

THE ELECTION LAW: Slalom Along Nine Gates

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On Tuesday, February 23, we have witnessed the new long announced beginning of political negotiations and agreements between Dragan Čović, president of Croatian Democratic Union (HDZ) B&H, the non-governmental organization Croatian National Assembly (HNS), and the leader of the Party of Democratic Action (SDA) Bakir Izetbegović. Although it was announced that the dialogue headed in three directions: amendments to the B&H Election Law, a set of topics related to the functioning of the Federation of B&H (among which the most crucial are the implementation of the 2018 elections, i.e. the appointment of the President and Vice President of the Federation of B&H and the Government of the Federation of B&H, appointment of the missing judges of the Constitutional Court of the Federation of B&H, and the eventual constitution of the two cantons) and EU integration, there is no doubt that the amendment of the B&H Election Law, which has been fiercely advocated by the Croatian side in recent years, is at the heart of these negotiations.

Before the 2022 General Elections, Čović is aspiring to generate amendments to the B&H Election Law that would ensure the "legitimate representation" of the constituent peoples, i.e. the victory of the HDZ B&H candidate and related parties in the race for the B&H Presidency and obtaining enough hands in the cantonal assemblies to ensure dominance in the 17-member Croat club in the House of Peoples in the Parliament of the Federation of B&H. With the acquired positions in the three "counties", in the Council of Ministers of B&H and the Government of the Federation of B&H, he would ensure dominance in the House of Peoples of the Parliamentary Assembly of B&H, and thus, applying the rules of consensus and veto, ensure that the Croatian side becomes and remains a dominant factor, not only in decision-making regarding key issues in B&H that are imposed on the political decision-making agenda by other political stakeholders and the international community, but also in order to achieve its key political objectives as easy and promptly as possible. In this way, with the "legitimate representatives", the doors would be opened for the implementation of their own long-term strategy, which undoubtedly goes in the direction of rounding off the territory of the parts of Bosnia and Herzegovina which is inhabited by the Catholic majority, i.e. the rebirth of the "extinguished" so-called Herzeg-Bosna, its complete territorial and political autonomy and its eventual annexation to the Republic of Croatia.

Thus, the amendment of the Election Law of B&H, 25 years after the Dayton Agreement, is put at the top of the political focus of HDZ B&H and it has become a matter of topmost importance to the identity of Bosnian Croats. These negotiations (for the umptieth time) are setting off in a social environment that is defined as the "permanent temporary", i.e. in the setting of unfinished and uncompleted constitutional and legal repairs that were to be made in compliance with the judgments of the European Court of Human Rights in Strasbourg, the rulings of the Constitutional Court of B&H, as well as the judgment of the Constitutional Court of the Federation of B&H (namely the removal of unconstitutional terms "prefect", "county", the name "Herzeg-Bosnian county", etc.). So, instead of promoting stability within institutions of the state of B&H and establishing a stable democracy, the B&H society and state are still groping in the dark, in the fog of ethno-nationalism, constant ethnic strife, and the unfinished conflicts of the 1990s.

We are witnessing that the democratic transition in Bosnia and Herzegovina from an authoritarian (one-party) system having been in place for 45 years (1945–1990), which began in 1990 to change into a system of stable, consolidated liberal democracy, is still ongoing. We label that process as democratization, which formally and legally began in 1990 with the first multiparty elections in Bosnia and Herzegovina on November 18, 1990. This was the period of the so-called third wave of democratization in the 20th century (S. Huntington writes about three waves and two counter-waves of democratization) which was initially characterized by transformation and replacement – "trans-plantation", with an emphasis on the strong role of opposition to the ruling regime, in the case of B&H, the Communist League of B&H, and simultaneously the adaptive role of the old regime party to new conditions. Hence, this process of pluralization of the Bosnian political scene began during 1990, when "democracy flourished" (Ćurak). The crescendo of this "negative democracy" was achieved "through the constitution of political parties on a mono-ethnic basis" (Ćurak) and it was abruptly interrupted by armed aggression against the internationally recognized Republic of Bosnia and Herzegovina in the period between 1992 and 1995. Therefore, we can call this process a process of democratization, which is contrary to the concept of stable democracy, respectively consolidated democracy, which in the case of Bosnia and Herzegovina has not been reached as yet. The process of democratization is to be distinguished from a stable, consolidated democracy, for which R.A. Dahl states as being characterized by "the government's continuing responsibility towards the demands of its citizens, who are considered politically equal." In the process of democratization that began with the fall of the Berlin Wall in 1989, and in B&H in 1990 with the fall of the socialist regime, Bosnia and Herzegovina went through phases of transition, replacement and relocation of the authoritarian, one-party system to a multiparty system (Huntington), which led to the discontinuation of ideas (ideology), institutions and procedures of the former regime. However, we still cannot define Bosnia and Herzegovina as a new "stable democracy". With the end of the war and the bloody conflicts, culminating into genocide, the Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina) was signed, of which Annex 3 – the Agreement on Elections is an integral part. This was the basis for the establishment of the OSCE Interim Election Commission (PIK), the adoption of rules and regulations, and the organization of multiparty elections under the supervision of the OSCE all until 2002. In August 2001, the B&H Permanent Election Law was passed, and in 2004, three international members of the Election Commission of B&H (now the Central Election Commission of B&H) left the body, practically handing over the "ownership" of the election process to the domestic actors. Altogether, eight presidential and parliamentary election cycles were held in the post-Dayton period (plus two early elections in Republika Srpska, that in 1997 and 2007), as well as seven local election cycles.

