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Why group rights can be superior to individual rights in the constitutional system of Bosnia and Herzegovina?

Sawako OBA, Research Fellow
at Japan Society for the Promotion of Science (JSPS)
oba-law@mail.goo.ne.jp

1. Introduction

Traditionally, the concept of a group right as a human right had not been accepted in constitutional jurisprudence. Such rejection has been changing over time, accompanied by the diffusion of the idea of multiculturalism, that individual human rights proved to be so weak and insufficient in some cases to maintain the dignity of people who belong to certain types of categories, especially, the national minorities. Gradually, the notion of group rights has been recognised and accepted in order to substantially protect their human rights. Now, we are quite familiar with the idea of linguistic human rights and cultural rights for the national minorities, including educational one.

Since a group itself cannot have its own intention and will, basically, a group right would be perceived as an accumulation of every member's individual rights, that is to say collective rights. Some might argue; how about the right to self-determination of peoples, isn't it a group right exercised by a group as such? Yes, precisely. As it seems like an individual would not personally enjoy it, thus the right might be called a "genuine" group right. A claim to peoples' self-determination refers, on the basis of international law, to the 'principle of equal rights and self-determination of peoples' in Articles 1(2) and 55 of the United Nations Charter, and also to the precedents of the International Court of Justice¹. Nevertheless, a question still remains how to verify the peoples' will. Eventually, it tends to follow that each "member" of the peoples would vote by referendum whether or not s/he supports the idea to exercise as a whole group the right to self-determination of peoples.

In this paper, we do not go into details, for instance, how to interpret the conditions for exercising the right to self-determination of peoples, or whether the right to secession should be considered a legal right, and the like. Instead, the discussion here will be defined within the field, rather

¹ The right to self-determination of peoples means a right to establish a sovereign and independent state (Radan, Peter, *The Break-up of Yugoslavia and International Law*, Routledge, London and New York, 2001, pp.3-4).

not of international law, but of (comparative) constitutional law. We will focus on the right to vote and what is called the veto rights, as group rights. In Bosnia and Herzegovina (hereafter, **BiH**) the BiH Constitution institutionalised such group rights for those who declared their affiliation to any of the three dominant ethnic groups there, namely, the “**constituent peoples**”. And consequently, individual political rights of “**Others**” and those from the constituent peoples, but reside in the ‘wrong’ places are partly hindered. In short, under the constitutional mechanism in BiH, the group rights for the majority are protected at the expense of the minorities’ individual human rights.

2. Peculiar Background of the 1995 Dayton Constitution

2-1. The Bosnian War and the aftermath

As a part of the territory of the Ottoman Empire by the late 15th century, the Slav Muslims (now called Bosniaks) dominated the region of Bosnia and Herzegovina. The dominant position of the country was taken place by the Croats under the Austrian occupation during the late 19th and early 20th century, and again, when the country became a part of the independent state of Croatia in 1941 as the result of the German invasion. Meanwhile, the Serbs had dominated the country when it became a part of the first Yugoslavia (1918-), and then, during the times of the Socialist Federation (1946- 1992), again. But, under the official ideology that the main ethnic groups were to be treated equally without discrimination, the Serbs were getting frustrated.

In the former Yugoslavia, a concept of the constituent peoples [konstitutivni narod] in each of the six republics which comprised the federation already existed to define who are the principal actors in the politics. On the one hand, five of the six republics were to be the homelands for each of the Yugoslavia’s five constituent peoples, the Serb, Croats, Slovenes, Macedonians and Montenegrins. On the other hand, unlike the other republics and autonomous provinces, no ethnic group was numerically dominant in Bosnia and Herzegovina. In such circumstances, the Slav-Muslims in Bosnia and Herzegovina were officially recognised only in the 1961 census as the category called “ethnic Muslims”, and finally acquired the status of a Yugoslav nation by 1971. Since then, the Serbs, Croats and Slav-Muslims (Bosniaks) have been the constituent peoples there.

