

# **Bosnia's Three-Headed Beast:**

## ***Sejdić and Finci v. Bosnia and Herzegovina* and the case for “reasonable” discrimination**

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### *Article IV § 1*

*“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).”*

### *Article V*

*“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...”*

*Constitution of Bosnia and Herzegovina*<sup>1</sup>

## **Introduction**

In December 2009, the European Court of Human Rights convened in Strasbourg to issue its historic ruling; by a vote of 16 to 1, the Court held that Bosnia-Herzegovina's constitution was in violation of the European Convention on Human Rights.<sup>2</sup> Jakob Finci, one of the plaintiffs, had seen it coming. “Oh, I was sure we would win,” he said nonchalantly.<sup>3</sup> His lawyer, Human Rights Watch's Clive Baldwin, was just relieved: “I really had no idea.” Tempering Baldwin's enthusiasm had been his belief that the Grand Chamber showed a historic aversion “to dealing with discrimination violations.”<sup>4</sup>

The *Sejdić and Finci v. Bosnia and Herzegovina* case began 2006, when Dervo Sejdić (who is Roma) and Jakob Finci (who is Jewish) charged Bosnia with systematically depriving them of citizenship rights: by barring them from the country's highest government posts (the Presidency and the House of Peoples).<sup>5</sup> Bosnia's constitution limits those offices to “Constituent

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<sup>1</sup> The Constitution of Bosnia-Herzegovina.

<sup>2</sup> Grand Chamber Judgment, *Sejdić and Finci v. Bosnia and Herzegovina*: Applications nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009).

<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860268&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> accessed on 29 September 2011.

<sup>3</sup> Interview with Jakob Finci, Bosnian Ambassador to Switzerland (17 September 2011).

<sup>4</sup> Interview with Clive Baldwin, Lawyer for Human Rights Watch (23 September 2011).

<sup>5</sup> The 2001 “OSCE Guidelines to Assist National Minority Participation in the Electoral Process” describes political participation as a constitutive element of citizenship. OSCE, “Guidelines to Assist National Minority Participation in

Peoples:” self-declared Serbs, Croats and Bosniaks: the three warring faction in the 1990s Bosnian War. Ethnic “Others” are ineligible, though they can still vote in national elections.<sup>6</sup> In December 2009, the European Court of Human Rights (ECtHR) concurred with Sejdić and Finci, ruling that Bosnia was in violation of European Convention on Human Rights (ECHR) Article 14 (in conjunction with Article 3, on voting rights) and Protocol 12.<sup>7</sup>

Soon after the verdict was handed down, the case—which had until then garnered scant media attention—was hailed continent-wide as precedent-setting, pioneering, historic. For it was the first time that the Court had ruled on Protocol 12: the ECHR’s new anti-discrimination provision, effective since April 2005, which guarantees equal treatment on all legal rights.<sup>8</sup> (Protocol 12 provides more extensive protections than Article 14, which also concerns anti-discrimination.)<sup>9</sup> Advocates and policymakers celebrated the ECtHR’s judgment as sign of a more muscular commitment to stamping out constitutional inequality. In a review of the case, Minority Rights Group International lauded the ruling for “set[ting] a high benchmark with regard to racial discrimination.”<sup>10</sup>

Precedent-setting or not, it has been more than two years since the Court made its ruling and Bosnia has yet to amend a single sentence of its constitution. EU-backed reform talks have floundered.<sup>11</sup> And international pressure—including a warning that Bosnia will not be eligible for EU candidate status until it complies with the Court’s decision—has gained little traction. “Today,” warns a damning new report from Human Rights Watch (April 2012), “it is the constitution itself that threatens peace in Bosnia.”<sup>12</sup>

Yet *Sejdić and Finci v. Bosnia* has implications for Europe too. I argue that the trial has exposed acute gaps in the ECHR’s new Protocol 12: in particular, its notion of “reasonable” discrimination. *Sejdić and Finci v. Bosnia*, a 2009 trial that put 1995-era institutions on the stand,

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the Electoral Process’, Organization for Security and Co-Operation in Europe, Mission to Bosnia and Herzegovina <<http://www.osce.org/odihr/elections/17569>> accessed 29 September 2011.

<sup>6</sup> The Constitution of Bosnia-Herzegovina.

<sup>7</sup> Grand Chamber Judgment, *Sejdić and Finci v. Bosnia and Herzegovina* (ECtHR, 22 December 2009).

<sup>8</sup> The provision, ratified by Bosnia, came into there at this time. Human Rights Watch, “Second Class Citizens,” (HRW, April 2012) 17. *Hereafter HRW 2012*.

<sup>9</sup> Council of Europe, ‘Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms’ (2005) <<http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>> accessed 29 September 2011; Lucy Claridge, ‘Discrimination and political participation in Bosnia and Herzegovina’, *Minority Rights Group International* (2010), p. 3.

<sup>10</sup> *Ibid*, p. 5.

<sup>11</sup> Steven Woehrel, ‘Bosnia: Current Issues and U.S. Policy’. *Congressional Research Service* (Washington, 20 June 2011), p 9.

<sup>12</sup> HRW 2012, 16.

revealed that the ECHR's anti-discrimination clause can hinge on an individual court's subjective reading of historical events. While the history in question remains disputed, so too will the verdict it renders. Protocol 12 stands as it did in 2009; and indeed, its flaws have largely been overlooked.

With no sign that this impasse will resolve itself in the near future, I set out, in the spring of 2012, to reflect on *Sejdić and Finci v. Bosnia* and what it means for citizenship rights in Bosnia. To this end, I discussed the ECtHR's 2009 ruling with relevant actors in Bosnia and elsewhere: lawyers, diplomats, the EU Enlargement Committee, EUFOR, Bosnian politicians and ordinary citizens. In Part I of this paper, I use these interviews to present a detailed account of a case that has received only cursory public attention. In Part II, I turn attention outward, considering what *Sejdić and Finci v. Bosnia* means for the ECtHR and its role in the region.

