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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT AMICUS CURIAE BRIEF

In the cases of

Sejdic and Finci v. Bosnia and Herzegovina
(Applications no. 27996/06 and 34836/06)

pending before
THE EUROPEAN COURT OF HUMAN RIGHTS

On the basis of comments by

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Mr Jean-Claude SCHOLSEM (substitute member, Belgium)
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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. *On 29 May 2008, the Venice Commission sought leave to intervene as a third party in the proceedings before the European Court of Human Rights (hereinafter: the Court, or ECtHR) in the cases of Sejdić v. Bosnia-Herzegovina and Finci v. Bosnia- Herzegovina (applications no.27996/06 and 34836/06).*
2. *These cases are undoubtedly of major importance. The alleged discrimination stems directly from the constitutional provisions of B-H, which is the fruit of the Dayton Peace Accords of 1995 that ended a bloody civil war in the country. The Constitutional court of B-H has recently been called upon assessing whether this text is still valid, and has concluded that it is.¹*
3. *The Venice Commission has been closely following the political and legal developments in B-H since 1994. Since then, the Commission has drafted more than one hundred reports and opinions². Among these, the opinion “on the Constitutional Situation in Bosnia Herzegovina and the Powers of the High Representative”³ is of particular importance. Chapter V of this opinion is almost entirely devoted to the problem of the compatibility of the constitution of Bosnia and Herzegovina with the European Convention on Human Rights. More recently, the Commission was asked to assess certain draft constitutional amendments which failed to be adopted but aimed inter alia at reducing if not eliminating the discriminatory treatments which are now the object of the applications to the European Court of Human Rights at issue⁴.*
4. *On 13 June 2008, the Commission was informed that the President of the relevant Chamber of the Fourth Section of the Court granted such leave.*
5. *The present amicus curiae brief was prepared on the basis of comments by Ms Angelika Nussberger, Mr Jean-Claude Scholsem and Mr Joseph Marko, and was adopted by the Commission at its ... Plenary Session (Venice, ...).*

II. The issues raised

6. *The central issue in both the case Sejdić v. Bosnia-Herzegovina and in Finci v. Bosnia-Herzegovina is the question of whether the provisions of the Constitution of Bosnia and Herzegovina and the corresponding regulations in the Electoral Code of Bosnia-Herzegovina preventing persons not belonging to one of the three constituent peoples from standing for election to the Presidency and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina comply with Article 14 of the European Convention on Human Rights, read in conjunction with Article 3 of Protocol No. 1 to the Convention and / or Article 1 of Protocol No. 12 to the Convention⁵.*

¹ Decision of the Constitutional Court of BiH, AP-2678/06 of 29 September 2006, 18 to 22.

² These are accessible on the Commission's website: www.venice.coe.int.

³ CDL-AD (2005)004

⁴ Preliminary opinion on the draft amendments to the Constitution of Bosnia and Herzegovina), CDL (2006)027.

⁵ The questions of the admissibility of the complaints and of a possible violation of Article 3 and Article 13 ECHR will not be addressed.

III. The Constitutional System of Ethnic Representation and Veto Powers

7. With the conclusion of the General Framework Agreement on Peace 1995 in Dayton and Paris, the legal continuity of the state Bosnia and Herzegovina was affirmed with, however, a different territorial arrangement. The Federation of Bosnia and Herzegovina (FBiH), which had been created in April 1994 in order to stop the war between Muslims/Bosniacs and Croats, as well as the political entity "Republika Srpska" (RS), which had violently seceded in 1992 from the internationally recognized Republic of Bosnia and Herzegovina, were recognized as "Entities" of BiH in Article 1 of the Constitution of BiH, laid out in Annex 4 of the GFAP. This Constitution also introduced a system of ethnic representation and veto powers on behalf of the so-called "constituent peoples", i.e. Bosniacs, Serbs and Croats. This "institutionalization" of ethnicity was introduced in the bi-cameral parliamentary system, in particular for the "second" chamber, the House of Peoples, and the three member Presidency of BiH. Thus, Article IV, paragraph 1 DC prescribes that the House of Peoples has to be composed of 5 Bosniacs, 5 Croats and 5 Serbs to be selected by the respective Bosniac and Croat caucuses in the House of Peoples of the Federation Parliament, whereas the Serb delegates have to be selected by the National Assembly of Republika Srpska (RS). Article V then prescribes that the Presidency shall be composed of 1 Bosniac and 1 Croat to be directly elected from the territory of the FBiH, and 1 Serb to be directly elected from the territory of RS.