Incidentally, some believed that the 1974 Constitution of Yugoslavia granted each republic a right to secede, however, many of the Yugoslav constitutional scholars had negative views to such a self-determination based perspective². When the disintegration of the former Socialist Federal Republic of Yugoslavia began, the Bosniaks and the Bosnian Croats were unwilling to allow the domination of the Serbs, on the other hand, the Bosnian Serbs did not want Bosnia and Herzegovina

² Bogwell, Ben, “Yugoslavian Constitutional Questions: Self-determination and Secession of Member Republics”, *GA. J. INT’L & COMP. L.*, vol. 21, 1991, pp. 490-491.

to be independent and their separation from Serbia, which they considered their mother land³. Earlier than the official declaration of independence of Bosnia and Herzegovina in March 1992, the Bosnian Serbs established a quasi-state, **Republika Srpska** (hereafter, **RS**) in January 1992 within the territory of the State.

Although, the Bosnian Croats created its own territory “Herzeg-Bosna” in November 1991 in the region of Herzegovina, the relationship between the Bosniaks and the Bosnian Croats was relatively well until the late 1992. In April 1993, though, the triangular war started throughout the country. At the first onset, the international community managed to put an end the fight between the Bosniaks and the Croats. The both of the parties agreed a peace accord at Washington D.C. in March 1994. In consequence, the Herzeg-Bosna ceased to exist, and **Federation of Bosnia and Herzegovina** (hereafter, **FBiH**) was established.

The peace negotiation for a cease-fire in the entire region where the Serbs concerned was much tougher. Therefore, the international community had to recognise, reluctantly though, the authorities of the two Entities: RS and FBiH, as already divided autonomous territories within the State. Finally, the so-called Dayton Agreement was signed in December 1995. The Bosniak parties were not satisfied with the advent of this highly decentralised state system, feeling as if it authorised the results of the massive ethnic cleansing and homogenization in wartime, mostly occurred within the area of RS.

Although there is no reference to it within the Dayton Constitution, current BiH is virtually a federal state, consist of two Entities, and one of the Entity, FBiH, is composed of currently 10 Cantons⁴. Many of the federal elements, such as the combination of Shared rule and Self-rule, multi-tiered government based on the population’s support shown through democratic election, are applied to BiH⁵. As a result of the excessive decentralisation, the competence of the state is very limited in BiH, and the country with just 3. 5 million population⁶ holds 14 Constitutions, 5 Presidents, 13 Prime Ministers, 152 ministries, 14 parliamentary bodies and 760 parliamentary members⁷.

³ Keil, Soeren, *Multinational Federalism in Bosnia and Herzegovina*, Southeast European Studies, Routledge, New York, 2016, p. 75

⁴ According to Keil, the drafters of the Dayton Constitution perceived the potential dangers in the term of federalism could be identified as a gateway to secession and self-determination [Keil (2016) p. 108].

⁵ See. Watts, Ronald, *Comparing Federal Systems* (third edition), McGill-Queen’s University Press, 2008; Burgess, Michael, *In Search of the Federal Spirit. New Theoretical and Empirical Perspectives in Comparative Federalism*, Oxford University Press, 2012; Woelk Jens, “Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes”, in Burgess Michael and Tarr G. Alan eds., *Constitutional Dynamics in Federal Systems. Sub-national Perspectives*, McGill-Queen’s University Press, 2012.

⁶ The latest 2013 Census shows the ratio of ethnicity or self-identification of the BiH population as below; Bosniak 50.11, Serb 30.78, Croat 15.43, Bosnian 1.05, Romani 0.36, Muslim 0.34, BiH 0.32, Albania 0.08, Yugoslav 0.07, Ukrainian 0.07, Montenegrin 0.05, Turk 0.03, Slovenian 0.03, Orthodox 0.02, Macedonian 0.02, Others 0.29, Undeclared 0.77, Unknown 0.18 (%). <http://www.popis.gov.ba/popis2013/knjige.php?id=2>

⁷ European Commission, Bosnia and Herzegovina 2006 Progress Report, COM (2006) 649 final, p. 6: ConstitutionNet

2-2. Dayton Constitution as a part of an International Treaty

Current Constitution of BiH is the Annex 4 of the Dayton Agreement as such. The parties concerned the negotiation for the agreement were the three Presidents, Alija Izetbegović from Republic of Bosnia and Herzegovina (R BiH), Slobodan Milošević from Republic of Serbia and Franjo Tuđman from Croatia. The Assembly of R BiH, from which the Bosnian Serbs departed, accepted the Dayton Agreement and enacted the R BiH Constitutional Law of 12 December 1995, by which they declared new 1995 BiH Constitution valid provided that the Dayton Agreement be “satisfactory” implemented⁸. It lacked, however, the majority of approval in the Assembly, which was thus stipulated as a requirement for amendment to the 1974 R BiH Constitution.