"After the collapse of the socialist regimes, the former one-party states underwent multiparty elections in the early 1990s and declared themselves as liberal democracies, but had not yet established stable liberal democratic institutions, thus being labelled new democracies."

Certainly, multiparty, competitive, "free and fair elections" are essential for the realization of a successful democracy and their conducting principally and seemingly symbolizes the accomplishment of democratic government and the principles of free and democratic elections (principles of free, general, equal, direct and secret elections). However, such elections themselves are insufficient to achieve that objective, i.e. building and maintaining a successful and stable democracy, achieving democracy as defined by Robert A. Dahl. The mere technical

conducting of elections that manifestly reflect democratic competition leads to a state that theorists have defined by the term electoralism. Therefore, the demands for amendments to the B&H Election Law are quite okay, provided that they are not a pretext for changes in the key paradigm: the principle of political representation, which can be regulated only by amending the B&H Constitution.

Let us remind that electoralism describes the paradoxical social situation where the transition of an authoritarian regime is initiated and managed by that same incumbent ruling regime. However, due to the dominant position of the existing authoritarian regime throughout the transition process, it fails to achieve the institutional qualities of a stable liberal democracy.

In "electoralism", the regime basically conducts and portrays elections as "free and fair." The absence of mass election fraud and intimidation on Election Day should formally confirm the democratic process. However, such a system lacks other essential elements of democracy, such as the rule of law, equal civil and political rights, and the institutional separation of powers. The entire election process is aimed at preserving the position of the current regime.

Many policymakers and scholars engaged in the promotion of democracy equate elections with democratization. They argue this by claiming that "free and fair" elections are the core, the central mechanism that enables "navigation" towards new democracies. As an ideology, electoralism elevates elections above all other dimensions of democracy. It starts from two key assumptions. Firstly, it is assumed that the competition campaign or "chaff" as Robert Dahl calls it, of a democratic order, will yield a process in which purposeful political parties, alliances and coalitions emerge to compete and, regardless of the relative strength of those parties, form parliamentary or presidential systems, shape fair election administrations and representative legislative bodies. Secondly, it is assumed that some minimal form of "electoral" democracy would be the outcome of that process. Although such regimes may still be far from liberal democracies – insofar as their armies are not subordinate to elected civilian officials, their executive power is not limited by other independent government institutions or their civil and political rights are not recognized – electoralists believe that the democratic "goods" stem from the fact that their legislative and executive offices are filled by means of conducting regular competitive elections.

Critics of electoralism question these assumptions. While, on one hand, most critics accept that conducting elections will have significant political importance in the least compelling the competing forces to change strategies and strengthen some electoral stakeholders over others, on the other hand, they believe that such elections can reduce or even exclude significant parts of the population from the process. Competitive elections can also cloud the way in which critical arenas of decision-making are beyond the control of elected officials. Moreover, there is no guarantee that the holding of elections will produce other democratic institutions, such as democratic political parties, representative legislative bodies or a fair election administration. Nor will electoral democracies necessarily become liberal democracies. Lastly, critics note that electoralism can produce unintended consequences including inciting or prolonging civil war.

Nonetheless, there are signs that electoral democracies have positive effects on civil and political rights and can evolve in more liberal democracies. Where there is electoral competition, there are also demands for accountable governance, airing of opposition's positions, and public policy debates. Thus, electoralism may or may not lead to full democratization. What matters is whether unexpected or opportunistic arrangements are aimed at guaranteed stability or, even, whether legitimizing undemocratic rules through elections can be translated into lasting and

reliable arrangements of distribution of power and respect for a wide range of civil and political rights. This mainly depends on the extent to which elections are "free and fair" in the broadest sense of these terms. Although external election observers may consider certain elections free and fair based on the voting procedures and their observation on election day (for instance, secrecy of voting, access to all polling stations, suitable ballot boxes, correct counting procedures, etc.), more effective measurement of freedom and fairness is the degree to which crucial freedoms are present before election day, especially equality before the law, equal civil rights, freedom of movement, speech, assembly and association, equal access to public broadcasters, and freedom from intimidation in connection with elections and the election campaign. If during the preceding months there is an evident lack of transparency, failure to establish an independent and impartial election commission, a dirty election campaign, excessively biased access to the media or public funds, prejudiced and harmful treatment of candidates by the police, army and courts, and so on, then the prospects for a lasting democratization even after the elections are bad. Furthermore, if key parties in the electoral process have not agreed on the principle of political representation, how the elections should be conducted, who is entitled to vote, what type of electoral system will be used, what constitutes freedom and fairness, what topics are subject to democratic voting, then elections will not serve the purpose of democratizing a society. But if this context is based on a "democratic bargain," and on jointly set rules agreed upon by all participants, then it is more likely to produce the outcomes assumed by the electorate.

