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De Jure vs. de Facto Minority Protection in Bosnia and Herzegovina

The article discusses the implementation of minority protection standards in Bosnia and Herzegovina. Reflecting upon the apparent dichotomy between particular domestic constitutional concepts and traditional national minority protection, it goes further and examines the impact of the latter on post-conflict reconciliation and confidence building amongst Bosnia's diverse communities. By highlighting discriminatory practices on the ground it argues that the more rigid the request for protection of collective rights, the less chance it has of being consensually accepted. Contextually, it analyses the influence of both European integration and regional dimension on inter-community and majority-minority relations in the country, and finds that proper enforcement of minority protection rights depends little on the quality of the legal framework in place, but rather on inventive diversity management strategies and tools that were missing in this specific case.

Keywords: constituent peoples, national minorities and Others, Bosnia and Herzegovina, numerically inferior groups, anti-discrimination, European integration, reconciliation.

De jure in de facto manjšinska zaščita v Bosni in Hercegovini

Avtor v članku obravnava implementacijo standardov manjšinske zaščite v Bosni in Hercegovini. V uvodu osvetli dihotomijo med specifičnimi lokalnimi ustavnimi koncepti in tradicionalno manjšinsko zaščito, v nadaljevanju pa analizira vpliv slednje na povojno spravo in ponovno krepitev zaupanja med skupnostmi, ki živijo v Bosni in Hercegovini. Predstavitev konkretnih diskriminatornih praks in aktualnih procesov dokazuje, da je teže doseči soglasje o zaščiti kolektivnih pravic, če so zahteve za te pravice toge. Avtor kontekstualno analizira vpliv evropske integracijske politike in regionalne dimenzije na odnose znotraj skupnosti, kakor tudi na odnose med večino in manjšino v Bosni in Hercegovini. Ugotavlja, da je uveljavitev manjšinskih pravic bolj kot od obstoječega pravnega okvira odvisna od inovativnih in uspešnih strategij in orodij upravljanja različnosti, ki pa jih v Bosni in Hercegovini niso razvili.

Ključne besede: *ustavna ljudstva, narodne manjšine in drugi, Bosna in Hercegovina, številčno inferiorne skupine, antidiskriminacija, evropska integracija, sprava.*

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1. Introduction

In Bosnia and Herzegovina, belonging to one of constituent peoples – Bosniacs, Serbs or Croats – is essential to an individual's ability to participate in political life. As a consequence, it has been referred to as country of multiple majorities with none of the main communities forming a clear majority of the total population. However, the publication of the results of the last census held in October 2013 by the Agency for Statistics of Bosnia and Herzegovina became a subject of political dispute, as they indicate that Bosniacs may have become by a slight margin the majority population.[1] In fact, the Republika Srpska contests the results, since they include many people who live, study or work abroad, but are registered in the questionnaire as full residents. Thus, it refuses to recognise almost 430,000 citizens, mainly Bosniacs, as residents of the country in the final results. This would reduce the overall population, as well as the total number of Bosniacs (Balkaninsight 2013, Josipovič 2016). The other collective groups in the country, including but not limited to the classic national minorities, such as the Roma or Jewish communities, are for the most part excluded from political participation. They belong to the so-called category of Others, predefined as any member of the other (minority) communities present in Bosnia and Herzegovina including persons who do not declare affiliation with any of the above three constituent peoples due to intermarriage, mixed parenthood or for other reasons.[2]

Contextually, the development of consociation democracy between three major ethnic groups through the Dayton Peace Agreement and the Constitution of Bosnia and Herzegovina (hereafter Constitution BiH), in Annex IV thereof, has allowed Bosnia and Herzegovina to remain stable enough to avoid a return to war, but has not facilitated the full political operation of the country necessary to consolidate democracy and enter into further integration processes, particularly those leading to European Union membership. Moreover, it has been confirmed in a series of cases brought before the European Court of Human Rights (ECtHR), starting with Sejdic and Finci vs. BiH (ECtHR, Application no. 27996, 22. 12. 2009), Zornic vs. BiH (ECtHR, Application no. 3681/06, 15.07.2014) up until the most recent case Pilav vs. BiH (ECtHR, Application no. 41939/07, 9 June 2016), that this model of democracy has created a discriminatory constitutional framework where belonging is interpreted exclusively along ethnic/territorial lines. As a consequence, the development and exercise of minority rights are hindered given that the political structure is based on special privileges for the main three communities, which often leads to the marginalisation and exclusion of minorities from important public posts. It also created a complex, highly fragmented, multi-layered institutional framework that impedes the effective protection of rights of all its citizens and makes minority communities particularly vulnerable to discrimination. The present research shows that this is also pertinent to Bosniacs, Croats and Serbs when they find themselves in *de facto*

minority situations in various territories and administrative units, thus creating a paradox in governance by majority ethnic elites. Moreover, even pressed by EU integration requirements, the shift from the Dayton "logic of belonging", i.e., the concept of "ethnic security" (Bojicic-Dzelilovic 2015) towards more inclusiveness has been unable to materialise. What, then, is the leverage that will change the paradigm of exclusivist belonging and allow for both *de jure* and *de facto* protection of all groups equally throughout the country is the main research question.

