁹ Roma Informative Center, “Decade of Inclusion 2005-2015,” available at <http://www.bhric.ba/dekada/dekada.php>

³¹⁰ Ibid.

³¹¹ Ibid.

It is widely accepted that discrimination against Roma and members of other national minorities is present in every aspect of life in BiH, from social over economic to political. Position of Roma and other national minorities is thus one of the country's focal problems that needs to be solved soon. Therefore, local authorities have to realize measures and activities that will diminish, if not completely remove, discrimination against minorities.³¹² Although this idealistic objective will be almost impossible to achieve in the country that is torn between ethnicity, religion and politics, it still needs to be one of the guiding principles in fighting against different forms of discrimination. The best way to remove the prejudices against Roma and other minorities is to provide and guarantee legal provisions that will enable inclusion of minority members into political, educational, social, cultural, economic and every other aspect of life.³¹³

Chapter 5.4: BiH Constitution: discriminatory or not?

One of the main reasons that has attracted author's attention and developed interest in minority situation in BiH is primarily the case *Sejdić and Finci versus Bosnia and Herzegovina* that was processed at the European Court of Human Rights. As the case mentions, the main actors in the proceeding were Dervo Sejdić, of Roma origin and currently OSCE's officer for Roma issues, and Jakob Finci, of Jewish origin, former president of the JCBH and current ambassador of BiH in Switzerland. As it was aforementioned, Constitution of BiH and Election law primarily discriminate against and prohibit members of national minorities to run for some of the highest offices in the country, i.e. the Presidency and the House of Peoples since they are composed only of persons belonging to one of the three constituent groups. To make situation even more discriminatory, when Finci tried to run for these offices, on 3rd January 2007, he received a letter from Central Election Commission of BiH stating that he cannot run for these offices mainly because of his Jewish origin.³¹⁴ Such a response was primarily conditioned by the discriminatory provisions of the Constitution and accordingly Election law. Lucy Claridge, Minority Rights Group's Head of Law, stated that by forbidding whole communities the right to participate fully in the country's political process, Bosnia's constitution and electoral law violate fundamental human rights

³¹² United Nations High Commissioner for Refugees in Bosnia and herzegovina, "Roma strategyin Bosnia and Herzegovina," p.18.

³¹³ Ibid, p. 18.

³¹⁴ Council of Europe, "Sejdic and Finci v. Bosnia and Herzegovina," available at http://www.coe.org.rs/eng/news_sr_eng/?conid=1545

standards.”³¹⁵ In their complaint, Finci and Sejdić relied mostly on Article 14 of the European Convention on Human Rights (ECHR) that prohibits “discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”³¹⁶ After the complaints were filed in 2006, the Court gave its judgment in 2009. The Court found that both Finci and Sejdić could be considered as the “victims of the alleged discrimination” since they are active participants in public life. Moreover, different treatment due to person’s ethnic origin can never be justified in any democratic society that respects values of pluralism and different cultures. Thus, the Court noted that discrimination, that cannot be objectively justified, occurred every time a person of a non-constituent origin would want to run for these two offices. The court also declared that political authorities of BiH seriously breached Article 14 of the ECHR.³¹⁷ The international community, in this case represented by the Court, is completely aware and judgmental of country’s constitution that, at the time of the war, seemed to be the only reasonable solution. It also noted that the situation has improved since the Dayton Peace Agreement. However, the Court regards that abandoning the power-sharing mechanisms and changing it with simple majority rule might not be the best possible move. Concerning the election to the Presidency of BiH, Finci and Sejdić mainly relied on Article 1 of Protocol No. 12 of ECHR. The Court noted that Article 1 provides for the protection to “any right set forth by law” regardless of persons ethnic origin, color, language, religion, association with national minority, political or other opinion.³¹⁸ It follows that this Article guarantees general prohibition of discrimination and it prohibits any form of discrimination by the local authorities. The applicants stated that they have been directly discriminated against and rendered ineligible to stand for election to the Presidency of BiH.³¹⁹ According to the Court, the election to the House of Peoples, that also renders members of national minorities ineligible, is regarded as highly discriminatory as well.³²⁰

