

**BOSNIA AND
HERZEGOVINA:
20 YEARS AFTER
DAYTON**



Bosnia and Herzegovina: 20 years after Dayton

20 years has passed since the General Framework Agreement for Peace in Bosnia and Herzegovina was reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States. The accords, also known as the Dayton Agreement, were formally signed in Paris on 14 December 1995. These accords put an end to the 3 1/2-year-long Bosnian War, one of the Yugoslav Wars.

The agreement's main purpose was to promote peace and stability in Bosnia and Herzegovina, and to endorse regional balance in and around the former Republic of Yugoslavia, thus in a regional perspective.

The present political divisions of Bosnia and Herzegovina and its structure of government were agreed upon as part the constitution that makes up Annex 4 of the General Framework Agreement concluded at Dayton. A key component of this was the delineation of the Inter-Entity Boundary Line, to which many of the tasks listed in the Annexes referred.

20 years after the signature of the Dayton Accords, political structure of Bosnia and Herzegovina is still unchanged, yet many challenges lie ahead. The emerging demand for change has articulated by nationalist and ideology-based parties as well. Their different views on the future prospects of the state as well as the visions of coexistence and the adaptation of human rights norms in local settings are analysed within ICRP's *Bosnia and Herzegovina: 20 years after Dayton*.

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BOSNIA AND HERZEGOVINA: 20 YEARS AFTER DAYTON

The Dayton Accords and the end of the Bosnian war

The Dayton Accords were a peace agreement signed by the Presidents of Bosnia, Croatia and Serbia, on 21 November 1995, which put an end to the armed conflict known as the Bosnian War.

It is not easy to state the beginning of events that led to the Bosnian conflict. According to Stathis N. Kalyvas and Nicholas Sambanis, one should go back until 1980, when the President of Yugoslavia Josip Tito died. The death of the long-time leader led to the rise of nationalisms among the Yugoslav republics, with the weakening of the Communist Party. In 1991, Croatia declared its independence. As a reaction, the Croatian Serbs, living in the East of the country, with the help of the Yugoslav army, repelled the Croats from their territory, having the Serbs ethnicity, by the end of the year, controlled almost one third of Croatian territory (BBC.com, 2015). In the meantime, in March 1992, following the example of other republics, Bosnia-Herzegovina declared its independence from Yugoslavia, after a national referendum, that the Bosnian Serbs opposition, led by the party of Radovan Karadzic, blocked in many Serb-populated areas (History.com).

As a result, Bosnian Serbs, wanting to be part of the "Greater Serbia", rebelled and created a separated state called Serb Republic or Republika Srpska, with the military and political support of Serbian President, Slobodan Milosevic (Camisar et al, 2005). By the end of 1993, Bosnian Serbs had taken control of 70%

of the territory, through a process of ethnic cleansing, systematic rape of women and mass executions.

An arms embargo imposed by the United Nations, in September 1991, to the Yugoslavian republics and the arose of the conflict between Bosnian Croats and Bosnian Muslim, in April 1993*, in the one third of the territory that was not yet under Milosevic's influence, helped to weaken the Bosnian army, leaving the situation unaltered until 1995.

**This conflict was later lightly solved, with the signature of the Washington Accords, in March 1994, which ceased the hostilities and formed the Croatian-Muslim Federation. "However, the Federation, constituted under American auspices, was more of a 'marriage of convenience' than a sincere alliance: the wounds from 1993 war would require a long time to heal" (Camisar et al, 2005, pp.3-4).*

The international community remained silent before the conflict. United Nations decided not to intervene, sending only a UN Protection Force for humanitarian help. Later, the world organization also assumed the responsibility to protect several "safe zones" (Lampe, n.d.). On the other hand, United States considered the war an European problem, with Secretary of State James Baker stating that "we don't have a dog in this fight" (Baker, apud Will, 1995); at the same time, the clash of interests between European countries kept them away: we are referring to Russia's connection with Serbia and British and French pro-Serbian governments.

The international ignorance towards the reality

in Bosnia started to change after the bombardments of Sarajevo's market place, carried out by Serb Republic killing dozens of people on 5 February 1994 and a second one on 28 August 1995. On 11 July 1995, between seven and eight thousand Muslim Bosnian men and boys were killed in this United Nations "safe zone" of Srebrenica, and several women we raped or sexually assaulted (Smith, n.d.; History.com; Lampe, n.d.). These two episodes were broadcasted around the world by CNN, raising people's awareness regarding the Bosnian conflict (Camisar, et al, 2005). On May 1995, Bosnian Serbs took as hostages hundreds of UN peacekeepers, as defence in case of an attack by NATO. After that, the world started to see the Serbian people as the aggressor.

In the summer of 1995, the reality in the field also started to change. The new French President Jacques Chirac boosted the United Nations to authorize a combat-capable Rapid Reaction Force, constituted by British and French soldiers to protect UN peacekeepers. In August, Croatia was able to recapture Krajina, after the American President Bill Clinton authorize retire US military personnel to train and improve the Croatian army. This was the first defeat of Serbia in four years, allowing to change the balance of powers (Camisar, et al, 2005).

Taking advantage of change of tables, Anthony Lake (National Security Adviser) and Peter Tarnoff (Undersecretary of State) were sent to Europe by the President Bill Clinton to present his peace project. On the 1st September, all parts of the conflict got together in Geneva. Bosnian Serbs did not accept the negotiations, which led to air attacks from NATO. A few days later, on the 14th, Richard Holbrooke, chief of the United States peace negotiations

and frontrunner of the talks, was able to make the leaders of Bosnian Serbs, Radovan Karadzic and Ratko Mladic to sign an agreement that led to the end of Sarajevo siege.

Two months later, on 11 November, the peace conferences started in the Wright-Patterson Air Force Base, near Dayton, Ohio. Holbrooke, once again, led the negotiations together with Secretary of State Warren Christopher. High representatives of the three parts of the Bosnian War were present: President of Bosnia Alija Izetbegovic, President of Serbia Slobodan Milosevic, President of Croatia Franjo Tudjman, as well as representatives from United States, United Kingdom, France, German, Italy, Russia and European Union. The negotiations took twenty one days. On the 21 November 1995, the General Framework Agreement for Peace in Bosnia Herzegovina, also known as Dayton Accords, was signed, ending the three and a half year war. The document was later formally signed on December 14 in Paris.

Considering humanitarian violations, where ethnical cleansing was use in the daily vocabulary, the respect and protection of the human rights and the recognition each party sovereignty was the basis of Dayton Accords. In fact, in the eleven articles that compose the accords, the three parties agreed to respect the equal sovereignty of each other, to settle their disagreements through peaceful means and Bosnia-Herzegovina and the Federal Republic of Yugoslavia recognized the existence of each other. The three independent nations also assumed their responsibility to respect the human rights and the rights of refugees and to cooperate with international entities in implementing the peace settlements and investigating and prosecuting war crimes and other violations of the international law. In this

sense, the Dayton Agreements had as primary goal to guarantee the stability, peace and regional balance between the previous Yugoslavian republics.