So, what does electoralism represent? It is a political understanding, ideology, but also a practical policy that assumes that the mere conducting of elections can "transfer, establish or strengthen democracy in undemocratic, pre-democratic or semi-democratic political systems" (Kasapović). It is a type of electoral policy characterized by the conduct of frequent elections at all levels of the political system, especially at the national level, without previously reaching the "democratic bargain" and a comprehensive social agreement on key aspects of free and fair elections.

In Bosnia and Herzegovina, as we have already pointed out, between 1996 to 2020, i.e. within the period of 24 years, eight parliamentary, eight presidential and seven local election cycles were held, with two cycles of early elections in the Republic of Srpska (1997 and 2007). All these electoral cycles were characterized by discriminatory electoral legislation, especially with regard to the exercise of rights guaranteed by the International Covenant on Civil and Political Rights (1966) and the Optional Protocols (1996 and 1989) and the European Convention on Human Rights. At national level, there is still no place in the B&H Presidency and the House of Peoples of the Parliamentary Assembly of B&H for B&H citizens other than those who declare themselves as Bosniaks, Serbs or Croats. The same goes for the level of election of the president and vice president of the entities. This greatly leads to the characterization of the B&H electoral system as discriminatory. Continuing to conduct election cycles under such conditions is nothing but the Bosnian-Herzegovinian electoral delusion, mere electoralism. That is why the need to make amendments to the B&H electoral system quite in place. At the same time, these changes may not be allowed to bypass the obligations for amendments in the constitutional and legal system that we are obliged to implement by implementing the binding judgments of the European Court of Human Rights as well as of domestic constitutional courts. It is up to the domestic politicians to run – in ski terminology – a slalom along nine gates.

Gate 1 – Implementation of the judgment of the European Court of Human Rights in the case of Sejdić-Finci vs. B&H

The proceedings in this case were instituted with two applications (Nos. 27996/06 and 34836/06) against Bosnia and Herzegovina, filed by two citizens of Bosnia and Herzegovina, Dervo Sejdić and Jakob Finci, on July 3, and August 18, 2006 before the Court. They complained that they were prevented from running in the elections for the House of Peoples and the Presidency of Bosnia and Herzegovina on account of their Roma and Jewish origins. They referred to Articles 3, 13 and 14, Article 3 of Protocol No. 1, and Article 1 of Protocol No. 12.

After a comprehensive review of the application, on December 22, 2009, the European Court of Human Rights ruled that there had been a violation of Article 14 in conjunction with Article 3 of Protocol No.1, relating to the inability of the applicants to stand for election to the House of Peoples of Bosnia and Herzegovina; it furthermore ruled that there had been a violation of Article 1 of Protocol No. 12 due to the inability of the applicants to run in the elections for the Presidency of Bosnia and Herzegovina.

To date, this final and binding judgment has not been enforced yet.

Gate 2 – Implementation of the judgment of the European Court of Human Rights in the case of Azra Zornić vs. B&H

In the case of Zornić vs. Bosnia and Herzegovina, proceedings were instituted following an application (No. 3681/06) against Bosnia and Herzegovina filed before the Court by a citizen of Bosnia and Herzegovina, Azra Zornić, on December 19, 2005. The European Court of Human Rights rendered a final and binding judgment on June 4, 2014.

Azra Zornić, who does not declare herself as a member of any of the "constituent peoples", but as a citizen of Bosnia and Herzegovina, and for that reason the Court assessed that this case is identical to the case of Sejdić and Finci. Although, unlike the applicants in this case, who were of Roma and Jewish origin, the applicant in this case does not declare herself as a member of any particular group, she is also prevented from running for Presidency of B&H and the House of Peoples on the grounds of her origin.

The Court found that there has been a violation of Article 14 of the Convention in conjunction with Article 3 of Protocol 1 in relation to the impossibility for the applicant to run in the elections for the House of Peoples of Bosnia and Herzegovina; and that there has been a violation of Article 1 of Protocol 12 in relation to the impossibility for the applicant to run in the elections for the House of Peoples of Bosnia and Herzegovina; The Court also held that there had been a violation of Article 1 of Protocol 12 in relation to the impossibility for the applicant to run in the elections for the Presidency of Bosnia and Herzegovina.

To date, this final and binding judgment has not been enforced yet.

Gate 3 – Implementation of the judgment of the European Court of Human Rights in the case of Ilijas Pilav vs. B&H

The European Court of Human Rights also ruled in the case of Pilav vs. Bosnia and Herzegovina on May 17, 2005. The proceedings in this case were initiated in connection with the application (No. 41939/07) against Bosnia and Herzegovina submitted to the Court by the citizen of Bosnia and Herzegovina, Ilijaz Pilav on September 24, 2007. The applicant complained in particular about the legal inability to run in the elections for the Presidency of B&H, and to vote for a member of his community for that position. He referred to Article 1 of Protocol 12 to the Convention. The applicant is from Srebrenica and declares himself as a Bosniak (one of the "constituent people").