³¹⁵ Minority Rights Group, “Bosnian Jew and Roma win challenge in European Court of Human Rights against bar on running for public office,” available at <http://www.minorityrights.org/9519/press-releases/bosnian-jew-and-roma-win-challenge-in-european-court-of-human-rights-against-bar-on-running-for-public-office.html>

³¹⁶ Council of Europe, “Article 14, Convention for the Protection of Human Rights and Fundamental Freedoms,” available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

³¹⁷ Council of Europe, “Sejdic and Finci v. Bosnia and Herzegovina.”

³¹⁸ Council of Europe, “Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,” available at <http://www.humanrights.coe.int/Prot12/Protocol 12 and Exp Rep.htm>

³¹⁹ Ibid.

³²⁰ Ibid.

Minority Rights Group International stated that BiH will be legally obliged to implement the Court's decision meaning that the constitution's discriminatory provisions will have to be amended in order to guarantee equal rights of all citizens especially regarding political participation of members of national minorities. Claridge noted that this decision "should have a far-reaching effect in BiH and will provide the basis for further strategic litigation in support of the rights of minorities in Europe."³²¹ Moreover, Sheri P. Rosenberg, professor and director of the Human Rights Clinic at the Benjamin N. Cardozo School of Law, emphasized the importance of this ground-breaking case and decision stating that it is "a major step forward in Europe's struggle against discrimination and ethnic conflict."³²² How and when this decision will be implemented considering the fact that 2010 is election year remains to be seen. Will the political elites agree on possible amendments or will they focus on their political campaigns more? Member of the Central Election Commission in BiH, Suad Arnautović, firmly believes that certain amendments to BiH constitution and Election law will be passed before the elections. Moreover, he notes that there is a consensus and political will between local elites to amend the constitution in accordance with the ECHR.³²³ Whatever the case is, one thing is certain: the constitutional reform that guarantees the equality and non-discrimination of all its citizens both legally and in practice will have to be realized in due time.

Another point of the view relevant to the decision of the European Court of Human Rights is that of the Council of National Minorities and its president Nedžad Jusić. Regarding the Court's decision, the Council demands that the implementation of the ruling be as swift as possible in order to remove the discrimination of minority members, especially with regards to the election to the Presidency and the House of Peoples. The ideal situation would be amending the Constitution and the Election law before the general elections in October 2010.³²⁴ In author's opinion, it is not of crucial importance when these amendments will be reached. The focal question is will the political elites agree to reach these amendments on their own or will the international community have to interfere again and oblige local politicians to finally reach the consensus? Besides the legal paradox that the very constitution

³²¹ Minority Rights Group, "Bosnian Jew and Roma win challenge in European Court of Human Rights against bar on running for public office."

³²² Ibid.

³²³ S. Škuletić, "Discrimination of the 'Others' in BiH has to be removed," Dnevni Avaz, 23.12.2009, Topics section.

³²⁴ Radio Television of Tuzla Canton, Interview with Nedžad Jusić by Gordana Sandić-Hadžihasanović.

promotes by protecting constituent groups only and at the same time adopting various human and minority rights documents, Nedžad Jusić focuses on another paradox contained in the constitution. He states that BiH constitution does not recognize the term ‘national minority’ although the Law on the protection of members of national minorities was adopted in 2003. It follows that this law is not in accordance with the constitution since the latter does not even mention, let alone recognize national minorities.³²⁵ Thus, BiH constitution has to introduce the term ‘national minority’ in its legal text as soon as possible in order to be in accordance with all the international treaties on which it was based and to protect members of national minorities in the same way it protects members of constituent groups. Furthermore, regarding the future activities of the Council, Jusić guarantees that the Council will start certain initiatives with the aim of amending the constitution in accordance with the Court’s decision. He firmly believes that national minorities will become a “constitutional category.” This will in turn allow them to freely elect and be elected to offices on all levels in BiH.³²⁶ Many other members of BiH society, from academics to politicians, openly support these proposals for amending the constitution.

