

# Cutting the Gordian Knot in Bosnia and Herzegovina

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Just after the polling stations on October 2, 2022, in Bosnia and Herzegovina (BiH) had closed, High Representative Christian Schmidt dropped a bombshell when he imposed changes to the Election Law of BiH as well as 21 amendments to the Constitution of the Federation of BiH. (This would have probably stopped everybody in the country in their tracks, if Sting had not given a concert in Sarajevo, exactly 25 years after U2's performance.) The first [decision](#) was enacted in July 2022 and followed leaked OHR documents implying further ethnic fracturing of the country through changes to the Election Law. This caused widespread anxiety in parts of the country and demonstrations in front of the OHR building in Sarajevo. Dark premonitions were soon dispelled when the High Representative seemingly changed his mind and imposed only technical changes to the Election Law. Visibly under pressure, the High Representative even had an outburst in front of cameras but maintained that he may impose further changes as well. And so he did.

In its [Opinion](#) on the constitutional situation in BiH, the Venice Commission had critically observed, already in 2005, that

*“...it is however certainly not a normal situation that an unelected foreigner exercises such powers in a Council of Europe member state and the justification for these powers for the future merits not only political but also legal consideration. The powers can be qualified as emergency powers. By their very nature, emergency powers have however to cease together with the emergency originally justifying their use.”<sup>1)</sup>*

The renewed use of the Bonn powers<sup>2)</sup> and their recent impact to change the BiH Election Law on the evening of the elections as well as constitutional amendments raises the question of the sustainability of this complex post-conflict arrangement in BiH. Was the quick fix by the High Representative necessary, useful and justified? What about other structural problems? While the results of the elections have not yet been confirmed and will be subject to further analyses, the decision of the High Representative opens the discussion again: What is the plan for a sustainable constitutional framework? Is there even one?

## Ethnic Power-sharing for Most and Constitutional Exclusion of Some

Being a compound of two Entities, 10 cantons, and one autonomous district combined with the parity of three constituent peoples (Bosniaks, Croats and Serbs), BiH is a peculiar ethno-territorial creation: Bosnians usually define it a “complex

State". This compromise to end a war maintains a kind of *status quo* ever since 1995, with the consociational system and consensus-based politics which often block the functioning of the institutions. And while the support for ethno-nationalist parties is probably at its all-time high, the position of "Others" (national minorities or undeclared citizens) is at its all-time low, as they are excluded from some political offices by the very Constitution. Over the years, this discrimination has been the subject of several cases before the European Court for Human Rights (ECtHR). Starting with the landmark decision in 2009, deciding in the case of [Sejdić and Finci v. BiH](#), the Court qualified the constitutional provisions as discriminatory, which render the applicants (in this case the "Others") ineligible for election to the Presidency of BiH. The ECtHR reinforced the above decision in the cases of [Zornić v. BiH](#), [Pilav v. BiH](#), [Šlaku v. BiH](#)<sup>3)</sup> and [Pudarić v. BiH](#).<sup>4)</sup> However, to this day, none of these decisions have been implemented as solutions for (better) inclusion of the "Others" require constitutional amendments<sup>5)</sup> and thus consensus by ethnic elites. The continuous violation of rights due to the lack of implementation of the ECtHR-judgments is a reason for the International Community and the European Union to insist on constitutional reform (after this topic has been off the table for a decade).

On top of this, there are legal and political problems with the electoral system in the FBiH. In 2016, in its [decision U-23/14](#) the Constitutional Court of BiH ruled that certain provisions of the Election Law are not in conformity with the Constitution of BiH ([Ljubić](#) case). One of the provisions was that "each of the constituent peoples shall be allocated one seat in every canton" (of the FBiH, the entity with a Bosniak and Croat majority), independently from their demographic strength. Other unconstitutional provisions include those that define the number and ethnic belonging of the delegates in the House of Peoples in the Parliament of the FBiH based on the census from 1991. Nevertheless, the Parliamentary Assembly of BiH failed to implement the decision within the stipulated time. This forced the Constitutional Court of BiH to render the provisions ineffective in 2017 (decision on non-enforcement U-23-14 [D.72](#)). The vacuum was filled by the Central Election Commission of BiH with the "Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in BiH under the Election Law of BiH", which provides for the division of mandates in the House of Peoples of the Parliament of the FBiH according to the 2013 census (see further [Joseph Marko](#)). Compared to the 1991 census, the 2013 census demonstrates the stunning consequences of the armed conflict on the ethnic composition of the country.

