
Political Institutions and Political Processes

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Bosnia and Herzegovina: Consociational or Liberal Democracy?*

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Summary

The author discusses the nature of the political system in Bosnia and Herzegovina and the possible outcome of the country's institutional reforms. The article begins with giving a detailed overview of the structure of the main political institutions and it continues with presenting and evaluating favorable and unfavorable factors of consociationalism in BiH. In the conclusion, the author analyzes the political implications of the suggested constitutional reforms.

Key words: Bosnia and Herzegovina, Consociational democracy, constitutional reforms, political consensus



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1. Dayton political system

The 1995 Dayton Peace Accord envisages Bosnia and Herzegovina as a special-type consociational state.¹ Constitutionally it is not defined either as

* The paper includes the abridged and revised chapters IV-VI of my book *Bosnia and Herzegovina: a divided society and an unstable state* (Zagreb, Politička kultura, 2005). Added to the original text is a review of the proposed constitutional changes of 2006.

¹ It is not possible here to give a detailed account of the concepts and patterns of consociational democracy. For this, read the classics on consociation, above all Lijphart (1968, 1974, 1977) and Lehmbruch (1967, 1974, 1975); also Lorwin (1974), Daalder (1966, 1974), Steiner J.

a federation or a confederation, but an analysis of the fundamental legal documents shows that it is a sort of an “asymmetrical confederation” made up of two entities: the unitary Republika Srpska (The Republic of Srpska) and the multiethnic Federation of Bosnia and Herzegovina.² The entities have been given all the characteristics of states within a complex state: territory, population, citizenship, constitution, parliament, government, judiciary, administrative system, military, police, official languages, flag, coat of arms, anthem, and so on. The powers of the central state institutions are limited to foreign policy and trade, customs, monetary, and migration policies, air-traffic control, the implementation of international obligations and regulations, the regulation of transport between the entities.

The Federation consists of ten cantons; in their political practice they are territorial-political units of the dominant national communities. They implement their own educational, cultural, media, housing, land, and social policies, establish and control their own police forces, and even have certain powers in economic policy e.g. power supply and tourism. The Federation is responsible for foreign and monetary policies, and for the policies regarding defence, international trade, economic, energy, and customs, and the fight against crime. The cantons have their own constitutions, parliaments, governments, administration, courts, police forces, and so on.

Thus the *territorial autonomy of the national segments is constitutionalized on two levels: at the level of the state of Bosnia and Herzegovina in the form of the entities, and at the level of the Federation of Bosnia and Herzegovina in the forms of the cantons.* The territorialization goes hand in hand with a strong political institutionalization of the national segments that ranges from the almost state-like status of the entities to the broad cantonal political autonomy.

All the basic state-political institutions are structured according to the principle of proportionality and parity. The House of Representatives, the first chamber of the Parliamentary Assembly, is composed according to the principle of entity proportionality: one third of its members are selected in the Republika Srpska, and two thirds come from the Federation. The second chamber, the House of Peoples, follows the principle of entity and ethnic parity: one third of its members (five Serbs) are elected by the National Assembly of the Republika Srpska, and two thirds (five Bosniacs and five

(1970), Nordlinger (1972, 1974), Steiner K (1972). Several seminal texts can be found in McRae (1974).

² Legal and political theorists from Bosnia and Herzegovina define its political system in very different ways. Kuzmanović (1999) claims that it is a union or an alliance of states, Ibrahimagić (1999) says it is a decentralized state, while Hodžić (1998) argues it is a “complex state – a federation sui generis”.

Croats) are selected by the House of Peoples of the Federal Parliament. The Presidencies of both Houses are made up of one Bosniac, one Serb and one Croat. The Council of Ministers, as the national government is called, is composed according to the principle of entity proportionality; not more than two thirds of its members can be from the Federation. The Chair of the Council, appointed by the Presidency, in turn appoints ministers and their deputies from all constitutive peoples. Such constitutional provisions created the normative framework for the formation of a kind of grand coalition governments i.e. governments consisting of the parties of all three national segments. The State Presidency is formed by parity and consists of one Bosniac, one Serb and one Croat. Finally, the Constitution (Article 9 Paragraph 3) lays down that the “officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina”.

The constitutional system of the Federation is also founded on consociational mechanisms. Besides the cantonal territorial autonomy, it is built around the principles of proportional or equal representation of the Bosniac and the Croatian communities in all major federal political institutions and around consensual decision-making and qualified majorities. The Federal Parliament consists of two houses; the second House, the House of Peoples, is composed by parity. Its representatives are elected in the cantonal legislative bodies, and the number of representatives per canton is proportional to the ethnic composition of their respective populations. To prevent any canton to have an exclusive ethnic delegation in the House of Peoples, the Constitution (Article 8) sets down that in this House “there shall be at least one Bosniac, one Croat, one member of the other groups from each canton which has at least one such delegate in its legislative body...” Each House elects the president and their deputy, and they have to be from different constitutive peoples. The governments are in essence composed according to the principle of ethnic proportionality, as it is constitutionally designated that at least one third of the ministers must be Croats. The prime ministers and their deputies, and the ministers and their deputies must belong to different constitutive peoples. The federal president and vice-president must also come from different constitutive peoples, and are elected in both Houses of the Federal Parliament by the majority of the votes of the Bosniac and the Croatian representatives. There are three ombudsmen in the Federation: one Bosniac, one Croat, and one representative of the other groups. The Human Rights Court consists of three judges: a Bosniak, a Croat, and a representative of the other groups. The Constitution even requires that as a rule i.e. “if explicitly not otherwise specified”, in each federal court there must be an equal number of Bosniak and Croatian judges. The adherence to the principle of national proportionality is also a norm in the cantonal legislative, executive and judicial governments.

All important decisions are made by consensus or by qualified majorities in both Houses of the National Assembly. The simple majority rule of decision-making in the Assembly is explicitly constitutionally described and explained: the representatives “shall put in maximum effort for that majority to include at least one third of the votes of the delegates or members from each entity’s territory”. The Presidency makes decisions by consensus and “if all efforts to reach consensus fail”, the decisions may be adopted by two Members (Article 5 Paragraph 2c). The outvoted member of the Presidency may then “declare a decision to be destructive of a vital interest of the entity” he comes from; if this claim is confirmed by a two-thirds vote in the National Assembly of the Republika Srpska or in the federal House of the Peoples, this challenged Presidency Decision shall not take effect (Article 5 Paragraph 2d). This means that the Presidency members are veto actors since they have the factual power of veto on legislative decisions if they believe they are detrimental for the vital interests of their peoples or entities.