On a recent round table with the focus on amending the BiH constitution, organized by Forum of Tuzla Citizens, participants shared a common ground regarding the future constitutional reform and the Court’s decision. They all agreed that the decision needs to be implemented and constitutional reform needs to happen as soon as possible in order to provide legal protection of not only minority members but of all citizens in BiH. Moreover, Sabrija Pojskić, member of Social Democrat Party, stated that the Court’s decision clearly imposed and opened the reform process that will close the chapter of Dayton BiH and open the chapter of Brussels BiH.³²⁷ Thus, it follows that the improvement of minority rights will have to be achieved in the legal context. The question that remains is: Will that improvement become an integral part of the real life context?

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Sabrija Pojskić, Round table: Citizens of BiH between equality and discrimination, 27.03.2010.

Chapter six: Conclusion

*The rise of nationalism has brought the issue of minority rights to the top of the European agenda. It is not surprising that nationalism has found a fertile breeding-ground in the particular circumstances of the post-communist transition.*³²⁸

Minority rights and minority groups, with their rather unique culture and tradition compared to the mainstream life styles, comprise a crucial segment of every society that needs to be protected and promoted even more than the majority of the population. In Bosnia and Herzegovina the situation and relationship between majority and minority is rather different. The rights and position of three major groups are the only protected ones in the country thus leaving no room for improvement and progress of groups that do not constitute majority. Since minority groups have always been regarded as smaller communities that are different from majority groups, it can be assumed that the current minority problem “emerges as a lack of consent or entitlement to full participation in political life.”³²⁹ It can also be assumed that the phenomenon of social exclusion is omnipresent in Bosnian society. It thus means that members of Jewish and especially Roma communities are considered political and social outsiders due to the fact that they are, first and foremost, legally prohibited from participating in political offices on the state level which in turn results in exclusion from other aspects of life such as economic, social and cultural. According to the UK Government’s Department for International Development, the phenomenon of social exclusion is “a process by which certain groups are systematically disadvantaged because they are discriminated against on the basis of their ethnicity, race, religion, sexual orientation, caste, descent, gender, age, disability, HIV-status, migrant status or where they live.” This discrimination ranges from public institutions (legal system, education and health services) to social institutions (households).³³⁰ In Bosnia and Herzegovina, person’s ethnic background and consequently religion play a crucial role in determining whether that individual will enjoy the rights of being protected and taken care of or not. How can BiH dismiss this ideology of social exclusion and strive towards creation and implementation of including all citizens into political, cultural, economic and social matters? Amending the constitution in order to provide minority protection and equality for all its citizens cannot drastically change the situation in

³²⁸ Hugh Miall, “Introduction.” In *Minority rights in Europe: The scope for a transnational regime*, Hugh Miall (ed.), p. 1.

³²⁹ Jennifer Jackson Preece, *Minority rights: Between diversity and community*, p. 11.

³³⁰ United Nations Development Program, “Social Inclusion in Bosnia and Herzegovina, National Human Development Report 2007.” p. 16. available at <http://www.undp.ba/index.aspx?PID=36&RID=63>

the country. However, it can give foundation for further improvement of ethnic relations that will open up a societal debate between members of different ethnic groups in order to create common understanding and tolerance between ethnicities. How can a minority situation be improved even more? Several steps need to be taken into account. The constitutional reform will provide a legal basis for minority participation in all political offices. Participation of minority members will enable them to present their points of view thus trying to influence the decision-making processes. This would in turn mean that the FCNM provisions are approached and implemented in a more mature way in order to create a set of common values that all other European societies are nurturing. Only when all these steps are taken into account and implemented accordingly, BiH will start to develop as a truly democratic society that protects and promotes ethnic and religious variety. Accordingly, these steps need to be explained in more detail.