8. With regard to decision-making processes, the respective provisions of the Constitution allow also for so-called "vital national interest" veto mechanisms in both the Presidency and the Parliamentary Assembly. Article V. (c) requires the members of the Presidency to achieve consensus whenever possible. If a consensus cannot be achieved and two members overrule the third one, this member, according to sub-paragraph d) has a right to declare this decision to be destructive of the vital national interest of the Entity from the territory from which he has been elected. If such a veto is confirmed by a two-thirds vote either of the Croat or Bosniac delegates in the House of Peoples of FBiH or the RS National Assembly representatives, the Presidency Decision cannot take effect. Such a "vital national interest" veto can also be invoked in the parliamentary process in the House of Peoples of the Parliamentary Assembly of BiH by the majority of the Bosniac, Croat, or Serb delegates. If a compromise cannot be found in a Joint Commission the matter has to be referred to the Constitutional Court which shall decide in an expedited procedure.

9. The ethnic representation and privilege of constituent peoples, i.e. Bosniacs, Croats and Serbs, in the composition of the parliamentary and executive institutions and decision-making processes leads to a double exclusion: first, all Serbs who reside on the territory of FBiH as well as all Croats and Bosniacs who reside on the territory of RS are excluded from the right to stand as candidates for the Presidency elections. Second, all "Others" who do not identify themselves as members of these constituent peoples are also excluded from the right to stand as candidates in the elections for both bodies referred to. Thus, a member of one of the 23 legally recognized national minorities or a person with the background of a "mixed marriage" who does not want to identify himself as exclusively Bosniac, Croat or Serb or a person who refuses to identify himself for whatever reason is prohibited by the Constitution and the Election Law to run in the elections for these bodies.

IV. The case-law of the Constitutional Court of B-H

10. The exclusion of so-called "Others" has already been brought before the Constitutional Court of BiH for judicial review. In case U 5/04, 27 January 2006, then President S. Tihić had contested the constitutional provisions referred to above before the Constitutional Court in an "abstract" review procedure claiming that these provisions violate Article 3 Protocol Nr. 1 and Article 14 ECHR as well as Article 5 ICERD which is, according to Annex 1 to the Constitution, directly applicable in BiH. The Constitutional Court declared the request, however, inadmissible.

The Court argued that the underlying problem to be resolved was the relationship in a supposed legal hierarchy between the Dayton Constitution and the ECHR. Thus, the Court found that the legal problem to resolve was not “a dispute between the Entities or institutions” as required under Article VI. 3. (a), but a potential conflict between national and international law. Moreover, the Court argued that the ECHR would not enjoy superior rank in relationship to the Dayton Constitution since the ECHR were put in force in BiH by the Constitution itself.

11. The second case (U 13/05, 26 June 2006), was also brought before the Constitutional Court by President Tihčić. This time he requested from the Court to review the conformity of the Election Law with Article 3 of Protocol Nr. 1, Protocol Nr. 12 to the ECHR and again Article 5 ICERD. Again the Constitutional Court declared the request inadmissible since the contested Article 8 of the Election Law excluding “Others” was a direct consequence of the provisions of the Dayton Constitution. In an interesting dissenting opinion, Judge Constance Grewe, argued that the system of ethnic representation of constituent peoples might have been justified in 1995 immediately after the war, but no longer with the recent ratification of the 12th Protocol of the ECHR.

12. The Constitutional Court examined the question of the compatibility of the exclusion of an applicant, a Bosniac living in the territory of Republika Srpska, from running as candidate in the elections for the Presidency of B-H with Article 25 ICCPR and Protocol Nr. 12 to the ECHR. The Court declared the appeal admissible, but rejected the claim on the merits (case AP 2678/06, 29 September 2006). It considered that the restriction of the right to stand in elections for the Presidency by operation of Article V of the Constitution and Article 8 of the Election Law could be justified in the light of the overall goal of the GFAP to preserve the peace in BiH by strengthening the position of the three constituent peoples through this exclusive power sharing arrangement.

V. Violation of Article 14 read in conjunction with Art. 3 of Protocol No. 1 to the Convention

A. Exclusion of the “Others” in the election of the Presidency

13. According to Article V 1 of the Constitution of B-H, the Presidency of B-H consists of three members: one Bosniac and Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska (see para. 7 above).

