# Three Constituent Peoples and "the Others"

## Legal Options and Political Obstacles for Electoral Reforms in Bosnia and Herzegovina

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This fall, presidential and general elections are supposed to take place in crisis-torn Bosnia and Herzegovina. Already in 2009, the electoral system in force and its approach of ethnic representation was found to be discriminatory in terms of the ECHR by the Strasbourg court's famous *Sejdić and Finci* decision. Without necessary amendments to the Constitution and the Election Act, the country now risks facing an electoral boycott or entering an election process contrary to the ECHR for the fourth time in a row.

### The Dayton Model of Ethnic Power-Sharing

Besides tensions caused by the Serb dominated Republika Srpska's ongoing secessionist tendencies and its boycott of state institutions after the recent enaction of a criminal law on genocide denial, political disputes about electoral reforms have been going on for years between Croat and Bosniac nationalists. The constitutional order and the electoral system were established by the Dayton Peace Agreement ending the war in Bosnia and Herzegovina in 1995 with a minimum compromise between the different ethnic groups on common statehood. Although there are chances to accomplish electoral reforms without opening *pandoras box* of renegotiating the key principles of 1995, the nationalist political elites still do not face enough political pressure to leave their deliberate stalemate position and solve this state of paralysis.

To understand the interests at stake for the ruling nationalist political parties, it is vital to briefly refresh how the power-sharing mechanism of the Dayton Peace Agreement works. In a nutshell, it adopted a so-called *consociational approach,* conceiving the equal representation of the three main ethnic groups of Bosniacs, Croats and Serbs in all state bodies as a premise for establishing peace. The preamble to the constitution acknowledges that the state is constituted by the will of *"Bosniacs, Croats and Serbs, as constituent peoples (along with Others) and citizens of Bosnia and Herzegovina."* In this light, the Constitution of Bosnia and Herzegovina creates a complex composition of territorial and ethnic features to organize the state as a federal system *sui generis*. It is divided into two entities, vested with strong competences: the Republika Srpska and the Croat-Bosniac dominated Federation of Bosnia and Herzegovina, which itself consists of ten federal units named *cantons*.

### Presidential Elections Between "Sejdić and Finci" and "Komšić"

On the basis of this territorial organization, the state bodies are constituted aiming to achieve ethnic equality. Accordingly, Art. V. of the Constitution establishes a three-member Presidency as the collective head of state, which *"shall consist of (...) one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska."* In *Sejdić and Finci,* the ECtHR held that this is discriminatory to citizens who do not identify themselves as Serbs, Croats or Bosniacs and to citizens who belong to one of these groups but do not reside in the respective entity. To align with the ECHR, every citizen must be eligible to the presidency, regardless of their ethnic affiliation or place of residence, since an exclusion from public office based on one of these criteria is disproportionate.

The judgment was criticized for applying rigid human rights standards to a very particular situation of ethnic division in post-war Bosnia and Herzegovina, possibly provoking instability (see the dissenting opinion of Judge Bonello). Though it was not the allegedly "peace-guaranteeing" ethnic feature itself that was

judged unconventional, but only it's exclusivity to three ethnic groups (cases of *Sejdić and Finci*, *Zornić*, *Šlaku*) as well as its tie to certain territories (cases of *Pilav*, *Pudarić*).

Giving up the ethnic criterion and introducing a simple majority vote for the Presidency seems like a quick fix to conform with the ECHR. The Bosniac nationalist party SDA proposed this, well-knowing that the Bosniacs are the largest group in Bosnia and Herzegovina and would thus be the most influential group in such a vote. Predictably, this is unacceptable to the Croat nationalist HDZ party, which fears an illegitimate misrepresentation of Croats by majoritarian vote in the so-called "Komšić scenario" that repeated itself in the elections of 2006, 2010 and 2018: Because of the majoritarian *one man, one vote* system within the two entities, a liberal candidate for the Croat seat to the Presidency – Mr. Željko Komšić – was elected by the votes of ethnic Bosniacs from the Federation, who deliberately did not check the box for the Bosniac member, but decided on the Croatian seat instead and outnumbered the HDZ candidate. Ever since, the HDZ deems this election to be illegitimate and contrary to the main idea of ethnic power-sharing and proposes a restrengthening of the ethnic criterion by even closer ties to certain territories, while the SDA keeps insisting that only a total cancellation of the ethnic feature ultimately complies with human rights and European values.