Constitution of each country needs to be the legal basis that enables creation of legal provisions necessary for proper functioning of the state in all matters, from political to economic and social. Moreover, the constitution should, naturally, be constructed in such a way that it promotes constant development of the country. BiH constitution is rather an experimental project created by the international community. As such, it is no wonder that its provisions, which focus on ethnic affiliation, present an obstacle rather than the basis for development and progress. According to Zoran Pajić, this ethnic affiliation is rather considered a legacy of the Yugoslav regime. After the collapse of Yugoslavia, people were not ready to accept and exercise individual freedom. Thus, the best solution for this problem was creation of yet another ethnic constitution that was regarded as the “protective shield against the confusion.”³³¹ As the crucial and the highest legal document in the country that is supposedly created to ensure the achievement of human rights and fundamental freedoms recognized in various international documents,³³² BiH constitution should thus be regarded as the focal legal document for protection of national minorities. On the contrary, the constitution itself can be regarded as discriminatory since it protects and promotes social, economic and political well-being of constituent groups only. Moreover, it does not even contain the term ‘national minority’ in its text but it makes a rather general and often offensive term ‘Others’ that relates to every other individual and group who do not want to

³³¹ Zoran Pajić, “The former Yugoslavia.” In *Minority rights in Europe: The scope for a transnational regime*, Hugh Miall (ed.), p. 57.

³³² Constitution of Bosnia and Herzegovina, Article 2.1.

declare themselves members of three constituent groups.³³³ It is quite obvious that BiH constitution consists of some “constructional mistakes”³³⁴ that need to be amended if the country is to continue on its way toward European integrations. Not only that these mistakes are not in accordance with the democratic principles, but with traditional values of BiH society as well.³³⁵ These mistakes have clearly degenerated the centuries-long tradition of multi-ethnic and multi-cultural way of life in Bosnian society and are still obstructing the re-creation of the same values. Two of the mistakes that are most important to the study and that represent major obstacles for societal development are: a) discriminatory election system embedded in the constitution that clearly violates the right of members of national minorities to vote and stand in the elections, and b) political system that clearly emphasizes national over civic principles that obstructs and hampers creation of democratic principles and efficiency.³³⁶ Consequently, ethnic affiliation, disintegration, political exclusion of non-constituents taint the constitution, election system, and organization and function of the state apparatus, which is contrary to the European democratic principles.³³⁷ It follows that the current constitution not only hampers the protection of minority rights and implementation of relevant minority documents but also the progress and prosperity of the whole country. Thus, it is only reasonable that such constitutional provisions that obstruct the development of the country be amended in order to provide the creation and implementation of democratic principles. Many prominent persons from academic and political spheres in BiH do agree that constitutional reform is of the utmost importance for the well-being of the country. For instance, Vehid Šehić, president of Forum of Tuzla Citizens, regards that discriminatory provisions of the constitution need to be amended in a way that they represent “a balance between individual and collective, civic and national.” Moreover, he adds that political and civic actors need to be aware of the fact that the question and position of national minorities has to be put on the same level as national question of constituent groups, thus giving every ethnic group in the country equal status.³³⁸ This will however advance the social inclusion of all citizens and it will result in creating a cohesive society where every person will share common values by respecting differences. The recent debate on constitutional reform, organized by Forum of

³³³ Constitution of Bosnia and Herzegovina, Preamble.

³³⁴ Term coined by Kasim Trnka, professor of Constitutional law and former judge of Constitutional Court of BiH.

³³⁵ Kasim Trnka, “Constitutional amendments below the level of true needs and democratic legitimacy,” p. 162.

³³⁶ *Ibid*, p. 162.

³³⁷ *Ibid*, p. 164.

³³⁸ Vehid Šehić, “How to amend BiH constitution in order to reach European integration goals,” p. 5.

