

MODELS FOR THE CONSTITUTIONAL REFORM AND THE REFORM OF ELECTION LAW IN LINE WITH THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Faris Vehabović

INITIATIVE FOR MONITORING
THE EU INTEGRATION OF
BOSNIA AND HERZEGOVINA

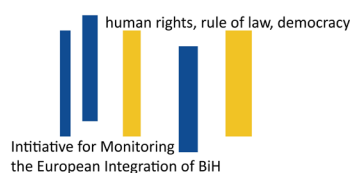
www.eu-monitoring.ba

Sarajevo, February 2022

ISSN: 2303-6079

CONTENT

LIST OF ABBREVIATIONS	3
EXECUTIVE SUMMARY	4
INTRODUCTION	5
A POSSIBLE MODEL OR MODELS FOR THE CONSTITUTIONAL REFORM AND THE REFORM OF (ELECTION) LAW IN LINE WITH THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS	10
1. Democracy	10
2. Effective Democracy	11
3. Discrimination and Equality	12
4. Collective Rights	12
5. Possible Models for the Elimination of Discrimination from the Constitution of BiH and BiH Election Law	13
6. Decision-Making System for the Changes to the BiH Constitution and BiH Election Law	22
CONCLUSION AND RECOMMENDATIONS	23
ABOUT THE AUTHOR	26
ABOUT THE INITIATIVE	27



Human Rights Papers Edition of Sarajevo Open Centre

Publication number: 61

Title: Models for the Constitutional Reform and the Reform of Election Law in Line with the Decisions of the European Court of Human Rights

Author: Faris Vehabović

Editors: Dajana Bakić and Edo Kanlić

Proofreading: Sandra Zlotrg

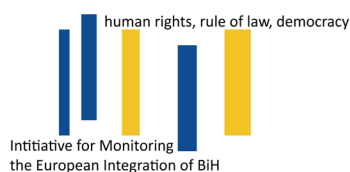
Translation: Jasenka Kapetanović

Layout and design: Lejla Huremović

Publisher: Sarajevo Open Centre (www.soc.ba) on behalf of the Initiative for Monitoring the EU Integration of Bosnia and Herzegovina (www.eu-monitoring.ba)

On behalf of the Publisher: Emina Bošnjak

© Sarajevo Open Centre



Non-commercial copying, photocopying or any other reproduction of this publication or parts of it is desirable, with the prior written notification to the publisher at: office@soc.ba.

Content of this publication is the sole responsibility of its authors.

LIST OF ABBREVIATIONS

BiH – Bosnia and Herzegovina

BiH Constitution – Constitution of Bosnia and Herzegovina

ECHR – European Court of Human Rights

EU – European Union

FBiH – Federation of Bosnia and Herzegovina

PABiH – Parliamentary Assembly of Bosnia and Herzegovina

RS – Republika Srpska

USA – United States of America

UK – United Kingdom

EXECUTIVE SUMMARY

Finding solutions for the electoral system reform in Bosnia and Herzegovina (BiH) presents a key milestone for the future of BiH and a shift from the post-war society phase into a transitional democracy, within the context of greater integrative processes. Changing the current electoral system would change the existing paradigm of responsibility exclusively within the framework of ethnic groups, without any responsibility for the entire Bosnian-Herzegovinian society. Of course, this would also imply a drastic increase regarding public engagement, as well as sanctioning of any non-democratic engagement through democratic procedures.

A legal framework for the transition from an ethnocratic into a democratic society has been provided by the European Court of Human Rights (ECHR) through the decisions it delivered regarding the equality of national minorities, constituency of the peoples and citizens within the electoral process, primarily through the decisions in the cases of *Sejdić/Finci*¹, *Zornić*², *Pilav*³, *Šlaku*⁴ and *Pudarić*⁵ v. BiH

Establishing a democratic society must be the primary objective of the electoral reform, with all the specificities of BiH society, which primarily implies the mistrust between the ethnic groups, kindled during the last 30 years. Unfortunately, it seems that this supposed struggle for the interest of the ethnic groups refers more to staying in power and maintaining privilege, which speaks volumes about the difficulty of the task before the political actors who have the political strength to adopt the changes to the electoral system which would in basic terms, quite certainly, withhold guarantees for the aforementioned actors to participate in the government. Such guarantees are present in the current constitutional system, and the establishment of a democratic society, which would ensure equal rights for each individual in the electoral process and which would ensure that everyone has a chance in the political ideas and programs' market, would mean the end to this fundamentally undemocratic practice.