This article draws on a review of existing materials, together with first-hand field research, analysis of anti-discrimination cases against minorities before relevant courts, including situations of *de facto* minority in the past two years, interviews conducted with members of minorities, as well as discussions with public officials, representatives of the international community and civil society organisations. The paper begins with a brief assessment of the constitutional and political system, followed by specific examples of discrimination faced by minority communities. It concludes with findings and recommendations for improvement, highlighting the need for inventive tools to address the systematic discrimination against all citizens of Bosnia and Herzegovina in a minority position, regardless of their appurtenance. These steps are essential for ensuring that members of minority communities are no longer treated as second-class citizens in their country.

2. Consociation Democracy Model Failing

One would expect a country consisting of deep vertical cleavages similar to those found in Bosnia and Herzegovina to suffer permanent conflict and disorder. However, Arend Lijphart developed the model of consociation democracy or power sharing (Boogards 2000) in the 1960s in an attempt to explain political stability in countries with deep vertical cleavages. Consociation democracy is "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy" (Lijphart 1969, 216). To be successful, the political elites of a divided society must have the ability to accommodate the divergent interests and demands of the other subcultures and to transcend cleavages in order to avoid political fragmentation. According to Wippman, consociation democracy is the "only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of larger societies" (Wippman 1998, 211). The model of consociation democracy thus respects the needs of each ethnic group, while providing a political framework for a functioning democracy. This model has been used to develop constitutional frameworks in a number of divided societies, including Bosnia and Herzegovina. In the development of consociation democracy four fundamental features have emerged, which are needed to ensure that these societies remain stable: a grand

coalition, segmental autonomy, proportionality and minority veto (Lijphart 1969, 211).

The constitutional framework of Bosnia and Herzegovina contains a number of elements which support the presence of a grand coalition. The Presidency of Bosnia and Herzegovina (Article V of the Constitution BiH, 1995) consists of a member of each constituent people who represent the majority ethnic group of the Entity from which he/she is elected.This means that that Bosniac and Croat members of the Presidency shall be elected from the Federation of Bosnia and Herzegovina and the Serb Member shall be elected from the Republika Srpska. The House of Peoples, the second chamber of the Parliamentary Assembly is composed along similar party lines. The Constitution BiH (Article IV) requires that the House of Peoples comprise of a total of fifteen members, with five members from each of the constituent peoples. Hence, such protection of the rights of the constituent peoples in Bosnia and Herzegovina is at the detriment of those citizens who fall under the category of Others, or those living in the so called wrong entity. For example, Serbs living in the Federation and Bosniacs or Croats in the Republika Srpska are not eligible to stand for these positions. In practice, Others are those persons of mixed parenthood, those not assimilating to ethnically predetermined categories and those from the smaller national minorities enumerated under the Law on National Minorities. The Constitution BiH provides no answer on how a person's ethnicity is determined; there is nothing to prevent a person from the Others category self-declaring as a member of one of the three constituent peoples in order to stand for election. Some have even chosen this kind of identity shopping, while some others have refused to employ this tactic for political reasons, arguing that they should be entitled to these rights without discrimination. Those who do not fall within one of the three constituent peoples may only be involved in the Grand Coalition in either the House of Representatives or the Constitutional Court, where membership is not predetermined by ethnicity or Entity of origin. This places restrictions on a large proportion of the population's ability to participate fully in political life and consequently in the grand coalition.

Regarding segmental autonomy, i.e., the ability of each segment of society to make decisions (Lijphart 1985, 4), the country's constitutional set up established an extreme form of such autonomy at the Entity level, where the rights of other Entity's population are largely ignored (Bieber 1999, 86). The focus of each Entity is to ensure that its own national vital interests are protected, with little to no regard for the interests of the other constituent peoples, through the use of the vital national interest veto.[3] Those belonging to the category of Others, including national minorities, have no decision-making powers at national level due to their exclusion from the House of Peoples of the state Parliament. This position is slightly improved with seven seats reserved for Others in the House of Peoples of the Federation and four seats in the Republika Srpska National

Assembly, though these seats have reduced competencies compared to the seats reserved for the constituent peoples. Thus, it is possible to suggest that Bosnia and Herzegovina only partially complies with the requirements of segmental autonomy under the consociation democracy model.

The principle of proportionality is a third feature of consociation democracy. The state is able to reduce any claims of bias towards one group of society by distributing positions in the public sector, authority positions and public funding proportionately between the different groups. In Bosnia and Herzegovina, proportionality is seen in civil service appointments, allocations of public funding and political representation, dividing these positions between the constituent peoples. This form of proportional representation does not guarantee all the minority groups represented as Others an equal distribution of positions and funding. Proportionality exists for the constituent peoples, which ensures representation of these three groups, at the expense of Others who continue to be a minority group largely excluded from political life.

