



Discussion Paper
No. 1/2012

REFORMING THE HOUSE OF PEOPLES OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

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Editor: Edin Hodžić

Publisher: Analitika – Center for Social Research

Publication year: 2012
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Address of publisher: Kralja Tvrtka 11, 71000 Sarajevo
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Graphic design: Dalida Karić Hadžiahmetović

Layout: Samira Salihbegović

The publication of this discussion paper has been funded by the Think Tank Fund, Open Society Foundations.

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Introductory Note

The ruling of the European Court of Human Rights (ECtHR) in the Sejdić-Finci case is the latest and strongest, but by far not the only impetus for constitutional reform over the 15 year period the Dayton constitution has been in force in Bosnia and Herzegovina. From the opinion of the Venice Commission in 2005 on the constitution and the role of the High Representative, to the April 2006 reform package and the ill-fated effort at Butmir in 2009, international actors have sought to facilitate and urge constitutional reform. Sejdić-Finci case gave constitutional reform in BiH additional urgency as changes to the constitution are not just a consideration to facilitate decision making in Bosnia or rendering the state more effective and allowing it to integrate to the EU with greater ease, it pointed to the fact that the constitution discriminates against its citizens who do not identify with the three constituent peoples.

The failure of previous constitutional reforms has, however, made it more difficult to remove discrimination from the document. Beyond the psychological obstacles of changing the constitution, amendments which would accommodate the Sejdić-Finci ruling do touch the pillars of the system of government, namely the constitutional balance between special rights to the three constituent people and rights granted to all citizens of the country. Even among proponents of power-sharing for Bosnia there is recognition that the institutions are too rigidly affirming the rights of Bosniaks, Croats and Serbs. At the same time, it is unrealistic and potentially dangerous to abandon representation along ethnic lines altogether.¹ If an ethnically blind liberal democracy is not an option in Bosnia and Herzegovina, the challenge is to re-adjust the balance between rights of the constituent peoples and the inclusion of others. It is impractical and

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1 I realize this is a controversial argument in Bosnia and Herzegovina with a number of scholars arguing that ethnic representation is inherently in conflict with liberal democracy. See Asim Mujkić, *We, the Citizen of Ethnopolis*, Sarajevo: Magistrat, 2008. Discussing the arguments for and against ethnic representation would extend beyond the scope of this paper. I should just note that Bosnia and Herzegovina resembles corporatist consociation, which is also seen among scholars of consociationalism as problematic. However, a more liberal consociational arrangement could more effectively reconcile ethnic representation with liberal democracy. See Stefan Wolff, "Conflict Resolution Between Power Sharing and Power Dividing, or Beyond?" *Political Studies Review*, Vol. 5 (2007), 377-393. This is also the view of the ECtHR: the Court has made clear that there is "no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, [however] the Opinions of the Venice Commission ... clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities." Grand Chamber, European Court of Human Rights, Case of Sejdić and Finci v. Bosnia and Herzegovina (Applications nos. 27996/06 and 34836/06), Judgment, 22.12.2009, Para 48.

problematic to just add representation of national minorities to the existing ethnic representation to overcome the discrimination identified in the Sejdić-Finci case. National minorities are too small in number to participate effectively like the three “constituent people” and such an approach would continue to exclude those citizens from high office who do not wish or cannot identify with any of the available ethnic identity categories. While it might be theoretically conceivable to create a caucus for ‘Others’, who refuse ethnic self-identification, such a category would be open to abuse and probably accomplish little but increase competition between parties representing the dominant ethno-national communities.

In brief, there is no easy constitutional fix that would easily accommodate the ECtHR ruling. Of course one can conceptualize, as some political parties have done, simple constitutional amendments which would formally remove discrimination, but which would not provide any substantial changes, i.e. not address some of the underlying problems of exclusion and decision-making.² Instead, this text will outline some considerations for the reform of the House of Peoples of the Parliamentary Assembly of BiH, which to date only grants representation to Bosniaks and Croats from the Federation and Serbs from the Republika Srpska. The House of Peoples has been neglected in debates on the ECtHR ruling, whereas the Presidency received more attention. This is somewhat misplaced as the Presidency is not particularly important in the institutional structure of Bosnia and Herzegovina, as the country could be best described as a weak semi-presidential system.³ The House of Peoples on the other hand holds equal powers to the House of Representatives in addition to being the legislative body to protect the “Vital National Interests” of the constituent peoples.

