Is Ethnic Gerrymandering a Solution for the Constitutional Impasse?

Joseph Marko

23.08.2022 doi: 10.17176/20220823-181822-0

Christian Schmidt, the High Representative in Bosnia and Herzegovina, had a fit of temper last week. After the draft of the HR's "Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina" had been leaked to the public, there had been mass demonstrations in front of the building of the Office of the High Representative (HR) in Sarajevo. A journalist had asked Schmidt, to his dismay, why he had tried to enforce the implementation of a single judgment, the so-called "*Ljubić case*" of the Constitutional Court of B-H, through his planned imposition of Amendments to the Election Law of B-H last month on the basis of his so-called "Bonn Powers" which allow him, *inter alia*, to impose legislative acts instead of the competent parliament. The question also suggested that this would have been done in favor of a single political party. So, what were the reasons for the mass demonstrations and what is the legal and political background for his outrage?

As far as the constitutional and legal background is concerned readers have to remember that according to the Dayton-Paris Peace Agreement of 1995 (GFAP) the overall constitutional system of Bosnia and Herzegovina (in the following: B-H) is composed of two Entities, the Federation of B-H (FB-H) and Republika Srpska, as a political compromise to end the war. The FB-H had been in itself territorially delimited into ten "cantons" with their own constitutions and governmental systems by the Washington Agreement 1994. The second major characteristic of this constitutional system is the strict power-sharing system based on constitutionally predetermined ethnic keys for the composition of most governmental bodies at all territorial levels on behalf of Bosniacs, Croats, and Serbs as so called "constituent peoples." Since "Others", that is members of national minorities or those who refuse to declare any ethnic belonging, are thereby excluded to stand as candidates in the elections for the Presidency of B-H and the House of Peoples, the second chamber of the Parliament of B-H, several complaints were lodged with the European Court of Human Rights (ECtHR) against these forms of ethnic discrimination. Already in its first landmark decision, the ECtHR ruled in *Sejdić and Finci versus Bosnia and Herzegovina* in 2009 that a power-sharing system which leads to an "automatic and total exclusion" from the right to stand as a candidate in elections amounts to a violation of Article 3 Protocol No.1 in conjunction with Article 14 of the European Convention on Human Rights (ECHR) which guarantees democratic elections without, *inter alia*, ethnic discrimination. This judgment was then followed by a series of other judgments such as *Zornić v. B-H*, 2014; *Pilav v. B-H*, 2016 or *Pudarić v. B-H*, 2020.

However, none of these judgments of the ECtHR has been implemented to this day since all efforts for the constitutional reform of ethnic keys in the so called „Dayton constitution", that is Annex 4 of the GFAP, have failed. Why? There is, in fact, no inter-ethnic competition between the mono-ethnic Bosniac, Croat, and Serb parties in general elections, but they form a cartel of power following the maxim „divide and rule", since the electorate of B-H is divided along ethnic lines due to, first, ethnic cleansing and genocide during the war and the parallel ethnic homogenization of state institutions in the respective Entities and, second, their territorial delimitation into cantons which serve as electoral districts. Thus, the ethnic keys in the B-H constitutional system allowed these parties an almost complete „state capture" not only of the state's institutions at all territorial levels, but also of the public and, in many cases, also the „privatized" labor market. This patronage system forms the stable

political basis of the cartel of power as the miserable results for multi- or non-ethnic parties in general elections demonstrate.

The latest effort of HR Christian Schmidt to impose amendments to the Election Law of B-H before the next general elections on 2 October 2022 has to be seen in this context.

The initial draft law leaked to the press in July 2022 can be subdivided into two parts. The first part comprises a number of articles to prevent or to sanction electoral fraud which were termed "technical" amendments. The second part, however, was perceived as a "political" compromise following the claims of the party leader of the Croat Democratic Community-HDZ, Mr. Dragan Čović, because he and his party affiliates have been complaining for years that Croats are marginalized in political decision-making processes and thus are discriminated against in their constitutional status as one of the constituent peoples. Two provisions were contested in this regard: Article 14 should abolish Article 20.16A of the Election Law, which had been freezing the results of the population census from 1991 as the basis for the allocation of seats in general elections until "Annex 7 of the GFAP has been fully implemented," requiring thereby to establish the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons in order to counter-act ethnic cleansing and the ethnic homogenization and segregation of institutions. The other one was Article 9, in particular paragraph 3, which prescribes, "if the Bosniak, Croat and/or Serb population of a Canton according to the last census constitute less than 3 percent of the total population of the same constituent people in the Federation, no seat shall be allocated from that Canton to that constituent people." Taken together, these two provisions would have allowed to use the results of the 2013 population census for a new allocation of seats for the House of Peoples of the Federation of B-H. Therefore the question, not only for the journalist mentioned in the beginning, but for the public in general: What is the purpose of this provision? Who will profit from it?