The fourth and last feature according to Lijphart's model is the right of veto. The purpose of this is to provide minorities with a guarantee that they will not be outvoted by a majority when their vital interests are at stake. In the case of Bosnia and Herzegovina, the state-level Constitution BiH provides the vital interest veto power to both the Presidency and the House of Peoples. Scholars explain that the House of Peoples simply exists to "provide a veto power that each group of constituent people may invoke to strike down legislation deemed harmful to its interests" (Raulston 2012, 677). While it is undeniable that the House of Peoples is a forum in which the constituent peoples may exercise this right of veto, as the upper chamber of Parliament it is ultimately an advisory body. However, the national interest veto power has been used only a few times in the House of Peoples, but numerous times as an entity veto, predominantly by the members from Republika Srpska, to prevent the passage of key legislation deemed to be against their Entity, hence the majority Serb interest (Trnka et al. 2009). The difficulty created by the use of the veto in passing legislation supports the arguments put forward by Raulston. The veto power in Bosnia and Herzegovina demonstrates the use of consociation democracy in providing stability in the country. However, it is exploited and used to further narrow ethnic interests and has been formulated in such a way that it continues to exclude the category of Others from the protection provided by this power. Furthermore, the continued use of the veto power and its effect of preventing the development of essential legislation is having a serious impact upon the country's EU membership prospects.

All in all, the drafters of the Dayton Peace Agreement predicted that Bosnia and Herzegovina would not be able to sustain a consociation arrangement without international supervision. Therefore the role of the Office of the High Representative (OHR)was developed to ensure civilian implementation of the

agreement according to its Annex X (Dayton Peace Agreement 1995), including the use of executive powers to enact laws, appoint or remove civil positions or amend Entity Constitutions.[4] The involvement of the international community in Bosnia and Herzegovina has received divided support. The Republika Srpska opposes the international presence with executive powers, whereas in the Federation, predominantly the Bosniac community is much more in favour as it provides un-blocking mechanisms, used at the beginning of the international mandate much more than now (Banning 2014). Indeed, international involvement has been linked to some of the difficulties of the consociation model in Bosnia and Herzegovina (Idrizovic 2013, 19). On the one hand, consociation democracy has developed a quasi-stable political environment with ongoing ethnic tensions and battles between the three main constituent groups. On the other hand, it has exacerbated the minority rights situation in Bosnia, leading the European Court of Human Rights to pass judgements having a direct effect on the country's journey to the European Union as implementation of those judgments, i.e., changes to the Constitution BiH became the conditionality for advanced stages of EU accession (Bărbulescu & Troncota 2013). The continued presence of a highly discriminatory constitutional framework which excludes all those who do not associate with one of the three constituent peoples or who reside on the wrong territory has thus created difficulties on Bosnia and Herzegovina's path to EU membership. Furthermore, according to the European Court, strict consociation democracy could be justified as a temporary measure to aid in the development of a stable functioning country after the war. However, in Bosnia and Herzegovina, the constitutional framework is still based on an exclusivist power-sharing model twenty-one years later.

3. Minority Protection as Collateral Damage

To counterbalance this rigidity, additional international human and minority rights instruments became directly applicable in the domestic legal system by virtue of the Constitution of Bosnia and Herzegovina (Annex IV of the Dayton Peace Agreement). Thus, the treaties on national minorities, such as the 1992 European Charter for Regional or Minority Languages, or the 1994 Framework Convention for the Protection of National Minorities, are amongst those that even did not had to be formally ratified by the Parliamentary Assembly of Bosnia and Herzegovina. Consequently, the country has been obliged to invite the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other intergovernmental or regional human rights missions or organisations to monitor closely the human rights situation in Bosnia and Herzegovina through the establishment of local offices and the assignment of observers, rapporteurs, or other relevant persons on a permanent or mission-by-mission basis and to provide them with full and

effective facilitation, assistance and access. Due to these specific arrangements, Bosnia and Herzegovina has also implicitly converted non-binding minority rights instruments, such as the Lund Recommendations on advisory and consultative national minorities' bodies, into legally binding rules of domestic legislation.

In first place, in 2003 the Law on the Protection of Rights of Members belonging to National Minorities was adopted, which mandated the establishment at both state and entity level of Councils of National Minorities as advisory bodies. The state-level Council was eventually established in 2006, but became active only in 2009, while its replicas were established at the entity level, in 2007 in the Republika Srpska and in 2008 in the Federation of BiH. Regarding the latter, at the cantonal level, out of ten cantons, the operational council exist only in Sarajevo Canton. However, the implementation of national minority instruments adopted at state and entity levels remains generally weak, especially in the fields of culture, education and political participation, and is hampered by a lack of coordination among the authorities (Minority Rights Group International Briefing 2015).That is also true concerning the implementation of the provisions on the consultative mechanisms, while the national minority councils do not still effectively play their advisory role (Hodžić 2011).