In connection with such background of the Dayton Constitution, the original text of the Constitution is written in English and there is no officially translated version into local languages, and it has not even published in the Official Gazette of BiH⁹.

3. Structure of the Dayton Constitution

3-1. “Constituent peoples” and “Others”

The Dayton Constitution provides the substantial legal basis for the protection of individual human rights, containing the European Convention for Human Right (ECHR) and its Protocols, and admits its direct applicability and the priority over all other law. Besides the provisions of the Constitution and the ECHR, other 15 international treaties on human rights listed in the Annex 1 of the Constitution become the direct legal norms on non-discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The second significant feature of the Dayton Constitution is, on the contrary, the mechanism of protection of the group rights for, what the BiH Constitutional Court terms “constituent status of peoples”, and this mechanism directly links to the serious bottleneck in the course of political decision-making. The tenth paragraph of the Preamble at the Dayton Constitution provides that “... *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows: ...*”

<http://constitutionnet.org/country/bosnia-and-herzegovina>

⁸ Ademović, Nedim & Steiner, Christian eds., *Constitution of Bosnia and Herzegovina Commentary*, Konrad Adenauer Stiftung, Sarajevo, 2010, p. 30; Marko, Joseph, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance”, *European Diversity and Autonomy Papers*, 2004, p. 8. www.eurac.edu/edap

⁹ Ćeman, Mirsad, “Constitutional Justice: Doctrine and Case-Law of the Constitutional Court of Bosnia and Herzegovina”, VII International Legal Forum, Conference organized by the Constitutional Court of the Russian Federation, Saint Petersburg, 2017, p. 3. <http://www.ksrf.ru/ru/Info/Conferences/Documents/2017CemanEn.pdf>

(underlined and emphasized by author) . “Others” here means people who do not declare themselves as members of any of the three constituent groups, which represents not only national minorities who identify their ethnic affiliations otherwise such as Jews, Roma, Turks, Montenegrins, Albanians, etc., but also includes citizens who cannot or refuse to declare themselves as one of the “constituent peoples”.

3-2. Representing System at BiH State Level

The leaders of every constitutional institution in BiH are chosen in accordance with the principle of equal representation from each of the three constituent peoples.

The role as a head of state and relatively ceremonial executive power are shared by a three-member **Presidency**, with rotating the Chair of it every eight months. One Bosniak and one Croat member of the Presidency are directly elected on the territory of FBiH, and one Serb member is from RS. This means that “Others” cannot run for it in neither of the Entities. Furthermore, neither a Serb living in FBiH, nor a Bosniak nor a Croat in RS cannot run for election of the Presidency. And vice versa, such peoples living in the “wrong” Entities have no choice to vote for a candidate who professes the same ethnicity with them as their representative. This obstacle to the voting right also applies to “Others”.

The **Council of Ministers** is called BiH Government or Cabinet, and its Chairman becomes the head of the BiH Government. The members of the Council are selected from among the members of the governmental coalition parties in the House of Representatives. Two-thirds of them should come from FBiH and one-third from RS. And a Minister and his/her Deputy Ministers are to be different constituent peoples. According to the Law on the Council of Ministers of BiH, its composition has to be in accordance with the principle of equal representation of the constituent peoples. And at least one seat should be reserved for the representative of “Others”.

The indirect electoral system for the **House of Peoples**, the upper chamber of the BiH Parliamentary system, also contains similar restriction on the voting rights of “Others” and some of the constituent peoples who reside in “wrong” Entities—the Serb living in FBiH, the Bosniak or the Croat in RS. The quota of all fifteen delegates to the House of Peoples are allocated to the House of Peoples of the FBiH, which appoint respectively five Bosniak and Croat representatives, and to the National Assembly of the RS to appoint five Serb representatives.