In 2006, as a candidate of the Party for B&H, the applicant submitted his candidacy for the 2006 elections for the Presidency of Bosnia and Herzegovina. On July 24, 2006, the Central Election Commission of B&H issued a decision rejecting his candidacy. The explanation stated that the applicant could not be elected to the Presidency from the territory of the Republika Srpska, given that he declared himself as Bosniak. According to Article V of the Constitution and Article 8.1 paragraph 2 of the 2001 Election Law, a candidate for the Presidency from that entity must be a Serb. On September 20, 2006, the Party for B&H and the applicant appealed to the Constitutional Court of B&H, alleging a violation of Article 1 of Protocol 12 to the Convention. On September 29, 2006, the Constitutional Court of Bosnia and Herzegovina found that there was no violation of that provision (decision no. AP 2678/06).

Although a member of one of the "constituent peoples", the applicant was denied the right to be elected a member of the Presidency of B&H due to a disputed residence claim. The Court found that this exclusion was based on a combination of ethnic origin and place of residence, both of which served as grounds for different treatment falling within the scope of Article 1 of Protocol 12, and as such constituted discriminatory treatment contrary to Article 1 of Protocol 12. The Court therefore found that there had been a violation of Article 1 of Protocol 12 regarding the inability of the applicant to run in the elections for Presidency of B&H.

To date, this final and binding judgment has not been enforced yet.

Gate 4 Implementation of the judgment of the European Court of Human Rights in the case of Samir Šlaku vs. B&H

In the case of Šlaku vs. B&H, the European Court of Human Rights rendered a judgment on May 3, 2016, finding that there had been a violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No.1, in relation to the inability of the applicant to run in the elections for the House of Peoples of Bosnia and Herzegovina, and that there has been a violation of Article 1 of Protocol 12 in relation to the inability of the applicant to run in the elections for the House of Peoples of B&H and in the elections for the Presidency of Bosnia and Herzegovina.

The proceedings in this case were initiated in connection with the application (No. 56666/12) against Bosnia and Herzegovina filed before the Court by a citizen of Bosnia and Herzegovina, Samir Šlaku, on August 8, 2012. The applicant complained that, as a member of the Albanian national minority in B&H, he had no right to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because he was not a member of any "constituent people".

To date, this final and binding judgment has not been enforced yet.

Gate 5 - Implementation of the judgment of the European Court of Human Rights in the case of Svetozar Pudarić vs. B&H

Svetozar Pudarić submitted the application to the European Court of Human Rights due to the applicant's inability to run in the elections for the Presidency of Bosnia and Herzegovina as a B&H citizen of Serbian nationality residing in the Federation of Bosnia and Herzegovina. In this judgment, the European Court pointed out that it had already found that a similar constitutional precondition constituted a discriminatory difference in treatment and a violation of Article 1 of Protocol No. 12 in the judgment Pilav vs. B&H, which concerned the inability of Pilav, an ethnic Bosniak residing in Republika Srpska, to run for a member of the B&H Presidency.

The Court also pointed out that the Constitution itself does not explicitly condition the exercise of passive suffrage with the requirements of residence (with reference to Articles II 2 and V of the B&H Constitution), and that

such a condition was introduced by the 2001 B&H Election Law. The Court reiterated that no statutory provision of domestic law should be interpreted and applied in a manner incompatible with the obligations of States under the Convention, especially if this would be contrary to the prohibition of discrimination and more broadly to the principles on which the Convention is based. This certainly applies to the respondent State, whose own Constitution gives the Convention "priority over all other laws".

The Court has not found any fact or argument which could persuade it to reach a different conclusion as to the merits of this complaint. Having regard to its own jurisprudence on the subject, the Court ruled that in the present case the applicant had been discriminated against on account of his eligibility to run for the Presidency of B&H. The Court therefore held that there had been a violation of Article 1 of Protocol 12 to the Convention.

To date, this final and binding judgment has not been enforced yet.

Gate 6 - Implementation of the block of judgments of the Constitutional Court of the FB&H regarding unconstitutional denominations such as "župan", "županija", "bošnjački jezik"...

By the Judgment of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-11/97 dated 20 November 1997 and 11 February 1998 ("Official Gazette of the Federation of B&H", No. 24/98), the Constitutional Court of the Federation of B&H ruled that the provisions of Articles 4, 8, 9 and 78 of the Constitution of Herzeg-Bosna County are not in accordance with the Constitution of the Federation of Bosnia & Herzegovina. The Constitutional Court, starting from the definition of the Constitution of the Federation of B&H, determined that the Federation of B&H consists of federal units with equal rights and responsibilities and that the fundamental idea of the equality of peoples must also be upheld at the cantonal level. This idea must also be reflected in the symbols of the cantons (coat of arms and flag). The symbols of the cantons must not represent the traditions of only one constituent people (Croats), because that is in contradiction to the fundamental idea of the Constitution of the Federation of B&H, the Constitutional Court emphasized.

By the Judgment of the Constitutional Court of the Federation of B&H No. U-29/98 dated 11 November 1998 it was determined that the use of the term "county" in the title and in Articles 1 to 18 of the Law on Federal Units (cantons-counties) ("Official Gazette of the Federation of B&H", No. 9/96) is not in accordance with the Constitution of the Federation of B&H, because Article 12 of the Constitution of the Federation of B&H states that "the Federation of Bosnia and Herzegovina consists of federal units (cantons)".