In essence, the primary role of advisory bodies for national minorities is of a consultative nature: the basic aim is to enable participation of national minorities in the decision-making process, articulating and promoting the position and interests of the minorities when it comes to specific decisions of the legislature. Although not binding by definition, their recommendations increase the quality of democratic debate by including different perspectives. Formally, the views of advisory bodies have a stronger position compared to other similar actors in political life (e.g. NGOs), and the legislative bodies should seriously take into account their opinions. However, recent research (Čorni 2016) shows the contrary in practice insofar as the integration impact of the councils is hindered for a number of reasons:

- lack of logistical support (financing) to the national minority councils,
- internal problems in terms of their capacity, representativeness, legitimacy and operability,
- insufficient political mobilisation of national minorities,
- poor communication with the communities they represent,
- their views being ignored by decision-making structures,
- unsolved political relations and tensions between the constituent peoples in BiH,
- the politicisation of appointment procedures.

From the above analysis the advisory bodies, at those rare governmental levels where they were established, appear only as a frame without real and practical

content. At the moment, the national minority councils' capacity to ensure participation of national minorities in political life and their influence on the decision-making process remains insufficient. There is a lack of basic institutional structure support in which the consultative mechanism would completely realise their essential meaning and purpose. In general, the consultative mechanisms have had an insignificant impact on the practical, political and legislative levels within their mandated responsibilities. However, given that national minorities are generally not politically represented in the governmental institutions at central level, the national minority councils should be the most important mechanism for ensuring participation of the national minorities in decision-making processes. It can therefore be concluded that international standards on the effective participation of national minorities in public life, besides their direct application in the BIH constitutional and legal order, have not materialised in practice when it comes to the issue of advisory and consultative bodies. Accordingly, the next stage of the analysis will consider whether these standards become more effective regarding individual participation of persons belonging to a minority in public/political life.

Consequently, the analytical framework encompasses electoral and other civil and political rights of both national minorities in the sense of the above mentioned law on minorities and members of the three main constitutent peoples on territories where they are in a numerically inferior position. Although the pre-cited 2003 Law guarantees to national minorities the right of political participation at all levels of governance in BiH (state, entities, cantons, municipalities, Brčko District) in proportion to the results of the last census, in 2008 the Election Law was amended to reduce significantly the possibility of such participation in political life at a local level (Human Rights Centre 2008). In fact, since 2004 members of national minorities at the level of municipalities had *de iure* greater opportunity to participate in municipal councils as they could have at least one guaranteed seat in these bodies, provided that minorities make up 3 per cent of the total population of that municipality. For those participating in more than 3 per cent of the total population, two guaranteed seats were available (Law amending the Election Law of Bosnia and Herzegovina 2004, Art. 13. 14, Chapter 13A). However, since the Election Law was based on the 1991 census, that is prior to the war and to the ethnic reshaping of the country, a *de facto* difficulty was finding minorities that were relocated since the end of the 1992/95 war. In reality, the 1991 census did not reflect the actual demographic situation at municipal level. Instead of seeking another tool or mechanism for enabling actual participation of minorities, the legislator further restricted that right by amending the election law of 2008, which guarantees the right to political representation to a minority (one seat) only if the ratio of participation exceeds 3 per cent of the total local population (Law amending the Election Law of Bosnia and Herzegovina 2008, Art. 61). Yet, such a possibility exists in an

insignificant number of municipalities and it has even been reduced as a result of the 2013 population census. Thus, irrespective of the minimalistic guarantees in the legal framework in place, the effective participation of minorities in public life at local level was unable to materialise.

Considering this example, one might assume that the higher the level of authority (e.g., the state presidency, chambers of parliaments, Entity parliaments etc.) the more protection of minority rights is guaranteed. Nevertheless, the series of cases adjudicated by the European Court of Human Rights (ECtHR) since 2009 provides yet another negation of this hypothesis, as well as of the main research question. This is valid not only for national minorities in classic terms, i.e., those who do not declare themselves as constituent peoples but also – and this is a peculiarity of the BiH political reality – to constituent peoples who find themselves in a *de facto* minority. The cases of Sejdić and Finci, Zornic and Pilav (as adjudicated by the ECtHR in 2009, 2014 and 2016 respectively) showed there was discrimination against those belonging to minorities or constituent peoples but living on the so called wrong territory, i.e. in an Entity where the majority belonged to a different ethnic group, when it came to running for high office. In other words the Constitution makes it legally impossible for an office holder of given ethnicity to stand as candidate for the top executive position only on the basis of his place of residence. This concerns primarily the right to stand for elections for the state Presidency or House of Peoples, nominally reserved for constituent peoples who are resident in a given electoral unit, i.e. the respective Entity. However, unlike many other ECtHR judgments, which only compel states to repair the financial damage suffered by individuals for human rights violations, the restorative nature of the above-mentioned judgments amounts largely to the political will to amend the state Constitution and facilitate the substantive equality of all citizens on the entire territory. The political capital used to foster this will seemed to be amongst the highest ones: the implementation of the ruling has been included as the conditionality that was necessary for the Bosnia and Herzegovina's Stabilisation and Association Agreement (SAA) with the European Union to enter into force. Despite believing in the power of Europeanisation that proved to be a successful model of external socialisation in Central and Eastern Europe (Wade et al. 2011) and its expected impact on reinforcing the sense of identification of aspiring states with Europe (Risse 2010, Brljavac 2011), hence the faster implementation of reforms,the EU and Council of Europe could only acknowledge with "great disappointment" that the institutional and political leaders of Bosnia and Herzegovina missed the deadlines for implementing ajudgment which would be compliant with the European Convention on Human Rights (Council of Europe, 2012. Joint statement by Commissioner Füle and Secretary General Jagland on Bosnia and Herzegovina). The lack of substantive guidance from the European Union, the Court itself or the Venice Commission of the Council of Europe has resulted in