Do “Vital National Interests” Matter?

The role of the House of Peoples is closely linked to the question of the function of protecting “Vital National Interests”. The fact that this parliamentary chamber has to date identical legislative powers to the House of Representatives constitutes an oddity in comparison to most Federal systems. The lack of differentiation between the two chambers of parliament is a clear weakness of the Bosnian political system. It unnecessarily duplicates veto points and complicated legislative procedure. While the ruling of the ECtHR could be transformed into constitutional reforms without addressing the competences of the House of Peoples, it would not only be a missed opportunity not to do so, but it would also render such changes ineffective. As Nenad Stojanović and Edin Hodžić point out, the ECtHR consider the limitation of the HoP to constituent peoples discriminatory in great part due to the broad remit of the institution.⁴

2 Such proposals have primarily come from the RS as the demographic dominance of Serbs in the RS would ensure Serb political dominance in the entity and also representation at the state level not to be threatened by the removal of ethnic labels from office, for example the state presidency.

3 Strictly speaking the system is semi-presidential, but the three person structure of the body reduces its effective powers as decisions in a number of fields have to be consensual. The rotation of the chairmanship further weakens the presidency.

4 Nenad Stojanović and Edin Hodžić, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdić and Finci v. BiH*. Sarajevo: Analitika, 2011, 25.

Were its competences curtailed, it could more legitimately represent only constituent peoples. There is, however, a broader problem that needs to be considered. The vital national interest clause is the one competence that differentiates the HoP from the House of Representatives in BiH. At the same time this competence has been ineffective.

Vital national interests have been evoked only four times in the past 15 years.⁵ Most laws which failed to achieve support in parliament failed due to the so-called entity veto, i.e. the requirement that two thirds of MPs in both chambers of parliament from both entities need to support a law for it to pass. The reason the vital interest clause has been invoked so rarely is due to the fact that vital interests are not defined in the constitution and as a result put to arbitration with the Constitutional Court which might, as it has done in a number of cases, find that no vital interest was breached. As a result, the “entity veto” provides for an alternative and easy way to block legislation without the risk of being overruled by the Constitutional Court.⁶ Yet, this option is realistically only open to Bosniak and Serb MPs, since they dominate in the two entities, but not to Croats. Reforming the House of Peoples without addressing this dilemma would provide formal relief, but no solution to the underlying problem of decision-making in BiH. Constitutional reforms to accommodate the Sejdić-Finci ruling thus would have to consider the effectiveness of the vital national interest mechanism both for the constituent peoples and others and the overall division of labour between the two chambers of BiH parliament.

Can citizens have a “vital national interest”?

BiH has a clear definition who constitutes the majority—the three constituent peoples—but a very confused picture on who everybody else is. The constitution conflates “Others” and citizens and the term “Others” is in turn often and falsely used as a synonym for national minorities. Strictly speaking, the ECtHR addresses the right of members of the Jewish and Roma community to run for the Presidency and the House of Peoples. In its conclusion, it clearly outlines that that exclusion of non-constituent peoples from these two bodies constitutes a discriminatory practice that might have been justified in the immediate aftermath of the conflict, but can no longer be upheld.⁷ This would suggest that the ruling implicitly also extends to the two additional groups of citizens other than national minorities. First, citizens who neither identify with the three constituent peoples nor are members of national minorities also cannot run for the Presidency or be represented in the House of Peoples. Whether these citizens merely