The most important decisions are mainly adopted by consensus or by qualified majorities in the Federation’s central political institutions as well, and generally by the consent of the majorities in both parliamentary houses. The decisions on the so-called vital interests of the two constitutive peoples are adopted by the consent of the special majority in the House of Peoples i.e. the majority of both the Bosniac and the Croatian members. The government must adopt all such decisions by consensus. In order for the laws and regulations concerning the vital national interests to be adopted, they must be voted for by the majority of the representatives of all three national clubs of the Council of Peoples in the Republika Srpska.

The relatively extensive criticism of the Dayton political system stems from two different sources. Experts mostly focus on the very concept of consociational democracy and on the pattern of its application in Bosnia and Herzegovina. The criticism of one empirical pattern of consociational democracy gives rise to the criticism of the entire theoretical concept it belongs to. This kind of criticism largely fits into the old dispute between consociationalists and liberals, but is given some extra weight by the fact that the critics can now point to a contemporary concrete case which, so they claim, reinforces their old arguments. Political criticism, on the other hand, has been motivated by primarily national-political reasons as the critics advocate a different model of a state.

2. Shortcomings of the consociational model: why democratic state does not function?

The implementation of consociational arrangements in building up political relationships in Bosnia and Herzegovina is justified by three reasons. First, Bosnia and Herzegovina is a paradigmatically divided society; many consider it to be the most divided European state (Reilly, 2001, 143). The political history of this country has been characterized by the coexistence and the conflict of three major religious and ethnic segments: Catholic-Croatian, Muslim-Bosniac, and Orthodox-Serbian. The religious segments began taking shape as far back as the 11th century following the collapse of the integral Christian community into the Western and the Eastern Church, and were intensified during the islamization of a part of the Bosnian Christian population under the rule of the Ottoman Empire (1463-1878). Historically speaking, the religious cleavages were the first to emerge; in the processes of the establishment of modern ethnic and national communities they morphed into ethnic and national cleavages. The nature of the cleavages and the resulting conflicts were affected by numerous factors, primarily foreign rule. Of the three states that ruled Bosnia from the mid-1400s to the end of the 20th century, the Muslims religiously and politically felt allegiance only to the Ottoman Empire, the Croats to the Austro-Hungarian Monarchy (1878-1918), and the Serbs to Yugoslavia (1918-1992). In more than five centuries of shared history, the members of the three major religious and ethnic communities never permanently, unitedly and massively stood behind one state. Only one community would do so, while the members of the other two would be adversaries or enemies of the incumbent ruling power. This centuries-old division was also manifested in the 1990s in the different attitude of the three communities to the idea of an independent Bosnian state.

Secondly and from the beginning, the religious and ethnic division of the society was recognized and institutionalized in different guises similar to consociational mechanisms: from the millet system in the Ottoman Empire,³ to the model of political confessionalism based on the principles of proportionality and parity during the Austro-Hungarian Monarchy, to the “national key” quota system also based on the principles of proportionality or parity in the representation of Muslims, Serbs and Croats in party, government and even social institutions and organizations in the communist Yugoslavia (Džaja, 1984, 202, 2004). This means that Bosnia and Herzegovina even before the war had some experience with the consociational mechanisms in the political relationships among its social segments, although we could not con-

³ G. Lehbruch (1974, 93) says that the millet system as established in the province of Lebanon in the Ottoman Empire belongs to the tradition of conflict resolution that fosters the development of a consociational political culture.

sider this as a genuinely enduring, coherent and conscious tradition of democratic consociationalism.

Thirdly, during and after the war (1992-5), the national cleavages among the social segments widened. Even more important, for the first time in the country's history these segments have been territorialized and politically institutionalized. Until that war, the three communities did not have compact geographical strongholds, but lived on the ethnically mixed territories in smaller homogeneous ethnic enclaves similar to the "tiger skin" (Đaković, 1985, 29 and others; Klemenčić, 1994). The process of the territorialization of the national segments got more or less completed in the war in two rather violent modes. The first was "ethnic cleansing" of the members of other ethnic communities from the areas in which one community had absolute or relative majority. The second was the military conquest of the areas in which the members of the aggressor community did not make the majority but their military-political leaderships thought those areas belonged to them due to some historical, military or economic reasons. Most displaced persons and refugees have not yet returned to their pre-war residences but to "the part of the country in which the people they belong to are the majority" (Papić, 2001, 24). This has radically altered the conditions for the construction of an independent state and efficient democracy in comparison to the conditions before the war.

Table 1. Favourable and unfavourable factors of consociationalism in BiH⁴

Favourable factors	Unfavourable factors
1. Distinct lines of cleavage among religious and ethnic segments	1. External threats
2. Three major segments and no majority segment	2. Radical nationalisms
3. Geographical concentration of segments and partial "administrative federalism"	3. Weak tradition of democratic consociationalism and elite accommodation
4. Small country and population size	4. Unequal segmental distribution of support to government by grand coalition
5. Relatively high internal political cohesion of segments	5. Weak approval of the principle of government by national elite cartels

⁴ The table uses Lijphart's list of the factors that foster or hamper consociationalism from his four seminal works on consociationalism as summarized by Bogaards (1998).

In Bosnia and Herzegovina at work are a few key structural factors that foster the establishment of consociational democracy: distinct religious and national cleavages that divide the society into three recognizable segments; almost “ideal-type” tri-segmental structure of the society that excludes the dual competition for domination as well as the efforts of the biggest segment to gain mastery over the other segments of the society; the geographical concentration of the segments and the institutionalized partial “administrative federalism”; the small country and population size; the relatively strong internal coherence of the segments. These are the so-called orthodox factors which some consider as the essential conditions for the establishment and survival of consociational democracy.