By the Judgment of the Constitutional Court of the Federation of B&H No. U-24/98 dated 10 November, 1998 it was determined that 51 articles of the constitution of Canton 10 (Livno) are not in accordance with the Constitution of FB&H, and that the use of the term "župan" in 15 articles of the Constitution of that canton is not in accordance with the Constitution of the Federation of B&H.

By the Judgment of the Constitutional Court of the Federation of B&H No. U-13/99 dated 04 November 1999 it was determined that the use of the terms "županija" and "župan" in certain provisions of the Constitution of the Central Bosnia Canton (more than 90 provisions) is contrary to the Constitution of the Federation of B&H.

Likewise, by the Judgment of the Constitutional Court of the Federation of B&H No. U-12/99 dated March 29, 2000 it was determined that the use of the terms "župan" and "županija", as well as "governor" and "deputy governor" in the Constitution of the Herzegovina-Neretva County-Canton, is not in accordance with the Constitution of the Federation of B&H.

Judgment of the Constitutional Court of the Federation of B&H No. U-7/98 dated 07 July 1998 ruled that

the provisions of the Constitution of the West Herzegovina Canton, namely Articles 8, 9, 10, and 30 unconstitutional, while the use of the term "county" in the Constitution of that canton is not in accordance with the Constitution of the Federation of B&H.

By the Judgment of the Constitutional Court of the Federation of B&H No. U-25/98 dated 10 November 1998, the provisions of the Constitution of the Posavina Canton, in which the terms "županija" and "župan" are used in the Constitution of that canton, were declared unconstitutional.

Although, on the surface, these judgments have no direct connection with the electoral system and solutions in the B&H Election Law, it is very important from the aspect of the rule of law to answer the question why only one judgment of the B&H Constitutional Court (U-23/14) would have priority and exclusive enforceability and the others not?

Gate 7 – Implementation of the decision of the Constitutional Court of B&H Nr. U-14/12

Another obstacle that must be cleared is the implementation of the ruling of the Constitutional Court of B&H in the case No. U-14/12 dated March 26, 2015, issued upon the appeal of Željko Komšić. This ruling declared the provisions of Article 80 paragraph (2) item 4 and Article 83 paragraph (4) of the Constitution of Republika Srpska as well as Article IV.B.1. Article 1 paragraph (2), and Article IV.B.1 Article 2 paragraphs (1) and (2) of the Constitution of the Federation of B&H, as well as Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law of B&H unconstitutional.

The disputed provisions of the Constitution of RS stipulate that the president of RS has two vice presidents from different constituent peoples, who are elected directly from the list of candidates for president of the Republika Srpska, so that the candidate with the highest number of votes is elected president, while the vice presidents are elected from among the candidates from the other two constituent peoples who won the largest number of votes following the elected president of Republika Srpska. The disputed provisions of the Constitution of the Federation of B&H stipulate that the President of the Federation of B&H has two vice-presidents from different constituent peoples, who are elected in accordance with the Constitution of the FB&H. At electing the president and two vice presidents of the FB&H, a minimum of one third of the delegates from the clubs of Bosniak, Croat or Serb delegates in the House of Peoples may nominate the president and two vice presidents of the Federation of B&H, which requires the acceptance of a joint list of three candidates by majority vote in the House of Representatives of the FB&H Parliament, and then by a majority of also the club of each constituent people. Articles 9.13, 9.14, 9.16 and 12.3 of the B&H Election Law, which elaborate these constitutional provisions of the two entities with regard to the election of the president and vice-president of the entities, have also been found unconstitutional.

With this decision, the Constitutional Court of B&H declared the above mentioned provisions inconsistent with Article II/4 of the Constitution of B&H as well as with Article 1 of Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (General Prohibition of Discrimination). However, the Constitutional Court of B&H did not repeal the above provisions of the B&H Constitution and the B&H Election Law, i.e. it did not order the B&H Parliamentary Assembly, the RS National Assembly and the Federation of B&H Parliament to harmonize these provisions until the domestic legal system adopts constitutional and legal measures that are to stop the existing incompatibility of the Constitution of B&H and the Election Law of B&H with the European Convention that had already been established by the European Court of Human Rights in the provisions of the judgments in the cases of Sejdić-Finci v. B&H and Zorić v. B&H. However, that does not amnesty the ruling political elites from

their obligation to ensure equal rights for all their citizens.

An important message of this ruling of the Constitutional Court of B&H is the over and over reiterated fact that the entire Constitution of B&H, in addition to the main text, includes 15 international human rights agreements from Annex I to the B&H Constitution that are directly applicable in B&H, rights arising from the European Convention on Human Rights including all Protocols, which is not only directly applicable in B&H, but under Article II/2 of the Constitution of B&H, supersede all other laws. It was especially emphasized that the rights warranted by Article II/4 of the Constitution of B&H are guaranteed to all persons without discrimination on any grounds. The importance of this article is especially emphasized by Article X / 2 of the Constitution of B&H, according to which no amendment to the Constitution of B&H can eliminate or diminish any of the rights and freedoms from Article II of the Constitution of B&H, nor change this provision.