The stakes are high. Within Bosnia, amending the constitution so that someone who is Jewish or Roma can run for president will require a far-reaching overhaul of the country's entire post-Dayton governance model. Across Europe, the European Court of Human Rights—and its prized new bulwark against discrimination, Protocol 12—risk appearing discordant and toothless if *Sejdić and Finci v. Bosnia* is not carried through, and soon.<sup>13</sup>

## **PART I: Sejdić and Finci go to Strasbourg**

### Background

When Daniel Serwer left Dayton, Ohio, where he'd arrived in November 1995 to help the US State Department negotiate the end of the Bosnian war, he felt uneasy. "We all said after Dayton that [Bosnia] was a house of cards," he told me. "And we weren't sure it was going to last."<sup>14</sup> The Dayton Agreement was, by most tallies, a diplomatic success; it ended a three-year-

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<sup>13</sup> A Note on Sources: Much of the material in this paper comes out of conversations I carried out with actors inside Bosnia. Two of my sources (unrelated) spoke on the condition that I identify them only as western diplomats. One is an embassy official; one works for an international organization. They will be cited in this paper as Diplomatic Source 1 and Diplomatic Source 2, respectively.

<sup>14</sup> Interview with Daniel Serwer, Scholar at Middle East Institute and Professor, School of Advanced International Studies, Johns Hopkins University (22 September 2011).

long war that had already claimed nearly 100,000 lives and uprooted over 2 million people.<sup>15</sup> But Serwer insists that, even then, he was troubled by what the Dayton Accord left in its wake: a broken country, with two ethnically-segregated states bound loosely under an anemic central government. Serwer, who was then a State Department director, says he made his concerns clear to then Assistant Secretary of State Richard Holbrooke, who in return accused him of being “disloyal” and “not with the program.”<sup>16</sup>

As a concession to warring parties, many of whom were hostile to the idea of a united Bosnia, Dayton negotiators agreed to an “institutionalization of ethnicity” within the country.<sup>17</sup> The Dayton Accord established two separate entities—one Serb Republic (RS) and one Croat-Muslim Federation—with wide-ranging powers, including the ability to conduct independent foreign policy.<sup>18</sup> It also gave birth to a constitution, which was drafted under EU and US oversight.<sup>19</sup> That constitution drew a distinction between ‘Constituent Peoples’ (Serbs, Croats and Muslims [Bosniaks]) and ‘Others:’ not just Jews and Roma and Poles—but those of mixed-descent, or those who opt not to ethnically self-declare. The last census to be carried out in Bosnia was before the war, in 1991. Thus, it is difficult to predict with great accuracy what percentage of the population would classify as “Others” today. Human Rights Watch places that figure between three and five percent of the country’s 4 million-strong population. Roma are the largest national minority.<sup>20</sup> To that end, Dayton set up a tripartite presidency. Bosnians would elect three presidents—a Serb (elected in the RS), a Croat and a Bosniak (both elected in the Federation)—who would rule on a rotation. The House of Peoples, through which all legislation must pass, would operate according to a similar ethnic formula. ‘Others’ were thus systematically barred from high-level posts, as were Constituent minorities (Serbs in the Federation, or Croats and Muslims in the RS).<sup>21</sup> This division also came with a set of accompanying provisions; majority factions, for instance, would have the power to veto

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<sup>15</sup> Woehrel, ‘Bosnia: Current Issues and U.S. Policy.’

<sup>16</sup> Interview with Daniel Serwer.

<sup>17</sup> European Commission, ‘Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina’ COM (22 October 2008) Opinion no. 283/2008.

<sup>18</sup> Noel Malcolm, *Bosnia: A Short History* (London, 2002), p. 256-270.

<sup>19</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4, [http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380) (accessed February 27, 2012); Constitution of Bosnia and Herzegovina, 1995, Preamble, [http://www.ccbh.ba/public/down/USTAV\\_BOSNE\\_I\\_HERCEGOVINE\\_engl.pdf](http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf) (accessed December 13, 2011).

<sup>20</sup> In addition to Jews and Roma, there are 15 recognized national minorities in Bosnia. HRW 2012, 1.

<sup>21</sup> The Constitution of Bosnia-Herzegovina.

legislation that purportedly threatens their ethnic interests (a so-called “vital interest veto”).<sup>22</sup> “I spoke to Holbrooke just after Dayton,” Jakob Finci explains. “I said, you’re pretending to be a friend, but I can’t run for your presidency.”<sup>23</sup>

In recent years, this constitutionally-codified discrimination has been bolstered by what observers from US Vice President Joe Biden to Freedom House to the International Crisis Group describe as a ratcheting-up of “nationalist rhetoric” across the country.<sup>24</sup> The feeling is described similarly on the ground. “We have become each other’s worst enemies,” Aleksandra Pavic, a warm, poetic 41-year-old teacher in Banja Luka explains—more that a little despondently. “We see the danger in the Other.”<sup>25</sup> By some estimates, Bosnia is more ethnically homogeneous than it was before the war. One paper from 2002 claims that the percentage of Serbs in the RS rose from 54.3 percent to 96.79 percent between 1991 and 1997—while the percentage of Serbs in the Federation dropped from 17.62 to 2.32 percent over the same time period.<sup>26</sup> Updated figures estimate the percentage of Serbs in the RS more modestly, at around 88 percent, but suggest that Croats and Bosniaks form an overwhelming 98% of the Federation.<sup>27</sup> Intermarriages, once commonplace in large cities, are now exceptional.<sup>28</sup> In this context, minorities fall victim to forms of discrimination more insidious than a constitutional clause. For instance, 70% of Bosnian Roma are homeless.<sup>29</sup> Pavic, who dreams of relocating to Canada, told me that what worries her most about Bosnia today is not the economy or the joblessness, but “the state of the soul.”

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<sup>22</sup> HRW 2012, 1.

<sup>23</sup> Jakob Finci Interview.