Among the unfavourable factors particularly significant are the external threats and the unequal segmental support to the consociational arrangements. The external threats remained – albeit in modified forms – despite the relative stabilization of the region. Although they can in general have a positive and a negative effect on consociational democracy, in Bosnia’s case they have always had a detrimental effect. Foreign powers never simultaneously threatened all three main social segments; their aggression was directed against only one or two of these communities, which would only drive the wedge between the segments even deeper and create a more profound division of the society. This was radicalized during the wars of 1991–5, when the lines of external conflicts coincided with the lines of internal divisions and conflicts. As the biggest aggressor, Yugoslavia (Serbia) threatened the Croats and the Bosniacs in Bosnia and Herzegovina; this external threat accelerated the dramatic splitting and conflicting among the segments. These “external frontlines” have not fully stabilized yet. While in Croatia the level of stabilization of the state and democracy is satisfactory, the state union of Serbia and Montenegro has been rift by disintegrational processes – the internationally monitored secession processes of Montenegro and Kosovo – which greatly destabilizes the Serbian state and indirectly affects the Serbian segment in Bosnia and Herzegovina. If these disintegrational processes drag out and intensify, they might in the long run affect the stability of Bosnia and Herzegovina, and even once again threaten its survival.

The unequal segmental support for the consociational model of democracy – both at the level of the elites and the masses – is nevertheless the biggest obstacle to its efficiency. There are three reasons for this inefficiency of the model of consociational democracy at the level of Bosnia and Herzegovina as a state, and one more at the level of the Federation as a state sub-entity: no consensus on the state, no consensus on the political system, no consistent strategy of international actors in establishing a democratic state, and the unfavourable two-segmental structure of the Federation with one segment outnumbering the other.

2.1. Lack of consensus on the state

The main cause of the inefficiency of consociational democracy in Bosnia and Herzegovina is the *lack of a minimal consensus of the members of all three constitutive national groups on the state*. The existence of such a consensus is otherwise formally determined by a constitutive referendum or a plebiscite in which the majority of voters ought to vote in favour of the new state. In Bosnia and Herzegovina such a referendum was held in 1992.

Table 2. Results of the 1992 referendum on independence

	Total	%
Registered voters	3,253,847	74.3
Number of voters	2,073,568	63.7
Invalid ballots	5,227	0.3
Valid ballots	2,067,969	99.7
For independent BiH	2,061,932	99.7
Against independent BiH	6,037	0.3

The referendum results show that the state of Bosnia and Herzegovina was established by the *consent of the majority of its citizens*. However, in the ethnically deeply divided and conflictual society such as that of BiH, the consent of the majority of its citizens is not enough for the survival of a democratic state. Namely, the citizens of BiH make up a paradigmatically multicultural or nationally differentiated citizenry (Kymlicka, 2003), which necessitates the *formal consent of the majorities of all major national segments of the society* or of all the constitutive peoples. It is this latter consent that has not been forged or confirmed even ten years after the end of the war. The cessation of overt political violence after 1995 can be interpreted as the consent of the majorities of all three national communities to peace, but not as the consent to living in a single state.

The overall majority of Bosnian Serbs boycotted the referendum in 1992. Even before the referendum, the Serbs had opted against their life in Bosnia and Herzegovina, and had militarily and politically de facto cut off the regions on which they lived from BiH. The Serbs saw the referendum primarily as a “show of support for the military option” (Popov, 1996, 62): the resounding affirmative vote of most Muslims and Croats for an independent BiH the Serbs saw as an open declaration of war (Plavšić, 2005). The majority of the Croats voted for the independence of BiH but primarily as a *contextually or contingently conditioned choice*. Their support was an outcome of the situation they found themselves at that time: between the life in Yugoslavia i.e. Serbia and Montenegro, and the life in Bosnia and Herzego-

vina they chose the second option as a lesser of two evils. Their consent largely “evaporated” in the processes of the territorialization and political institutionalization in the Croatian state or state-like creations in 1992 and 1993, and particularly following the conflicts between the Muslims and the Croats in 1993 and 1994. The contingency of their consent is corroborated by another fact: namely, the Croats originally conditioned their consent to the establishment of an independent state by the referendum definition of the nature of the state they were voting for. The Muslims wanted the referendum question to be formulated in the following way:

“Are you in favour of a sovereign and independent Bosnia and Herzegovina, a state of equal citizens and nations of Bosnia and Herzegovina – Muslims, Serbs and Croats and others who live in it?”

The Croats wanted the question to run as follows:

“Are you in favour of a sovereign and independent Bosnia, a state union of its constitutive and sovereign nations – Croats, Muslims and Serbs – in their national regions (cantons)?”

The differences between these two formulations from the constitutive aspect are more than obvious: while the Muslims envisaged Bosnia and Herzegovina as a unitary civil state, the Croats envisaged it as a federation or a confederation of its national units. In such special historico-political circumstances, for the Croats the secession of BiH from the former Yugoslavia was strategically more important than its internal political order, but this issue never disappeared from their agenda. The “revocation” of the Croatian consent to the state of Bosnia and Herzegovina had two major consequences: first, it probably signalled the eclipse of the civic majority that in 1992 gave its support to the state; and second, the bloc national majority that was in favour of the establishment of the state vanished. The Bosniacs became a minority, both from the civic and the national aspect.

Although the fact that since 1995 Bosnia and Herzegovina has existed as a state *not* built on a substantial minimal consensus of the majorities of all three national segments making up its “differentiated citizenry” is not publicly acknowledged, it is implied in the domestic policy as well as in the policy of international actors towards that state. The legalization of the Republika Srpska cannot be understood in any other way but as a major concession of the international community to the Bosnian Serbs for accepting the decision (imposed from the outside) of their leaders to remain within the borders of Bosnia and Herzegovina contrary to the political will of the majority. The legalization of the Federation was a minor concession of the international community to the Croats to remain in Bosnia and Herzegovina despite the fact that during the war it was obvious that they largely “revoked” their consent expressed at the 1992 referendum. This might explain

why the international community has not dared to introduce some more radical changes into the existing state structure or to call a new constitutive referendum in which the political will of the people and the peoples would be probed. The risks are incalculable, and its results might delegitimize everything that has been done so far for the reconstruction of the state. While implicitly surviving as a “non-consensual” state union, the country must remain under the international military and political protectorate.

2.2. Lack of consensus on the political system

The second key reason for the inefficiency of a consociational state and democracy is a *lack of the consensus of the elites of all constitutive peoples on the political system or a lack of a firm belief of the elites of all ethnic segments that the preservation of the existing constitutional and political system is necessary and desirable*. Lijphart has shown how this is invariably connected to the ability of the elites to create overarching loyalties among the different segments and solve problems in the “spirit of disagreement”. In other words, if the elites are not convinced that the existing political system is desirable, they will not try to create overarching loyalties among the social groups they represent.