As for specific measures established by the General Framework Agreement, it is worth noting certain points of the eleven annex of the document. Related to the military aspects, all the parties must proceeded with the military withdrawal and ensured the maintenance of the cease-fire imposed before the beginning of the negotiations. It also established an Inter-Entity Boundary Line between the Federation and the Bosnian Serb Republic and reunified the capital Sarajevo, within the Federation, but open to all people in the country. As for Gorazde, taken by

the Bosnian Serb Army, during the war, would remain secure and accessible, connected to the Federation through a land corridor. Elections based on freedom and fairness, and supervised by international organisms, for the Presidency and House Presidency and House of Representatives of Bosnia and Herzegovina, for the House of Representatives of the Federation and the National Assembly and presidency of the Bosnian Serb Republic were scheduled. Any citizen with at least 18 years-old, including refugees and people displaced by the conflict were allowed to vote. Another point important to highlight was the establishment a new Constitution for the Republic of Bosnia and Herzegovina (1995).

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State structure of Bosnia and Herzegovina

Bosnia and Herzegovina has probably the most complicated governmental system in the world. As a consequence of the historical developments during and after the war in the area, two separate semi-state engendered, each with their own constitutions.

Bosnia and Herzegovina is administratively divided into two entities and these were created in the Dayton Agreement 1995; The Republika Srpska, 49% of the total territory, the Federation of Bosnia and Herzegovina, 51% of the total territory. Within compass of this separation is also the District of Brčko, an additional entity, which does not belong to any of the entities, but represents a separate department unit over which sovereignty have the institutions of Bosnia and Herzegovina.

The entities have a president, parliament, government and courts. Also they have jurisdiction in the areas of civil administration, health education, police department, physical planning and many other, while at the state level are foreign policy, defence, border monitoring, elections, foreign trade, fiscal and monetary politics, and other areas. In Bosnia and Herzegovina, equality of these three constructor peoples have guaranteed by the Constitution of these entities. The House of Peoples of the Federation of Bosnia and Herzegovina and the Council of people of the Republic of Srpska are the bodies, which responsible of the equality.

While the Republika Srpska resembles a unitary autonomous republic dominated by the Serbia

ethnic group, the Federation was established as a highly decentralized autonomous republic with ten cantons by Washington Agreement (Markert 2003, p.88).

The ten cantons are Unsko-sanski, Posavski, Tuzlanski, Zeničko-dobojski, Bosansko-podrinjski, Srednjobosanski, Hercegovačko-neretvanski, Zapadnohercegovački, Canton Sarajevo, Canton 10, which one considered federal units within this entity, have a high degree of autonomy, each has its own parliament and government. The government has jurisdiction in the fields of health, education, culture and sport, home affairs, and other areas related to civil administration.

In the Federation aside from the House of Representatives, there is an indirectly elected second chamber with the same amount (17 each) of Bosniak, Croat and Serbian representatives who represent the cantons based on population proportionality. Members of the cantonal assemblies are sent as delegates to the second chamber. These delegates have the ability to make use of their veto rights in the parliament in case of a violation of vital national interest. (Garvic et al. 2013, p.52)

Other levels of political division of Bosnia and Herzegovina are the municipalities. The state comprises of 137 municipalities, 74 in the Federation of Bosnia and Herzegovina, 63 in the Republic of Srpska. Also, municipalities have their own government and services, and are mainly formed around the most important town in the area.

Moreover, each canton has several municipalities. They are divided into

communes. Besides, Bosnia and Herzegovina has seven official cities; Banja Luka, Bihać, Jajce, Mostar, Zenica, Sarajevo and Eastern Sarajevo.

Also Tuzla is in the process of becoming the 8th official city of Bosnia and Herzegovina. And all these cities have their own City Council.



Brčko District

Brčko District has a special status in the complex territorial structure of Bosnia and Herzegovina, as it is not allocated to either entity, and functions as a demilitarized,

independent district subject only to state control. However, the district is not a federal unit on its own. (Garvic et al 2013, p.56)

The first Brčko International Supervisor arrived in April 1997. Just previous that time, the Organization for Security and Co-operation in Europe (OSCE) had a modest office presided by Randolph Hampton.

In 2006, under the Supervisory Order, all “Entity legislation in Brčko District and the IEBL” was abolished. The ruling made by the Brčko Supervisor Susan Johnson abolishes all Entity Laws in the District, as well as abolishing the Entity Border Line. The ruling makes the Laws of the District and the Laws of the State of Bosnia and Herzegovina (including the laws of the Socialist Republic of Bosnia and Herzegovina) paramount within the District. (OHR, 2006)

Following a Peace Implementation Council (PIC) meeting on 23 May 2012, it was decided to suspend, not terminate, the mandate of the Brčko International Supervisor. The Brčko Arbitral Tribunal, together with the suspended Brčko Supervision, continues to exist. (OHR, 2012)

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Electoral system in Bosnia and Herzegovina

The Dayton Peace Agreement and the Electoral Law laid the legal ground for elections and the electoral system in Bosnia and Herzegovina. But, many concessions affecting the electoral system have been made. These concessions are based on the combination of two principles: the constituent people's principle and the national sovereignty principle.

International democratic standards related to electoral systems (universal suffrage, right to stand for elections, equal right to vote, direct ballot, secret ballot, etc.) have been incorporated in the Dayton Peace Accords.

Preliminary, the Dayton Peace Accords specified elections chase in shorter periods time. This was later prolonged until 2002; even it was convenient to last only for elections that were held in 1996 and 1998. The Dayton Peace Accords address elections and the electoral system of Bosnia and Herzegovina in several instances.

The first post-war presidential and parliamentary elections at the state and entity levels were held on September 14, 1996. The first local elections were postponed a year and took place in 1997.

The first round of post-war elections (from 1996 to 1998) helped to consolidate ethnic exclusivism with little impact on the promotion of peace building and democratization. As the local elections of 1996 demonstrated in conditions of group insecurity and mutual distrust, with no encouragement for politicians to appeal beyond their own ethnic consti-

tuencies, elections predictably turned into an ethnic census.

The 2000 elections differed from the previous elections in three important aspects. First, open list and multi-member constituencies were introduced. Second, preferential voting system was adopted for the election of members of the House of peoples in the Federation was introduced. Of the three innovations, the first did not specially foster inter-ethnic accommodation but rather disadvantaged multi-ethnic and civic parties; the second and the third, both inspired by an integrationist approach, backfired because of the timing and method of their adoption. As the experience of the 2000 elections shows, there is a narrow line between fine-tuning election rules and manipulating them. The international community's approach, learning more towards manipulation, backfired. (Belloni, 2004, p.340) In 2001, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Electoral Law of Bosnia and Herzegovina. This law made no significant changes to the temporary electoral system constitute by way of the Dayton Peace Agreement.

The electoral system of Bosnia and Herzegovina uses different models and principles of mandate distribution. There are elements of both direct and indirect elections applied; plurality and proportional system tampered in electorates; proportional representation formula, compensatory mandates etc.

Some authors are "convinced of the soundness of this and believe that the current electoral system of proportional

representation through part/coalition list (list PR) is the appropriate choice for Bosnia and Herzegovina. Nonetheless, it is conceivable that elements of the integration through electoral engineering approach, based on multiple preferential voting and or ethnic vote distribution requirements for certain executive posts at various levels of government, can be introduced with some success, albeit in a very limited way, in the foreseeable future. This should not be ruled out as permanently infeasible – times change and conditions can change with time.” (Bose, 2002).