<sup>24</sup> Woehrel, ‘Bosnia: Current Issues and U.S. Policy.’; International Crisis Group, *CrisisWatch: Bosnia-Herzegovina* (1 December 2010). <<http://www.crisisgroup.org/en/publication-type/crisiswatch/crisiswatch-database.aspx?CountryIDs=%7BEE137C78-CA78-45D0-A6C5-7460B7E7D5BE%7D>> Accessed 29 September 2011; Freedom House, *Freedom in the World 2011 - Bosnia-Herzegovina* (14 June 2011) <<http://www.freedomhouse.org/template.cfm?page=22&year=2011&country=8001>> accessed 29 September 2011.

<sup>25</sup> Email from Aleksandra Pavic to author (11 September 2011).

<sup>26</sup> Robert Hayden, ‘Bosnia Ten Years after ‘Independence,’ EES Special Report (May 2002) <<http://www.wilsoncenter.org/publication/bosnia-ten-years-after-independence-the-dictatorship-the-protectariate-under-civicist>> accessed on 10 April 2012.

<sup>27</sup> World and Its Peoples: Western Balkans, 1642.

<sup>28</sup> Sumantra Bose, *Bosnia after Dayton: nationalist partition and international intervention* (United Kingdom, 2002), p. 14.

<sup>29</sup> Dervo Sejdić, ‘Comments on the Implementation of the Framework Convention’ (Council of Roma of the Federation of Bosnia and Herzegovina <[http://www.nrc.ch/8025708F004CE90B/\(httpDocuments\)/E1DDFCE39A48E213802570B700587783/\\$file/Council+of+Roma+1.pdf](http://www.nrc.ch/8025708F004CE90B/(httpDocuments)/E1DDFCE39A48E213802570B700587783/$file/Council+of+Roma+1.pdf)> accessed on 29 September 2011.

The present situation is not an inexorable product of atavistic ethnic strife, as is commonly claimed in ominous sounding news reports (often the kind that anticipate another imminent Balkan battle). Noel Malcolm forcefully argues this point in his judicious book, *A Short History of Bosnia*. Ethnic groups co-existed peacefully in Bosnia in the years leading up to war, and the catalyst for fighting in the 1990s was more external provocation by Serbia and Croatia than internal strife. “Bosnia was never Northern Ireland,” one foreign diplomat told me. In large cities, at the height of Tito’s Yugoslavia, “it was virtually irrelevant whether you were Croat, Serb, Bosniak, or whatever.”<sup>30</sup> But things have changed, and ethnic lines are now entrenched.

Serwer, the former US state department envoy, admits that foreign diplomats at the Dayton Peace Conference were short-sighted when it came to securing minority rights in Bosnia. “Frankly,” he says, “we had our hands full...[but] in retrospect, I think we should have tried to do a little bit more.” Beginning a decade after peace was established, US and EU officials—in some cases, the very same actors who had given the constitution its shape and form at Dayton—began agitating for reform.<sup>31</sup> The two rounds of international talks that ensued, Butmir I (2006) and Butmir II (2009), proved unsuccessful, and since then the involved “international actors... have backed away from pushing political reform.”<sup>32</sup> Nevertheless, Serwer is adamant that, in a roundabout way, US diplomats paved the way for *Sejdić and Finci v. Bosnia*. Though the Bosnian constitution lacks explicit human rights guarantees, it does include a clause stating that the European Convention on Human Rights takes precedent over Bosnian law. It reads:

*[T]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority above all other law.*<sup>33</sup>

The provision was “snuck in” says Serwer: left purposefully ambiguous, so as not to offend any side—but written down nonetheless. Unfortunately, Serwer concedes, that orchestrated

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<sup>30</sup> Interview with Diplomatic Source 2 (22 September 2011).

<sup>31</sup> HRW 2012, 15.

<sup>32</sup> HRW 2012, 16. Erin Hodzic and Nenad Stojanovic, ‘New/Old Constitutional Engineering?’ (May 2011), 41-42. <<http://www.analitika.ba/en/publications/%E2%80%9Cnewold-constitutional-engineering%E2%80%9D>> accessed on 10 April 2012.

<sup>33</sup> The Constitution of Bosnia-Herzegovina.

ambiguity has allowed the Bosnian government to disregard the clause for the last seventeen years.<sup>34</sup>

### The Curtain Draws

It started with coffee. In June 2009, both sides—Bosnia’s government lawyers, Dervo Sejdić, Jakob Finci and the three prosecutors<sup>35</sup>—gathered on the opening day of the trial with the ECtHR’s president, for an early-morning caffeine jolt. Lawyer Clive Baldwin, representing Jakob Finci, was approached by the president: “He said, ‘My colleagues and I are so interested in the case that we’ve given you an extra hour!’ Normally, you have two hours; but we were given three for extra discussion.”<sup>36</sup> Already the case had, quite unusually, been passed directly to the ECtHR’s Grand Chamber, which takes only a few salient cases a year. A Minority Rights Group report noted, “this decision is indicative of the huge importance of the case in the view of the Court.”<sup>37</sup>

*Sejdić and Finci v. Bosnia* began when Jakob Finci, a Jewish lawyer who has held a number of prominent government and private posts (he is currently Bosnia’s ambassador to Switzerland), announced his intention to run for the country’s presidency and parliament. In January 2007, he received a letter from the Bosnian Central Election Commission informing him that he was not eligible to stand in those elections because he is Jewish.<sup>38</sup> Immediately, he decided to challenge the decision in court. Around that time, Finci learned that his acquaintance Dervo Sejdić, a member of Bosnia’s Roma Council, was planning a similar suit. The two joined forces. Soon, a number of high-powered interests were on board; the Venice Commission, the AIRE Center, and the Open Society Justice Initiative all requested, and were authorized, to intervene in the case.<sup>39</sup>

At least, that’s how Finci tells it. But his case made it to Strasbourg, and made headlines there, in large part because Clive Baldwin, then at Minority Rights Group, had independently

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<sup>34</sup> Daniel Serwer Interview.

<sup>35</sup> Clive Baldwin of Human Rights Watch, Sheri Rosenberg of Cardozo Law School, and Javier Leon Diaz, formerly of the Bosnia Human Rights Chamber.