## **The Dual Crisis Over the Last Months: Announced Secession (RS) and No Government (FBiH)**

Instead of being a tranquil year without elections, and use the opportunity for reforms and constructive change (see further [Lidia Bonfatti](#)), 2021 saw major political controversy and institutional crises. In July 2021, the outgoing High Representative, [Valentin Inzko](#), imposed amendments to the BiH Criminal Code to sanction the denial of genocide and the glorification of war criminals. This stirred up strong

reactions, in part because of the inadequate dealing with the past. Then Serb member of the BiH Presidency, Milorad Dodik, aggressively pushed not only for the suspension of participation of Serb representatives in state-level institutions but also for a withdrawal from state-level institutions including armed forces, judiciary, and tax authorities essentially instigating secession of Republika Srpska. These were contrasted in spring by the High Representative and by the Constitutional Court.<sup>6)</sup>

In the other entity, the Bosniak-Croat Federation, dysfunctionality has dominated, ever since the last parliamentary elections in 2018, as its institutions have remained essentially provisional. The Government of the Federation, for example, kept functioning in the so-called technical mandate with several ministers being also elected in legislatures, thus performing executive and legislative functions in parallel. The Election Law has been blamed as the reason for the lack of mechanisms to elect the House of Peoples (see also [here](#)). According to the Bosnian Croat party HDZ, there is a problem of “legitimate representation”, as Croats from smaller Cantons are over-represented and their delegates are often determined by other groups (voters are free for whom to vote). This diminishes the effective strength of HDZ, which is particularly strong in Herzegovina and claims to be “the true representative” party of Croats in BiH. The delegates of the ethnic groups in the House of Peoples have a veto power and can block bills violating a “vital national interest.” The delegates also control the appointments to important offices in the institutions nominated by Parliament, as these are proportionately held by the three constituent peoples. A change of the electoral law has therefore long been a political demand of the Croat party HDZ.

## **The Shortcut: Swift Solutions Imposed by International Decree**

On the evening of the elections, High Representative Schmidt decided to intervene with a “[functionality package](#)” for “ensuring timely implementation of the results of the October 2022 elections” and for setting “the stage for further electoral and constitutional reform”.<sup>7)</sup> The package includes various [amendments to the Election Law](#) and [amendments to the Federation Constitution](#), and – according to Schmidt – “only relates to the post-election establishment of indirectly elected bodies”. The central part of the package is devoted to the House of Peoples of the Federation, its composition and the processes of forming it. It shall “implement the Constitutional Court decision in the *Ljubi#* case by improving the proportionality of representation of constituent peoples from each canton in the Federation House of Peoples” avoiding “severe overrepresentation (...) in cantons with very small populations of each people”. Accordingly, each constituent people’s caucus is increased from 17 to 23 seats; each canton will continue to have at least one representative for each constituent people by contrast with earlier plans, leaked in the summer, to introduce a threshold of 3% of the population as a minimum requirement for representation. Also, the number of seats of “Others” is increased from 7 to 11 opening their representation from all 10 cantons. In conformity, the related provisions of the election law are amended, but also the application of the latest census. This

raises questions regarding Annex 7 of the DPA (right to return of refugees): as long as its full implementation has not been declared by the OHR, the pre-war census of 1991 must be used as reference for the population; instead, it appears that the constitutional amendment now bases calculations on the new census of 2013 (new article IX.7.2), which would affect the distribution of mandates as ethnic belonging has become more territorially embedded which favors more homogenous areas. This part also includes amended procedures for the election of the President and Vice-President of the FBiH: their swift election shall be guaranteed through lower majority thresholds, which apply after fixed deadlines have passed. However, if there is no political will, these measures will hardly create functioning institutions automatically and there are no sanctions (nor can there be). Perhaps the addition of a principle of loyal cooperation to the package can be seen as an implicit acknowledgment of this unresolvable problem. If there were loyal cooperation, however, even a bad Constitution could actually function. Also, the list of issues that can be invoked as vital national interest-veto in the House of Peoples has been significantly reduced. Another part of the package concerns the selection of judges of the Supreme Court and the Constitutional Court of the FBiH, which shall be guaranteed, again, by deadlines and procedural facilitations after their expiry. In the end, there is even “a measure (which) obliges (the two legislative) bodies to develop procedures for considering citizen initiatives to encourage a more responsive and accessible legislative process”.