The most formidable enemies of the existing constitutional model of the state and democracy are the Bosniac political and social elites, which have never willingly accepted it, arguing that it is an expression of the pressures of the international community, and that it legitimizes the aggression and the genocide (Imamović, 2003, 395; see also Đozić, 2003, 5; Duvnjak, 2004, 89). The existing constitutional model is challenged from the perspective of the concept of the “modern civic state”. It is argued that it was legitimized by the “civic referendum” of 1992 and that the overall majority of the citizens or the overall majority of the “Bosnian people” as the sole subject of the Bosnian state voted in favour of it (Ibrahimagić, 2001, 23). This does not mean the Bosnian people in the civic sense but an integral and naturally and historically shaped single Bosnian or Bosniac nation made up of the members of all three faiths. The contemporary BiH is but a “reincarnation of Bosniachood” as a nation: “While that Bosnian national reincarnation is a given for the Bosnian Muslims, it will take some time for the Bosnian Catholics and the Orthodox Serbs to accept it until the consequences of the many decades of Serbization and Croatization wear off.” (Ibrahimagić, 1999, 19).

The Croats and the Serbs in Bosnia and Herzegovina did not emerge in the “natural and historical” processes of national integrations, but are artificial and violent products of the “political propaganda of their neighbours and the ecclesiastical establishments” (61), the product of the activities of the

“Greater-Serbian and Greater-Croatian nationalist ‘mole’, that has turned the Bosnian Orthodox people into Serbs and Bosnian Catholics into Croats” (Ibrahimagić and Kurtćehajić, 2002, 25; also see Duvnjak, 2004, 71-72, and others). It is implied that the key national-integrational factor on the Bosnian territory should, and that partly it was, and that it will undoubtedly be the Bosnian state, and that Bosnians or Bosniacs of the three faiths should emerge – and that in the future they will emerge – as a “state-nation”. This approach is expressed by the motto: we have created Bosnia; now it’s time to create Bosniacs. However, from the Middle Ages to the end of the 20th century Bosnia and Herzegovina was never an independent state so that the state could never play the integrational role which is apparently attributed to it. On the contrary, in the intensive processes of the national integrations on the South-Slavonic territories in the second half of the 19th century and the first half of the 20th century, it belonged to different state entities – the Austro-Hungarian Monarchy and the monarchical Yugoslavia – in which the Croatian and the Serbian communities lived in Croatia and in Serbia. So the Croats and the Serbs in Bosnia and Herzegovina were not created through the “nationalist propaganda by the neighbours” but were a part of the processes of the integration of the Croatian and the Serbian nations within the same state entities. The processes of national integration among the Croats and the Serbs have been completed and it would be useless to expect that the Bosnian state, practically reconstructed from the outside after the civil war, will be able to “delete” their results and redirect them into the processes of the creation of a new Bosnian or Bosniac nation. That the creation of a state is not a sufficient condition for creating a nation is best illustrated by the failed attempt at creating a Yugoslav nation after the establishment of the Yugoslav state in 1918.

The assumption of a single Bosnian people or nation gives rise to the demand for a radical transformation of the constitutional political order. As there is only one people in Bosnia and Herzegovina, or one nation is deliberately being forged, there is no reason for dividing it into the entities and also for any ethnic regionalization or federalization of the state. There is no justification for the survival of the consociational arrangements as well. The unitary system should be consistently introduced at all levels and in all forms of activity. Because of such opinions, prevalent among the Bosniac scientific and political elites, but also among the general Bosniac population, most members of the Bosniac elite today act as *anti-system actors*.

The basic framework of the Serbian national ideology and political program was early on defined by the Bosnian Serb political warlord Radovan Karadžić. Among the variety of possible solutions to the Bosnian question, he deemed the division into the “Serbian Bosnia”, the “Croatian Bosnia” and the “Muslim Bosnia” to be the most probable one. In this union of the three Bosnias, he envisages the “Serbian Bosnia” as an ethnically clean and a

factually independent state. The Serbian state was legitimized by the 1991 Serbian plebiscite by which the Serb-occupied parts of Bosnia and Herzegovina were cut off and annexed to Serbia. The Serbian political elite claim that the Republika Srpska has gained and maintained the territorial and legal continuity from its establishment on 9 January 1992 until today. It was not – and this is the chief argument – created by the Dayton Agreement, but only verified by it, and it cannot be abolished by that Agreement's revision. It can be abolished only by “democratic consensus”, which is illusory. Bosnia and Herzegovina is acceptable to the Serbian political elite only as a union i.e. as an “asymmetrical confederal-federal state consisting of the Republika Srpska and the Federation of BiH” (Kuzmanović, 1999, 374). The existing constitutional model is the “maximal Bosnian state” that the majority of the Serbs can “stomach”. That is why the Bosnian Serbs are the chief guardians of the existing Constitution, but only contextually, of course: they began defending it after they had been forced to accept it because international actors did not recognize the Republika Srpska as an independent state.

The most difficult to reconstruct is the national ideology and the political program of the Croatian political elite in Bosnia and Herzegovina due to the “dual politics” that has, latently and manifestly, characterized the period after 1990. It has already been said that the Croatian support for Bosnian independence in the 1992 referendum was primarily contextually conditioned and was soon withdrawn. Then the Croatian military-political elite launched the territorialization and political institutionalization of its own national segment in the form of the Croatian Community of Herceg-Bosnia i.e. the Croatian Republic of Herceg-Bosnia, by which it practically furthered the process of the “fragmentation” of the Bosnian state which had to a large extent already been “fragmented” or dismantled. In 1994 it caved in under outside pressures and agreed to take part in the process of the reconstruction of the Bosnian state which began with the establishment of the Bosniac-Croatian Federation. The Croats have never been satisfied with their status within the Federation and have never accepted it voluntarily. On the contrary, it is claimed that the Dayton Agreement opened the Croatian national question in Bosnia and Herzegovina as it regulated the interethnic relations “at the expense of the Croatian people” (Žepić, 2002, 27). The Croats demonstrated the dissatisfaction with their position by trying to establish the third entity, the Croatian federal unit, by linking the cantons with the Croatian ethnic majority into a single political unit. The Croatian entity “should be viewed as a logical, justified, and just programmatic goal of the Croatian people in BiH as long as it is divided into entities and as long as there is the Republika Srpska in it” (Žepić, 2002, 164).