Tuzla Citizens as one of the leading NGO in civic affairs, provided some similar viewpoints on the importance of removing discriminatory provisions from the BiH constitution. One of the participants, Goran Marković, stated that the constitutional reform is necessary if local authorities want to implement the decision of the European Court for Human rights in the case *Sejdić and Finci versus Bosnia and Herzegovina*. Regardless of the Court's decision, the constitutional reform is a must since the current constitution reflects the ethnic division in the country that needs to be removed. Goran Marković, professor of constitutional law, is rather skeptic with regards to actual equality that the reform is supposed to achieve. He thinks that the equality of all citizens can be achieved formally by amending the constitution and introducing equality provision of all its citizens regardless of ethnic affiliation. But he fears that the actual equality will be harder to achieve. The only possible way to achieve it is to provide institutional provisions to members of national minorities that will guarantee minority representation in all state levels.³³⁹ On the other hand, political elites that still promote ethnic ideals and protect their ethnic groups are the biggest obstacle in achieving formal and actual equality. Nerzuk Ćurak, professor of political science, stated that ethno-nationalist parties that obstruct constitutional reform should start taking this reform seriously and promoting policy of mutual friendship and tolerance that will make these amendments easier for all parties involved.³⁴⁰ Furthermore, Vehid Šehić supports this argument by emphasizing that the constitution needs to be amended in a way that will be acceptable for all the parties and without the international community's pressure. Moreover, he noted that BiH will achieve equality of its citizens only when it legally and actually enables all individuals to enjoy fundamental human rights, regardless of ethnicity and including national minorities as well. One of the major requirements that BiH needs to achieve on its way towards the EU is the removal of discriminatory provisions that cause segregation among people. On that way, BiH needs to be a coherent society where people feel mutual understanding, tolerance and belonging to the state. Furthermore, Šehić emphasized that the common interest of all BiH citizens should be securing and respecting human rights and freedoms in accordance with major international human and minority rights documents.³⁴¹ If equality rights were granted to

³³⁹ Goran Marković, "Equality as constitutional category." (paper presented at the round table: Citizens of BiH between equality and discrimination, Sarajevo, 27.03.2010).

³⁴⁰ Nerzuk Ćurak, "Political context of constitutional reform." (paper presented at the round table: Citizens of BiH between equality and discrimination, Sarajevo, 27.03.2010).

³⁴¹ Vehid Šehić, "How to amend BiH constitution in order to reach European integration goals," pp. 11-13.

all citizens, including members of national minorities, it would mean that BiH is finally ready to allow and promote minority participation at all state levels.

According to the Lund Recommendations, the states should allow minorities the right to participate in public life. How can this right best be guaranteed? Legally, the most secure way to guarantee minority participation is to embed this right into the constitution of the country, as the highest legal document.³⁴² Granting the right to political participation of minority members would on the other hand enable minorities to finally voice their opinions, participate and influence decision-making processes and protect and promote the variety of ethnic identities that reflect the biggest value of Bosnian society. The right to effective participation in all societal matters is one of the crucial values of any democratic societies. If you take into consideration a rather vulnerable position of national minorities, it follows that this right is of the utmost importance “for the survival of their distinct cultures and identities.” Moreover, Hoffmann emphasizes that only those minority groups, who have the sense of belonging to the state they live in, are able to completely integrate themselves into the society. Thus, it follows that effective participation of members of national minorities is clearly “*conditio sine qua non*.”³⁴³ Centuries-long presence of Roma and Jewish minorities in BiH means only that they do regard BiH as their country as well and that they are entitled to full and effective participation. Instead of preaching and practicing exclusive and rather constitutive group-oriented approach, local authorities should adopt inclusive ideology in political, social, cultural and economic matters. This would mean that members of Jewish and Roma communities, as well as others, will finally have a say in matters that concern them. Having a say would mean that they have the ability and legal power to change the situation for the better in order to improve not only their situation but also the situation of every individual in the country. According to Owen and Tully, having a say in the matters that are related to one’s well being is regarded as the basic freedom that one individual has in a democratic society.³⁴⁴ It is clear that minority participation is not only essential to preserving and promoting minority identity but to the better understanding of minority protection and to the improvement of life in general. Thus, it follows that political participation of minorities will

³⁴² Office for Democratic Institutions and Human Rights, “Guidelines to assist national minority participation in electoral process,” p. 15.

³⁴³ Rainer Hoffmann, “Implementation of the FCNM: Substantive challenges” in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A. Verstichel, A. Alen, B. De Witte (eds.), p. 177.