## **No Shortcuts to Achieve Necessary and Sustainable Constitutional Change**

In May 2019, the European Commission published its [feasibility study](#) on the path to EU membership. The problems listed are nearly the same as those already identified 15 years earlier by the Venice Commission, with “Bosnia and Herzegovina (...) overall at an early stage regarding its level of preparedness...”. This strongly suggests that there has been a long standstill for the sake of stability, an interest shared by all sides. The latest double crisis is serious and questions this stability-compromise. Reforms in many sectors are needed and the political will to adopt them to complete BiH’s democratic transformation. The European Commission also has made it clear that EU accession cannot take place without changes to the Dayton Constitution (starting with the implementation of the *Sejdić and Finci* case law). The intervention by the High Representative does not add elements which favor reaching such constitutional change. On the contrary, it contains a disclaimer that the ECtHR cases cannot be addressed, as this would be *ultra vires*. The decrees are rather a shortcut that hopes to create the political conditions for containing (or appeasing) the political forces which have unleashed the dual crisis. The measures do not open chances for structural change; they rather cement the current system. Their substance, which will probably favour the Croat party HDZ, and the [confirmation of prior coordination with Croatia](#) on the issue as well as the timing of their imposition on the evening of the elections are controversial. This risks transforming the High Representative from a moderator and facilitator into a divisive (f)actor. Instead of discussing options for constitutional reform, there is now a renewed debate on the OHR and the Bonn powers. The EU Delegation and

the EU's High Representative Josip Borrell officially reacted to the international decrees with a sober "(we) take note" clarifying that "[t]his was a decision of the High Representative alone." It's high time for an overall, inclusive and strategic approach which includes constitutional reform.

Throughout 2022, the Americans, the British, and the EU Delegation conducted negotiations with the political elites on constitutional and electoral law reforms, to no avail. In parallel, the EU Delegation experimented with a [Citizens Assembly](#) of 57 randomly selected citizens. Their recommendations differ significantly from the proposals of the international community and political parties. For instance, they suggest the indirect election of a four-member BiH Presidency (from among the members of the House of Representatives), with each member serving as President for one year. True innovation is their recommendation of the abolition of the House of Peoples, with veto rights to be exercised, instead, by *ad hoc* caucuses in the House of Representatives.<sup>8)</sup> 27 years after the end of the war, instead of backroom deals or international imposition, one might ask citizens for their view about the future of the country. The more so, as they might otherwise not respond anymore but emigrate or do not engage at all: a turnout of a mere 50,41% at the elections is a clear warning sign.

## References

- European Commission for Democracy through Law, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, COUNCIL OF EUR. (MAR. 11, 2005), (par. 86); [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e). The Opinion confirmed the increasing criticism in academic debate, e.g. Gerald Knaus & Felix Martin, Lessons from Bosnia and Herzegovina: Travails of the European Raj, 14 J. OF DEMOCRACY 60, 61–63 (2003).
- Extended powers of the High Representative, introduced by the Peace Implementation Council in 1997 to enable the implementation of the Dayton Peace Agreement. Only in 2002, then High Representative Wolfgang Petritsch had used those powers for imposing amendments to the Federation Constitution.
- Šlaku v. Bosnia and Herzegovina, App no 56666/12 (ECtHR, 26 May 2016).
- Pudari# v. Bosnia and Herzegovina, App no 55799/18 (ECtHR, 8 December 2020).
- The amendment-procedure is simple, in comparative perspective, as it only requires a decision by the Parliamentary Assembly, including a two-thirds-majority in the House of Representatives (article X).
- The High Representative blocked RS legislation by using his Bonn powers (Decision Enacting the Law on Amendments to the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, 12 April 2022). In May, the Constitutional Court declared declarations by the RS National Assembly unconstitutional which aimed at withdrawing powers from the judiciary at state level; in July, a RS law on medical care was annulled.

- So the title of the summary of the two HR's Decisions: "Measures to improve Federation functionality", 02/10/2022.
  - Other recommendations are in line with the conclusions of the Venice Commission's 2005 analysis or the 2006 "April Package" for constitutional reform; See Delegation of the EU to BiH, BiH Citizens' Assembly presents its recommendations on constitutional and electoral reform to the BiH Parliament (Mar. 17, 2022), <https://europa.ba/?p=74565>.
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