Political Parties in Bosnia and Herzegovina

Political parties must have fifty founding members before registering as an association with the relevant municipal court. All political parties last out a strict and complicated registration and investigation process to be able to stand for election for any political office. (Art.4.1–4.25 Election Law of Bosnia and Herzegovina). Also, a political party needs 3,000 signatures to register in the elections for the Presidency or state-level House of Representatives.

The main parties are important in Bosnia and Herzegovina:

The Party of Democratic Action (SDA)

The Party of Democratic Action was founded on 26 May 1990 in Sarajevo. It was a realisation of Alija Izetbegovic’s idea of an Islamic religious and national party in Bosnia and Herzegovina. It is the first and largest to Bosniak Party of Bosnia and Herzegovina. At first, the party avoided national or religious label in multinational SR Bosnia and

Herzegovina, however, SDA was evidently a Muslim Party, which the party’s founders openly declared. Since the beginning of the war, SDA has always been a member of the central state government with the exception of the period of the Alliance for Change (2000–2002) and since 2012. After the Bosnian general election, 2014, SDA became once again the longest party in Bosnia and Herzegovina.

Union for a Better Future of Bosnia and Herzegovina (SBB)

Union for a Better Future of Bosnia and Herzegovina (BiH) is a centre-right political party in Bosnia and Herzegovina. The party was founded in September 2009 by Fahrudin Radoncic, the founder and owner of Dnevni Avaz, the largest daily newspaper in Bosnia and Herzegovina.

Democratic Front (DF)

Democratic Front is a political party in Bosnia and Herzegovina founded by Croat Member of Presidency of Bosnia and Herzegovina Zeljko Komsic. The Democratic Front is a social democratic party.

Alliance of Independent Social Democrats (SNSD)

The Alliance of Independent Social Democrats is a Serb political party in Bosnia and Herzegovina. It founded 1996. Its president, Milorad Dodik, is the president of the Republika Srpska.

The Croatian Democratic Union (HDZ)

The Croatian Democratic Union of Bosnia and

Herzegovina is the largest political party of Bosnian Croats. It is an observer of the European People's Party (EPP). The party was formed on 18 August 1990, at the first party convention held in Sarajevo, and it participated in all multiparty elections held in Bosnia and Herzegovina since 1991. It regularly won support of the Croat electorate up to 2000, and took part in forming the government. It returned to power in 2012, where it remained until 2010.

*The Croatian Democratic Union 1990
(HDZ 1990)*

Croatian Democratic Union 1990 led by Bozo Ljubic. The second strongest political group of Bosnian-Herzegovinian Croats is the Croatian Democratic Union 1990. This party split from HDZ in 2006, and due to widespread

discontent, nearly every HDZ delegate to state parliament switched their allegiance to HDZ 1990. Today, HDZ 1990 is the second most important Croat party in Bosnia and Herzegovina. Since July 2013, Martin Raguz is the new party president.

The Serbian Democratic Party (SDS)

The Serbian Democratic Party, founded by Radovan Karadzic, has been the dominant Serb political party since 1990-2006. It is currently led by Mladen Bosic, who succeeded Dragon Cavic. In the parliamentary elections of October 2006, the SDS lost its status as the leading party in Republika Srpska and the main party Serb party in Bosnia and Herzegovina to Alliance of Independent Social Democrats (SNSD), led by the Prime Minister of Republika Srpska, Milorad Dodik.

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Identity politics in Bosnia and Herzegovina

When talking about reconciliation in the Bosnia and Herzegovina all European stakeholders (institutions of the European Union, representatives of the national governments as well as local communities) agree on the significance of achieving political stability in the country. What international bodies and governments have learnt about the necessity of political and economic stability since the end of the wars could fill a library by now. In recent social science literature and also in press articles many authors dissect the following question regarding the conflict-ridden multi-ethnic state in the Balkans: “what is the key to establish a stable political system in that multicultural country”?

The political thought in the Balkans’ multi-ethnic country is predominantly determined by the interrelationship of ethnic communities and their politically saturated views on the common state they ought to live in. Up to date, two competing approaches divide the political scene: according to one view, political actions should be based on ethnic identity politics, while another view supports the supremacy of ideas above the nationalist agenda. The latter is often referred as *third culture* in political terminology.

In order to measure the possibility of creating a supra-ethnic political culture in Bosnia and Herzegovina, the following aspects have to be put in focus in the research: (1) the historic development of the political system, (2) the circumstances of identity creation in Bosnia and

Herzegovina and (3) the political environment. The characteristic of the current political culture in Bosnia and Herzegovina – a one that can host the germs of a *third culture* – is determined by many factors.

The early state, the medieval Bosnia which had a certain level of independence as a geographic and political unit, the later province of empires and independent state is an important element of the contemporary political thought. The identities and their qualities formed in different historical periods are also influential. Therefore it is fundamental to take into account the regional patriotism, integrative Bosnian and Yugoslav identities besides Croatian, Serbian and Bosniak identities which are based on cultural elements and origin. In addition it shall be noticed how the application of *soft power* of neighbouring great powers influenced local political thought during the times and what effect did it have on the formation of identities ultimately.

The constituent peoples’ different views on the state and their different perspectives about each other are also significant factors in the political thought of Bosnia and Herzegovina. Regarding the competing views on the state, all the ethnic perspectives have historical concepts of state in common. The earliest concepts of state of all the three constituent communities refer to the medieval states which had existed on the territory of today’s Bosnia and Herzegovina. Serbs founded their early state in the region when Vojislav united the Serbian territories in the mid-8th century. Despite the fact that the principality existed only for a short period of

time (its Bosnian parts were annexed by the Byzantine empire 200 years after its foundation), its significance is indisputable due to that Christianity became the official state religion. Croats established their state on the territory of today's Croatia and western part of Bosnia and Herzegovina in the late 8th century. The early Croatian state had its greatest extent during the reign of Tomislav in the mid-10th century when the kingdom's influence extended as far as Istria on the west and the Drina River on the east (which is the current border between Serbia and Bosnia and Herzegovina). Regarding Bosnia as somewhat separate territorial unit and political entity, it is known that it had existed in the middle of the Middle Ages¹ having specific cultural and religious features. The state of Bosnia in a modern sense exists after 1322. The medieval Bosnia had its golden ages during the reign of Tvrtko I (1353–1391) when its political power and territorial extent reached its height. However the short-living independent Croatian, Serbian and Bosnian states cannot be compared to the states in modern (Westphalian) sense. Such comparison would be also problematic because of the lack of exact historical sources regarding the nature of those states. In this reason those entities cannot be regarded as the alternatives of modern states, however the medieval states have influenced the formation of modern identities. The fate of medieval states in the Balkans which were losing their independence was to integrate into empires. The Kingdom of Croatia entered a union with the Kingdom of Hungary and later became a part of the Austro-Hungarian Empire. The territory of Bosnia was occupied by the Ottoman Empire and later the Austro-Hungarian Empire annexed the region. Serbia was also the victim of the Ottoman imperial expansion; however the country was

the first nation state to become independent among the three regions in the beginning of the 19th century. The Ottoman conquest has resulted in the loss of independence and the development of the *millet system*² which contributed to the emerging influence of Christian Churches on society and culture. (Bougarel, 1996, p.88) It was also the first step towards institutionalised communitarianism in Bosnian and Herzegovina. However, the reforms in the last decades of the Empire, the existing *millet system*, the political modernity of the late-19th century and the nationalist ideology confronted due their contrasting values. Some of them regarded the state as the goal of politics while the others aimed at building communities to reduce the role of state. (Zürcher, 2005, pp.10–11)

The Serbian and Croatian national idea emerged during the Ottoman and Austrian rule and started to spread from the neighbouring Serbia and Croatia towards Catholic and Christian Orthodox communities in the mid-19th century. However Muslims living in Bosnia could not form their national identity due to their identity was based on rather religious differences than ethnic origin on the one hand and Croats as well as Serbs considered Muslims as part of their community on the other hand. For this reason most Muslims felt that their community is an alien society within a divided country. (Sorabji, 1996, p.60) The underlying reason is that Christian peoples had independent states before the Ottoman rule and the Muslims living in the region were converted to Islam during the Ottoman occupation period.