Gate 8 - Implementation of the Ruling of the Constitutional Court of B&H No. U-23/14

In the Judgment of the Constitutional Court of B&H No. U-23/14 dated 1 December 2016, the provisions of the Election Law of B&H, Chapter B, Article 10.12, paragraph (2), in the part reading "Each constituent people is allotted one seat in each canton", were declared unconstitutional, because they are not in accordance with the Constitution of the Federation of B&H, which determines that one Croat, one Serb and one Bosniak from each canton will be elected only if there are such among the elected members in the cantonal assembly. The B&H Parliamentary Assembly was ordered to harmonize these provisions with the B&H Constitution within six months. That has not been executed yet. In the meantime, in order to achieve a smooth functioning of the constitutional legal system, the Central Election Commission of B&H adopted in 2018 the Instruction on the Amendments to the Instruction on the Procedure of Conducting Indirect Elections for Governmental Authorities in B&H, covered by the B&H Election Law that regulates the election of delegates for the House of Peoples of the Parliament of the Federation of B&H from 10 cantons.

Following this verdict of the Constitutional Court of B&H, Borjana Krišto filed an appeal in which she challenged parts of the Constitution of the Federation of B&H regarding the election of delegates to the House of Peoples of the FB&H Parliament. However, she soon withdrew this appeal. It is assumed that she received assurances from those close to the B&H Constitutional Court that, regardless of the reasoning of Judgment U-23/14, her appeal would not be sustained, as it would lead to complete chaos and paralysis of the system.

In the reasoning of this verdict, the Constitutional Court of B&H accepted the appellant's construct "legitimate political representation", which implies that constituencies are the ethnic groups, thus opening a Pandora's box in a multiethnic community and granting the HDZ B&H opportunities to demand by means of ultimatums and blackmail amendments not only to the method of election of delegates to the House of Peoples of the FB&H Parliament (which represents the merits of Judgment U-23/14), but also to the method of election of members of the Presidency of B&H, which is not treated at all by this judgment, but is the subject of the judgment of the European Court of Human Rights in the Sejdić-Finci case. In doing so, the Constitutional Court of B&H has utterly compromised the current method of electing the House of Peoples of the Parliament of the Federation of B&H, but not only of that, yet also of all other institutions at state, entity, regional and local level, the establishment of which is based on ethnic structure. In such case, the head or member of any institution that is based on ethnic affiliation would not have "legitimacy" if a member of another nation voted for him/her?! For example, the B&H Council of Ministers, the entity governments, the House of Peoples of the FB&H Parliament, and the RS Council of Peoples, all state institutions, are

appointed on the basis of the candidate's ethnicity. However, the mechanisms of their selection are different.

If the reasoning of the Constitutional Court of B&H were applied *ad litteram*, the question would arise, for example, of the legitimacy of Bosniaks and Croats in the Government of Republika Srpska, because, in line with that reasoning they are not legitimate representatives of Croats and Bosniaks in RS, as they were elected by the political will of the Serb majority in the RS National Assembly.

Let us remind that the members of the cantonal assemblies are elected directly by the voters (emphasized by S.A.) registered in the Central Electoral Register – which means of all voters, Bosniaks, Croats, Serbs, and all others. They are not restricted in any way to vote for whomever they want, to the best of their belief and conscience. This mere fact alone calls into question everything that the B&H Constitutional Court stated in the reasoning of this judgment. Even if the structure of delegates elected from individual cantonal assemblies to the House of Peoples of the Parliament of the Federation of B&H were changed, nothing would change in terms of concept, because by only literally interpreting the reasoning of Judgment U-23/14, no elected representative would have full legitimacy, as they were elected by voters belonging to other ethnic groups or they do not declare any ethnic affiliation at all.

On the other hand, the logic implying that where Bosniaks are the majority, the principle of "legitimate representation" should be applied, and where Bosniaks are a minority, the civic principle of political representation should be applied, doesn't stand the test, rendering the substantial amendment of the B&H Election Law all the more improbable.

Regarding the election of the Presidency of B&H, the problem is that this change is desired to be carried out without going into amendments to the Constitution of B&H. So, the focus is not on the comprehensive re-conceptualization of the election of all members of the Presidency of B&H, i.e. the implementation of the ECHR Judgment in the Sejdić-Finci case, but only on the realization of the HDZ B&H request for a different election of the B&H Presidency members from the Federation of B&H. At a press conference on February 23 this year, Dragan Čović declared that it was possible to do so without amending the Constitution of B&H. One should wait to see those solutions. Yet, in any case, it is important to avoid new lawsuits before the European Court of Human Rights. Čović's insistence to only amend the B&H Election Law, and not the B&H Constitution, has a clear political reason. If changes are made to the Constitution of B&H, it will be required to change the method of electing all institutions in B&H, and not only the House of Peoples of the Parliament of the Federation of B&H. In such case, it would be required to undertake significant amendments to the RS Constitution, the method of their election and their competencies, and not only of the president and vice president of Republika Srpska and the Council of Peoples of RS, but also of all city and municipal local communities. The question is whether Čović would have the support of Milorad Dodik for such extensive changes to the B&H constitution?!

Gate 9 – Implementation of the 14 priority recommendations from the Opinion of the European Commission on B&H's application for membership in the European Union

The state of Bosnia and Herzegovina applied for membership in the European Union on February 15, 2016. Subsequently, on 20 September 2016, the Council of the European Union called upon the European Commission to submit its opinion on this application.