<sup>36</sup> Clive Baldwin interview.

<sup>37</sup> Claridge, ‘Discrimination and political participation in Bosnia and Herzegovina.’

<sup>38</sup> Council of Europe, ‘Sejdić and Finci v. Bosnia and Herzegovina’ (2009)  
<[http://www.coe.org.rs/eng/news\\_sr\\_eng/?conid=1545](http://www.coe.org.rs/eng/news_sr_eng/?conid=1545)> accessed 29 September 2011.

<sup>39</sup> Council of Europe, ‘Sejdić and Finci v. Bosnia and Herzegovina’ (2009).



decided that he wanted to sue the Bosnian government. Baldwin explains that he was eager to test out the ECHR's new anti-discrimination clause: Protocol 12 (effectively an extension of Article 14).<sup>40</sup> Baldwin explains, "My colleague in Budapest said: the Bosnian electoral system, that could be challenged couldn't it? I said, you've got a point there. And we thought: OK there's this new Protocol 12 and Bosnia has ratified it. Why don't we challenge this?" Baldwin knew a lawyer in New York who had experience working in the Balkans and she got in touch with Finci, who said he was thinking about bringing forth a case. Sejdić already has his own lawyer, and attorneys merged the cases. In other words, the trial came together, in large part, because of the advocacy of a prominent Western human rights organization.

Given the dearth of relevant precedents, it is not surprising that the ECtHR judges were so eager to devote attention to *Sejdić and Finci v. Bosnia*. The closest precedent is a 2004 case: *Aziz v. Cyprus*, which dealt with discrimination in voting laws. *Aziz v. Cyprus* was brought forward by a Turkish-Cypriot living in a Greek-dominated part of Cyprus, who had been excluded from the Greek-Cypriot electoral list and was therefore not able to vote in parliamentary elections.<sup>41</sup> In that case, the ECtHR found a violation of Article 14. Nevertheless, the 2004 case did not deal with elected officials and its judgment was issued before Protocol 12 came into being.

Yet the fact that *Sejdić and Finci v. Bosnia* made its way to Strasbourg—rather than being dealt with domestically—is the product of another Dayton-era muddle. In 2006, a separate case concerning "Others" was presented to the Constitutional Court of Bosnia. That court confirmed that Bosnia's electoral exclusion of "Others" violated Article 3, Article 5 and Article 14 of the ECHR. Yet it subsequently declared the case inadmissible: on the grounds that the constitutional violations themselves were provisions of the Dayton Agreement—and thus not subject to alteration by a national Bosnian court. The problem at hand, ruled the Constitutional Court, was not "a dispute between the Entities or institutions," but rather a conflict between national and international law.<sup>42</sup> In other words, not only did the Dayton Constitution

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<sup>40</sup> Protocol 12 (Article 1): General prohibition of discrimination. 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1. Council of Europe, 'Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2005).

<sup>41</sup> Judgment, *Aziz v. Cyprus* (ECtHR, 22 June 2004) <[http://www.rtdh.eu/pdf/20040622\\_aziz\\_c\\_chypres.pdf](http://www.rtdh.eu/pdf/20040622_aziz_c_chypres.pdf)> accessed on 29 September 2011.

<sup>42</sup> Council of Europe, 'Sejdić and Finci v. Bosnia and Herzegovina' (2009).



institutionalize discrimination, but it left unresolved the question of competency—so that domestic courts could excuse themselves from amending the discriminatory clauses internally.

For their part, Bosnian government lawyers were unable to piece together a cohesive case. I can best sum up the government lawyers' presentation as such: 'We're not discriminating. But if we were, it would be justified. And anyway, it's the fault of the international community.' First, lawyers argued that Sejdić and Finci were not excluded from the democratic process, since they were able to vote in elections and run for lower government posts. Second, they asserted that if the country's electoral rules *were* discriminatory, there was 'reasonable justification' for the discrimination. (This language is important, and will be discussed in PART II.) Finally, the lawyers noted that that Bosnia's electoral rules were provisions of the Dayton Accord and thus set in stone, as far as domestic courts were concerned.<sup>43</sup>

In the end, the ECtHR's decision was perhaps to be expected; The Open Society Justice Initiative, in its 2006 statement to the ECtHR, noted that no court has ever found total exclusion, based on race or ethnicity, legitimate under international law.<sup>44</sup> Indeed on 29 December 2009, the Court ruled that Bosnia was in violation of Article 14 and Article 1 of the gleaming new Protocol 12.<sup>45</sup> "Racial discrimination is a particularly egregious kind of discrimination," judges ruled. It thus "requires... special vigilance and a vigorous reaction."

The judges also cleared up the question of competency. They ruled that the Bosnian parliament was able to make constitutional amendments. This is significant for future cases, and was deliberately co-ordinated by Sejdić and Finci's lawyers. Baldwin explains that, in the lead-up to the trial, his team was asked by the ECtHR to name the party that had jurisdiction over the alleged discrimination. Baldwin named the Bosnian parliament, rather than the Office of the Higher Representative (OHR): the international governing body set up by the Dayton Accord, which is technically the highest office in the country.<sup>46</sup> Baldwin admits that, in the end, it might have been easier to work through the OHR. "But we were suing Bosnia, not anyone else," he insists. The clients wanted the domestic government, rather than the international community, to assume responsibility for its own legal code.<sup>47</sup>

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<sup>43</sup> Claridge, 'Discrimination and political participation in Bosnia and Herzegovina.'

<sup>44</sup> Open Society Justice Initiative, 'Third Party Observations: European Court of Human Rights in the cases of Dervo Sedjic and Jakob Finci against Bosnia and Herzegovina' (Submission to ECtHR, 15 August 2008).

<sup>45</sup> Grand Chamber Judgment, Sejdić and Finci v. Bosnia and Herzegovina.

<sup>46</sup> Office of the High Representative <<http://www.ohr.int/>> -

<sup>47</sup> Clive Baldwin Interview; Woehrel, 'Bosnia: Current Issues and U.S. Policy.'