During Ottoman and Austrian administration the region became part of a distinct civilizational and geopolitical space and the identities of local communities were strongly

formed by the emerging national ideologies of the 19th century. All of these ideologies were exclusive nationalisms, while only three integrative ideologies have developed. Firstly, Benjámín Kállay (who was appointed Austro-Hungarian ministry of finance and administrator of the Condominium of Bosnia and Herzegovina) called for a formation of a Bosnian identity after the occupation of the territory. The core of his vision about this supranational identity was the concept of Bosnia as motherland which was acceptable for all the communities living in Bosnia. Over the time the *Bosnjastvo* concept was adopted mainly by Bosnian Muslims who lived in the urbanised areas. This conception is not far from the one which pursues to concentrate on the past³ instead of focusing on the present problems. According to the concept, the primary task of the state is to protect the past, which almost always described with the metaphor of “heritage”. The priority of the past, the priority of tradition and monuments, is however, widely accepted as inherent and normal in the nationalist agenda. (Treanor, 2002) This ideological view is a vision of Bosnia as a museum-like zone. The third integrative conception was Yugoslavism, which rather comes from the current identity crisis than it would be a real identity. Yugoslav identity was shared by those who derived it from their ideological conviction (the acceptance of leftist Yugoslavism during the Tito era) or were born from mixed marriages and thus cannot identify themselves with any ethnic group. The positive feeling of belonging to the federal state of Yugoslavia would be difficult to link to the majority of Croats or Bosniaks. For this reason, uniting Serbs (i.e. the unification of Republika Srpska with Serbia) in a “little Yugoslavia” would be accepted mostly by those

living in Serb majority areas within Bosnia and Herzegovina. In the light of the low popularity of the three integrative conceptions mentioned above, it is visible that nationalist political paradigms are still primary factors of contemporary political thought. The Bosnian war between 1992 and 1995 was virtually the clash of those classic nationalist movements originated in the 19th century.

Political thought after the Bosnian war

The political paradigms which (concerning the concepts on the state) have been popular during and after the Bosnian war were summarised by Paul Treanor in 2002.⁴ His detailed research – which focuses on the logic of the war – lists the viewpoints based on the intentions of the parties involved in the conflict and contains the concepts of both local societal groups as well as the international community.

Local paradigms

All Bosnia is Croatia

The concept originates from the time of Croatian national awake in the 19th century and it claims that all Bosnia (or at least most parts of it) shall be regarded as a part of the state of Croatia. That opinion coupled with the concept of national liberation in the 1990s. At that time those who opposed Croatia’s inclusion to Yugoslavia have designed the vision of an independent and great Croatia which would allow all Croats to live in one country. That concept⁵ was favoured by numerous Croatian nationalists, Croatophile intellectual groups in Europe and some representatives of the Catholic Church as well.

All Bosnia is Serbia

The option – which is the most far-reaching concept regarding the aims – is originated in the pan-Serbian idea. Its supporters encouraged the Yugoslav People's Army to “liberate” not only the Serbian territories but to annex the whole former socialist republic to Serbia. However, the military intervention aimed only to support Bosnian Serbs in fact, due to that President Milošević sought for solutions to the partition of Bosnia and Herzegovina instead of annexation.

Bosnian Muslims are Croats, (Bosnian Serbs are not)

According to the partly inclusionist Croatian concept, the members of Bosnian Muslim community shall be regarded practically as the ones who belong to the Croatian community. However, this opinion did not gain widespread acceptance because of emerging tensions, the apparent religious conflict and international Muslim cooperation. Nationalism means inclusion, at least as much as exclusion, thus bringing Muslims into the fold of the Croatian nation meant that those Croats feeling historical nostalgia would have been delighted to see the revival of the Muslim-Croat military cooperation in the Second World War. In the same time this conception excluded Serbs from the community of Croatian people.

Bosnian Muslims are Serbs (Bosnian Croats are not)

Besides the conception of Croat-Muslim community that excluded Serbs from the political nation, a model with similar simple logic exists: Bosnian Muslims are Serbs while

Bosnian Croats are not. The idea is an inclusionist standpoint. However, Serbian nationalism generates its enemy image by emphasizing the different religion and ethnic origin of Muslims. For this reason the conception could hardly be realistic.

Bosnian nation

The essence of the approach is that the Bosnian nation (*Bosanski narod*) is a multiethnic community which members have multiple identities however they are primarily loyal to their homeland. On the one hand, the basis of the citizenship loyalty is the belonging to a former Yugoslav republic in which some ethnic groups are just entitled to formal recognition. This attitude was widespread mainly before and during the Bosnian war. Nowadays it is mostly represented by the Bosnian-Herzegovinian Patriotic Party lead by Sefer Halilović. On the other hand there is a concept according to which the citizenship loyalty is based on the common experience of the civil war. In this regard the war is a metaphor of common suffering that had an effect on all the people in Bosnia: parallel to the American Civil War the Bosnian war can be a new beginning for the whole nation after the common struggle. Currently this concept has appeared in the political manifesto of the Democratic Front lead by Željko Komšić. The manifesto envisions an ethnically “diverse Bosnia” in which people have “strong allegiance” to their homeland.

Bosniak nation

Originally, the members of the Bosnian nation would have been the Serbs, Croats and Muslims living in the country. That concept was a sort of pan-Bosnian idea supported also

by Kállay, however it was not in fact favoured by the Serbs and Croats. The reason of that was the religious separateness of Muslims on the one hand, and the fact that the two ethnic groups had a (neighbouring) kin-state on the other hand. Over the time a third, separate “national” identity has formed (*“Bošnjacki narod”*). The Bosniak identity had been given an impetus by the differing nation-building process, the collective rights gained during the Yugoslav era, and lastly the constraints of distinction from other communities.

Islamic Bosnia

According to the “Islamic Bosnia” concept the majority of the country’s population is Muslim; so that Islam shall be the “default religion in Bosnia”, however an Islamic state does not exclude from the nation those who are the followers of other faiths. The supporters of this view believe that the main characteristic of the state is tolerance while being secular. The idea had been paralleled to the Catholic Poland. According to the conception an Islamic Bosnia could expect support from other Muslim countries. At the same time a more radical view, the vision of a theocratic Islam republic of Bosnia has appeared. However it is unlikely that an Iran-like state would be established in the Balkans, though it was cited by Serb nationalists many times during their accusations against Bosniaks.