- 1 Case of *Sejdic and Finci v. Bosnia and Herzegovina*, (Applications nos. [27996/06](#) and [34836/06](#)), Judgement of 22 December 2009.
- 2 Case of *Zornic v. Bosnia and Herzegovina*, Application no. [3681/06](#), Judgement of 15 July 2014.
- 3 Case of *Pilav v. Bosnia and Herzegovina*, Application no. [41939/07](#), Judgement of 9 June 2016.
- 4 Case of *Slaku v. Bosnia and Herzegovina*, Application no. [56666/12](#), Judgement of 26 May 2016.
- 5 Case of *Pudaric v. Bosnia and Herzegovina*, Application no. [55799/18](#), Judgement of 8 December 2020.

INTRODUCTION

The Constitution of Bosnia and Herzegovina (BiH Constitution) is, quite certainly, a typical transitional document, regardless of its status of a constitution.⁶ The central government only has several established competences which must be exerted solely with the agreement between all sides, including entities and constituent peoples. Bosniaks, Serbs, Croats (as the *constituent peoples*), the Others and citizens are described in the Preamble of the BiH Constitution. At the state level, such decision-making mechanisms are established that it is practically impossible to reach a decision contrary to the will of a representative of any constituent people, or entity. Apart from the House of Representatives, the House of Peoples is established; a veto based on the vital interests is introduced for all three constituent peoples in both Houses; as well as for the collective Presidency consisting of three members: a Serb member from the RS, and a Bosniak and Croat members from the FBiH, where veto is also introduced based on the entity, and in fact ethnicity of the Presidency members. The structure of state institutions is conditioned by the ethnicity which is tied to territorial belonging, and thus institutional discrimination is built into the BiH Constitution. Apart from the predominant *ethnic* and, cumulatively established *territorial* principles, it is clear that the state competences cannot ensure mechanisms for the creation of self-sustaining and prosperous *democratic society*. A particular issue is *entity vote* and the establishment of *veto* based on the *vital national interest* which makes the weak state institutions non-functional and open to all sorts of obstructions to the efficient state governance. In these circumstances, it is pointless to think of the state as a service for citizens.⁷

Apart from this, ECHR delivering the aforementioned decisions presents a request to Bosnia and Herzegovina for a certain level of a constitutional reform in order to eliminate the discrimination of national minorities labelled as *Others* in the Constitution, and BiH citizens and provide them with an equal access to the political sphere at the state level. ECHR

has established that *the nature of conflicts in BiH was such that it was*

6 Vehabović, Faris. *Relationship Between Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms*. Sarajevo: ACIPS, 2006, p. 13.

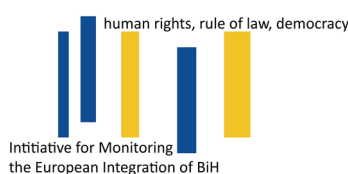
7 Vehabović, Faris. *Why There Will not be Systematic Constitutional Changes?*, *Sveske za javno pravo*, vol. 1, No. 1-2, December 2010, pp. 36-54.

necessary to accept the constituent peoples in order to secure peace, which suggests that ECHR considers the existence of *constituent peoples* as a temporary aim which is not sustainable in a functional democracy.⁸

A constitutional reform is a complex and lengthy process which would, in the end, due to the outdatedness of (post)conflict logic of the Dayton constitutional system, necessarily result in the adoption of a completely new constitution based on the principles of de-ethnicization of law with the optimal balance between liberal-democratic and territorial-federative models of political decision-making. This process can be initiated with the adoption of the necessary constitutional amendments which can in a given political moment gain support of the political actors, so that the categories of *Others* and *citizens* can be made equal to the other categories in the Preamble of the Constitution in regards to their participation in the forming of institutions of BiH.

The Constitution determines that the political positions in the BiH institutions can only be occupied by those who declare their belonging to one of the *constituent peoples* (a parity division between Bosniaks, Croats, and Serbs).

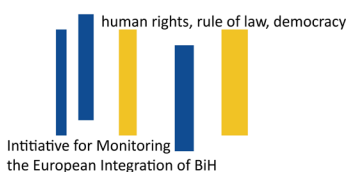
However, since ECHR has delivered a decision that these constitutional stipulations referring to the selection of member of the BiH Presidency (hereinafter: Presidency) and the delegates in the House of Peoples of the Parliamentary Assembly of BiH (PABiH) violate the European Convention on Human Rights and Fundamental Freedoms (European Convention), the constitutional reform which would change the existing state has become unavoidable, and BiH has to change the Constitution in order to eliminate the discrimination stemming from its stipulations as these were the demands in the aforementioned decisions of the ECHR. As this endeavour implies a sort of revision of the Dayton Peace Accords, which is founded on the idea of distribution of governance exclusively between the three *constituent peoples*, in order to amend the constitutional text a lot more than a simple technical approach to the issue will be needed, regardless of how unlikely and unattainable it may seem at this point.



⁸ Vehabović, Faris and Lajla Zaimović Kurtović. *Our Perspective for the Constitution*. Sarajevo: ACIPS, 2010.