The **House of Representatives** is the lower chamber of the BiH Parliamentary system. The forty-two members are directly elected, two-thirds of them are from the FBiH and one-third are from the RS. There is no restriction based on the ethnicity for candidacy nor electoral district with respect to the election for the House of Representatives.

The **BiH Constitutional Court** consists of nine Justices, and four of them are appointed by

the House of Representatives of the FBiH, two of them are by the National Assembly of the RS, and the rest of three are by the President of the European Court of Human Rights (ECtHR) after the consultation with the Presidency. This composition implies that each of the three constituent groups is able to send two judges, respectively. In the course of the deliberation, a decision is taken by simple majority. Unlike the parliamentary system, even when dealing with an ethnically sensitive matter, it could avoid falling into malfunction thanks to the “international judges”.

Such power-sharing allocation among the constituent peoples is a routine practice all over the public sector in BiH. The posts of top officials at public institutions should be “equally represented” by each of the three groups of the constituent peoples, while other ordinary personnel should be filled with on ethnically proportional basis according to the 1991 census, which conducted for the last time before the war.

3-3. “Veto” Power as Group Rights in the Political Decision-Making Process

While the Members of the Presidency have to endeavour to adopt any decision by consensus, each Member has a veto power to declare a Presidency Decision to be destructive of a “**vital interest of the Entity**” from which s/he was elected.

Although all decisions at both of the parliamentary chambers are basically taken with a simple majority of those present and voting, there is a requirement what is called “**Entity veto**”, requiring at least one-third of the representatives of each entity approved the decision.

A majority of Delegates from each of the three constituent peoples to the House of Peoples can dissent from the approved decision, which considered to be destructive of their “**vital national interest**”. Furthermore, as a **quorum**, at least three Delegates from each of the three constituent peoples should be present at voting in the House of Peoples, that means abstention could be another device for veto.

4. Group Rights vs. Individual Rights

As we have already noticed that the electoral system for the Presidency and the House of Peoples under the Dayton Constitution partly restricts the individuals’ voting rights, such as the right to stand for the offices and the right to select representatives from among the candidates with the same ethnicity, for those categorised as “Others”, as well as those from the constituent peoples but reside in the “wrong” Entity. Now, a suspicion arises; Can it be justifiable that collective rights sacrifice individual rights?

4.1. Why Group Rights? —Explanation from the BiH Constitutional Court

The concept of group right was not very new to BiH, as the Constitutions in the times of the former Yugoslavia, such as right to express ethnic affiliation and the protection of rights of national

minorities were contained, including the rights to education (language and alphabet, too), the freedom of religion and the organisation of churches and religious communities¹⁰. And as mentioned at section 2.1 of this paper, the notion of the constituent peoples was already introduced there, however, the then RBiH was not decentralised nor provided such a strict power-sharing mechanism as it is today.

The current BiH Constitutional Court, obliged to uphold the Dayton Constitution, excused and defended why the group rights are indispensable in BiH and should be guaranteed in light of collective equality for the constituent peoples, as below; “*...under the circumstances of a multi-ethnic state that representation and participation in governmental structure – not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights – does not violate the underlying assumptions of a democratic state*” (U5/98 III, para.56) . “[E]quality of groups is not the same as equality of individuals through non-discrimination. Equality of the three constituent peoples requires equality of the groups as such, whereas the mixture of the ethnic principle with the non-ethnic citizen principle in the compromise formula should avoid special collective rights that violate individual rights by definition. It thus follows that individual non-discrimination does not substitute equality of groups” (U5/98 III, para.71) .

4.2. Adjudication by the ECtHR

The two BiH citizens, one from Roma community and the other from Jewish one respectively submitted the applications to the ECtHR, on the ground that the relevant articles of the BiH Constitution on the electoral system for the Presidency and the House of Peoples, which limits their voting rights on the basis of ethnicity are discriminatory and thus in conflict with the European Convention on Human Rights (Sejdić and Finci cases, Application nos. 27996/06 and 34836/06).