14. Thus, all members belonging to ethnic minorities living in the territory of B-H are denied the right to stand for elections as Member of the Presidency of B-H. This regulation is alleged to violate Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1 to the Convention.

15. The Venice Commission recalls at the outset that a violation of Article 14 of the Convention can only be assumed if the discrimination concerns a right guaranteed by the Convention.

16. The guarantees contained in Article 3 of Protocol No. 1 relate to the “choice of the legislature”. According to the jurisprudence of the ECHR the interpretation of what is meant by “legislature” has to take into account the function of the relevant State organs within the constitutional structure of the State in question and to analyse its role in the overall legislative process.⁶ Therefore it is possible to apply Article 3 of Protocol No. 1 to the election of the President, if it is “established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities”.⁷

⁶ ECtHR, *Matthews v. the United Kingdom* (GC), No. 24833/94 ECHR 1999-I§ 42, 49.

⁷ ECtHR *Boskoski v. the Former Yugoslav Republic of Macedonia*, No. 11676/04.

17. This is not the case in Bosnia-Herzegovina. According to the Constitution, the collective Presidency exerts classical executive functions such as the conduction of foreign policy or the execution of the decisions of the Parliamentary Assembly. It does not have the right to initiate legislation or to control the passage of legislation. The right to veto fixed in Article V 2 d) of the Constitution applies only to Presidency Decisions (Article V 2 b, Art. V 3 a). The right to determine the own rules of procedure is also restricted to organising the functioning of the Presidency itself and does not confer real legislative powers. The fact that the Presidency has the power to propose on the recommendation of the Council of Ministers, the annual budget to the Parliamentary Assembly is not sufficient for ascribing a legislative function to it. In similar cases the ECHR has already denied the applicability of Article 3 of Protocol No. 1 to the Convention.⁸

18. In view of the above, the Commission is of the opinion that Article 3 of Protocol No. 1 is not applicable to the elections to the Presidency of Bosnia Herzegovina.

B. Exclusion of the "Others" in the election of the House of peoples

19. The exclusion of all members belonging to the category of "Others" living in the territory of B-H from the right to stand for elections as Member of the House of Peoples of B-H is also alleged to violate Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1 to the Convention.

20. Contrary to the election of the Presidency, the election of the members of the House of Peoples is covered by Article 3 of Protocol No. 1. The House of Peoples forms part of the Parliamentary Assembly which is the main legislative body in Bosnia-Herzegovina.

21. According to the jurisprudence of the European Court of Human Rights, the Contracting States have a wide margin of appreciation⁹ in designing their electoral systems in regard of the "differences in historical development, cultural diversity and political thought."¹⁰

22. On the other hand, different treatment on the basis of ethnicity can hardly ever be justified. Thus the Court explains in the case *Timishev v. Russia*: "*Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.*"¹¹ It further adds: "*In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.*"¹² The case-law of the Court does not allow for any exclusions from groups of persons from participating in the political life of the country: "*Although the Court notes that States enjoy considerable latitude to establish rules within their constitutional order governing*

⁸ See *Boskoski v. the Former Yugoslav Republic of Macedonia* No. 11676/04; *Baskauskaite v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998; *Habsburg-Lothringen v. Austria*, no. 15344/89, Commission decision of 14 December 1989, Decisions and Reports 64, p. 211.

⁹ ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 23, § 54.

¹⁰ ECtHR, *Zdanoka v. Latvia*, No. 58278/00).

¹¹ ECtHR, *Timishev v. Russia*, No. 55762/00 and 55974/00, 56.

¹² ECtHR, *Timishev v. Russia*, No. 55762/00 and 55974/00, 58.

parliamentary elections and the composition of the parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States."¹³

23. Despite the large margin of appreciation of the Contracting States in organizing their election systems, a system based on ethnic discrimination can therefore be justified only under truly exceptional circumstances. The Court regards minorities generally as especially vulnerable and therefore not only prohibits direct and indirect discrimination, but also requires protective measures.¹⁴

24. Conditions imposed on the right to stand for elections must be in pursuit of a legitimate aim and the means employed must be proportionate.¹⁵

25. As concerns the legitimacy of the aim pursued by the provisions at issue, the Venice Commission notes that in the negotiation of the Dayton Peace Agreement and the new Constitution for B-H, the predominant aim was to find a compromise between the different ethnic groups, the Bosniacs, the Serbs and the Croats and to achieve peace and stability in the region after the war.