Yugoslavism

The reason of insignificance of a pan-Slavic idea lacking real ethnic identity is due to the nationalist homogenisation process that took place in the former republics during the disintegration of Yugoslavia. The South Slavs

had decades of experimenting with adequate forms of long-term coexistence. For many years, Yugoslavism, centrist great-Serb and separatist movements have competed cyclically. The last stage of the process that eliminated Yugoslav identity was the recentralisation attempt by Milošević. (Juhász, 2000)

International paradigms

Most of the listed concepts above have in common that they appear in the political thought either as marginal factors or visions of those political communities which are not able to predominantly influence the fate of the country. All the local paradigms appear mostly on an institutionalised way through the activities of the political parties or in the parties’ manifestos. However none of those concepts could be realised so far. Moreover, the war – paradoxically – resulted in a territorial settlement for which none of the ethnic groups had fought for during their military conflict. Instead of local paradigms the resolutions initiated by the international community have been closer to realisation. Regarding the post-war settlement three main conceptions have been evolved during and after the military operations. Firstly, the vision of a multicultural Bosnia has become widely known. According to this idea the constituent peoples of Bosnia would coexist in a consociationalist form of democracy. It is often compared to the Belgian model, but due to the recent negative experiences in Belgium there are concerns that such conception could not serve as a basis of settlement in a multi-ethnic Balkan country. This proposal is purely considered as a better and more effective version of the current political structure. Secondly, a political community based on some transnational

identity or citizenship loyalty gained awareness – although not reaching much success – as a parallel concept to challenge some of the local paradigms. The idea has been reflected in different degrees in the party stances of the Bosnian-Herzegovinian Patriotic Party, the Democratic Front and the self-declared multi-ethnic Social Democratic Party of Bosnia and Herzegovina. The third option for settlement was the state model set out by the international community in the Dayton Accords in 1995. Its over-bureaucratised political system resulted in a quasi-dysfunctional state administrative structure while excluded those from the political community who are not members of any of the three constituent nations.

Enemy images and civilizational consciousness

Based on the above concepts of state originating from local paradigms, civilizational differentiation and national paradigms still have primary role in the political thought in Bosnia and Herzegovina. In a region which is considered as homeland by several nations these paradigms were formed by the way how people regarded each other and the whole community (i.e. the Bosnian nation). The existing self and enemy images could be explained by Samuel P. Huntington's two-decades-old civilizational approach, by those enemy image interpretations which had been reviewed by Slavoj Žižek more than a decade ago and by the latest results of nationalism researches.

Mapping of political paradigms in the region can be useful in order to reveal the question (by accepting Huntington's division of the world) "how people living on the peripheries of civilisations see themselves and those who belong to another civilisation?" It can be

assumed that large communities of people based on vague principles (i.e. the civilisations as imaginary political entities) can be regarded as reference points only for those who live in the periphery of a geographically well definable, ethnically homogenous region and having regular contacts with other cultures while preserving their diversity. However international cooperation is not based on this principle, some of its aspects can be recognised in the case of relations on the local and regional level.

As Slavoj Žižek concluded, the phenomenon of historical and geographical differentiation in the Balkans is versatile in accordance with the logic of "us" and "them". Disintegrating post-socialist countries in the Balkans tend to emphasise their ties to some larger entity by portraying themselves as "the last bastion of Europe" thus legitimising differentiation from others. After the political transition in Eastern and Central Europe the relation of the involved (us) and the excluded (them) was rather determined by the sense of belonging to a civilisation than to an ideology. That relation can be also described as a dichotomy of the so-called "civilised Europe" and "barbarian East". According to Žižek, in this context "for right-wing nationalist Austrians there is an imaginary frontier which is Karavankas, the mountain chain between Austria and Slovenia; beyond it, the Slavic hordes rule. For the nationalist Slovenes the frontier is the river Kolpa, separating Slovenia from Croatia; we are *Mittleuropa*, while Croats are already Balkan, involved in the irrational ethnic feuds which really do not concern us – we are on their side, we sympathise, but in the same way one sympathises with a third world victim of aggression. For Croats the crucial frontier, of course, is the one between them and Serbs,

between western Catholic civilisation and the eastern Orthodox collective spirit, which cannot grasp the values of western individualism. Serbs see themselves as the last line of defence of Christian Europe against the fundamentalist danger embodied in Muslim Bosnians and Albanians.” (Žižek, 2003, pp.221–222)

This approach suggests that Croats (and the predominantly Christian Slovenes) are the natural allies of the West, while Serbs and even Bosniaks are cut off from this possibility. Although, the political activities of Alija Izetbegović’s movement made the recognition possible in the case of the latter, insomuch that Bosniak community eventually became the poster child of the West. Owing to that Muslims in Bosnia and Herzegovina along with Croats could “fit into” the conception of “civilised Europe”. The view is also shared by Huntington; however those observations could be rather valid exclusively in the Bosniak-Serbian relation during the war. It is also necessary to mention that Western attitudes towards their Bosniak allies affected the political attitude of the Muslims population. Due to Western military and political support Bosniaks amended their political identity with European perspectives during the war.

The supra-ethnic political culture in Bosnia and Herzegovina

So far no political culture or political milieu developed in Bosnia and Herzegovina that could have facilitated the emphasis of citizenship identity over ethnic identities. The reason of that are the historical imprints of state structures, the mutually exclusive identity alternatives, the different views of history and lastly, the disagreements that have culminated

in a military conflict. The Dayton Accords – as the basis for post-war settlement – and the constitution which was designed in the agreement have cemented the state structure based on ethnic quotas by recognising the special status of the three main ethnic communities. Naturally, this fact did not contribute to the formation of a new political and behavioural culture analogously to those which can be observed in federal political systems.

Presently two agents of intercultural communication are capable to apply the supra-ethnic political approach’s set of instruments in the Bosnian testing ground. One of these agents is the state administration, where traces of the *third culture* can be identified with the image of the state apparatus. It consists of mainly the heads and high-rank officials of the executive power and its civil servants who are engaged in policy formulation and implementation in the cantons, entities and federal level. The members of diplomatic corps also belong to that community since diplomats have to represent the whole of a country’s population abroad regardless of their ethnic origin. The state apparatus and diplomatic corps are virtually comprise of the “state nobility” (*la noblesse d'état*) formed by the educational selection mechanism (as described by Pierre Bourdieu) and the members of “functional elites” who are responsible for managing the most important functional subsystem of a society made up of professional communities (as described by Niklas Luhmann). However, the contribution of state apparatus to the spread of citizenship-based identity is limited: despite of the available resources it is a well-identifiable narrow group which cannot always set an example that is followed by the society as a whole.

The other agent of Bosnian intercultural

communication is the civil sector. Myriad of non-governmental organisations were established after Dayton and numerous INGOs opened their offices mainly in the capital, Sarajevo. These institutions were also aimed at reforming current social structures by using their relief and aid distribution monopoly. However, they failed at strengthening a supranational identity. Some authors have

explained the reason of their failure earlier by the economic recovery, but actually it were the divergent nationalist reactions to the economic depression (the claim by Serbs to secede Republika Srpska from Bosnia and Herzegovina and Croatian pursuit for autonomous status) which further weakened the Bosnian identity based on citizenship loyalty.

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¹ The first historical source mentioning Bosnia occurs in 958.

² The *millet* is a structure of communities acting as local administrative units with own taxation regulation, religious and cultural autonomy which are integral part of the Ottoman Empire. (Schöpflin, 2001)

³ The Dayton Accords established a Commission to Preserve National Monuments in Bosnia aiming to preserve and protect property designated as national monuments. The experimental intent of the international community was probably to establish an institute that contributes to identity building through preservation of cultural heritage.