5 Miodrag Simović, “Zaštita vitalnog interesa konstitutivnih naroda u Domu Naroda Parlamentarne Skupštine Bosne i Hercegovine,” in Kasim Trnka (ed.), *Proces odlučivanja u Parlamentarnoj Skupštini Bosne i Hercegovine. Stanje - komparativna rješenja – prijedlozi* (Sarajevo: Konrad Adenauer Stiftung, 2009), p. 47 and Kasim Trnka, “Evaluacija procesa odlučivanja u Parlamentarnoj Skupštini BiH 1996–2007. godine,” in Kasim Trnka (ed.), *Proces odlučivanja u Parlamentarnoj Skupštini Bosne i Hercegovine. Stanje - komparativna rješenja – prijedlozi* (Sarajevo: Konrad Adenauer Stiftung, 2009), p.92

6 See Kasim Trnka, op. cit. and Birgit Bahtić-Kunrath, “Of Veto Players and Entity voting: Institutional Gridlock in the Bosnian Reform Process,” *Nationalities Papers*, Vol. 39, No. 6 (2011). Birgit Bahtić-Kunrath demonstrates that laws relevant for EU integration are no less subject to the entity veto than other legislation.

7 Nenad Stojanović and Edin Hodžić, op. cit., pp. 44-50.

reject an ethnic identification for personal reasons or are unable or unwilling to identify along these categories due to parentage of different national background is irrelevant. The second group of excluded are Serbs from the Federation and Bosniaks and Croats from the RS. While Nenad Stojanović and Edin Hodžić are right to point out that the electoral system is very flexible when it comes to declaring one's national identity and thus precludes citizens from running for the House of Peoples or the Presidency only if they are unwilling to make the declaration of a particular identity, this act is highly symbolic and strategic identification with a particular community cannot address the substantial discrimination of the system.⁸ Furthermore, the political system presumes that the entities are mono- or bi-national in their composition, which might largely be true, but has been successfully challenged in the Constitutional Court of BiH's 'constituent peoples' case' of 2000. Thus, reforms to the composition of the House of Peoples which would ensure the inclusion of national minorities, would not consider the other two excluded communities nor address the most substantial instances of discrimination.

A key problem in the case of the House of Peoples is that the primary function of this chamber of parliament is to represent communities and allow for the protection of their interests. Citizens who do not identify as members of collectivity other than citizens of BiH are thus per se excluded. The idea that Bosnian citizens have vital national interest might sound rhetorically intriguing, but would provide little substance. The idea of a national interest of a community defined in non-national terms would be an oxymoron and would in effect ethnicize citizens, rather than reduce the ethnonational logic of the political system. On the other hand, Serbs in the FBiH and Bosniaks and Croats in the RS would have to be very much equally able to articulate vital national interests as their kin in the other entity.⁹

National minorities face a different problem. Self-identified members of national minorities can clearly identify themselves as belonging to a community and have been recognized in the Law on Protection of Members of National Minorities.¹⁰ However, here their small numbers constitutes an obstacle. In 1991 national minorities numbered less than one percent of the population (36,368 or 0.83%).¹¹ While this number might underestimate the number of Roma and despite the absence of reliable numbers on minorities today as no census has been

8 Ibid., pp. 83-4.

9 In fact, these communities enjoy the protection of "vital national interests" at the entity level, where these have been evoked more frequently than at the state level. Trnka, op. cit., p. 92.

10 The law recognizes 17 national minorities. They are listed in the law and identified as "part of the population-citizens of BiH who do not belong to one of the three constituent peoples and constitute people of same or similar ethnic origin, same or similar tradition, customs, religion, language, culture and spirituality and similar or related history and other identifiers." Art.3, Zakon o zaštiti prava pripadnika nacionalnih manjina, 1.4.2003.

11 The report of the government on the FCNM claims a population share of 2.4% based on the population census, but this number is probably based on grouping national minorities together with citizens who refused to identify themselves along ethnic lines (categories "unknown" or "undeclared". Even if one were to include the category of Others, i.e. self-identification which did not fit into the available categories, the total only increases to 1.23%. Second Report Submitted by Bosnia and Herzegovina Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, Received on 2 August 2007. For census data see Statistical Office of the Federation of Bosnia and Herzegovina, <www.fzs.ba>.