In December 2009, the Court declared the applicants’ principal complaints as regards their ineligibility to stand for the election to the House of People and the Presidency of BiH admissible, and held that there has been violation of ECHR and its Protocol. The Court assessed the disputed provisions of the BiH Constitution 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” was necessary to ensure the very fragile ceasefire and peace (para. 45). But the Court observes significant positive developments in BiH since the Dayton Agreement (para. 46). While the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to BiH and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinion of the Venice Commission clearly

¹⁰ The BiH Constitutional Court, *Constitutional Court of Bosnia and Herzegovina 1964-2014*, 2014, p. 14. http://www.ustavnisud.ba/admin//public/down/Ustavni%20sud%20BiH%201964_2014_s.pdf

demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities (para. 48).

After the judgement of the Sejdíć and Finći cases, the Court reiterates that the BiH electoral system at issue has been in a violation of the ECHR mechanism, at the other related cases submitted by a BiH citizen who refuses to declare to be any of the constituent peoples (Zornić case in 2014) and by a Bosniak living in RS (Pilav case in 2016).

4.3. Effort to Revise the Discriminatory Mechanism

The drafters of the Dayton Constitution were fully aware of its fundamental deficiency that the mechanism of the group rights for the constituent peoples goes too far, and consequently some of the BiH citizens, as the minorities, are to be excluded from the political sphere¹¹. The drafters, therefore, expected someday the deficiency be revised when the non-nationalistic political parties gain more power in the BiH political scene.

In fact, owing to the pressure from the international community, the opportunities to negotiate the amendment to the Dayton Constitution arrived several times between 2000 and 2009. Most importantly, when the tenth anniversary of the Dayton Constitution came around in 2005, after the persevering persuasion, discussion or bargaining, scarcely a compromise named “April package” was reached in March 2006 among the leaders of the BiH political parties, at the residence of the American ambassador. Unfortunately, however, just two votes for the draft were short and then the April package was rejected at the Parliamentary assembly.

And then, in response to the 2009 ECtHR judgement, the BiH Council of Ministers adopted an action plan and established a working group in order to implement it. In the end, no agreement was made there. Apart from that, the BiH Parliament set up a joint committee. A lot of NGOs submitted their proposals for the constitutional amendments to the committee, however, when the campaign period for the election of October 2010 started, the efforts went nowhere. Since then, the momentum for the amendment to the Dayton Constitution has been totally shrunken¹².

The strict power-sharing mechanism throughout the BiH public sector, demonstratively at the Parliamentary Assembly, hampers the decision-making process. Each side of the nationalist parties among constituent peoples utilize the group rights, namely, veto powers, in order to block any decisions that could challenge the ethnically-based power-sharing model. Even if the veto power in practice has not been exercised so frequently, institutionalised mechanism as such works enough to

¹¹ Nystuen, Gro, *Achieving Peace or Protecting Human Rights. Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, Martinus Nijhoff Publishers, Leiden/Boston, 2005.

¹² Sebastián-Aparicio, Sofia, *Post-War Statebuilding and Constitutional Reform. Beyond Dayton in Bosnia*, Palgrave Macmillan, London, 2014.

prevent any drastic reform proposal to be brought to the Parliamentary assembly.

And when it comes to election in BiH, there always happens battle of manipulation, hate-speech and polarisation of the media, etc. Consequently, people who wish to be just “Bosnians”, or who do not want to emphasise their particular ethnicity, feel tired of going to vote. And the overlapped and swelled BiH public sector is, beyond controversy, not only wasteful and inefficient, but also provides the good frame of clientelism. Thus, the triumph of the nationalist parties is almost always expected, and the exodus of doom and gloom people from BiH reinforces the tendency. Only the never-ending conflict amongst the three nationalist groups in the political arena remains.

5. Conclusion – Is there any Solution for the Deadlock?

After the two decades of the international engagement presupposed the Euro-Atlantic integration, BiH finally applied for the membership in the EU on February 2016. Although implementation of the 2009 ECtHR judgement is the marked conditionality for the EU accession process, any solution inevitable to revise the Dayton mechanism is hardly foreseen, because of the group-rights mechanism in BiH.