³⁴⁴ David Owen and James Tully, “Redistribution and recognition: Two approaches” in *Multiculturalism and political theory*, Anthony Simon Laden and David Owen (eds.), p. 281.

also bring about protection and promotion of other fundamental rights such as right to freedom of expression, right to religious freedom, right to equal protection by the law, etc. However, minority participation would secure two other major rights, namely the right of an individual to participate in elections and the right not to be discriminated against. Individual's right to participate in elections naturally entails the right to stand for office. Moreover, this right needs to be granted in the constitution of each country, especially emphasizing that no minority person is "barred from office or standing for office."³⁴⁵ Thus, it means that promoting and constitutionally granting the right to participate in elections regardless of one's ethnic or minority affiliation is something that local authorities are morally and legally obliged to achieve. In turn, this would simultaneously result in achieving non-discrimination right and it should be applied equally on all individuals in the country.³⁴⁶ The real features of democratic society, namely equality and non-discrimination, will be realized in BiH only when the government allows and constitutionally grants the right to political participation of national minorities. The importance of minority participation is crucial to country's democratic development and it can best be presented in two arguments. Firstly, without members of national minorities partaking in decision-making processes, hardly any minority right will be "effectively ensured."³⁴⁷ This means that with no participation, the implementation and effectiveness of minority protection mechanisms are seriously put into question. It can also be assumed that the implementation of a legally binding minority document, such as the FCNM, will not be as effective as if the members of national minorities were included into political deliberations that directly influence the FCNM. And secondly, without minority members actively participating in political matters, BiH is deepening the ideology of social exclusion.³⁴⁸ Consequently, striving towards creating a socially inclusive and cohesive society where members share the sense of equality and common values can be put into danger. No matter how beneficiary political participation of minorities is, there are still problems regarding its implementation. Firstly, it is obvious that in a society where there is tension between ethnic groups, implementation of minority participation can be seriously obstructed. Secondly, implementation of minority participation does indeed represent an "exception to the equality principle." According to Palermo and Woelk, this problem can only

³⁴⁵ Office for Democratic Institutions and Human Rights, "Guidelines to assist national minority participation in electoral process," p. 18.

³⁴⁶ *Ibid*, p. 20.

³⁴⁷ Florian Bieber, "Balancing political participation and minority rights: Experience of the former Yugoslavia," p. 1.

³⁴⁸ *Ibid*, p. 1.

be solved by including minority protection as one of the values that the constitution protects. Thirdly, there is the problem of two notions of the nation that each society needs to recognize, namely democratic notion that entails the civic society in general and ethnic notion that relates to the expression of different traditional, linguistic, religious and cultural characteristics.³⁴⁹ It follows then that a proper constitution needs to entail minority protection provisions in order to provide and guarantee equal protection by the state and same rights for every individual. This would in turn result in legally recognizing members of national minorities as equal as the constituent groups. Minority recognition indeed is a crucial prerequisite that is necessary for proper and effective participation of minority members. Since BiH is a country of rich cultural and religious variety, acknowledging and protecting these differences would diminish arbitrary decisions of the ruling elites toward minority groups. Moreover, this would enable creation of dialogues between ethnic groups with the aim of developing a sense of tolerance for different values and ideals. Once the sense of respecting and protecting your own and other cultures and ethnicity is developed, the basis for different forms of political participation will be set up. Due to the fact that Bosnian constitution is discriminating against members of national minorities and promoting and protecting the rights of constituent groups, the only possible way to achieve any form of participation at the moment is through the Council on National Minorities. According to Weller, consultative bodies on minority issues are the most effective protection mechanism if the parliamentary participation is forbidden or not allowed. These bodies can actually provide certain form of engaging minority members into the work of the government and present decisions that directly relate to them.³⁵⁰ Creation of the Council should indeed enhance the inclusion of minority members into political offices at all levels in BiH. This in turn should improve minority situation by promoting and strengthening their ideals and values. But, there still remains one important issue that this Council needs to focus on the most. The question about implementing the decision of the European Court of Human Rights in the case *Sejdić and Finci versus Bosnia and Herzegovina*, which directly obliges BiH to remove the discriminatory provisions from the constitution, can seriously change the situation of national minorities for the better if taken seriously in the Parliamentary Assembly.