⁴ Treanor, P., 2002. The logic of the war in Bosnia. [online] Available at: <<http://web.inter.nl.net/users/Paul.Treanor/bosnia.html>> [Accessed on 1 December 2014]

⁵ The idea – to expand the Croatian invasion of Serbian Krajina – was discarded by Franjo Tuđman due to American pressure.

BOSNIA AND HERZEGOVINA: 20 YEARS AFTER DAYTON

Sejdić and Finci v. Bosnia and Herzegovina

On the surface the examined case, *Sejdić and Finci v. Bosnia and Herzegovina* seems quite simple. It is evident that – even on the edge of Europe – the prohibition of discrimination at least on constitutional level should be applied. Especially in a country which have an accurately formed institutional system with special care of the checks and balances and proportional representation of constituent ethnic groups.

How can be even possible that 6 years after the judgement the implementation is still delay?

The case was a landmark not only in the history of a country but also in the history of the Dayton Agreement what was strongly criticised in conjunction with the case itself, and also during the process of implementation what pointed out the weaknesses of the federative system. The amendment of the Constitution would be a premise to the further negotiations with the European Union, but as far as I see it is just the top of the iceberg in a country where the unemployment, corruption, nepotism and the renewed ethnic and secession conflicts imply a more serious problem.

The following paragraphs highlight the inconsistencies of the judgement, cite the critics, and also seek the possible reasons behind the delay of the implementation.

The circumstances of the case

The Constitution of Bosnia and Herzegovina is an annex to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995.¹

The Dayton Agreement

Since the Constitution was part of a peace treaty, it was drafted and adopted without the application of procedures which could have provided democratic legitimacy. It constitutes the unique case of a constitution which was never officially published in the official languages of the country concerned but was agreed and published in a foreign language, English.²

At the State level, power-sharing arrangements were introduced, making it impossible to adopt decisions against the will of the representatives of any “constituent people”, including a vital interest veto, an entity veto, a bicameral system (with a House of Peoples composed of five Bosniaks and the same number of Croats from the Federation of Bosnia and Herzegovina and five Serbs from the Republika Srpska) as well as a collective Presidency of three members with a Bosniak and a Croat from the Federation of Bosnia and Herzegovina and a Serb from the Republika Srpska.³

The present case

The applicants were born in 1956 and 1943. They have held and still hold prominent public positions. Sejdić is now the Roma Monitor of the Organisation on Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, having previously served as a member of the Roma Council of Bosnia and Herzegovina (the highest representative body of the local Roma community) and a member of the Advisory Committee for Roma. Finci is now serving as the Ambassador of Bosnia and Herzegovina to Switzerland, having previously held positions that included being the President of the Inter-Religious Council of Bosnia and

Herzegovina and the Head of the State Civil Service Agency.⁴

The applicants describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the “constituent peoples”, they are ineligible to stand for election to the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).⁵ Finci obtained official confirmation in this regard on 3 January 2007.⁶

The constitution of Bosnia and Herzegovina / The Dayton Agreement Annex 4

The Constitution confirmed the continuation of the legal existence of Bosnia and Herzegovina as a State, while modifying its internal structure. In accordance with the Constitution, Bosnia and Herzegovina consists of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.

The Constitution makes a distinction between “constituent peoples” (persons who declare affiliation with Bosniaks, Croats and Serbs) and “others” (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood, or other reasons).

In the former Yugoslavia, a person’s ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. There was also no requirement of acceptance by other members of the ethnic group in question. The Constitution contains no provisions regarding the determination of one’s ethnicity: it appears that it was assumed that the traditional self-classification would suffice. Only persons declaring affiliation with a “constituent people” are entitled to run for the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).

The case

The Applicant’s principal complains

The appellants argue that their rights have been violated, taking into account the fact that Article II § 2 of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina and that they shall have priority over all other law.

The applicants took issue with their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. They relied on Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.⁷

Admissibility

Although the respondent State did not raise any objection as to the Court’s competence *ratione personae*, this issue calls for consideration *ex officio* by the Court.

It is reiterated that in order to be able to lodge a petition by virtue of Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be *directly* affected by the impugned measure (have to claim to be victim). The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. It is, however, open to applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they

belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted.⁸

In the present case, given the applicants' active participation in public life, it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency. The applicants may therefore claim to be victims of the alleged discrimination.

The Court notes that the Constitution of Bosnia and Herzegovina is an annex to the Dayton Agreement, itself an international treaty. The power to amend it was, however, vested in the Parliamentary Assembly of Bosnia and Herzegovina, which is clearly a domestic body. In addition, the practice set out in paragraph 17 above confirms that the powers of the international administrator for Bosnia and Herzegovina (the High Representative) do not extend to the State Constitution. In those circumstances, leaving aside the question whether the respondent State could be held responsible for putting in place the contested constitutional provisions, the Court considers that it could nevertheless be held responsible for maintaining them.

The Court declares the applicants' principal complaints admissible.

Merits

1. Submissions of the Applicant

The applicants submitted that difference in treatment based expressly on race or ethnicity was not capable of justification and amounted to direct discrimination. The "Race Directive" – implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which in Article 2 explicitly included under its definition of indirect discrimination the possibility of objectively justifying the treatment, but made no such justification possible under its definition of direct discrimination.

Even on the assumption that a justification was possible, the applicants maintained that the

respondent Government would still bear a very heavy burden when seeking to establish an objective and reasonable justification, given both the basis of the complaint (direct racial and ethnic discrimination) and the areas to which it applied (political participation and representation at the highest level of State).

The applicants concluded that the respondent Government had failed to demonstrate that the difference in treatment was justified in the instant case.

2. Submissions of the Government

The Government referred to the case of *Ždanoka v. Latvia*⁹, in which the Court had reaffirmed that the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State.

3. Submissions of the third party

The Venice Commission, in its submissions of 22 October 2008, took the view that the constitutional provisions contested in the present case breached the prohibition of discrimination.

The Open Society Justice Initiative underlined that political participation represented one of the rights and responsibilities that maintained the legal bond between a citizen and a State. In most jurisdictions, the rights to vote, to be elected and to stand for office were what most clearly distinguished a citizen from an alien.

Article 14 in conjunction with Protocol I. Art 3. The House of People and the Presidency

The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols require each State to guarantee. It applies also to those additional rights falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. The Court must decide, therefore, whether elections to the House of

Peoples of Bosnia and Herzegovina fall within the “ambit” or “scope” of Article 3 of Protocol No. 1. Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

In the judgement, the Court highlights the State’s strong cooperation with the international organisations and institution.

The Court concludes that the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.

Applicants remaining complains

The first applicant submitted that his ineligibility to stand for election to the House of Peoples and the Presidency on the ground of his Roma origin effectively reduced him and other members of the Roma community as well as other members of national minorities in Bosnia and Herzegovina to the status of second-class citizens. The Court has held in previous cases that racial discrimination could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3. In the present case, however, the Court observes that the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicant and that it was not designed to, and did not, humiliate or debase.

The Court reiterates that Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention.

Finally, it considered that the finding of a violation constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicants and ordered the respondent State to pay 1,000 euros (EUR) to the first applicant and EUR 20,000 to the second applicant for costs and expenses.