The Bosniac-Croatian Federation was undoubtedly built on unfavourable structural grounds. It is made up of two segments of very different size, as the Bosniacs hugely outnumber the Croats. Under such circumstances, and

despite the institutionalization of consociational mechanisms, the smaller group is objectively exposed to the attempts of assimilation or marginalization. Since the majority population does not possess satisfactory industrial and cultural capacities for a successful assimilation, the minority population has been resisting this assimilation and trying to institutionalize its territorial-political autonomy. This is the additional underlying reason preventing the proper functioning of the political system in the Federation and indirectly in the entire state. That is why the Croatian political elite advocate the establishment of the Croatian entity and the overhaul of the entire state and its reconstruction as an alliance of national entities.

A short overview of the main ideological-political positions of the three national elites shows that there is no consent on the fundamental principles of the political system of Bosnia and Herzegovina. The existing constitutional political system is conditionally accepted only by the Serbian political elite, but not by the Bosniac and the Croatian elites. While the Bosniac elite strives for a reform of the constitutional consociational state into a “pure” liberal civic state, the Croatian elite wants a federal state or a state alliance of the three national units. In such a constellation of political goals, interests and views there is not enough space for the accommodation among the elites. This limits the possibilities for an efficient consociational democracy, having in mind that the role of political elites is “undoubtedly the most important element of consociational democracy” as it is only they who can bridge the cleavages among social segments and to ensure the survival of a community through their cooperation (Lijphart, 1992, 59).

2.3. Strategy of international actors in building the state and democracy

The third cause of the inefficiency of the state is the incoherent and inconsistent strategy of the international community. This is important because in Bosnia and Herzegovina the strategy of “cooperative internationalization” was employed (O’Leary, 1989), in which the international community played the role of the promotor of the establishment and the preservation of peace and the instigator of the negotiations among the conflicting parties and the control over them. Although it would seem, based on the Dayton Peace Accord and the factually “octroyed” constitutional documents, that the international community opted for Bosnia and Herzegovina as a consociational democracy, it did not pursue this strategy but constantly modified its institutional-political preferences and promoted the model solutions nearest to the “old” or “radical” liberalism. We shall illustrate this by the examples of electoral engineering, the media politics, and the attempts at changing the structure of the federal parliament.

Electoral design is considered to be “the most powerful lever of constitutional engineering” (Horowitz, 1991, 163; 2003). There are two dominant schools of thought regarding this problem: consociational and centripetalist. The consociational model of democracy centres round the idea of fair political representation of all important social segments in the legislative and the executive branch of government which can be realized only by means of proportional electoral rights. Lijphart considered proportional electoral system – especially its sub-type closest to the “mirror theory” – the model backbone of consociational democracy. The centripetalist approach on the other hand prefers majoritarian electoral systems with preferential voting. This model is based on the idea that these systems might be conducive to the agreements on “preference exchange” among various ethnic actors and in that way encourage the accommodating behaviour of political elites and voters in elections and politics in general. Centripetalism is, in principle, non-functional in the states in which ethnic communities live on geographically homogeneous areas; accordingly, and due to the geographical concentration of the ethnic segments in Bosnia and Herzegovina during and after the war it became nonfunctional in that country as well. However, international actors do not think so.

The post-war electoral practice followed the consociational tradition. In the post-conflictual elections of 1996 and in the 1998 elections, the House of Representatives of the Parliamentary Assembly was elected on the basis of a proportional electoral system that “maximizes proportionality” i.e. excluded the legal electoral thresholds and abolished the division of the state into constituencies. In the elections of 2000 and 2002 the pure proportional system was replaced by a compensatory electoral system with two levels of the mandate division: 30 mandates at the level of the constituencies and 12 mandates at the national level. The country was divided into eight small- and mid-size constituencies. There was a 5% threshold for the participation in the distribution of the mandates at the level of the constituencies (although the natural threshold in all the constituencies was higher), but at the national level there was no legal obstacle for gaining mandates, and the lists that had not obtained 5% of the votes could nevertheless get the mandates. In the first round of the distribution of the mandates at the national level, the mandates were distributed according to the total number of votes the lists had gained in all the constituencies. Owing to this, the parties that had obtained 1.1% and 1.3% of the votes got a mandate in the 2000 parliament; in 2002 the mandates were given to as many as seven parties that gained between 1.1% and 2% of the votes. These seven parties together gained 10.9% of the votes and took up 16.7% of the seats. These were primarily small “non-ethnic” or multi-ethnic parties whose marginal support in the electorate might be hugely disproportionate to the “pivotal” role they might play in the adoption

or the rejection of the constitutional reform before the forthcoming parliamentary elections in 2006.

The second example is related to the media policy. During the war three separate media systems were created with a plethora of radio and TV stations, newspapers and magazines and official news agencies. After the war, international actors decided to selectively change this situation by some measures that even restricted the freedom of the media. Besides, they directly encroached upon the cantonal constitutional powers as, according to the Federal Constitution the cantons are – among other things – responsible for “making policy concerning radio and television facilities, including decisions regarding regulation and provision thereof” (Article 4, Paragraph I). Namely, the Office of the High Representative decided to establish three TV networks: the Federal RTV, the RTV of the Republika Srpska and the PBS Public Service. The Bosnian Croats were outraged by this decision and clamored for a separate Croatian TV channel instead of the Croatian-Bosnian federal television. In order to make the Croats finance the federal television, unorthodox methods were devised to collect the TV subscription fee: the receipts first came attached to the electricity bills and later the phone bills. Despite the threats that due to the non-payment of the “joint utility bills” their power or phone would be cut off, the Croats massively demonstrated civic disobedience and refused to pay the bills, dissatisfied with the Federal TV which they consider a “Muslim TV”. The Croatian cultural and social institutions in 2004 launched a petition demanding the creation of a Croatian TV or a Croatian channel within the federal TV.