26. The Venice Commission has already expressed its opinion on the legitimacy of the approach:

"In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination."¹⁶

27. It remains to be seen whether this approach continues to be justified and the restriction on the right to be elected of the "Others" is still proportionate more than a decade after the end of the war, i.e. if the emergency situation is still present¹⁷.

¹³ ECtHR, *Aziz vs. Cyprus*, No. 69949/01. § 28.

¹⁴ ECtHR, *D.H. and others v. the Czech Republic*, No. 57325/00.

¹⁵ ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium, Gitonas and Others v. Greece, Zdanoka vs. Latvia*

¹⁶ Venice Commission, Opinion on the constitutional situation in Bosnia and Herzegovina CDL-AD (2005) 004, § 74.

¹⁷ In its Opinion on Bosnia and Herzegovina, adopted on 27 May 2004, the Advisory Committee on the Framework Convention for the Protection of National Minorities stated, in relation to the constitutional provisions resulting in the exclusion of the Others from the Presidency and the House of Peoples: "[the Advisory Committee] ... considers that such arrangements raise issues of discrimination. While it may be said that they pursue a legitimate aim, namely to ensure equal representation of the three constituent peoples, their proportionality is questionable in terms of totally excluding in particular persons belonging to national minorities from accessing key-positions in public life. This therefore raises issues of compatibility with Article 4 of the Framework Convention. Notwithstanding that the institutional framework deriving from the Constitution and therefore from the GFAP has been instrumental in securing stability in Bosnia and Herzegovina and that amending the Constitution can only be envisaged once a broad consensus among political forces and constituent peoples has emerged at the national level, the Advisory Committee is of the opinion that consideration should be given to finding ways and means of remedying the total exclusion of persons belonging to national minorities from the above-mentioned posts, even if this cannot be achieved in the short term" (paragraph 39).

28. In its Opinion on the constitutional situation in Bosnia and Herzegovina of 2005, the Venice Commission stated that:

“This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the ECHR and its Protocol No. 12. As set forth above, the situation in BiH has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the rules on the Presidency to make them compatible with international standards while maintaining the political balance in the country.”¹⁸

29. In 2006, the Constitutional Court of Bosnia and Herzegovina argued that, at that time, there was still an objective and reasonable justification for the differential treatment of the different ethnicities in Bosnia-Herzegovina (the decision did not concern the exclusion of the “Others”, but the special election system based on a combination of the territorial and ethnical principle; see para. 12 above) because of “the specific nature of the internal order of Bosnia and Herzegovina that was agreed upon by the Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties.”¹⁹

30. The Constitutional Court further held that the restrictions were “proportionate to the objectives of general community in terms of preservation of the established peace, continuation of dialogue, and consequently creation of conditions for amending the mentioned provisions of the Constitution of Bosnia and Herzegovina and Election Law.”²⁰ In his concurring opinion Judge Feldmann underlined that this justification was only temporary, but “that the time has not yet arrived when the State will have completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.”²¹

31. Contrary to the opinion of the majority of judges, Judge Grewe argued in her dissenting opinion “that the current situation in Bosnia and Herzegovina does not justify at this moment the differential treatment of the appellant’s candidacy in relation to the candidacy of other candidates ...”.²² She accepted that specific measures were necessary, but stressed that “the Dayton Agreement architecture is evolving and has to adapt to the different states of evolution in BiH.”²³

32. The Venice Commission agrees with the Constitutional Court of B-H that it is necessary to have a framework for the “continuation of dialogue”. It might even be necessary to uphold

¹⁸ CDL-AD (2005) 004, §§ 74-76.

¹⁹ Decision of the Constitutional Court of BiH AP-2678/06 – 2006, 21.

²⁰ Decision of the Constitutional Court of BiH AP-2678/06 – 2006, 22.

²¹ Concurring Opinion of Judge Feldmann to the Decision of the Constitutional Court of BiH AP-2678/06 – 2006, 3.

²² Concurring Opinion of Judge Grewe to the Decision of the Constitutional Court of BiH AP-2678/06 – 2006.

²³ Concurring Opinion of Judge Grewe to the Decision of the Constitutional Court of BiH AP-2678/06 – 2006.

specific regulations in order to guarantee a fair representation of the different ethnicities living in B-H.