In the Strategy for the Western Balkans as of February 2018, the Commission stated that "by constantly investing effort and engagement, Bosnia and Herzegovina could become a candidate for membership." At the EU-Western Balkans summit held in Sofia in May 2018, EU leaders reaffirmed their unequivocal support for the EU

perspective of the Western Balkans, while the Western Balkan partners reiterated their commitment to this perspective, which represents their strategic orientation. The EU leaders aligned the Sofia Declaration and the Sofia Priority Agenda, which set out new measures to enhance co-operation with the region in key areas such as security, the rule of law and migration.

In its Conclusions and Recommendations, the Commission states: "Bosnia and Herzegovina still does not sufficiently meet the criteria relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities established by the European Council in Copenhagen in 1993."

The Commission also emphasizes that Bosnia and Herzegovina will need to fundamentally improve its legislative and institutional framework to ensure that 14 key priorities are met, including:

1. Ensure that elections are conducted in line with European standards, by implementing the relevant recommendations of the OSCE/ODIHR and the Venice Commission, ensure transparency in the financing of political parties and hold local elections in Mostar

(...)

4. Thoroughly improve the institutional framework, including at the constitutional level, in order to:

(...)

f) ensure equality and non-discrimination of citizens, in particular proceeding in compliance with the judgment of the European Court of Human Rights in the Sejdić and Finci case;

(...)

9. Strengthen the protection of rights of all citizens, in particular by ensuring the implementation of the Law on Non-Discrimination and Gender Equality.

These recommendations cannot be implemented without amending the B&H Constitution and the B&H Election Law.

Along with the implementation of the above-mentioned judgments of the European Court of Human Rights and of the domestic constitutional courts, it is necessary to reach a **consensus on a new social contract in B&H**.

Namely, after the signing of the framework peace agreement in Dayton, the international community in B&H established a policy of "frequent elections", so that election cycles were held almost every other year (1996, 1998, 2000, 2002), and later in regular cycles (2006, 2010, 2014 and 2018), and thus there were frequent changes and modifications of the electoral system. Although there had been individuals who formally opposed this concept, the concept prevailed and post-war B&H entered the process of reconciliation and social convalescence, and building democracy through frequent but insufficiently prepared elections (even from a technical point of view – for instance with regard to the incomplete and false electoral register, but certainly not only from that point of view). The wrong formula implying that building democracy in B&H can be accomplished with frequent and consecutive election cycles (electoral democracy) while adapting the electoral system to the wishes of the international community or even individual stakeholders of that community, has exhausted both domestic and foreign factors politically, materially, organizationally and in terms of personnel. Technically, the expected effects have not been achieved, because at the end of that process, everything returned to the beginning, with the triumph of the national parties in the general elections of 2002, 2006, 2014 and 2018.

That is why it would be correct to **first make amendments to the Constitution of B&H, then to the Election Law of B&H**, and only then go for the organization of the next elections. In this context, and in order to simplify the decision-making procedure, it is useful to consider the possibility of setting up a unicameral parliament of Bosnia and Herzegovina, which would reflect the structure of B&H society, i.e. the whole spectrum of political forces and dominant social groups, as well as civil society, as a "mirror of society".

With regard to matters that would be precisely regulated in the B&H Constitution, and which represent the vital national interest of certain ethnic groups, **members of every ethnic group could be selected from the B&H Parliament to form ad hoc houses of peoples, to harmonize and protect the vital national interest of a certain ethnic group**. The ethnic group that raised the issue of vital national interest in the B&H Parliament would have the right to veto the decision-making of the B&H Parliament all until the decision of the Constitutional Court of B&H.

In terms of simplifying the political representation within and outside Bosnia and Herzegovina, **it would be necessary to elect one president of the state**, who would share the constitutionally separated competence with the prime minister. The president of the state would be elected by a two-round majority electoral system, by voters from all over the country following the principle of "one man – one vote – equal value", to a term of five years.

The B&H Parliament should be elected based on a **personalized system of proportional representation** (similar to the electoral model of the Federal Republic of Germany) with a system of loosely structured lists. It is necessary to introduce an election threshold (prohibition clause) of 5% across the whole country, i.e. at the state level. The election of the B&H Parliament, which would consist of 120 representatives, could be accomplished by a personalized proportional election procedure with two votes per voter:

- **one vote in a uninominal constituency** (region), which would elect 60 or 50% of the representatives in a single-member constituencies based on a relative majority constituency system ("the first gets the seat") or using the preferential system;
- **one vote at the state level as one constituency** (at large), which would elect the remaining 60 or 50% of the members of Parliament, while the election would be executed according to the list system of

proportional representation using a system of loosely structured lists.

Moreover, it is necessary to conduct a **reform of the electoral legislation, primarily in terms of commitment to a stable and a long-term election system in B&H** that would be based on the fundamental principles of modern democratic elections: the principle of universality, equality, directness, secrecy and the principle of free elections. It is necessary that the electoral system in Bosnia and Herzegovina has the ability to enable and continuously strengthen the political integration of Bosnian society, i.e. to ensure that all parts of the Bosnian-Herzegovinian political community truly participate and are represented in the political process. This system must necessarily be able to faithfully reflect the overall diversity of B&H society and provide mechanisms for the effective protection of the interests of each segment of that society.