a number of disparate political party proposals for constitutional reform being put forward, though none have yet been agreed and implemented. It is obvious that reforms are required to enable the equal participation of all peoples in state-level institutions, let alone to reinvent strategies and models of participation at local level. However, from being a key pre-condition for advancing on the EU path, the minority rights protection, i.e., implementation of the Sejdic-Finci judgment, has been downgraded to a later phase conditionality, according to the new EU approach on BiH and initiated by Germany and the United Kingdom in 2015 (Djapo & Ridic 2015). Triggered by both the failure of Sejdic-Finci implementation talks and the violent demonstrations of February 2014 seeking more economic reforms, the shift in paradigm of EU conditionality from requiring serious political agreements to "low hanging fruit" of a social and economic nature (European Commission Progress Report on BiH 2014, 4) makes minority protection a hostage, or collateral damage of Brussels' shifting priorities. Thus, the EU Conditionality methodology based merely on compromise between a few leaders of the major BiH parties has shown its limits. Likesome previous attempts of constitutional reform under the US administration project of April Package 2006, or the joint EU/US initiative called the Butmir process in 2008 and 2009 (Bieber 2010), the requirement for adding more inclusiveness to the Dayton logic of ethno-territorial exclusivism, as stemming from the Strasbourg jurisprudence, could not be implemented only through the fostering of political deals. The major difference between these methods and constitutional follow-up of the Sejdic-Finci et al. case law is no longer a matter of political will but of enforcement of a clear international obligation of the state of Bosnia and Herzegovina. Accordingly, the state must proceed in this case as with any other international (contractual) obligations – within the framework of the constitution, laws and with respect to its own institutions. In other words, it is imperative that any future discussion is brought back to the parliament of the state, instead of attempts to change the rules of the game outside of the institutions. The ownership of reform should belong to domestic institutional, political, expert and other actors, while political leaders, as *de facto* representatives of political forces in the country, should be allowed through institutions to explain and defend their legitimate interests. Otherwise, the EU will continue hitting the wall of obstructionism of BiH's failure to comply with the European Convention on Human Rights and other obligations, which makes EU's leverage ineffective regarding implementation of its own Acquis.

However, in the course of EU accession an applicant country is expected to foster a spirit of tolerance towards its minorities and take appropriate measures to protect those who are subject to threats or acts of discrimination, hostility or violence. The situation in that regard in Bosnia and Herzegovina only confirms the extensive research work of Antonija Petričušić who argues that EU conditionality policy regarding protection of national minorities has been used

with parsimony, almost selectively, until the moment the EU faced the truth in the candidate/potential candidate country (Petričušić 2013). In Croatia, for instance, following the 2013 accession to the EU, respect for national minority protection standards worsened, specifically regarding the linguistic rights of the Serb minority in wider Vukovar region (Petričušić 2014).

As a result, laws and policies related to minority rights often simply remain unimplemented, which frequently leads to direct or indirect discrimination against minority communities. In Bosnia and Herzegovina, despite the efforts of the Constitutional Court of BiH to create collective equality among the three main groups throughout the country (Constitutional Court of Bosnia and Herzegovina 2000), even where they constitute a numerical minority they still continue to experience significant challenges in realising their rights. The following sections show that due to the high level of discrimination they live in segregation and often face difficulties in receiving an education that reflects specific aspects of their culture. Is it possible for the education system to cross over ethnic boundaries and promote reconciliation?

4. The Education System or Fear of the Other

The phenomena of the so called two schools under one roof in the Federation of BiH, and the use of the mother tongue in schools enclaved in minority municipalities in the Republika Srpska Entity reflect the above political and ethnic status-quo. In other words, each community considers itself superior on the territory it controls and the rare multi-ethnic areas appear as yet further collateral damage.

Concerning the management of the education system, while education in the Republika Srpska is largely centralised, the administration of the educational system in the Federation of BiH operates at several levels, including Federation, cantons, municipalities, and the individual schools themselves. The Constitution of the Federation of BiH states that "/ … / the cantons are exclusively responsible for developing education policy, including decisions concerning the regulation and provision of education as well as for developing and conducting cultural policy / … /" (Constitution of the Federation of BiH 1994, Article III/4 b,c). However, in Bosnia and Herzegovina the three main communities which opposed each other during the war twenty-five years ago are still struggling through fragile coexistence, thus children grow up in segregated schools. Moreover, due to the strong nexus between religion and ethnicity, it is not surprising that religion became an important tool of identification during and after the war, and school became a battlefield (Low-Beer 2001, Marusic 2011, 65). The examination of the current primary and secondary school systems provides an alarming insight into the current situation, with political inefficiencies, prevalent ethnic discrimination, and an unpromising future ahead, in particular for those in a *de facto* minority.