Before adjourning, the ECtHR ruled that Bosnia must amend its constitution before October 2010 presidential and parliamentary elections; indeed the Court had expedited its decision in time for the elections.<sup>48</sup> These elections have come and gone with no change.

### The Aftermath

“Nobody is in a hurry,” laughs Jakob Finci. Finci explains that, since the ECtHR made its ruling, Bosnia government offices have shuffled responsibility for the case between various branches. Says Finci, “the parliament gave the job to the Council of Ministers. After a few months, the Council of Ministers said: we are not [authorized] to do this. They sent it back to parliament. At the moment, no commission is working on it.”<sup>49</sup> Dervo Sejdić has since sued Bosnia for failing to follow through on the ECtHR’s verdict; in 2010, he asked for compensation valued at “four years worth of presidential salary” (about 125,000 euros). “I love Bosnia,” he told *The Associated Press* in March 2012, “That’s why I’m suing... I can do this all my life.”<sup>50</sup>

The thing is that, at least ostensibly, no party in Bosnia is opposed to including ‘Others’ in the electoral framework. Finci says he hasn’t come across anyone who disagrees with the ECtHR’s ruling. And Human Rights Watch’s latest paper concedes that members of some groups, the Jewish community for instance, face little discrimination in their daily lives.<sup>51</sup> Milorad Dodik, the RS president, has acknowledged the need for change: “We must exclude national exclusivity... and we are prepared to do that. But Sejdic-Finci is being used here as the opportunity for massive constitutional change.” Dodik has pledged to resist centralising reforms.<sup>52</sup> I asked Slaven Zeljko, member of the presidency of the HDZ, one of the more radical Croat nationalist parties, for his general opinion on the status of Jews and Roma in Bosnia. He stood firm: “We’re strongly committed to the convergence of the constitution of Bosnia and Herzegovina with the verdict of the Human Rights court in Strasbourg.”<sup>53</sup> One foreign diplomat I spoke to noted that this, in itself, is a positive sign:

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<sup>48</sup> Claridge, ‘Discrimination and political participation in Bosnia and Herzegovina’, p. 5; HRW.

<sup>49</sup> Jakob Finci Interview.

<sup>50</sup> Aida Cerkez, ‘Bosnian minorities push for right to be prez,’ *Associated Press* (30 March 2012). <http://www.google.com/hostednews/ap/article/ALeqM5jlySHZMmH1tooODk97wXYnNsk4aA?docId=12e7747bb0244b91b1bc295a03669b9d>

<sup>51</sup> HRW 2012, 13.

<sup>52</sup> Matt Robinson and Daria Sito-Sucic, ‘Two decades from war, a new fight to save Bosnia,’ *Reuters* (4 April, 2012). <http://uk.reuters.com/article/2012/04/04/uk-bosnia-war-idUKBRE8330HZ20120404>

<sup>53</sup> Email from Slaven Zeljko, member of the Presidency of Croatia Union of Bosnia and Herzegovina (23 September 2011).

*It was good news that, when the Sejdić/Finci case came up, it didn't result in any complaints. There was just a general shrugging of the shoulders. Here, people recognize that those rights should be in place. They recognize that Dayton needs to be fixed.*<sup>54</sup>

It is unlikely that such a ruling would have been so digestible a decade ago.

Since 2009, US and EU officials have pressured Bosnia to conform to the ECtHR's ruling, but to little effect. Immediately after the ruling, Council of Europe states urged Bosnia to implement the ECtHR's decision immediately, in time for October 2010 elections, to avoid another rights violation. Nothing happened.<sup>55</sup> Early in 2011, German Chancellor Angela Merkel organized a summit for Bosnian leaders with the goal of designing a constitutional reform package. Nothing came of it. The EU has also threatened to withhold up to 100 million Euros of "pre-accession assistance" to Bosnia. But as of now, Bosnia continues to receive its funding: a move that undermines EU pressure.<sup>56</sup> On March 15, 2012, Bosnia missed another Council of Europe deadline to propose forward steps.<sup>57</sup>

The EU has stressed that Bosnia must implement *Sejdić and Finci v. Bosnia* before it can even assume EU Candidate status. "It's a question of political will," explains an analyst at the EU Enlargement Committee. "It could happen tomorrow or it could happen in 10 years... But we can't push Bosnia's hand." The analyst estimates that, were all political parties to agree on a constitutional amendment today, the necessary changes could be implemented in two or three weeks. Is he confident that ongoing talks will come to fruition? He laughs: "Hope dies last."<sup>58</sup>

In the meantime, various parties are floating proposals for what Bosnia's new constitution might look like. Two large international conferences have focused solely on the question of how to move forward on *Sejdić and Finci v. Bosnia*. Some are calling for the presidency to rotate between four members: the fourth coming from an umbrella 'Others' category. Some want to scrap the entire ethnically-centered model. A popular proposal would maintain the tripartite presidency, with one RS and two Federation members, but eliminate the

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<sup>54</sup> Interview with Diplomatic Source 1 (19 September 2011).

<sup>55</sup> HRW 2012, 2.

<sup>56</sup> Woehrel, 'Bosnia: Current Issues and U.S. Policy.'

<sup>57</sup> HRW 2012, 2.

<sup>58</sup> Interview with analyst at European Union Enlargement Commission (September 2011).

ethnic requirement. The Venice Commission of the Council of Europe has released a report outlining these competing options.<sup>59</sup>

Caught in a stalemate, Bosnian leaders all claim that they are ready to get the ball rolling. “This is the Bosnian paradox,” says Finci. “Everyone agrees that we need reform. It’s easy to pass resolutions.” But all that comes of that is endless negotiations, working groups, and advisory commissions who “end up negotiating what they should negotiate.”