Nevertheless, the most dramatic consequences so far were triggered off by the attempt to alter the structure of the Federal Parliament. A month before the 2000 parliamentary elections, the OESS proposed the manner in which the elections for the House of Peoples (the second chamber of the Federal Parliament, supposed to institutionally protect the equality of the minority nation) were to be carried out. According to Article 8 of the Federal Constitution, the representatives in the House of Peoples are elected indirectly by the cantonal assemblies; the Croatian members are elected by the Croatian representatives in the cantonal assemblies, and the Bosniac members by the Bosniac representatives in the same cantonal assemblies. According to the proposed electoral legislation reform, all the representatives of the House of Peoples would be elected by all the representatives of the cantonal assemblies. As the Bosniacs outnumber the Croats in the cantonal assemblies, this would mean that their influence in electing the Croatian representatives would be incomparably bigger and momentous than the influence of the Croats on the election of the Bosniac representatives. The HDZ therefore rejected this proposal, interpreting it as a betrayal of the fundamental principles of the structure of the federal institutions and a threat to the principle of equality of the two constitutive peoples of the Federation. Although

international actors saw in this claim an attempt to protect the narrow party interests and the party monopoly in the political and social life of the Croats in BiH, the HDZ's argument nevertheless was valid in principle. In response to this act of the international community, the HDZ convened in 2000 the Croatian National Assembly (Sabor) of all Croatian parties; there they adopted the Declaration on Sovereignty of the Croatian People in Bosnia and Herzegovina, and demanded that the electoral law reform be abandoned. The Sabor then called for a referendum in which the Croats were to declare whether they are in favour of the establishment of their own entity within the Federation. The referendum which the OESS and the OHC declared illegal, was duly held, and 70% of the voters were in favour of the establishment of a Croatian entity in the Federation.⁵ Based on the referendum results, the Sabor in 2001 declared the Croatian self-rule in Bosnia and Herzegovina and announced that the Croats were quitting the Federation and constituting themselves as the third entity in Bosnia and Herzegovina. High Representative retaliated by ousting the president of the HDZ from his post in the Presidency and by suspending a number of political, military and other officials of that party in the federal and governmental bodies. The conflict ended when the international community gave up on the electoral law reform and the HDZ rescinded the Croatian self-rule.

That example showed once again that international actors do not have a comprehensive and coherent strategy of building a democratic state in Bosnia and Herzegovina. It showed in a politically dramatic way how a lack of such a strategy creates space for reckless and irresponsible experiments with the reforms of the constitutional order that may lead to serious political crises in the country. The HDZ's political demands in the first phase of its conflict with the international community, directed against the electoral reform and, consequently, the constitutional order, were an expression of "legitimate minority nationalism" protecting the fundamental collective rights of the Croatian national community in the Federation that had been institutionalized and that the arbitrary acts of international actors tried to deinstitutionalize. This contributed to the radicalization of the Croatian politics or offered it an exceptionally good excuse to radicalize. The consequences of this radicalization never, however, hurt only the members of other national communities, but also the members of the very national community in whose name national politics is being radicalized. This does not only include the international economic, political and moral sanctions against a community but also

⁵ "The international community was especially disappointed by the high turnout for the referendum that the OESS and the OHC declared illegal, and that provided for the HDZ in BiH the justification for the establishment of a separate Croatian partial state in Bosnia and Herzegovina. Because of this, the elections were a fiasco for the UN authorities. The nationalist parties, primarily the HDZ BiH, once again proved their strength and showed to the OHC and the OESS the limits of their influence" (Kasch, 2002, 342).

narrows the space for “internal dissent” and at the same time opens space for imposing “internal restrictions” of the civil rights and freedoms of a community in the name of the preservation of its collective identity and the realization of its collective goals (Kymlicka, 2003, 54-55 et al.; Kimlika 2002, 41 et. al). The above mentioned political furore postponed the potential internal pluralization of the Croatian community and, contrary to the intentions of international actors, only strengthened the HDZ.

3. Constitutional changes: prospects for a democratic state?

3.1. Constitutional design: theory

Bosnia and Herzegovina, as a typically divided society is, according to Lijphart (1992), faced with three options:

- the division of the state into three separate homogeneous national states – the Bosniac, the Croatian and the Serbian. The Croatian and the Serbian state would immediately join Croatia and Serbia;
- the transformation of the divided society into an undivided one through the assimilation of one or several segments;
- the acceptance of the divided society and the establishment of a consociational democracy.

These hypothetical options do not exist in Bosnia and Herzegovina. First, it was reconstructed as a state community by the will of the international community which practically vetoed the division of the state in 1995. Despite all the wrangling and disputes among international actors regarding the present and the future of this state, it is not realistic to expect they will lift that veto. So, Bosnia and Herzegovina is going to remain an international state subject, independent of the will of its constitutive peoples. It is an internationally designated and protected state community, so that any attempt to change this situation in the existing constellation of international relations is useless and meaningless. That is why the Bosnian Serbs and the Croats have to give up on their maximalist nationalist goals aimed at the secession of the areas of Bosnia and Herzegovina they inhabit. The external designation is perhaps not a desirable but is a realistic starting-point for the agreement of the political representatives of the three constitutive peoples on how to arrange the political and social life in the country.

Second, in Bosnia and Herzegovina no national segment significantly outnumbers the others nor is culturally so dominant that it would have enough capability and potential to assimilate one, let alone two other segments. Even before the war it was unimaginable that the Muslims could politically and culturally assimilate the Serbs and the Croats. During the war

the cleavages among the national segments were widened and deepened to such a degree that their patching up or at least mending is not possible in the immediate future. The post-war Bosniac assimilation project of creating a new Bosniac nation is historically a debacle and politically extremely dangerous. Even a veiled assimilation project based on the assumption of an integral Bosniac people as the sole sovereign is not politically viable.

The major political and social actors in Bosnia and Herzegovina will have to put up with the reality of living in a divided society. In order for their coexistence to be possible, the state ought to be established as a consociational democracy. And for this consociational democracy to be viable, every elite must begin implementing the policy of accommodation. The externally imposed consociationalism cannot survive if there is no political will of the domestic elites. The key issue is, therefore, whether there are structural conditions for the accommodational policy of the national elites that would be conducive to their replacing the policy of conflict with the policy of accommodation. The policy of accommodation means that every elite would have to give up on their maximalist national interests and goals in favor of achieving compromise solutions. The starting bargaining positions of the three sides must eliminate the “zero sum” rule according to which one side takes all and all other sides get nothing. In other words, the elites must a priori renounce the intention to achieve in negotiations their exclusivist or maximalist political goals at the expense of the other parties. Also, the starting bargaining positions must include the assumption that there are non-negotiable issues which the negotiators have no mandate to talk about, such as the identities of the constitutive communities or the renunciation of these identities or their change.