With regard to access to the EU integration process, which should be the ideal of every political effort, in terms of improving the B&H electoral system, **it is necessary to accept the principle of universal, equal, free, direct and secret suffrage, which primarily means to accept the principle of "one man - one vote - equal value"**, with the maximum protection of national, cultural, ethnic, religious and other collective rights of all citizens of Bosnia and Herzegovina.

In the interest of the citizens of B&H and the further reinforcing of democracy, as well as with the objective of integrating Bosnia and Herzegovina into European and other international associations, it is necessary **to harmonize its electoral system with the recognized international standards**. According to current constitutional provisions, one third of the electorate of Bosnia and Herzegovina has been deprived of either the active or passive voting right for the election of members of the Presidency of B&H and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

The long-term and stable development of democracy in Bosnia and Herzegovina requires **the achievement of constituency of the citizens of B&H on the entire territory of B&H**, which requires changes in the constitutional and legal system at both the state and lower levels of government. This effort should also result in full national equality and the realization of all other freedoms and rights for all citizens of Bosnia and Herzegovina without discrimination, across its entire territory.

The mere conducting of elections every other year (general, local) without a qualitative reform of the constitutional-legal, i.e. political system keeps B&H in a state of "electoral delusion". That situation must be changed. We are free to conclude that the electoral reform, i.e. the new electoral system of B&H can be sought in the framework of overall European and democratic achievements in general. In the first place, elections should ensure that the number of cast votes is proportional to the number of seats of each political option in the political representative body. This ensures the achievement of political equality of citizens-voters. The proportional system, or its combination with the majority system, enables both social and parliamentary balance, protects and establishes legitimacy and legality of the elected representatives. From the presentation so far, it is clear that for a new step forward, especially in terms of EU and Euro-Atlantic integrations, B&H needs a comprehensive constitutional reform, i.e. the B&H society needs a thorough constitutional and electoral reform, which can spring from three directions:

(1) first make the necessary modifications to the B&H Constitution, and then the B&H Election Law.

A new civil constitution needs to be adopted in Bosnia and Herzegovina. The current Constitution of B&H – Annex IV is part of the General Framework Agreement for Peace in Bosnia and Herzegovina. It should remain *ad acta* as a historical necessity, which played an important historical role at a certain point. The text of the Constitution must be the result of consensus of all political actors in the political arena of B&H. At state level, an integral part of the constitutional reform must be the enforcement of the judgments of the European Court of Human Rights in Strasbourg in the following cases: Sejdić-Finci; Azra Zornić, Ilijas Pilav, Samir Šlaku and Svetozar Pudarić, as well as the implementation of all final and binding rulings of the Constitutional Court of B&H (Ljubić, Komšić, etc.) and the Constitutional Court of the Federation of B&H.

The ruling ethno-national political elites themselves are in a limbo between their own desire to maintain the status quo and their promises made to the international community. This hypocritical approach keeps us in a state of "permanent temporality." There is a conflict between two political concepts in the political arena: the ethno-territorial (Dayton) concept, which advocates the exclusive status and primacy of ethnic groups, the so-called constituent peoples in political representation, and the civil (Strasbourg-Brussels) concept, which gives primacy to Article 25 of the International Covenant on Civil and Political Rights, which, to complete the paradox, is an integral part of the Constitution of B&H^[1].

(2) The second direction is to immediately go for political amendments to the B&H Election Law without modifying the B&H Constitution (in line with what HDZ B&H and Dragan Čović are striving for).

These claims are justified with the need to implement only one decision of the Constitutional Court of B&H (U-23/14) in order to ensure the "principle of legitimate representation". This approach would lead to the cementing of the outdated Dayton solution of exclusive ethno-territorial representation of the so-called constituent peoples and in the long term prevent the adoption of a new modern civil Constitution of B&H. This would also thwart the reform based on civic principles of political representation.

(3) The third approach is to opt the most essential "technical" amendments to the B&H Election Law, which would include, inter alia, the reform of the appointment of members of polling committees and election commissions; reform of voter registration and identification; reform of the constituency, and the reform of the voting process using new technologies (introduction of optical scanners, cameras at polling stations and in the Main Centre for Counting and Automated Fingerprint Identification System). This approach would only delay the agony of "permanent temporality" because it would not provide solution to the most important issues of setting up of, the character of and the criteria for functional political representation.

REFERENCES & BIOGRAPHY

^[1]Article 25 of the International Covenant on Civil and Political Rights reads: "Every citizen shall have the right and opportunity, without any distinction referred to in Article 2, and without undue restriction: a) to participate in the conduct of public affairs, directly or through freely chosen representatives; b) elect and be elected in fair periodic elections with universal and equal suffrage to be conducted by secret ballot, in a manner that guarantees the free expression of the will of the electorate; c) have access to public services in his/her country in accordance with the principle of general equality. " See: Ibrahimagić, Omer, Seizović, Zarije, Arnautović, Suad, 2010, Political System of Bosnia and Herzegovina Volume I Textbook, Promocult, Sarajevo, p. 75. This International Covenant is an integral part of the Constitution of B&H – Annex I Additional Human Rights Agreements to be applied in Bosnia and Herzegovina.

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