The incorporation of ‘Others’ into the electoral framework is clearly viewed by Bosnian policymakers not as a limited legal task, but as an opportunity to improve ethnic relations on a national scale. The Sarajevo-based Center for Social Research Analitika argues:

*Since the elections for the Bosnia Presidency represent perhaps the most conflicting point in the political scene of Bosnia, the reform of this institution should be approached with particular attention, not only from the perspective of elimination of discrimination, but also considering the possibilities and options for mitigating political tensions in the country.*<sup>60</sup>

To reform the electoral system so that a Jew or a Roma might run for president will require a retooling of Bosnia’s entire governance model. “The very essence of the Dayton peace accord or the Dayton Constitution is being challenged,” says the International Crisis Group’s Srečko Latal.<sup>61</sup> Such a shake-up would create new opportunity. Human Right Watch predicts that more inclusive constitutional amendments would inspire broader national reform in Bosnia’s cantons and entities; “by showing that discrimination based on ethnicity is no longer acceptable in the public sphere [the amendments would] give courts the clear legal power to strike down discriminatory provisions at all levels.”<sup>62</sup>

Two years on, Europe has an important role to play in shaping the legacy of *Sejdić and Finci v. Bosnia*. It is likely that Bosnia’s constitution will eventually be reworked in accordance with the ECtHR. Until that happens, the European Union must take a hard line on Bosnia, or risk its own institutions appearing toothless.

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<sup>59</sup> Venice Commission, ‘Draft Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative’ (10 March 2010). <  
[http://www.venice.coe.int/site/dynamics/N\\_Country\\_ef.asp?C=50&L=E](http://www.venice.coe.int/site/dynamics/N_Country_ef.asp?C=50&L=E)> accessed 29 September 2011.

<sup>60</sup> Analitika Center for Social Research, ‘How to Execute the European Court of Human Rights Decision in the Case of Sejdić and Finci v. Bosnia’ (Conference, Mediacentar Sarajevo, 7 September 2011).

<sup>61</sup> Matt Robinson and Daria Sito-Sucic, ‘Two decades from war, a new fight to save Bosnia,’ Reuters.  
<http://uk.reuters.com/article/2012/04/04/uk-bosnia-war-idUKBRE8330HZ20120404>

<sup>62</sup> HRW 2012, 7.

## Part II: What now for the European Court of Human Rights?

### Reasonably Discriminatory

The landmark ECtHR ruling also offers an occasion for a re-evaluation of European human rights legislation. I argue that *Sejdić and Finci v. Bosnia* exposes critical gaps in European thinking about consociational government models: gaps that the ECtHR should address before the ECHR's Article 14 and Protocol 12 are put to use again.

Those I interviewed generally agree that Bosnian policymakers will arrive at a compromise agreement: one that makes space for an 'Others' category at the highest levels of government, but which preserves the ethnically-based power-sharing model. This appears to be in accordance with the Framework Convention for the Protection of National Minorities, adopted on November 10, 1994.<sup>63</sup> Indeed, Finci himself believes that the Bosnian parliament should include designated seats for different ethnic groups.<sup>64</sup>

In anticipation that some kind of 'intermediate system' is implemented, new questions arise: How do we ensure that an ethnicity-based model is fair to all parties? Where do we draw the line between discrimination and equal access? And perhaps most troublingly: How much discrimination do we allow? Indeed, as the Open Society Justice Initiative outlines, ECHR Article 14 and Protocol 12 do not ban discrimination outright. Rather, they insist on a "reasonable proportionality between the means employed and the aim sought to be realized"—thus tepidly allowing discrimination in pursuit of a "legitimate aim."<sup>65</sup> The burden is on the state to prove "whether the treatment pursues a legitimate aim."<sup>66</sup> As Christopher McCrudden and Sacha Prechal explain, this effectively privileges "the intention of the state, rather than the effect

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<sup>63</sup> Council of Europe, 'Framework Convention for the Protection of National Minorities' (2005) <http://conventions.coe.int/Treaty/en/Treaties/html/157.htm>> accessed 29 September 2011.

<sup>64</sup> Jakob Finci Interview.

<sup>65</sup> Open Society Justice Initiative, 'Third Party Observations.'

<sup>66</sup> In the 1968 *Belgian Linguistics Case*, for instance, the parents of French-speaking children in a Dutch majority region argued that the state, in mandating that their children be educated in Dutch, was committing discrimination; the Court, however, accepted as "legitimate" the state's intention to promote a Dutch-speaking majority. Lindsey E. Wakely, 'From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in *Sejdić v. Bosnia*', *North Carolina Journal of International Law and Commercial Regulation*, 31.1 (2010), p. 240-3.

of the policy.<sup>67</sup> Yet *Sejdić and Finci v. Bosnia* has demonstrated that states enjoy considerable room to maneuver (in ECtHR speak, “margin of appreciation”) under this provision.<sup>68</sup> Too much hinges on this elusive claim to legitimacy.

Indeed, the Bosnian case shows that much of this comes down to timing. The ECtHR ruling on *Sejdić and Finci v. Bosnia* did not rebuke Bosnia’s ethnic power-sharing model in its entirety. Rather, the Court tacitly acknowledged that the discriminatory electoral model was necessary in 1995, in the post-war context:

*When the impugned constitutional provisions were put in place a very fragile cease-fire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and ‘ethnic cleansing.’ The nature of the conflict was such that the approval of the ‘constituent peoples’ (namely, the Bosniaks, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations...*

At the same time, the judges confirmed that the *continued* ineligibility of Roma and Jews to government posts in Bosnia “lacks an objective and reasonable justification.” In other words, the Court ruled that enough time has passed to render Dayton-era discrimination unnecessary.<sup>69</sup>

But Bosnian lawyers had a different take on their post-Dayton history. Effectively, they argued that same conditions that rendered the discriminatory provisions necessary in 1995 are still in place today. In this way, the government’s arguments cannot be dismissed offhand as a crude effort to uphold a prejudicial status quo. For in effect, the ECtHR’s legal ruling hinged on which of two competing historical narratives the Court found more convincing. One narrative

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<sup>67</sup> The authors explain that claims of “legitimate” discrimination are “subject to a test of ‘reasonable and objective justification.’”