The exclusivist nationalist attitudes regarding the political system of Bosnia and Herzegovina can be summarized as follows:

- the Bosniac political elite advocates a unitary civil state;
- the Serbian political elite advocates the exclusive status of Republika Srpska as a nation-state of the Bosnian Serbs and its union with the rest of the state;
- the Croatian political elite advocates the state as a union of three national entities.

Hence the Dayton political regime is unequivocally supported only by the Serbian political elite, while the Bosniac and the Croatian elites are disgruntled with it, do not accept it, and would be practically continually obstructing it were it not for the international political actors who have been forcing them to respect it while it is formally in effect. However, the international actors would most probably proffer their support to any proposal of political system reform about which the political elites of the three constitu-

tive communities have reached an agreement and consent. Is such an agreement possible?

Apart from the above underlying rationales representing the first political preferences of the three national political elites, it seems that their shift to the positions of the “second best solutions” would be relatively easy, as they express their second political preferences. After the start of the negotiations among the elites in the “spirit of agreement about the general disagreement” but with the goal of overcoming this “general disagreement” in order to create the foundations for a viable democratic state, most probably in the long and difficult first round of secret negotiations behind the closed doors (in order to avoid the negative or hysterical reactions of the respective publics to various concessions and counter-concessions of their negotiators), the chief actors will switch to the positions that express their second political preferences. The Serbian political elite might agree to a union of the three entities and thereby come close to the starting Croatian position. However, a political alliance between the Serbian and the Croatian elite would be illusory for several reasons. First of all, the international political actors have already renounced this solution by their uncompromising suspension of the Provisional Croatian Self-rule. They would not accept it even in different circumstances as it would seem that they are in favor of a Croatian-Serbian alliance and against the Bosniacs. After all, it is not likely that the international actors would support the starting positions of any side, including the Croatian. The moment the Serbs supported the Croatian position, the Croats would have to renounce it as this is their maximalist demand in the existing circumstances. Therefore they would give up the concept of the confederation of the three states in favor of an ethnic federation i.e. a federation of three or more ethnic cantons. The Bosniac side would probably relinquish their plan for a unitary civic state and embrace the concept of a non-ethnic federation i.e. a federation of several non-ethnic cantons, which is for the Bosniac side a tolerable political solution. After the first round of the negotiations, the political positions of the three negotiating parties would look like this:

- the Serbs would accept a state union of the three national identities;
- the Bosniacs would accept a unitary federation i.e. a federation of non-ethnic cantons;
- the Croats would agree to an ethnic federation i.e. a federation of ethnic cantons.

In the second, incomparably more tortuous and unforeseeable round, all the negotiating parties would have to come up with the new “conceptual” and practical concessions. Conceptually the biggest concession would have to be made by the Serbian side. The Serbian side cannot be expected to forego the concept of the national territorial-political organization, so it

would be useless to insist on that. The Serbs might be offered to restructure the Republika Srpska into two or three geographical cantons in which the Serbs would make a majority. The Federation could be territorially-politically restructured so that instead of today's ten cantons there would be four or five with the Croatian and the Bosniac majority respectively. All the cantons would make up the federal units of Bosnia and Herzegovina as an ethnic federal state. In this way both the Republika Srpska and the Bosniac-Croatian Federation would cease to exist as separate state-political entities. At the same time, the ethnic cantons would be normatively allowed different forms of cultural, economic, and political cooperation and ties.

So, the first condition for the creation of a viable democratic state is a free territorial-political organization of the three major national units. Bosnia and Herzegovina is not sustainable as a non-ethnic or "administrative-territorial" federation modeled after Germany or Austria, nor can its ethnic communities be satisfied with some sort of "unemotional regionalism" characteristic for Western nation-states. The ethnic communities are now largely geographically concentrated and it is no longer very difficult to draw territorial borders among them. The deliberate creation of artificial administrative borders among the cantons and giving administrative names to the federal cantons only disguises the fact that there is an ethnic territorial-political self-rule at work here. This can also be understood as a veiled strategy by which the plans for a territorial-political overhaul of the Federation and the entire state are stalled deliberately so that the ethnic composition of some areas can be altered. The liberal-democratic nature of the multi-ethnic federation would be manifested in the guarantees of individual civil and political rights that all the governments would have to provide (Kimlika, 2002, 84).

This would be a "win some, lose some" solution for all the sides. Of course, the Serbs would be the biggest losers as they would be left without its "state within the state". However, they would be compensated by something that in the long run seems incomparably more important for the legitimacy and the credibility of the Serbian politics in Bosnia and Herzegovina and in the international arena. The Bosniacs and the Croats would agree to the territorial-political organization of the Serbs in the ethnic federal units and in the areas seized in the war, in which the Serbian ethnic segment has since been territorialized and politically institutionalized as a majority following the politically and morally odious mass ethnic cleansing and criminal activities. The Bosniacs would get a more integrated Bosnian state than the one envisaged by the Dayton Agreement, and the Croats their national territorial-political self-rule within the existing state borders.

The second condition for the creation of a viable democratic state is the institutionalization of the other essential consociational mechanisms or the mechanisms typical for the democracies in which government is divided.

The main political institutions ought to be structured in line with the principles of proportionality and parity. There ought to be some normatively stipulated conditions under which decisions are made by consensus and qualified majorities in the federal government bodies. Also, the constitutional veto issues in the political system and the veto actors should be precisely defined.

3.2. Constitutional design: a political blueprint

In 2005, on the occasion of the tenth anniversary of the signing of the Dayton Peace Accord, the international community, primarily the USA, launched a debate on the constitutional reforms. The entire process was in fact foisted on the domestic political actors by threatening to bloc Bosnia and Herzegovina's entry into all Euroatlantic integrations and cut down on international economic aid if they did not accept the constitutional reforms. Under such pressure, seven political parties (three major ethnic parties – SDA, HDZ, SDS – and four smaller parties – SDP, SNSD, HNZ and PDP) in March 2006 signed the so-called “American plan” of constitutional reform and ushered it into the due parliamentary procedure.