## Intermediate Solutions at Hand

There are intermediate solutions on the table to align the modus of presidential elections with the ECHR without redefining the proportion of ethnic representation. A simple solution would be an indirect election of a single head of state in Parliament, possibly in combination with a reduction of the presidential powers. Its ethnic legitimation could be achieved by a vote of confidence from the delegates of all ethnic groups assembled in the House of Peoples. The Venice Commission suggested a similar solution in an opinion that was also quoted in *Sejdić and Finci*.

Recently, the negotiating parties have come up with an alternative idea, involving an indirect vote through an electoral college system. A third option – though often deemed dysfunctional (see *Greve* on this blog) – would uphold the current direct election mode and just extend the Presidency to a representative of the group of "Others." As we can see, there are several constitutional designs that would match the presidential elections with the ECHR standards without major detriment to the current balance of ethnic representation. Yet, they deliberately remain blocked in (pseudo-)negotiations between the SDA and the HDZ.

## Attempts of Gerrymandering the House of Peoples into a House of Regions

Vested with large veto powers to all legislative decisions, the House of Peoples is the second state body affected by the ECtHR's judgments. The upper house of the bicameral Parliamentary Assembly was designed on the basis of ethnical representation, too, and according to Article IV of the Constitution *"comprises 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs)."* Adding a proportionate number of delegates from the "other people" and dumping the rigid criterion of residence seems to be without any alternative in order to comply with the ECHR – if the chamber were to be upheld at all, which is controversial because of the practice of instrumentalizing veto powers to block the institution's work.

Under the current system, the Croat and Bosniac delegates are chosen by the members of the equivalent House of Peoples of the Federation of Bosnia and Herzegovina, which is made up of delegates from the 10 cantons in a number that is proportionate to the population of the respective ethnic group in each canton. Here again, the HDZ apparently refuses to agree to a reform package that would not strengthen the proportion quota of the lower populated cantons of the Southern and Western Herzegovina region – the main areas of its influence. This is nothing but classical *gerrymandering* and would in fact transform the House of Peoples into a "House of Regions", each designed to be as ethnically homogenous as possible (for further analysis see *Mujanović*).

Such a redesign of the constituencies ignores the principle of strict proportional representation of the constituent people (not territories) in the House of Peoples, as strictly upheld by the Constitutional Court in its *Ljubić* decision. Intertwining the design of electoral constituencies with the task of making the state's House of Peoples comply with the ECHR is in fact the political hostage-taking of the entire parliamentary system for the particular party interests of the HDZ.

## Breaking the Deadlock on International Stage

Since the deadlock over the electoral reforms is upheld deliberately by the HDZ and the SDA, it could be helpful if the international community pushed the sides to leave this stalemate position.

The EU and especially the US were ready to intervene in 1995 to broker the Dayton Peace Agreement, but now tolerate the paralysis of the political and institutional development caused hereby. They both appointed special envoys to mediate the negotiations, but keep silent about the proposals that are negotiated on in closed-door meetings in their presence (like recently in a luxury hotel at the Herzegovinian seaside). The government of neighboring Croatia seeing itself as a protector of Croats in Bosnia and Herzegovina, but lobbying exclusively for the HDZ's party interests, is not helping either. President Milanović recently stated that he will do everything in his power to prevent the conduction of elections if an agreement (in terms of Croat nationalist proposals) is not reached.

Insisting on transparent negotiations of the reform packages would increase political pressure on the HDZ and the SDA, dismantling their policies that have been depriving the citizens of their basic political rights under the ECHR for over a decade now. Additionally, the non-nationalist opposition parties need to be actively included in the process, which should preferably take place in the Parliamentary Assembly of Bosnia and Herzegovina. Unfortunately, it is only symptomatic for the political culture of Bosnia and Herzegovina that two decades after the end of war nationalist leaders are still permitted to "solve" profoundly public issues in private negotiations.

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