“There are several elements in this test: (1) Has the state established the justification? (2) Does the difference in treatment have a legitimate aim or aims? (3) If so, (a) is the objective sufficiently important to justify limiting a fundamental right; (b) are the measures designed to meet the objective rationally connected to it; and (c) are the means used to impair the right or freedom no more than is necessary to accomplish the objective? In applying the test of objective and reasonable justification, the ECtHR has made clear that states ‘enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.’”

Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, (June 2009), 34.

<sup>68</sup> Council of Europe, ‘The Margin of Appreciation’ <[http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp)> accessed on 10 April 2012.

<sup>69</sup> Wakely, ‘From Constituent Peoples to Constituents,’ p. 238; Grand Chamber Judgment, *Sejdić and Finci v. Bosnia and Herzegovina*.

painted Bosnia as a country still mired in post-war ethnic strife. The other posited Bosnia as a country that has moved on: one that is sufficiently secure to absorb the shock of constitutional reform. The ECtHR chose the latter, but the choice was hardly pre-ordained.

Indeed Bosnia's Constitutional Court has ruled on Protocol 12 before, and wielded its standard narrative of national history—which describes a still-fragile state, in need of continued ethnic coddling—in order to prevent Protocol 12's application. In March 2005, a Bosniak named Ilijaz Pilav who wanted to run for the national presidential seat in the Serb Republic was barred from doing so because he is a Bosniak. He filed a suit. But the Bosnian Court ruled that the provisions thwarting Pilav's bid for office did not violate Protocol 12 because the discrimination they embodied “serve[d] a legitimate aim... the objectives of general community.”<sup>70</sup>

Has Bosnia progressed enough in the last seventeen years for European justices to accurately declare that its governance model—a model that the international community itself fashioned at Dayton—is antiquated and illegitimate? The question affects citizenship rights in the country more broadly. In 2004, then High Representative for Bosnia and Herzegovina Paddy Ashdown asked these same questions, when deliberating on his decision to remove hostile government officials from their posts (a move that falls within the OHR's mandate):

*The international community felt strongly that... it would be intolerable to preside over a post-war environment in which... hard-line officials could sabotage the provisions of the Dayton Agreement with impunity, or cripple various governments and parliamentary assemblies, or hobble the legislative process.... But is all this still justifiable in 2004? And is it compatible with the ECHR and other relevant conventions?*<sup>71</sup>

Eight years later, Ashdown's questions remained unanswered. The ECtHR itself affirmed that Bosnia might *still* require some kind of ethnically-based consociational model—albeit one that makes room for ‘Others:’ “The time may still not be ripe for a political system which would be a simple reflection of minority rule.”<sup>72</sup> And, as the current political impasse demonstrates, more time passed does not necessarily strengthen the more optimistic interpretation of Bosnia's post-Dayton trajectory. One foreign diplomat I spoke to insists that “relations between communities

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<sup>70</sup> HRW, 16-17; Constitutional Court of Bosnia and Herzegovina, *Party for Bosnia and Herzegovina and Ilijaz Pilav*, (September 29, 2006) <<http://bit.ly/HyPuaR>> accessed on 10 April 2012.

<sup>71</sup> Paddy Ashdown, ‘Speech by the High Representative,’ (8 October 2004) <[http://www.ohr.int/ohr-dept/press/presssp/default.asp?content\\_id=33344](http://www.ohr.int/ohr-dept/press/presssp/default.asp?content_id=33344)> accessed on 10 April 2012.

<sup>72</sup> Grand Chamber Judgment, *Sejdić and Finci v. Bosnia and Herzegovina*.



were better in the 1990s.”<sup>73</sup> Paradoxically, though this diplomat would like to see the ethnically-based government structure dismantled, his very claim that things are worse today was the same claim used by Bosnia lawyers working to uphold the status quo during *Sejdić and Finci v. Bosnia*.

These questions apply to others constitutions that enforce similar power-sharing structures: especially those designed in precarious post-conflict environments (ie: Cyprus). It thus seems imperative that the European actors, like the Council of Europe, devise more concrete parameters for the ECHR’s “legitimate justification” clause. This will involve the somewhat elusive task of determining how to measure historical progress. If the ECtHR is willing to initially tolerate “proportional” discrimination in a country’s constitution, it must also concern itself with monitoring, and ruling on, when a state has progressed sufficiently far in the area of ethnic/religious relations to render that discrimination obsolete.

### The Pressure Game

It is time for the European Union to take a harder line on Bosnia. Bosnia’s failure to implement the reforms dictated by *Sejdić and Finci v. Bosnia* is the latest evidence of the country’s inability to mold to European standards; but it is not the only proof. In April 2002, when Bosnia joined the Council of Europe, it committed itself to “review within one year... electoral legislation in light of the Council of Europe standards, and to revise where necessary.” Bosnia has not adhered to this commitment. And the Council of Europe’s repeated attempts to kickstart reform talks with Bosnian leaders have crumbled.<sup>74</sup> Allowing Bosnia to continue stalling on these reforms will be (further) proof that Europe’s commitment to anti-discrimination is toothless, as it applies to the Bosnian case.

The obvious first step would be for the European Union Enlargement Commission to withhold pre-accession assistance to Bosnia. My diplomatic source at an international organization in Bosnia was particularly vehement about this: “I believe that all the money that has been put into this place in the past seventeen years has been counter-productive,” he stressed.

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<sup>73</sup> Interview with Diplomatic Source 2 (22 September 2011).

<sup>74</sup> ‘Statement of Facts and Questions to the Parties’ (Strasbourg Consortium, 12 March 2008)

<<http://www.strasbourgconsortium.org/document.php?DocumentID=4872>> accessed on 29 September 2011.