The “American plan” envisages a two-stage constitutional reform: the first phase should be carried out before the parliamentary elections in October 2006, and the second after the elections. The content of the first phase is operationalized in the Agreement on the Annexes and the Amendments to the Constitution, while the content of the second phase remains unknown. It is generally presumed that the first phase contains easier changes while the second stage should cover the most difficult and thorniest part: the country's territorial-political division.

The first phase would include the structure of the central government institutions – the State Presidency, the Parliamentary Assembly, and the Council of Ministers – and the methods of their decision-making.

In the formal sense, the most significant change would refer to the institution of the president of the state. While the Dayton Constitution envisaged it as a collective body made up of directly elected and equal representatives of the three constitutive peoples, after the reform it would be transformed into a three-member body with the president and two vice presidents, elected by the Parliamentary Assembly. The candidates for the Presidency can be the members of the Parliamentary Assembly if their nomination is supported by 20% of the members of the House of Peoples or 10% of the members of the House of Representatives. Three ethnic candidates for the Presidency are selected by the majority of votes of the parliamentary families of the three constitutive peoples in the House of Peoples. This three-member list is confirmed by the House of Representatives. The Presidency

will again be made up in line with the ethnic or entity principle: “The list must contain at least one member of the Presidency of BiH from each entity and one member of the Presidency of BiH from each people at the most.” While the members of the Presidency are nominated and elected by the members of both Houses, the right of impeachment belongs solely to the House of Representatives: the president and the vice presidents are impeached if at least two thirds of the House of Representatives are in favor of their ouster with the proviso that this majority must contain at least half of the representatives of the people whose member of the Presidency is being removed from office. The manner of the election of the president of the Presidency is not precisely defined but only broadly outlined as a sort of the rota system or some other procedure that will be later defined by the Parliamentary Assembly. It is stipulated that the Presidency decides by consensus on three issues: the defense of the state, the appointment of the Constitutional Court judges, and the appointment of the members of the Central Bank Board.

Concerning the content, the most important change refers to the method of election, the principle of decision-making and the power relationship between the two Houses of the Parliamentary Assembly. First, the number of the members of the House of Representatives has been more than doubled: from 42 to 87; three seats are explicitly reserved for the representatives of the national minorities. From the concept of the “minimal parliament” both in its size and the powers, there will be a gradual transition to the “normal parliament” with the number of the representatives more appropriate for the population size, and with bigger powers. The decisions shall be made by majority, with the proviso that “maximum effort” shall be made that this majority includes at least one third of the representatives of every entity.

The number of representatives in the House of Peoples will also be increased, from 15 to 21. The members of the House of Peoples shall be elected indirectly as always, but not by the entities’ parliaments as before but by the House of Representatives of the Parliamentary Assembly. In order to elect the House of Peoples, three national families shall be *ad hoc* formed in the House of Representatives which elect seven members into the House of Peoples. The basic function of the House of Peoples remains the protection of “vital national interests”,⁶ and the fundamental institute is the right of

⁶ Vital national interests are: the right of the three constitutive peoples to be represented in the legislative, the executive and the judicial bodies; the right to the preservation of their identities; the right to territorial organization; the right to the organization of public bodies of government; the right to education; the right to the use of language and alphabet; the right to the use of national symbols and flags; the right to the protection of spiritual legacy, especially to the nurture of religious and cultural identity; the right to the preservation of the integrity of BiH; the right to a public information system; the right to submitting amendments to the Constitution of

veto. The right of veto in the House of Peoples can be exercised by the majority of the representatives of one constitutive people for all specified instances of threatening vital national interests (see the footnote). The only exception is the last stipulation: that the term vital national interest may refer to any not explicitly mentioned issue if two thirds of one national family in the House of Peoples decide so. In such cases, for the veto to be valid it must be opted for by two thirds of the representatives of one people. The veto right may be challenged by the majority of the representatives of one of the other two constitutive peoples, and they can file a complaint with the Constitutional Court which then adjudicates on the binding decision concerning the procedural and substantial justification of exercising the right of veto.

And finally, the size and the powers of the Council of Ministers are going to be increased with the establishment of the Ministry of Agriculture and the Ministry of Science, Technology, and Environmental Protection. The Council is made up in line with the parity principle. The President of the Council must be nominated by one sixth of the representatives in the House of Representatives and is elected in three ballots. The Council of Ministers shall “try to make all the decisions by consensus”. If there is no consensus, decisions will be made by simple majority with the support of at least one minister from each constitutive people.

3.3. Conclusion

The constitutional changes do not alter the two-entity division as the fundamental constitutional-political framework of the country. They will somewhat shift the balance of power in the direction of the central government by increasing the powers of the Parliamentary Assembly and the Council of Ministers, and to a certain extent by the changes in the manner of electing those bodies and the decision-making processes in them. However, they greatly alter the ethnic relationships in that country by formally equalizing the status of the two-nation Federation with the status of the single-nation Republika Srpska. The Federation is implicitly regarded as a Bosniac entity, which is obvious from the discourse of international representatives who denounce every demand by the Croatian community for its territorial-political autonomy as the demand for “the third entity”, which implies that there are already two entities – the Serbian and the Bosniac – and that the Croats are clamoring for their own – the third – entity. While the Serbs in the Republika Srpska have been granted the right to “establish parallel ties” with Serbia, the Croats in the Federation have been practically denied that right. Paradoxically, but the decision on the establishment of “parallel ties” with

BiH; the right to veto any issue that two thirds of the members of one national family in the House of Peoples declares to be an issue of vital national interest.

Croatia can be made by the Bosniacs but not the Croats in the Federation. It is not difficult to see that this exacerbates the so-called Croatian question in that country.

The ethnic principle is increasingly being replaced by the entity principle, so that the key actors of domestic policy are now the territorial-political entities and not the collective ethnic communities. They decide on the transfer of authority to the central government and, upon reaching an agreement, they can transfer the powers back to themselves.

The principles of consensus and qualified majorities in decision-making in central government institutions have been losing ground in favor of simple majorities. The consensual decision-making in the Presidency has been reduced to three areas. The House of Representatives make decisions by plurality, which practically means that all the decisions can be made without the votes of the Croatian representatives, but not without the votes of the Bosniac or the Serbian MPs.

There are two main consequences of the first phase of the constitutional changes. The first consequence will be manifested in the deepening of the two-entity division of the country as it will be more difficult and not easier to reform it. The second consequence will be the aggravation of the "Croatian question" in Bosnia and Herzegovina.

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