carried out since 1991, there is little reason to believe that these numbers are substantially different.¹² While small numbers are no obstacle for the protection of minority rights, they can make it difficult to ensure effective political participation. This is particularly the case for a parliamentary body such as the House of Peoples. While national minorities could be overrepresented, as the practice already is with Croats and is common practice in Federal systems for smaller federal units, it would be hard to conceive granting veto rights to a cluster of minorities constituting less than one or two per cent of the population. Even the creative solution chosen in Macedonia where all minorities (including Albanians) have a cumulative veto right, the so-called Badinter majority would seem disproportional for national minorities in BiH. Conversely, if minorities are represented, but without any effective mechanisms to ensure a stake in the decision making process, this representation might be limited to window dressing. As the House of Peoples is primarily based not only on representation of communities, but on their rights to block laws and decisions as a community, the inclusion of national minorities without veto rights would render their representation symbolic, in essence tokenistic.¹³

Constituting a New House of Peoples

The above discussion clearly highlights that a reform of the House of Peoples is by no means easy. It would be conceivable to undertake a minimalist reform which would add minority representatives or "Others" more broadly (however defined) to this chamber of Parliamentary Assembly to satisfy the ECtHR ruling and/or reduce its competences. However, neither of these two solutions would address the substantial problems of this chamber of parliament. Instead, a constitutional reform would need to address the following aspects:

1. Ensure the inclusion of national minorities in the House of Peoples while keeping in mind the small number of national minorities;
2. Create a clearer distinction between the two chambers of parliament;
3. Provide for inclusion of constituent peoples who do not live in the entity they dominate in; and
4. Secure rights of citizens who neither identify with a constituent people nor constitute a national minority.

The starting point for thinking about potential options is considering the question of what Bosnia is constituted of. While constituent peoples are given clear constitutional role, Bosnia is also a state constituted by different territorial units. The division in the Federation and the RS is a reoccurring feature in the constitution. Although Bosnia might not be a self-ascribed

12 The shadow report on the Framework Convention for the Protection of National Minorities by the NGO Independent offers an estimate of 30,000 to 60,000 Roma in Bosnia and Herzegovina. Independent, Alternative Report on the Implementation of the Framework convention for the Protection of National Minorities in Bosnia and Herzegovina. Zenica 2008.

13 See Nenad Stojanović and Edin Hodžić, op. cit., p. 107.

Federation, it is clearly a Federal state composed not only of three peoples, but also by three territorial units (two entities and the district of Brčko). One of the weaknesses of the Dayton constitution has been the conflation of territorial and ethnic representation. Although this feature was a reflection of demographic reality achieved through ethnic cleansing from 1992 to 1995, it creates the grounds on which the ECtHR found the constitution to be in breach of the European Convention of Human Rights. Furthermore, this link has been successfully challenged at the entity level by the Constitutional Court in the constituent peoples' case.

Thus, a reform option for the House of Peoples would be to try to disaggregate these two categories and to consider representation of both territories and communities separately. In this case, BiH resembles Belgium which defines itself to be constituted by both regions and communities (Art. 1 of Belgium constitution). It would thus follow from here that the House of Peoples would be a chamber representing both territorial units and peoples separately. As a result, a reformed House of Peoples could include representatives of both peoples and entities (and thus would need to be renamed to reflect the inclusion of territorial units, i.e. Senate). In addition, it could offer representation to the District of Brčko, considering that the district is a separate territorial unit of BiH and currently lacks its own representatives in the Parliamentary Assembly. The representation of entities would also provide the opportunity for the representation of citizens who do not wish to identify with a constituent people. In addition, the House of Peoples should include representatives of the constituent peoples from the entities where the respective nation does not dominate, for example a number of Serbs from the Federation and Bosniaks and Croats each from the RS to ensure that these interests are also voiced. Such a system would also enable national minorities to be included. However, the likelihood of national minorities to be represented would be slim without special reserved seats. Thus, it would be reasonable to provide for a certain number of guaranteed seats for national minorities to be able to articulate their interests and also shape decision making. Here, it would be useful to consider the BiH Council of National Minorities delegating members to the reformed Senate.