A clear case of the ongoing ethnic discrimination comes from the need to enable Croat and Bosniac children to have education in their respective languages in areas of mixed population, primarily in the two Cantons of the Federation of BiH (Central Bosnia and Herzegovina-Neretva). Thus, inside the same school buildings different spaces and curricula are assigned to students belonging to different constituent peoples. The project was conceived in past years as a temporary solution, mainly by international organisations, the OSCE in the lead, but it still persists today. In many such schools children, as well as their respective teachers, have no mutual contact. Students often arrive at school via different entrances (e.g. Mostar gymnasium) or they take separate breaks, and the teachers have separate meeting rooms; sometimes Croatian pupils attend classes in the morning and Bosniacs in the afternoon. In some more reformed schools, the classes are multi-ethnic, but when the time comes for national subjects such as geography, history, and language, the classroom is split up into entity-specific groups. It should also be underlined that this segregation system deeply affects not only students, but also teachers, as they are still appointed through ethnic criteria (Mujkic 2012, 54). An additional force that works in favour of division is the fear of assimilation. A UNICEF report showed that parents feel less threatened if their children attend mono-ethnic classes, and that this fear is especially present in areas where the system of two schools under one roof operates. Asked about the causes of this situation, one teacher replied:

> [T]here are political parties in government right now that wish to keep the divisions and what might be the ultimate reason I could not say. I can tell you my own experience, which is that these things will affect all children passing through this system of education, the one that is being implemented in this country. Of course, a normal human being cannot support segregation in schools, on any grounds. That is a very difficult situation that this school has been passing through since the end of the war. It is obvious that the politicians who represent us up there, and we have no pedagogic institute, it means that they are totally in favour of keeping this system of divided schools (UNICEF BiH 2009, 183).

Clearly, the dominant perception places the roots of the problem in the political system and party machinery, thus elegantly removing the responsibility for one's own actions to someone else.

As stated repeatedly by the European Commission,

> The continuing existence of divided schools in some Cantons of the BiH Federation and mono-ethnic schools across the country does not foster the development of an inclusive multi-cultural and tolerant society. *De facto* ethnic-based separation and discrimination in some public schools in the BiH Federation remain a serious concern. There needs to be more effort to make schools more inclusive and to address the continuing existence of two schools under one roof in the BiH Federation (European Commission, Bosnia and Herzegovina Progress Report 2013, 17).

The educational and school environment – together with the media and religion – was one of the first hotbeds in which opposing nationalist forces started the fight to control and manipulate public opinion, and to give shape to a feeling of "fear of others" (Slack & Doyon 2001). This has continued until today.

In this context, a lawsuit for violation of anti-discrimination law has been filed by the NGO Vaša Prava (Your Rights) from the city of Mostar. The Municipal Court of Mostar granted the suit and ordered in the first instance the Ministry of Education to "establish single, integrated, multi-cultural [schools], with a unified curriculum fully observing the children's right to education in the mother tongue" (Tolomelli 2015, 103). For organising the education system along ethnic lines, the Court found two schools in the Stolac and Čapljina municipalities (Herzegovina-Neretva Canton, FBiH) in violation of the law on prohibition of discrimination. Precisely in these two local communities, the Bosniac constituent people members are in a *de facto* minority position. The same can be said for Croats who are in a *de facto* minority position in Zenica or the Central Bosnia Canton and where such schools also exist. The implementation of the 2012 ruling, which was already enforceable at the time of the violation, is proving to be highly problematic and politically contentious. The plaintiff, the NGO Vaša Prava confirmed that, during discussions, the local authorities openly expressed their unwillingness to implement the ruling in the current political setting.[5] The verdict was overturned by a cantonal court in the second instance for procedural reasons, but then upheld again by the Federation's Supreme Court later in 2014 when it became final and binding. This judgment of the Supreme Court is considered to be a slap-in-the-face to nationalist politicians in Bosnia's southern region of Herzegovina, who have long resisted calls for integration. However, as indicated above, the political will necessary to remedy such a violation, enforce the judgment and restore human rights is still missing. Scholars argue that "without major changes in the education system, it will not be possible to re-introduce tolerance and acceptance in the present society" (Tolomelli 2015, 105).

The adoption of the comprehensive anti-discrimination law in 2009, on which the above court decisions were based, confirms again the main research hypothesis: although the legislation in force represents an important feature, albeit imperfect regarding the protection of minorities in BiH, its adoption is not enough for the removal of political, social, economic and cultural barriers currently preventing justice being served for members of minority communities.

