



European Union's underbelly: problems of integration in the case of Bosnia and Herzegovina

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Abstract

This policy brief will briefly inform the reader on the issues regarding the integration problems of Bosnia and Herzegovina into the European Union with the reader being free to make parallels with similar scenarios that have played out in other countries or that have the possibility of arising. The brief focuses on the two capital rulings of the European Court of Human Rights for Bosnia and Herzegovina (B&H) regarding its constitutional rights and in turn the almost impossible process of harmonizing B&H's rights structure with the values of the EU, particularly in the domain of voting rights and elections, and the ongoing constitutional crisis.

Key words: Bosnia and Herzegovina, constitution, elections, European Court of Human Rights, integration.

Introduction

Bosnia and Herzegovina is a complex state, starting from its inception to this day and rocked by political instability for almost all of its existence. Some regard it as a clear-cut federation, whilst others are inclined to focus on its aspects that lean into it being a

confederation¹, all the while some academic voices regard it as a modern colonial state (protectorate in any case)² exemplified by the controversial role that the Office of the High Representative has³. Its constitution is an annex to the peace treaty which ended the civil war in 1995. As such the constitution is a top down enforced act with its main purpose being to end the war and to create something resembling a state, amalgamating the warring states of Republic of Srpska and The Federation of Bosnia and Herzegovina into one state⁴. The constitutional style is wholly foreign to the legal tradition of the area, Anglo-Saxon in nature with wide paragraphs and long sentences, introducing original legal creations such as entities (federal units in effect), with no concepts of citizens from whom sovereignty derives but of constitutional peoples, that being the Serbs,

¹ M. Dmičić, Division of competences between institutions of Bosnia and Herzegovina and the entities, (un)justification of the transfer and the possibility of their return, in *"Law, tradition and changes"* (Docent dr Dimitrije Čeranić), Eastern Sarajevo 2020, p. 91,

² D. Mitrović, *Intro to law*, Belgrade 2013, p. 86,

³ In effect can decree law without parliaments – which led to the current political upheavals where the president of the Republic of Srpska was sentenced to jail,

⁴ G. Marković, *Federalism of Bosnia and Herzegovina*, Belgrade/Sarajevo 2012, pp. 69-70,

Croats and Bosniaks with the term Others and citizens used for those not belonging to the three aforementioned groups⁵. As such B&H is an example of consociationalism, where power is shared between the three main groups. Following this constitutional logic the electoral system is built in a way that demands quotas for key positions (legislative, executive and judicial) and de facto makes irrelevant votes of citizens in some areas of the country.

This can be taken as the source of the ever ongoing (read current) constitutional crisis. There is a push among a certain political elite (Bosniak) to wholly erase the categories of constitutional peoples and federal units and to make B&H a clear cut unitary state and full democracy (one citizen one vote slogan). This is countered by the Serbian and Croatian political elites which see this as a maneuver to win political power by the majority Bosniak population, marginalizing the other two groups.

ECHR case law cannonade against B&H

As part of B&H legal framework the state is a signatory to a fan of international agreements, among others, the European Convention on Human Rights (Convention). Following from that the decisions of the European Court of Human Rights (Court) are binding. One case which shook the legal framework of B&H is Sejdić and Finci v. Bosnia and Herzegovina⁶. The applicants filed two separate applications where, in the end, the Grand Chamber decided with one judgment in 2009. The applicants were, respectively, of Roma and Jewish minorities

and, as such, in the constitutional and electoral framework of B&H could not run for the office of Presidency and the upper house (House of Peoples) of the legislature. As they say, in the application, they were denied active voting rights based on racial and ethnic discrimination, which the Court accepted⁷ in saying that B&H violated Articles 14 in liaison with Article 3 of Protocol 1⁸, as well as the violation of Article 1 of Protocol 12 of the Convention⁹. The mentioned articles deal with prohibition of discrimination (Article 14), the right to free elections (Article 3 of Protocol 1) and the general prohibition of discrimination (Article 1 of Protocol 12). The dissenting opinions are of interest as well but to analyze them would go beyond the scope of this brief. The reader is encouraged to look into them, however¹⁰.

After the Court decided on this case that shook the political and legal scene in B&H, there was a wave of enthusiasm which led to a slew of applications and two more decisions dealing with similar/same issues. Zornić v. Bosnia and Herzegovina¹¹ where the Court found that the same rights were violated, on discriminatory grounds, as was the case in Sedjić and Finci v. Bosnia and Herzegovina in regards to the ability (disability) of the applicant to gain passive voting rights. The third case Pilav v. Bosnia and Herzegovina¹², that I will not get into because of its specificities, also had an impact in the general scheme of constitutional rights and the problems with B&H electoral system.

⁷ Paragraphs 38-56,

⁸ Parahraph 50,

⁹ Paragraph 55,

¹⁰ Partly concurring and partly dissenting opinion of judge Mijović, joined by judge Hajiyeu and dissenting opinion of judge Bonello,

¹¹ Zornić v. Bosnia and Herzegovina, application number 3681/06, judgment from 15.7.2014,

¹² Pilav v. Bosnia and Herzegovina, application number 41939/07, judgment from 9.6.2016,

⁵ Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, Official Gazette for Bosnia and Herzegovina number 25/2009 – Amendment I,

⁶ Sejdić and Finci v. Bosnia and Herzegovina, applications number 27996/06 and 34836/06, judgment from 22.12.2009,

With these problems of constitutional and electoral nature which stretch deep into the structure of the country, one can imagine that fixing them will be a difficult task at best. As any country that ratifies the Convention they take on the obligation to obey the final rulings of the Court. These aforementioned rulings are yet to be implemented by B&H. This is, in truth, not the fault of laziness on part of the political elites, for there were many attempts at the federal level to find a way to implement these rulings. Joint committees and action plans in the Council of Ministers were the ones that got closest to finding a method of implementation but in the end failed. On the other hand the international bodies which give advice are not deeply enough familiar with the inner workings of the state in order to give sound advice. One such case was the opinion of the Venice Commission which suggested the abolition of the upper house of the legislature, thinking it to be obsolete - a radical measure at best¹³.

Conclusion

The European Union (EU), perhaps only in rhetoric, remains a partner to B&H and sees the future of the country as part the Union. B&H currently has candidacy status, but in regard to the rulings of the Court, the country has not fulfilled its obligations toward the Court and therefore its route to accede to the EU will be almost wholly halted because of this fact. An emphasis must be made that the implementation of these decisions are crucial for assuring the core principles of the EU – freedom, democracy, equality and the rule of law. In contrast, taking the legal sunglasses off and talking in politically real terms these obligations can, in truth, be circumvented or straight up ignored if the will of the EU is such. Yet what kind of message would

it send both to current member states and other candidate countries if a country which has been found to disregard the core principles of the EU is nevertheless able to accede to it? Attempts have been made to disregard these obligations for the time being, subject to B&H committing to fully implement these rulings in the future. The role that B&H plays in the overall scheme of European politics is miniscule but if the attitude of the EU towards it remains lackluster, it can be certain that B&H will remain a “spiked rock in the varnished shoe” of the EU.

¹³ European Commission for democracy through law, Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, CDL-AD (2005) 004, March 2005.