The first hint can be discovered in the preambular provisions of the draft law by "deploring that the authorities in Bosnia and Herzegovina failed to implement the decision of the Constitutional Court of Bosnia and Herzegovina of 1st December 2016 in Case No. U 23/14 (hereinafter: *Ljubic* Case) …". In this case, the then President of the House of Peoples of the Federation B-H, Dr. Božo Ljubić, had filed a request to declare several articles of the Election Law of B-H concerning the allocation of seats for the election of the members of the House of Peoples of the Federation B-H unconstitutional. In contrast to the House of Peoples on state level with 5 Bosniacs, 5 Croats and 5 Serbs, but no „Others", the House of Peoples of the Federation B-H is composed of 17 Bosniacs, 17 Croats, 17 Serbs and 7 „Others." The contested Article 10.12., paragraph 2 did prescribe that at least *one* delegate from *each* of the constituent peoples shall be elected from *each* of the cantons to the House of Peoples, even if one of the constituent peoples is not even represented in the respective cantonal assembly. At the same time, Article 10.12, paragraph 1 ruled that the number of delegates from each constituent people and group of Others to be elected from each canton shall be proportionate to the population of the canton. In his complaint Dr. Ljubić basically argued that these provisions discriminate Croats in their equal right as constituent people following from an allegedly constitutional "principle of legitimate representation." More specifically he argued that the contested provisions grossly violate the principle of equal votes of equal value and Croat delegates in those cantons, where the Croat population is numerically in a "minority" position, are elected not only by voters of Croat origin, but also by Bosniac or Serb origin and by "Others."

The Constitutional Court of B-H did indeed declare the provision of the Election Law with the formula of one Bosniak, on Croat, one Serb to be delegated from each canton as well as the legal provision with fixed numbers of seats for the cantons unconstitutional, but not the other contested provisions. Thus, the general elections 2018 were held on the basis of the *Ljubić* judgment after the BiH Constitutional Court had finally abrogated the contested provisions in a

second judgment on 5th July 2017, because the Parliament of B-H had remained inactive during the time limit granted by the Constitutional Court for legislative action. After the general elections in 2018, the HDZ tried to convince representatives of the international community and the other party leaders in negotiations behind closed doors that their claim for electoral reform could be fulfilled without a simultaneous reform of the Dayton constitution itself. This would help to "de-block" the general impasse of the governmental institutions of the B-H Federation. This approach was indeed "successful" to strike a deal, the so-called Mostar Agreement, between the HDZ and the SDA, the biggest Bosniac party, for the organization of municipial elections for the city of Mostar in December 2020, where the last elections had been held in 2008.

In line with the ongoing political mobilization efforts of HDZ, three parliamentary representatives of the HDZ published a proposal for the reform of the B-H Election Law on 5th July 2021. Against the HDZ claim that a reform of the B-H Election Law is possible without a change of the Dayton constitution, the proposed Article 8.1 concerned the electoral process for the election of the three members of the B-H Presidency whose composition is clearly regulated in Article V of the Dayton constitution itself. The proposed provision regulated the creation of three "ad hoc electoral districts A, B and C" for the election of the respective Bosniac and Croat member of the B-H Presidency on the territory of the FB-H. District A was then characterized as territory with an at least two-thirds majority of Bosniac population and district B was to comprise the territory with an at least two thirds majority of Croat population, whereas district C should comprise the "rest" of the territory. The proposed Article 8.1, paragraph 3 then ruled that only a Bosniac and Croat candidate with most votes from the respective majority cantons is elected member of the Presidency. These provisions beg, of course, the question: who shall be favored by these provisions? It is safe to assume that these provisions were to favor the two biggest mono-ethnic parties, namely the Bosniac SDA and the Croat HDZ and their party leaders, in particular with the HDZ winning almost no votes from the cantons of district C in regional elections due to strong intra-ethnic competition. Moreover, it has to be taken into consideration that the HDZ party leader, Dragan Čović, had lost several times in the presidential elections to the Croat seat against Željko Komšič from the Socialdemocratic Party, respectively Democratic Front.

This enables us now to evaluate also the proposed Article 9 of the draft law of HR Schmidt. The proposed threshold would paradoxically introduce not only an unequal value of votes for candidates of the same constituent people, depending on their seat of residence, in spite of the clear reasoning of the ECtHR in the case of *Pilav v. B-H*, 2016, but even "automatically and totally exclude" them from the right to stand as candidates in elections against the reasoning in the *Sejdić and Finci* case outlined above. Due to the clear purposive effect of this proposal, it is again a clear case of *ethnic gerrymandering* through "packing" the electoral districts with supporters of the respective incumbent as could also be seen from the Venice Commission's "Report on Constituency Delineation and Seat Allocation" of 12 December 2017 (CDL-AD(2017)034, p. 23). Moreover, it must be regarded a violation of the principle of non-discrimination and the principle of "pluralism as the essence of democracy" following from the longstanding jurisprudence of the ECtHR, because such a threshold will reduce *intra-ethnic* pluralism in general elections and could establish a quasi-monopoly of a single mono-ethnic party in the political representation of constituent peoples as this was in fact the case until the general elections in 2000.

In the end, HR Schmidt imposed with his "Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina" only the "technical" part of the draft law on 27 July 2022, but not the "political" provisions. Whether this will end the political crisis and constitutional stalemate before and after the general elections on 2 October 2022 remains to be seen. What is clear, however, from the presentation above regarding the electoral mechanisms intimately intertwining the cantonal, Entity, and state level, is the fact that there can be no reform of the B-H Election

Law without a reform of the ethnic keys of the Dayton constitution as a necessary requirement for the implementation of the mentioned judgments of the ECtHR as condition for further EU integration.

ABOUT THE AUTHOR

Joseph Marko

Joseph Marko is full Professor of comparative public law and political sciences at the Institute of Public Law and Political Sciences at the University of Graz.

SUGGESTED CITATION

Marko, Joseph: Is Ethnic Gerrymandering a Solution for the Constitutional Impasse?, Verfassungsblog, 23.08.2022, doi: 10.17176/20220823-181822-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220823-181822-0.