Holds by fourteen votes to three that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants’ ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina.

Holds by sixteen votes to one that there has been a violation of Article 1 of Protocol No. 12 as regards the applicants’ ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.

Judge Bonello expressed a dissenting opinion. Judge Mijović, joined by Judge Hajiyevev, expressed a partly concurring and partly dissenting opinion.

Dissenting opinions

Dissenting opinion of Judge Bonello

The dissenting opinion of Judge Bonello highlights the significance of two very interesting issue. One is the importance of the examination of the historical/political context. The circumstances of the constitutional process back in 1995 can explain the aims and also the weaknesses of the Constitution. The Dayton Agreement and also all the negotiations based on the aim of creating a system of checks and balances between the three belligerent ethnicities. It was a question of the peace and an agreement. With his words: *the judgment has divorced Bosnia and Herzegovina from the realities of its own recent past.*¹⁰

In other hand Bonello also criticised the Court’s right to have a jurisdiction – with a bit of irony – in the case when the actions (in this special case the Dayton Peace Accords) were caused by the European Union and of the United States of America. Does not more than points out the responsibility of the international community’s role in connection with the drafting the Constitution of Bosnia and Herzegovina.¹¹

*Partly concurring and partly dissenting opinion
of Judge Mijović joined by Judge Hajiyeu*

Judge Mijović adopts the majority's position conjunction with the state presidency and recognises the prohibition of discrimination. However, Dr. Mijović has a separate opinion in some other questions. Joined to the dissenting opinion of Judge Bonello confirms, that the Court would have to pay more attention to the conditions that existed at the time of the Dayton settlement. The Court's case law has several examples where the examination of the circumstances was the core of the proceedings at least they have been mapped.

The aim of the Constitution was to create a balance of power in order to rekindle the serious tension between the three „constituent peoples” in Bosnia. The minority groups became part of the power-sharing arrangements at the Entity levels but not on the State level. Not even after 20 years however the constitutional reform was planned several times. In the next part of the dissenting opinion Judge Mijović criticises the implementation of the Protocol XII. of the Convention.

The most interesting chapter is connected to the eligibility to the Bosnian upper house, the House of People. According to the logic of reasoning neither the tripartite structure of the governance nor the role of the upper does not support the legitimacy of the request. The structure itself ripped for change, what are sufficiently justified by the failure of the institutional system, what is the consequence of the amount of bureaucracy and the consensus-based decision-making.

He makes two exposure in connection with the eligibility to the upper house. One is that the members of the House of Peoples are not elected but appointed by the Entities therefore they eligibility is precluded. Otherwise he draws attention using the German and English upper houses as examples that the traditional function of these bodies rather compensatory. Based on the principle of right of representation. Offer territorial, linguistic, ethnic representation. In

this function not necessarily democratic. However there is a special situation in Bosnia because the lower and upper house has almost equal weight in the legislature. Whether that is good or not, it is another question. Judge Mijović has the opinion that he concept of the right to free elections in Bosnia and Herzegovina does not include *per se* the right to stand for election to the House of Peoples, since members of this House are, as noted, not elected, but designated/selected by the Entity Parliaments. The House of Peoples was designed to secure ethnic balance in the legislature.

Raises the question of the independence of Bosnia, since the county was created as result of pressure from the international community and, fourteen years later, still does not function as an independent and sovereign State.

The opinions of the third party

Venice Commission¹²

In 2004 the Parliamentary Assembly asked the Venice Commission “to determine how far these practices [the Bosnian constitution and election law] comply with Council of Europe basic principles.” In its report from March 2005 the Venice Commission responded that: “The ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature.”

In other words, the provisions concerning the election of members of the presidency do not constitute a violation of one of the core rights of the Convention of Human Rights. The right to be elected president does not derive from the convention directly, but from protocol 12, which only entered into force in Bosnia in April 2005, and which served as the basis for the ECtHR judgement in Sejdić and Finci.

The ethnic representation and privilege of constituent peoples, i.e. Bosniaks, 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 the Federation of Bosnia and Herzegovina as well as all Croats and Bosniaks who reside on the territory of RS are excluded from the right to stand as candidates for the Presidency elections. "There exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities"¹³

As the Venice Commission had clearly demonstrated in its opinion of March 11th 2005, however, there existed mechanisms of power-sharing that did not automatically lead to the total exclusion of representatives of the communities which did not belong to the "constituent peoples". Furthermore, when it joined the Council of Europe in 2002, Bosnia and Herzegovina undertook to review the electoral legislation within one year, and it had ratified the convention and the protocols thereto without reservations.¹⁴

European Stability Initiative, a think-tank with a long and influential history in the Balkans¹⁵

The think-tank stands up for Bosnia and Herzegovina's Constitution. Their arguments are basically the following: To block a country's European integration process on the base of a decision delivered by Strasbourg is unfair and contra-productive because: „*This is not an issue of institutional "racism" – Bosnia is not violating fundamental human rights! This is not an issue of Bosnia systematically violating its international obligations*”.¹⁶

On closer examination we can see that the core element of the first argument is the nature of the definition and the lack of the definition of the ethnic origin. The authors did not go into the details of the questions of identity moreover they short-cut that: „*basically any candidate can decide to register as a Serb, Croat or Bosniak if she or he so wishes*”¹⁷ – they stated. It is simply excluded that the applicants did not want to do just that.

The second strong argument is that the Court's requirements/demands are stricter against Bosnia. The think-tank criticise the lack of the equal treatment and brings various examples to confirm that.

The first example is the electoral system in Brussels, where in the capital region 72 of the parliament's 89 seats are allocated a priori to the French-language community. The 17 remaining ones are reserved for the less numerous Dutch-language community. The registration is required for the candidates who have to register their belonging to one of the two language groups. The Francophone group is always awarded the post of prime minister, as well as two ministerial and two state secretary portfolios. The Dutch-speakers get two ministers and one state secretary. If Dervo Sejdić were to run in such an election, he would have to opt for one of the two language groups and to make sure his identity card confirms that affiliation. And if he were to choose Dutch, he could not become prime minister of the Brussels region, as this position is traditionally reserved for a French-speaker.

But Dervo Sejdić could be also Ladin in South-Tirol, or a Turkish Cypriote. In both places, the constitutions drafted by foreigners were unpopular from the outset but are still in force today- The first free elections took place in August 1960. Electoral lists were drawn up along ethnic lines. The constitution stated: "The State of Cyprus is an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President being Turk elected by the Greek and the Turkish Communities of Cyprus respectively as hereinafter in this Constitution provided." The constitution also defined who belonged to these two communities: "The Greek Community comprises all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share the Greek cultural traditions or who are members of the Greek-Orthodox Church; The Turkish Community comprises all citizens of the Republic who are of Turkish origin and whose

mother tongue is Turkish or who share the Turkish cultural traditions or who are Moslems.” As a result of the crisis, the parts of the Cypriot constitution referring to a Turkish community were suspended. This meant that all of its members, including Muslim Roma, lost both the right to run for public office and the right to vote. Ibrahim Aziz, a Turkish Cypriot living in the Greek part of Nicosia, asked to be registered to vote in the parliamentary elections of May 2001. His request was refused on the grounds that, “under Article 63 of the Constitution, members of the Turkish-Cypriot community could not be registered in the Greek-Cypriot electoral roll.” The Annan Plan – with a two chambers parliament- was, however, rejected in a referendum. In May 2004 Cyprus became a member of the EU with the 1960 constitution still in force.