The new upper house of the parliament would thus include representatives of the three constituent peoples not just from the entity where they dominate, but also from the other entity, as well as representatives of the three territorial units¹⁴ and national minorities. The composition does not, however, address the question of the role of these deputies.

Competences and Voting in the House of Peoples

In order to distinguish the two chambers of parliament to resemble more closely the structure of other Federal systems, it would be reasonable to reduce the powers of the reformed House of Peoples to the protection of vital interests, be they the interests of territorial units or peoples. Thus, the House of Peoples would have broader mandate to protect the interests of

14 In the case of the Federation, it would be appropriate to have, for example, one representative per canton so that cantons as constituent feature of this entity are also included.

entities and the district, yet at the same time have narrower remit to just consider laws where such interest need to be considered, requiring a mechanism for determining such interest. Currently vital national interests at the state level are undefined. At the same time, there is a clearer definition of what constitutes a vital national interest at the entity level. It would consequently be appropriate to extend this definition also to the state level and to develop a similar definition for the interests of the entities and Brčko. Similarly, a definition of what constitutes the interests of national minorities would need to be developed. Such a definition would be similar to those of constituent peoples, but might be narrower (i.e. issues of national minority laws, language laws, use of symbols and constitutional reform). As already today invoking such vital interests in regard to a particular law should be hard veto right, but instead requires a procedure which includes both a mediation process and an adjudication mechanism in case no compromise can be found. Whether the constitutional court is the best institution to be the final arbiter would need to be discussed.¹⁵ As a consequence, this chamber of Parliamentary Assembly of BiH would be the body where collective vetos, be they by nations, entities or national minorities can be evoked in clearly defined areas. Consequently, it would be consistent to remove the ability of entities to veto decisions in the House of Representatives.

Conclusion

A new House of People, or rather a Senate, which would be an upper house of the BiH parliament that would be able to debate the interests of constituent peoples, of constituent territorial units and national minorities alike, could eliminate the discrimination of the current system and reduce the link between territory and ethnic identity. Such a reform would not be a panacea to the problems of the Bosnian political system, as it cannot remove the blockades that can render decision making difficult. Constitutional engineering has to be aware of its own limitations: it cannot create a political will where it does not exist and it cannot short-circuit the divisions which are a feature of political reality in BiH. The best such a constitutional reform can achieve is to “level the playing field” so that not only the interest of some collectivities matter and to provide for mechanisms that a disagreement over a law do not automatically lead to a blockade. Whether these tools are used will remain open to those holding office: constitutional changes cannot create political will, but only provide for incentives.

15 As the Constitutional Court votes by majority, there has often been a majority of international and Bosniak judges taking a more restrictive line on collective rights than Serb and Croat judges.

About the Author

Dr Florian Bieber is a Professor of Southeast European Studies and head of the Centre for Southeast European Studies at the University of Graz, Austria. He previously taught East European Politics at the University of Kent, UK. He received his M.A. in Political Science and History and his Ph.D. in Political Science from the University of Vienna, as well as an M.A. in Southeast European Studies from Central European University (Budapest). Between 2001 and 2006, he has been working in Belgrade (Serbia) and Sarajevo (Bosnia-Herzegovina) for the European Centre for Minority Issues. Florian Bieber is also a Visiting Professor at the Nationalism Studies Program at Central European University and taught at the University of Bologna and the University of Sarajevo. In 2010, he has been a Visiting Fellow at the London School of Economics and in 2009 he held the Luigi Einaudi Chair at Cornell University, USA. He is also the editor in chief of *Nationalities Papers*. His research interests include institutional design in multiethnic states, nationalism and ethnic conflict, as well as the political systems of South-eastern Europe. He published articles on institutional design, nationalism and politics in South-eastern Europe in *Nationalities Papers*, *Third World Quarterly*, *Current History*, *International Peacekeeping*, *Ethnopolitics* and other journals. He is the author of *Nationalism in Serbia from the Death of Tito to the Fall of Milošević* (Münster: Lit Verlag, 2005, in German) and *Post-War Bosnia: Ethnic Structure, Inequality and Governance of the Public Sector* (London: Palgrave, 2006) and edited and co-edited four books on South-eastern Europe.



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