The Dayton Constitution connotes contradictions and inconsistencies in layers within it. First, the group rights on politics for the constituent peoples are excised, even partly, at the expense of the individual rights of the others. Needless to say, it is a serious contradiction to the principle of human rights guarantee as the most significant universal constitutional doctrine, which the Dayton Constitution itself proclaims with particular consideration. Second, the constitutional institutions guaranteeing the equality of the three constituent peoples contributes the most to the Croats, as the numerically smallest group among them, but with ignoring a certain number of constituent peoples who reside in the “wrong” Entities. Lastly, the constitutional tools to implement the purpose for the equality of the status of the three constituent peoples partially show twists. Because, the constituencies for the electoral systems regarding the Presidency and the House of Peoples in BiH are divided according not to the ethnicity among the three groups, but to the Entities.

Although the Constitutional Court of BiH denies the idea that the Dayton Agreement recognised ethnic separation through territorial delimitation¹³, obviously, the latter two discrepancies above mentioned disclose the BiH mechanism of the group rights guarantees on the premise that the Serbs live in RS, the Bosniaks and Croats in FBiH, respectively. After all, it ensures more the equal status of the two Entities, than the equal status of the three groups as such.

In any case, without implementing the adjudication by the ECtHR, in other word, without resolving the contradiction in the Dayton Constitution and then revising the electoral legislation, the

¹³ U5/98 III, para.57.

EU membership would not be granted BiH. What things make more complicated is, however, besides the possibility of a positive decision at the Parliamentary Assembly, that a new appropriate design would be hardly found. According to Florian Bieber, if the Presidency are elected without ethnic prefixes, the Croats are likely to be unrepresented, and if a fourth member is added to represent “Others”, this position might be abused by nationalist parties running token minority representatives for the seat¹⁴. Because, in the BiH system, ethnic affiliation is subjectively decided and not officially registered except on a list of candidates at an election of the Presidency or (indirect selection, though) the House of Peoples, and the declaration of ethnicity is, de facto, changeable. Actually, a number of positions reserved for “Others” were occupied by “self-declared” minorities¹⁵, and reportedly, similar cases have occurred for the positions allocated to any of the constituent peoples¹⁶. And Bieber assumes that a single Presidency would be the best solution, but the Croat and Serb parties would not agree with it¹⁷.

Well, there is an argument that non-implementation of the 2009 judgement of the ECtHR should not be the obstacle for the BiH accession to the EU membership¹⁸. The claim is that any citizen in BiH is not officially defined her/his ethnicity and theoretically it is possible to declare oneself as one of the constituent peoples. So that the BiH system is more liberal than either Belgium’s or South Tyrol’s. Even Cyprus, remains split in two, allowed to become an EU member state. Furthermore, as for the record implementing the ECtHR decisions, BiH is doing better than most of the current EU member states.

It might be a fair argument in a sense, however, it would be hard for the EU as tribune of the human rights to accept such realistic standards toward the new comers from the post-conflict societies. Now, everyone is completely puzzled whether there can be any solution for the BiH constitutional system to satisfy both of the rights for the groups and the individuals.

¹⁴ Bieber, Florian, “Constitutional reform in Bosnia and Herzegovina: preparing for EU accession”, Policy Brief, European Policy Centre, April 2010, p. 2.

¹⁵ Bieber, Florian, “After Dayton, Dayton? The Evolution of an Unpopular Peace”, *Ethnopolitics*, Vol. 5, No. 1, pp. 15-31, March 2006, p. 23.

¹⁶ See. Balkan Insight 28 November 2018 <https://balkaninsight.com/2018/11/28/bosnia-s-mps-are-changing-ethnicity-to-get-posts-11-28-2018/>; Balkan Insight 15 December 2014 <https://balkaninsight.com/2014/12/15/bosnia-s-mps-change-ethnicity-to-get-positions/>.

¹⁷ Bieber (2010) p.2.

¹⁸ European Stability Initiative (ESI), Lost in the Bosnian labyrinth. Why the Sejdic-Finci case should not block an EU application, ESI Discussion Paper, 7 October 2013.