Though the above judgment only applies to the Federation as the sole region over which the court has jurisdiction, school segregation exists in various forms across the country, whenever there is a *de facto* minority. For the last couple of years, Bosniac parents in the Serb-majority Republika Srpska have boycotted schools in the Srebrenica area. In this highly symbolic place for Bosniac returnees, parents were demanding that their children be taught separately according to an

explicitly national curriculum, requesting in addition that the mother tongue is named Bosnian (transl. bosanski) and not Bosniac (transl. bošnjački) i.e., the language of Bosniac people (transl. jezik bošnjačkog naroda), the latter being the official terminology used in the Constitution of Republika Srpska. In fact, according to Article 7 as amended and enacted by the executive decision of the High Representative, the official languages in Republika Srpska are: "the language of the Serb people, the language of the Bosniac people and the language of the Croat people" (Article 7 of the Constitution of Republika Srpska). Equally, several dozen children from Vrbanjci near Banja Luka in Republika Srpska did not start school on September 1 due to their parents' boycott of the school system which does not allow Bosniacs to have their own curriculum at the local school, which uses the Serbian-language teaching programme (Freedom House 2014, 147). Republika Srpska officials claim that the issue was being politicised, but parents from Konjevic Polje (Srebrenica area) protested that the Republika Srpska was not allowing Bosniac children to be taught under the Bosniac curriculum. They object to the fact that contrary to the relevant legislation of Republika Srpska (Law on Education), which guarantees any group representing more than 20 per cent of the local population the right to use its own language in education, the authorities have been constantly violating such a right by refusing to title the subject (mother tongue) using the name the minority population calls its own language (Balkaninsight 2016).

Thus the Bosniacs who reside in the above minority settlements in the Republika Srpska decided to stop sending their children to local schools until these are allowed to choose the Bosniac curriculum, which differs in a few subjects such as history and language. One of the political problems behind such a decision is that Republika Srpska officially does not recognise the term "Bosnian language", while the other Entity, the Federation of BiH, continues using the term Bosnian, Croatian and Serbian to denominate the official language. Moreover, the education system of Republika Srpska contains references in history and geography textbooks that are allegedly offensive to the non-dominant population. Accordingly, dozens of pupils from the Konjevic Polje primary school did not finish the last school year because of a dispute, but instead went to classes at an improvised school in the premises offered by the local Koranic school where they were given lessons by teachers from Sarajevo. Recently, the Constitutional Court of Bosnia and Herzegovina has been asked to review the constitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part reading: "the language of the Bosniac people" (Constitutional Court of BiH 2016). The applicant, inter alia, held that this provision is not in conformity with the Preamble of the Constitution of Bosnia and Herzegovina, i.e., with its principle of equality the constituent Bosniac people enjoys throughout the country. In addition, the applicant emphasised that the challenged provisions are in violation of the provisions of the European

Convention of Human Rights and other international instruments annexed to the BiH Constitution. However, the Court dismissed the request as ill-founded as it established that there was no violation of the Constitution of Bosnia and Herzegovina. It concluded that such terminology is a neutral provision which does not determine the name of the language, but contains the right of the Bosniac constituent people as well as other constituent peoples and Others, who have not declared themselves as such, to name the language they speak in their own way, which is in compliance with the Constitution of Bosnia and Herzegovina, and any different conduct in practice would lead to the violation not only of the Constitution of Bosnia and Herzegovina but also of the Constitution of the Republika Srpska (Constitutional Court of BiH 2016, Paragraph 62). The present article has demonstrated that such different conduct was indeed the practice on the ground, and consequently the parents of children in a *de facto* minority position boycotting the classes in Republika Srpska have filed criminal, civil and administrative suits against the authorities of the Republika Srpska, which ultimately may end up before the European Court of Human Rights. Interestingly, the Constitutional Court of Bosnia and Herzegovina concluded that the Constitution of Bosnia and Herzegovina does not stipulate in any way that the names of the languages spoken by the constituent peoples must be associated with the names of the constituent peoples (Constitutional Court BiH 2016, Paragraph 64). The Constitution of Bosnia and Herzegovina gives the right to the constituent peoples and Others to name the language they speak as they wish. The name of the language cannot depend upon linguistic rules because the constitutional right to the name of the language is independent from the content of the language, standards of the language etc.

Therefore, even though the principle of calling the language by using the name of the (constituent) people who speaks it was declared in conformity with the state Constitution, the very practice which is at stake was implicitly condemned by the Constitutional Court and is now subject to the legal suits mentioned above. Again, as in the case of *de facto* school segregation in the Federation of BiH and condemned by the Supreme Court of that Entity, the scope of court decisions in both cases seems limited by the non-existing political will for their implementation.

5. Conclusion

One cannot ignore that post-conflict normative solutions such as minimum assurance of minority participation in public life at local level or power sharing mechanisms, even if not perfect, have contributed to the re-emergence of cooperation and, to a certain degree to the normalisation of relations among the different ethnic communities across Bosnia and Herzegovina. However, this article has demonstrated that legal guarantees of minority rights means little for

inter-community reconciliation and reduction of social distance if policy makers believe that legislation should merely allow for the preservation of minority identities and assure minimal proportional participation. Underpinned by empirical research, the article has argued that in a fragile multi-ethnic scenario, the focus should be on increasing intercultural tolerance and acceptance, which can be achieved through a thorough implementation of the normative framework, periodically reviewed in accordance with the highest European standards. However, since this still is not the case in Bosnia and Herzegovina, the article concludes that the current domestic normative and institutional mechanisms are not yet sufficient to foster reconciliation and the systemic acceptance of tolerance.