³⁴⁹ Francesco Palermo and Jens Woelk, "No representation without recognition: The right to political participation of (national) minorities," p. 226.

³⁵⁰ Marc Weller, "Effective participation of minorities in public life" in *Universal minority rights - A commentary on the jurisprudence of international courts and treaty bodies*, Marc Weller (ed.), p. 479.

Finally, securing and promoting minority participation in all matters would mean that minority provisions, which BiH has legally obliged itself to fulfill, will become fully effective. By formally recognizing all national minorities and including them as equal citizens in the constitution, Bosnia and Herzegovina will finish the circle of recognizing and accepting national minorities on both fields, namely domestic and international. Only then, the importance and real impact of the FCNM will become truly apparent. Besides the fact that the FCNM is weakly worded and contains vague provisions, it still represents one of the major minority rights documents not only in BiH but in whole of Europe. One of the biggest importance of the FCNM for minorities in BiH is in the facts that this convention is an integral part of the Law on rights of national minorities, which was created after the FCNM, and that is also embodied in the Constitution of BiH as one of the highest legal documents for the protection of minority rights. Another importance of the FCNM that needs to be considered seriously by the local authorities is its promotion of the *social cohesion model* that promotes legal protection of human and minority rights, thus focusing on the importance of equality principle. Ideally, this model should create a society where “people will accept responsibility for one another” and where whole society belongs to all its peoples, including minorities as well.³⁵¹ Why should local authorities take this into consideration? In ethnically divided societies, such as BiH, the mission of building a sense of belonging to the society as a whole and striving to achieve common social values are the only possible ways to overcome and solve the problems caused by ethnic differences. Although they are weakly composed, the main aim of the FCNM provisions is to ensure equality for all people, regardless of their ethnic affiliation, while developing diversity in coherence with social cohesion model.³⁵² Thus, the provisions contained in the FCNM can only serve as tools for creating a society where differences will be met with pride rather than punishment. The way toward creating such a society can best be realized by implementing and promoting certain provisions that are of the utmost importance for Bosnian society. First and foremost, Article 4 of the FCNM guarantees right to equality of all people before the law. Moreover, it puts a serious obligation on BiH to promote “full and effective equality between persons belonging to a national minority and those belonging to the majority” in all aspects of life from political and economic to social and cultural.³⁵³ It is clear that equality status among all the citizens of BiH

³⁵¹ Asbjørn Eide, „Towards a Pan-European Instrument?“ in *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, A.Verstichel, A.Alen, B. De Witte (eds.), p. 10.

³⁵² Ibid, pp. 10-11.

³⁵³ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 4.

strongly influences the creation of the sense of belonging to the whole society. What is more important is the fact that BiH authorities are solely responsible for creating and developing such a sense among their citizens. Moreover, BiH government is also responsible and legally obliged to create and promote conditions for development of minority cultures, especially regarding development of “religion, language, traditions and cultural heritage.”³⁵⁴ By doing this, BiH will actually acknowledge the importance of nurturing cultural differences, promoting minority identity and developing minority traditions that are integral and inseparable part of the society that only enrich the culturally diverse state. Finally, the most important obligation that has already been imposed by the international community concerns the right to political participation of minority members. The FCNM clearly puts another obligation on BiH to create necessary conditions that would enable members of minority groups to participate in all matters regarding their well being.³⁵⁵ Proper implementation of the legal obligations mentioned above will consequently result in the creation of a socially cohesive society in which all members feel equal and responsible for one another thus striving to achieve common goals that would bring about the prosperity of the whole country. It follows that integration of national minorities into every day life should be regarded as one of the priorities of BiH government. In order to achieve this integration in the best possible way, there has to be a will on the side of minority communities to become integral part of the society as well. Apparently, two communities that have shown the strongest interest in becoming inseparable part of Bosnian society are Jewish and Roma minorities. History and presence of these two minority groups that dates several centuries back clearly signifies the striving of Roma and Jewish communities to successfully integrate into the society. Regardless of this, the way that government treats these two minority groups is rather different. Consequently, the same approach was used while depicting Jewish and Roma minorities in this study. Due to a rather good position of Jewish community, the study focused more on identity creation through non-political activities. On the other hand, a rather depressing situation of Roma community caused the study to focus more on governmental activities aimed at improving their situation. But, no matter how different these two minorities are, their struggle to achieve their fundamental rights is what distinguishes them from other minority groups.