33. The Commission however does not find that it is justified to exclude the “Others” from this dialogue and from certain parts of the political decision-making process on a permanent basis. Even if special constitutional arrangements are still deemed necessary for the inter-action between the constituent peoples, this does not justify the complete exclusion of third persons. On the contrary, the inclusion of third persons might help to overcome the stalemate in Bosnia-Herzegovina. The long time that has elapsed since the elaboration of the Dayton Peace Treaty proves that the solution found in 1995 does not really help to overcome the problems in Bosnia-Herzegovina. It is not proportionate to nullify rights guaranteed in the Convention in order to preserve a constitutional structure that has not helped to acquire the desired results within a period of about 13 years.

34. In this context, the Venice Commission recalls that the “Others” are defined by exclusion from the three constituent peoples (see para. 9 above). Whether or not one belongs to one of the constituent peoples does not result from legal criteria, but from mere sociological ones. As a consequence, the “Others” in Bosnia-Herzegovina comprise not only persons who, like the applicants, consider themselves to belong to a specific group (Jews or Roma); they also comprise anyone (including people in ethnically mixed marriages) who refuses to define himself or herself as belonging to one of the constituent peoples. The notions of “constituent peoples” and of “others” therefore lead to a stratification of society which, instead of appeasing ethnic tensions, exacerbates them, given that part of the civic prerogatives depend on whether or not one belongs to a constituent people. The passing of time is thus a problematic factor.

35. The Commission further notes that there is a striking contrast between the system under consideration and the Entities’ Constitutions. At the level of the Entities, not only constituent peoples, but also Others are included into the ethnic quota system. All of them are represented in the respective second chamber, the cabinets and the judiciary. The regulations on ethnic representation and participation in the Entity constitutions give thus clear evidence that there is a mechanism of power sharing which does not automatically lead to the total exclusion of the category of Others from the right to stand as candidates in elections. Through the introduction of the category of “Others” into the constitutional mechanisms for ethnic representation and participation also at state level, the conflict arising under the Dayton Constitution between the group rights of constituent peoples on the hand and the individual human right to vote and to stand as a candidate in elections could be avoided.

36. Neither is the differential treatment justified by the inability of the political players to find a compromise on a new constitutional architecture. As B-H has become a member of the Council of Europe and ratified the relevant human rights acts, it has acknowledged its willingness to live up to the standards set in these documents.

37. One can indeed notice a significant change of mentality in B-H. This can be explained, at least in part, by the increasing connections of B-H with the European Union and by the ensuing need for global reforms.

38. A tangible proof of the above is the attempt to reform the constitution in March 2006. This attempt failed, but hardly, which shows a real readiness to change the basic functioning of the institutions in B-H. This attempted constitutional reform further shows that the choice does not need be a radical one. In order to conform to the ECHR, it is not necessary to dismantle totally

the system set up by the Dayton Agreement, which can maintain a certain legitimacy, as the Constitutional Court of B-H indicated²⁴.

39. In conclusion, in the Venice Commission's opinion the provisions of the Constitution and the Electoral Code leading to the exclusion of the "Others" in the election of the House of Peoples cannot be considered proportionate and are therefore at variance with Article 14 read in conjunction with Article 3 of Protocol No. 1 of the Convention.

²⁴ See in this respect the Preliminary Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina (CDL (2006)027), especially at §§ 22 to 27. See also the Opinion on Different Proposals for the Election of the Presidency of Bosnia-Herzegovina (CDL (2006)004).

VI. Violation of Article 1 of Protocol No. 12

40. Article 1 of Protocol No. 12 prohibits discrimination in “the enjoyment of any right set forth by law”. It is therefore applicable to restrictions concerning the eligibility to the Presidency and to the House of Peoples of Bosnia-Herzegovina.

41. As regards the justification for a different treatment of “the Others” on the basis of the Constitution of B-H and the Electoral Code, the Venice Commission refers to its reasoning in respect of a violation of Article 14 read in conjunction with Article 3 of Protocol No. 1 to the Convention.

42. The Venice Commission is therefore of the opinion that the provisions of the Constitution and the Electoral Code leading to the exclusion of the “Others” in the election of the Presidency and of the House of peoples cannot be considered proportionate and are therefore at variance with Article 1 of Protocol 12 to the Convention.