There is a generally accepted explanation for this, which illustrates the fact that, despite the efforts undertaken through the European integration process, societal reconstruction has not yet occurred 22 years after the end of the war across the Western Balkans (Petričušić & Blondel 2012, 2). Small differences, which were previously of no significance in multi-ethnic Yugoslavia, and in Bosnia and Herzegovina in particular, are now used to politically, legally and socially distinguish the other. By first overcoming the physical divides, like the ones in schools, believing that small as well as big steps which reflect the perseverance and dedication of all actors can bring the needed changes, the local authorities as well as the international community missed the opportunity for confidence-building amongst constituent peoples first, and then towards classical national minorities. This is because the majority of the citizens of Bosnia and Herzegovina are locked in a struggle between existence as a genuine human being and as a loyal ethnic being. In the 2013 population census, citizens were even not allowed to declare themselves as Bosnian-Herzegovinians.[6] In fact, the logic of ethnic exclusivism has dehumanised the public and political space, making it unwelcoming for various minorities. The eruption of violence on the occasion of the latest local elections in October 2016 in Stolac, a town in the Herzegovina-Neretva Canton of the Federation of BiH and the subsequent interruption and recalling of elections is the clearest exemplification of that so called separate-but-equal logic.

A more coordinated, multi-layered action of diversity management at the societal and local level could be much more efficient way of overcoming the present situation. For instance, instead of maintaining measures of separation of pupils for the sake of security, schools should design activities, both curricular and extra-curricular, that would encourage interaction among them. For a start, all school trips, sports activities, theatre plays and celebration of graduation could be commonly organised, which will allow for more informal interaction and are not contrary to any constitutional or legal provision in force. From the human rights perspective current political and legal circumstances continue to hamper implementation of minority protection standards and do not foster

the development of an inclusive, multicultural, and tolerant society. Moreover, in general, reforms in Bosnia and Herzegovina are usually slow to take place, as politicians from different ethnicities struggle to achieve compromises. In a failed model of consociation democracy, this article has shown that even the court decisions are difficult to enforce, as a consequence of a conscious choice of opposing ethnic policies. Therefore the impact of forthcoming judgments, even at the level of the European Court of Human Rights, seems compromised. In this situation of ethnic divisions, prejudice, stereotyping and discrimination, this article argues that it is imperative to promote interaction and dialogue among the different communities, majorities and minorities to foster social cohesion. For instance, an educational system that respects the principles of multiculturalism and intercultural education, but where instruction also reflects the perspectives and identities of all constituent peoples and minorities would be preferable. Such a system would promote constructive interactions amongst students and teachers from different groups, while also enabling different groups to preserve their own culture and promoting greater knowledge of minority cultures among majority children.

However, regarding the prospect of EU membership, the European Union adheres to its policy that, from the perspective of political criteria, segregation or discrimination against minorities is not compatible with the European aspirations of Bosnia and Herzegovina. Despite using such a conditionality policy based on previous Europeanisation models, the EU has not managed, as demonstrated throughout the article, to create the necessary political momentum towards the substantive equality of all communities, including constituent peoples found in *de facto* minority position. Therefore, only through renewed and parallel efforts on internal reconciliation in Bosnia and Herzegovina, but also in other countries of the region, may a way out be found, before continuing to implement all the normative and institutional features of the so-called minority protection under international instruments, which alone do not suffice. Yet, this is a topic for another larger debate.

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Notes

[1] Data as per the Population Census 2013 and published in July 2016 indicate that 50.11 per cent of citizens declare themselves as Bosniacs, 30.78 per cent as Serbs, 15.43 per cent as Croats, 2.73 per cent as Others, 0.77 per cent as not declared and 0.18 per cent with no answer.

[2] According to the 2003 Law on Protection of National Minorities that is based on the previous 1991 census there are 17 minority groups, namely Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Russinians, Slovaks, Slovenians, Turks, Ukrainians and others who fulfil the legal criteria for declaring themselves a minority, i.e., expressed and distinguished from constituent peoples.

[3] Vital national interest (VNI) protection is a complicated constitutional procedure intended to prevent inequality between constituent peoples only (with the exclusion of Others). In reality, it is often misused by politicians to block the adoption of laws and appointments, and due to its narrow and inconsistent interpretation by the Councils for VNI – a sub-structure within Entity's Constitutional Courts, it rarely reaches the required consensus. Further details on this issue in K. Trnka et al. (2009, 93–94).

[4] Introduced by the Peace Implementation Council in December 1997 in Bonn (and referred as to: Bonn Powers), to overrule obstructive domestic politics delaying or blocking the implementation of the Dayton Peace Agreement.

[5] Author's interview with Emir Prcanovic, Director of Vaša Prava NGO, held on 15 December 2016.

[6] See categories listed in the census forms, cf. note 1.