³⁵⁴ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 5

³⁵⁵ Council of Europe, Framework Convention for the Protection of National Minorities, Art. 15

Even though it accused BiH as a highly discriminatory society, the case *Sejdić and Finci versus Bosnia and Herzegovina*, represents, ironically enough, nothing more than the highest form of stating and demanding that all minority groups should achieve the same equal status as the members of constituent groups are already enjoying it. Since local authorities turned a blind eye to the demands of Jewish and Roma representatives, they had to appeal to the European Court of Human Rights as the highest human rights institution that also promotes and protects rights of minority groups, in order to improve their marginalized position in the country. It is now up to the political elites to understand the importance of the Court's decision and to implement it in the best possible way in order to provide for legal and factual conditions for a successful integration of national minorities into BiH society. Promotion and protection of Roma and Jewish minorities, as well as other minority communities, should be regarded as a serious issue within political circles in the country. Not only that national minorities need to be integrated into the constitution of the country in order to be legally protected but they also have to be allowed to participate in all aspects of Bosnian society in the same way members of constituent groups are allowed. What is more important regarding minority integration in BiH is the fact that activities of Jewish and Roma communities regarding the improvement of their political and social status can indeed serve as a stimulus for all other minorities in the country that are also in a similar situation. Besides relying on the government to take part in changing the legal and factual situation regarding minority position, members of national minorities in BiH should also take a more active role in striving to protect and promote not only their minority rights but their cultural, ethnic and religious identities. Granting the right to political participation of minority members could indeed result in creating a basis for enhancing their overall situation and promoting their fundamental needs. In order to achieve this, the constitution of BiH must be amended in a way that it legally and factually forbids any form of discrimination and promotes equality and protection of all its citizens. Moreover, political leaders have to focus on bridging the divisions that are present among ethnic groups in the country by "socializing the population to a shared, civic culture."³⁵⁶ Furthermore, through repressing minority groups, the societies will experience only "retarding developments." Thus, it follows that government should change their practices toward national minorities in order to achieve mutual understanding.³⁵⁷ On the other hand, minority rights mechanisms, minority groups and governments have to be mutually

³⁵⁶ Steven L. Burg, "Bosnia Herzegovina: A case of failed democratization" in *Politics, power and struggle for democracy in South-East Europe*, Karen Dawisha, BruceParrot (eds.), p. 126.

³⁵⁷ Hugh Poulton, *The Balkans: Minorities and states in conflict*, p. 210.

supportive of one another in order “to realize a setting in which minorities are enabled to safeguard their specific identity, without jeopardizing the interests of the government and the majority.”³⁵⁸ Finally, Bosnia and Herzegovina and its ruling elites should indeed realize that the harmony, where different ethnic groups, religions, languages, traditions and ideals have managed to live next to one another for centuries, has to be achieved once more in the society for the sake of country’s development and progress towards democratic ideals. Moreover, respecting and protecting human rights is one of the utmost prerequisites for achieving those ideals. The process of democratization will be completed only when Bosnia and Herzegovina creates an environment where “human rights are universally respected.”³⁵⁹ Thus, including, protecting and promoting values and ideals of both constituent and non-constituent groups in the country has to be regarded as the only objective the government and its citizens must strive towards in order to regain that harmony.

³⁵⁸ Rianne M. Letschert, *The impact of minority rights mechanisms*, p. 451.

³⁵⁹ David Chandler, *Bosnia: Faking democracy after Dayton*, p. 90.

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