



Constitutional Reform in Bosnia and Herzegovina: „Civil State“ of Constituent Peoples

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When I was invited to deliver this presentation on constitutional reform in Bosnia and Herzegovina (BiH), I was wondering how the issue of constitutional reform would fit under the main interest of both the HUMSEC project and the conference, dealing with a contribution to a better understanding of the link between trans-national terrorist groups and criminal organizations in the Western Balkans and their role in the peace-building process in the region. It was therefore difficult to find a good connection between the constitutional reform and all those features making congruous and consistent presentation. However, it appeared that parts of the constitutional reform in BiH can easily be discussed under one of the focal issues of the project - the influence on the state and on civil society.

For this reason I decided to focus on the to-be-carried-out constitutional reform in BiH, its relation to the creation of a safe and secure environment in BiH, its direct effect on the internal tensions being maintained as well as on preventing efficient fight against the inside and outside threats. Namely, it is obvious that in today's BiH, the most critical stumbling point related to consistent implementation of the counter-terrorism policy, as well as the fight against organized crime and the preservation of a secure environment, is the current constitutional settlement introduced by the Constitution of BiH (Annex 4 to General Framework Agreement for Peace in Bosnia and Herzegovina – GFAP), colloquially known as the Dayton Peace Accord/s.

The State of BiH - legally, politically and ethnically torn up to the utmost – had been subject to synthetic institutional resurrection under the patronage of the international community. The country re-appeared, re-integrated, in the form of a rather strange creature based on the principle “one state - two entities - three nations.” This principle still plays an important role in long-lasting and on-going disintegration processes throughout the country.

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Ethnic nationalism, which, as a by-product of the defeat of ex-communist totalitarian regimes throughout Europe proved to be the major hindrance to a true democratization of those countries, was literally institutionalised in BiH. The “ethnic criteria” introduced in the Preamble of the Constitution of BiH (being reinforced in number of places in its normative part) prevents BiH authorities from sharing power equally within the civil society, favouring ethnic groups to the detriment of the individual citizen.

The Preamble of the Constitution of BiH defines Bosniaks, Croats and Serbs as “constituent peoples” of BiH, while “others” and “citizens” are merely mentioned. It is apparent that individual rights are mistakenly (!?) given to members of three ethnic groups, rather than to citizens. The concept of “constituent peoples” is found to be in clear violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). ECHR provides protection to individuals, and not to social/religious/ethnic groups as such. On the contrary, the Constitution of BiH recognizes collective rights as opposed to the protection of individual rights as provided for in the ECHR. As such, the very Constitution enables constituent peoples to share all the power among themselves, preventing the enforcement of equal treatment for all, and clearly upholds and maintains a strong, discriminating distinction between constituent peoples (Bosniaks, Croats and Serbs) and non-constituent peoples (others, citizens).

This bizarre principle inflicts an overwhelming negative influence on the entire system of human rights protection in BiH, on its public administration, and on its political and judicial systems; the entire structure of the state level institutions (the Presidency, the Parliamentary Assembly, the Council of Ministers, the Constitutional Court, etc), is set up on the above mentioned discriminatory “one state - two entities - three nations” model.

Although the Constitution of BiH recognizes basic human rights and fundamental freedoms, and requires the institutions of the States and Entities to ensure the highest level of internationally recognized human rights and freedom from discrimination (Art. II 4), the very concept had clearly failed to deliver these fundamental entitlements to all citizens of BiH.

Namely, the General Framework Agreement incorporated directly into the Constitution of BiH catalogue of rights and freedoms from the ECHR as well as other fifteen international human rights instruments grants the ECHR priority over all other (national) laws (Art. II 2). Additionally, Article 14 of the ECHR guarantees that the enjoyment of all rights and freedoms set forth in it shall be secured without discrimination on any ground, including religion and national origin, as well as association with national minority. The idea was unsuccessful from the very outset in BiH, as the Constitution did not provide for protection of individual citizens but their collective identity.

The concept of “constituent peoples” had been reinforced with “national veto” i.e. veto that gives unlimited power to the State Parliament’s members of “constituent national origin” to stop any legislative action and to prevent the adoption of any piece of legislation that is considered to run counter to the “national interest” of specific “constituent peoples”. Needless to say, there is a strong distinction between the terms “national group” and “ethnic group” in the comparative sociology. To be precise, in Western countries, national interest means the interest of the whole nation (a state as a whole). Therefore, the national interest would be the state interest in these countries. On the contrary, in BiH, “national interest” denotes the



interest of one of the three constituent peoples - Bosniaks, Croats, Serbs - which would be, in the comparative sociological perspective, the interest of an ethnic group.

The above explained constitutional limbo blocks decision making process whenever national patron saints wish to obstruct the legislation process. The legislative gap is being by-passed by imposing legislation by the Office of the High Representative (OHR). Sometimes the activity of the international community, including that of OHR, shows an insufficient understanding of the local legal tradition and environment. The unnatural imposition of procedures and features of divergent legal systems brings about additional disorder regarding legal terminology, institutions and their competencies, addressees of norms, etc., instead of harmonising with the BiH legal system. The central parts of the reform often had to do with the country of origin of the Head of Legal Office of the OHR, and the legal system and legal tradition of that particular country was frequently taken as model for actual reform. Additionally, many European countries, as well as the United States, undertook a number of unilateral "harmonisations" of different segments of the BiH legal system, an approach that sometimes led to counter-productive effects. Some extreme undertakings of the international community constituted flagrant violations of the Constitution of BiH. For instance, the establishment of the „Joint Ministry of Defence,“ even though according to constitutional norm the Entities, and not the State, were responsible for defence. The same saga is currently going on regarding the „Joint Ministry of Interior“. There are many other examples that support the belief that such a bizarre, ineffective and over-administered country would never be internally re-integrated, and hence would hardly be integrated into Europe. The principal question that still remains is: can legal reform, or reform in general, be imposed?

The problem can be found in the Dayton's concept of the country: one which is neither Republic nor Federation, but consists of one Republic and one Federation both of them being called Entities (!?). There is no elementary political will whatsoever that would be a driving force to adoption of a set of (legal) reforms that are considered to be precondition to establishment of functional and effective state to join the Euro-Atlantic integrations.

The country's national anthem has no lyrics, for constituent peoples could not agree on them. A flag and coat of arms are computer generated, and have nothing to do with the country's history, tradition or symbolism, for constituent peoples could not agree on the percentage of blue, red, green colours to be displayed on it. Eventually, BiH became the only non-sovereign member of the Council of Europe and United Nations. As such, it can hardly find its place within the European family of contemporary European states. Does latter-day Europe really have the authority to welcome its access?

National homogenization remains the key drawback to a political and economic re-integration of the state, and still plays a substantial role in the continuing crumbling of processes throughout the country. Thus, a valid conclusion would be that, as long as the national (i.e. ethnic) identity is the single identification model for the BiH citizens, and the concept of "constituent peoples" remains a constitutional feature, the State of BiH shall remain inefficient in many realms within the jurisdiction of a well-organized state. Providing for human security, and successfully combating organized crime and terrorism can only be done by a fully functional and politically integrated and stable state. At present, BiH shows a sharp departure from this model.



	<p>The HUMSEC project is supported by the European Commission under the Sixth Framework Programme “Integrating and Strengthening the European Research Area”.</p>	
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