“It has gone into structures which are fundamentally insidious—which are the cause of problems here. And this is why it’s so depressing. Because when the EU puts money in, it strengthens existing structures.”<sup>75</sup> Recently, the EU has made equivocal threats about holding back funds. But at present, Bosnia’s pre-accession assistance is slated to increase to 110.2 million Euro in 2012.<sup>76</sup>

Such a strategy admittedly assumes that the Bosnian government is in a position such that if pressure were exerted it could realistically inspire change. The same diplomat who is calling for funding to be slashed concedes that Bosnia “seems prepared to go without pre-accession funds.” Indeed, a U.S. Congressional Report concurs, “it is unclear whether these incentives are strong enough for Bosnian leaders to change their policies.”<sup>77</sup> One of the main factors which holds the government back from instituting reform is a political deadlock so crippling that Bosnian politicians were unable to form a government for more than a year following October 2010 elections.<sup>78</sup> I asked Slaven Zeljko, the Croatian HDZ politician, what he thought of constitutional reform; he replied that his party is rooting for a 3-way territorial split of the country along ethnic lines.<sup>79</sup>

In the meantime, more pressure could be applied on Bosnia from within. Numerous international agencies have already urged Bosnia to amend its constitution.<sup>80</sup> Baldwin and Serwer believe that these groups can play a role by encouraging lawsuits against the Bosnian government. Recall that the catalyst for *Sejdić and Finci v. Bosnia* was a couple of American and European lawyers (Baldwin included) looking for a bone to pick in Europe. However, Baldwin says that, in the future, international advocacy groups and NGOs should work with Bosnian lawyers: supporting them so that they can bring forward their own cases. He acknowledges that this will be a difficult task—and might necessitate a broader legal training scheme. He notes that when it came time to present documents to the ECtHR, “I wanted to find a Bosnian lawyer to do it. But despite all of our efforts, despite my colleague having worked in Bosnia for two years, we

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<sup>75</sup> Interview with Diplomatic Source 2 (22 September 2011).

<sup>76</sup> Woehrel, ‘Bosnia: Current Issues and U.S. Policy.’

<sup>77</sup> Ibid.

<sup>78</sup> Ian Traynor, “Bosnia in worst crisis since war as Serb leader calls referendum,” *Guardian* (April 28, 2011) <<http://www.guardian.co.uk/world/2011/apr/28/bosnia-crisis-serb-leader-referendum>> accessed on 10 April 2012.

<sup>79</sup> Author correspondence with Slaven Zeljko, 23 September 2011.

<sup>80</sup> These include: the UN Committee on the Elimination of All Forms of Racial Discrimination, the UN Human Rights Committee, the Council of Europe, the European Commission for Democracy through Law, the European Commission Against Racism and Intolerance, and the Organization for Security and Cooperation in Europe, HRW.

couldn't find a lawyer who was willing and able. So we ended up doing it ourselves." Finci agrees with this sentiment, and says Bosnian minority groups need to be "better organized and much more vocal."<sup>81</sup>

Xavier Bougarel, a researcher at France's CNRS who specializes in Bosnia, further insists that the "minority" category must be interpreted broadly. And here again is where an opportunity lies. *Sejdić and Finci v. Bosnia*, presented as it was by a Jew and a Roma, concerns only the constitutional category "Others." It pays no heed to constituent minorities: Serbs living in the Federation, and Bosniaks and Croats living in the RS. Yet these admittedly minute groups face systemic electoral discrimination as well.<sup>82</sup> (A Croat living in the RS also is ineligible for the Presidency). In this vein, expanding Bosnia's tripartite presidency to a quadripartite presidency, with a seat saved for "Others," will only solve half the problem.

## Conclusion

When I asked Daniel Serwer, the Dayton negotiator, whether he has any major regrets about Dayton, he didn't hesitate. One of the biggest mistakes, he insists, was not legally guaranteeing a point "say at the 8 or 10 year mark" where parties would have to sit down and revise the constitution. "We needed to make sure that there was a formal opportunity for revision," Serwer explains—especially because the constitution had been pulled together in haste, and expressly designed to withstand tampering in the immediate years after the war. Serwer is now a scholar at the Middle East Institute and active in discussions on state engineering in places like Cairo and Tripoli. He says policymakers would do well to remember this lesson, heading into a post-revolution Middle East.<sup>83</sup> Clive Baldwin agrees. He says lawyers playing advisory roles in countries like Libya must understand that when constitutions are designed in a post-conflict environment, they are rarely elegant—and are often discriminatory. Baldwin sighs: "The temporary so often becomes the permanent."<sup>84</sup> New constitutions should have a built-in "sunset clause," which would make certain articles expire on an agreed-upon date.

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<sup>81</sup> Clive Baldwin Interview; Daniel Serwer Interview; Jakob Finci Interview.

<sup>82</sup> Claridge, 'Discrimination and political participation in Bosnia and Herzegovina.'

<sup>83</sup> Daniel Serwer Interview.

<sup>84</sup> Clive Baldwin Interview.

*Sejdić and Finci v. Bosnia* might offer a belated opportunity for this constitutional reassessment. For actors inside and outside Bosnia, the stakes are high. Domestically, the case has shed light on forms of institutionalized prejudice that persist today: discrimination that was permitted as a concession to warring parties in the 1990s, but whose “legitimate justification” (as defined by the ECtHR) has run its course. Reform, of the variety recommended by European judges, will require a reevaluation of the country’s fragile power-sharing model. Internationally, there is pressure not to let this precedent-setting case languish. There is also a need to fill conceptual gaps in the ECtHR’s thinking about discrimination, which were exposed during the *Sejdić and Finci* case.

Looking back at his role in Dayton, Ohio, Serwer thinks about that elusive provision that US diplomats slipped into the Bosnian constitution: the clause stating that the European Convention on Human Rights would hold precedent over Bosnian law—the one that has been ignored for the last 17 years. “We snuck it in and nobody noticed it!” Serwer still seems astonished that he got away with it. “If [the Bosnians] had noticed it, they probably would have insisted that it was taken out.” Today, Serwer insists that this one act of stealth paved the way for *Sejdić and Finci v. Bosnia*. Yes, he says, Dayton negotiators are accused of throwing minority rights to the wind in 1995. But his team “was well aware that [we were] planting in the constitution the seeds of its own destruction. Although [we] thought the destruction might come a little faster than it has...”<sup>85</sup>

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<sup>85</sup> Daniel Serwer Interview.

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