*Democratisation Policy Council:
Critics on the discussion paper of ESI*¹⁸

ESI argues that “non-implementation of the Sejdić-Finci decision cannot justify blocking Bosnia and Herzegovina’s application for EU membership,” instead the EU should quickly give Bosnia and Herzegovina candidate status and expect the constitutional revisions demanded by the ECHR to take place while Bosnia negotiates with the EU about membership. ESI compares this case to voting and selection processes in other EU member states, including Belgium, Italy (South Tyrol) and Cyprus, and concludes that similar provisions (sometimes even stricter) are also applied in other EU member states. These states however, are not sanctioned by the EU. Legally speaking, this assessment is correct. Indeed, while power-sharing (in the form of consociationalism) has been designed to ensure group-inclusion, it can also serve as a tool of exclusion and discrimination. By specifying which groups “share” power, constitutional provisions can also discriminate by excluding certain groups. The aim of the power-sharing

arrangements in both countries is to allow for minority groups to participate in decision-making. Hence, the legal framework has to be understood in the context of the intended aims of power-sharing mechanisms. We also have to bear in mind that the flexibility within a system is crucial, and the language groups (instead of ethnical) can be more flexible.

Taking into account the poor track-record of EU conditionality in the country (see for example the failed police reform; the roll-back of reforms that were preconditions for signing the SAA; the failure to establish a functional anti-corruption body even after visa liberalisation required it, the weakening of state judicial structures under the EU’s “Structured Dialogue,” etc.), this will result only in negative consequences.

The third fault in the ESI’s report is a complete ignorance of Bosnia’s political dynamics. The rigid structures in the domestic politics in the country. There is no interest in changes. Agriculture. They ignore the centrifugal, secessionist forces that work against the very existence of a unified state. However, elites in Brussels know very well that what the country needs is a fundamental reform of its system. The current political framework is inefficient, expensive, discriminatory and has been failing in recent years. The unwillingness to reform must be penalised and that Bosnian elites should be punished for non-compliance.

Provisions

Bosnia attempts to find a solution. Generally, Bosnia’s leaders agree that formal discrimination has to be eliminated, but finding a solution has proven difficult. Three major initiatives to amend the constitution have failed so far.

The so-called 2006 “April package”, the first serious discussion of constitutional reform since Dayton, fell two votes short of reaching the required two thirds majority. The 2008 “Prud Process” and the 2009 “Butmir Process” are two other major attempts for constitutional

reform: the first one ended before a debate on concrete reform proposals had actually started and the second failed to secure the accord of key domestic political stakeholders.

Ahead of the 2010 general elections, a Parliamentary working group and an Action plan for addressing the ECtHR ruling were set up, again yielding no results. The EU's position: from a key condition to delayed implementation

The Council's 2010 conclusions put Sejdić-Finci case at the top of the EU's agenda, making its resolution a condition for Bosnia to submit a credible membership application. Since then, considerable time and multiple efforts have been dedicated to this issue, to no avail. In 2012, a high-level EU-Bosnia dialogue was launched to support the ruling's implementation, among other things. It ended in February 2014, when Commissioner Stefan Füle expressed "deep disappointment" with the lack of results. The EU hoped that making implementation an EU accession requirement would encourage Bosnia to align its constitution with the ECHR.

Opposing views held that EU's insistence on the ruling was not justified, as it concerns Protocol 12 (ratified so far by only 17 EU

Member States). Another argument in that respect was that similar legislative provisions exist in Belgium, South Tyrol (Italy) and Cyprus, for example. The Sejdić-Finci case contributed to the stalemate in Bosnia's EU accession prospects. Its SAA was blocked due to failure to implement the ruling. In this context and following the 2014 citizens' protests, the EU sought a renewed approach towards Bosnia, which the Council approved in December 2014.

Its aim is to reach a pre-accession deal with Bosnia and Herzegovina, without it having to change its constitution first. In return, in January 2015 the Bosnian leaders signed a written commitment to a package of reforms, including compliance with the Sejdić-Finci ruling. This made possible the unfreezing of the SAA, in force since 1 June 2015. In practical terms, this new approach "re-sequences" EU conditionality: it "side-lines" the Sejdić-Finci precondition. Although still on the agenda, the ruling appears to have gone from the top to "the back seat", to be paid special attention "at a later stage". Apart from the wording "as soon as possible", however, the written commitment of Bosnia's leaders has no specific deadlines for delivering results.

¹ Constitution of Bosnia and Herzegovina. Available at: <<http://www.legislationline.org/documents/section/constitutions>> Accessed on 13 November 2015.

² A/50/790 S/1995/999. p.59. Annex 4.

³ Gavrić, S., Banović, D. and Barreiro, M., 2013. *The Political System of Bosnia and Herzegovina. Institutions – Actors – Processes*. Sarajevo, pp.31–56 [pdf] Available at: <http://cps.ba/wp-content/uploads/2013/09/POLITICAL-SYSTEM-OF-BiH_FINAL.pdf>

⁴ While measuring the admissibility of the present case, the public role of the appellants has to be considered.

⁵ Claridge, L., 2010. *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010

⁶ Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, judgment of 22 December 2009 [pdf] Available at: <http://www.echr.coe.int/Documents/Reports_Recueil_2009-VI.pdf> pp.281–282.

⁷ Article 14 of the Convention provides: "The enjoyment of the rights and freedoms set forth in [the] Convention 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."

Article 3 of Protocol No. 1 provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Article 1 of Protocol No. 12 to the Convention provides: "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.”

Judgment on the merits delivered by a Chamber *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, judgment of 22 December 2009

⁸ European Convention on Human Rights Art. 3. Available at: <<http://echr-online.info/article-34>> Accessed on 13 November 2015.

⁹ ([GC], no. 58278/00, ECHR 2006-IV)

¹⁰ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, judgment of 22 December 2009, p.332.

¹¹ *Ibid* pp.332–335.

¹² Venice Commission – European Commission for Democracy Through Law (the Council of Europe’s advisory body on constitutional matters; also known as the Venice Commission).

¹³ European Commission for Democracy through Law (Venice Commission), Opinion No. 483/2008 CDLAD(2008)027-f.

¹⁴ [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf), Downloaded: 13.11.2015.

¹⁵ Europe’s think tank for South East Europe and enlargement

¹⁶ Lost in the Bosnian labyrinth. Why the *Sejdić-Finci* case should not block an EU application ESI discussion paper 7 October 2013 p.2. [pdf] Available at: <http://www.esiweb.org/pdf/esi_document_id_143.pdf> Accessed on 12 November 2015.

¹⁷ *Ibid* p.2.

¹⁸ Keil, S., 2013. Legal Misunderstandings, False normative Hopes and the Ignorance of Political Reality A Commentary on the recent ESI Report “Lost in the Bosnian Labyrinth” *DPS Policy Note*, Canterbury, November 2013 [pdf] Available at: <<http://democratizationpolicy.org/uimages/DPCPolicyNoteNewseriesSejdicFinci.pdf>> Accessed on 13 November 2015.



Institute for Cultural Relations Policy

Institute for Cultural Relations Policy
1131 Budapest, Gyöngyösi u. 45.
<http://culturalrelations.org>
institute@culturalrelations.org