Of course, every constitutional initiative must take into consideration the social circumstances surrounding it, that is to the realistic possibilities that this text gains a wider social support of the main political actors. Still, the ECHR decisions have established a minimum which needs to be achieved through the limited constitutional changes and their instrumentalisation through the BiH Election Law.

With such constitutional background, ECHR has faced cases which were in direct connection with the discrimination set in the BiH Constitution, discrimination stemming from Article 5 of the BiH Constitution stipulating that the delegates for the House of Peoples of the PABiH elected from the territory of Republika Srpska are of Serbian ethnicity, while, following the same principle, the delegates of Bosniak and Croat ethnicity are elected from the territory of Federation of BiH. A similar situation can be observed regarding the election of the members of Presidency of BiH, where a Serb member is exclusively elected from Republika Srpska, while a Croat and a Bosniak members are elected from the territory of Federation of BiH. The first decision of ECHR in case *Sejdić/Finci*⁹, which dealt with the issue of discrimination in the election procedure, has established that the Bosnian-Herzegovinian constitutional system is not in line with the European Convention since it violates the stipulations on the prohibition of discrimination. ECHR has established, in its decision, that Article 14 was violated in regards to Article 3 of the Protocol number 1 of the European Convention. In concrete terms, the stipulation refers to the inability of applicants to register as candidates in the elections for the House of Peoples of PABiH. Further, Article 1 of Protocol number 12 was violated due to the lack of possibility for the applicants to register as candidates in the elections for the BiH Presidency¹⁰. In both cases, the elements of the constitutional system which do not allow all citizens of BiH to, exercising the right to stand as a candidate, participate in an equal manner in the political and constitutional system of BiH. In regards to Annex 4, this means that ethnic discrimination must be removed from the actual political relations and that suitable mechanisms for practical equalizing of unconstituent and constituent citizens of BiH. In this regards, every citizen, based on the fact that they are a citizen of BiH must have realistic material chances to be elected to the Presidency under equal



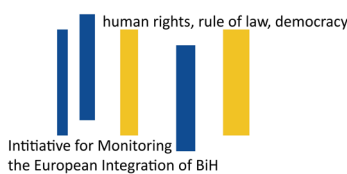
⁹ *Sejdić and Finci v. BiH*, *ibid.*

¹⁰ *Sejdić and Finci v. BiH*, operative segment.

conditions. They can be realised in the simplest manner, in regards to Sejdić/Finci decision, through the introduction of a democratic standard: amending each provision which, in advance, guarantees a position in the state bodies for the representatives of constituent and unconstituent peoples through regulations which allow for the possibility of being elected, providing that the decision on the election remains with the electorate. A suitable solution in the existing constellation can be found in the rule that the members of all ethnicities are guaranteed participation in the state bodies under equal conditions, but that no position in the state bodies is guaranteed in advance for constituent and unconstituent individuals. The Decision of the ECHR has imposed an obligation upon the Bosnian-Herzegovinian government to harmonize the stipulations of the BiH Constitution with the European Convention.¹¹ Implementing the decision has been emphasised as a prerequisite for the BiH application for the European Union.¹²

Specifically, the main observations of ECHR have been shaped through the application of Article 46 of the European Convention in the case *Zornić v. BiH*, which practically means that a systemic violations of human rights have been established and that systemic changes need to occur regarding legal regulations (acts of general application) which have been the subject of the consideration by ECHR, and in these cases they are Articles 3 and 5 of the Constitution of BiH and the corresponding stipulations of the BiH Election Law. The core of ECHR's decision-making is summarised in the Paragraph 43 of the decision in the case *Zornić v. BiH* stating: "In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (see *ibid.*, § 45). The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace (*ibid.*). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions.

The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy,

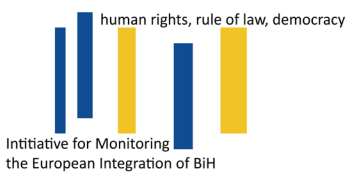


¹¹ *Zornić v. BiH*, Paragraphs 38-43.

¹² [https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA\(2015\)559501_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf)

the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.” A few conclusions can be drawn from such formulation – that the original intent of the *constitution makers* had been to stop the war and for this reason it had been necessary to accept the existence of the constituent peoples in the Constitution of BiH; that enough time has passed to move away from the wartime society and that the next step should be made with the aim of (final) establishment of a democratic order (which it is not at the moment) and an efficient political democracy (which is now lacking), as well as that the electoral system is based on the democratic principle with respect to equality of the rights of each person to exercise the right to vote and the right to stand as a candidate, and that such a system cannot be based on discrimination and special rights of any particular group, even of constituent peoples.

In these circumstances, it is necessary to find an arrangement which could address the request made in the ECHR decisions. A basic problem is a different level of accepting the instructions of ECHR. On the one hand, there is the exclusive rejection of accepting the decrease in the role of the constituent peoples in the constitutional system of BiH, and on the other, there is insisting on the consistent application of the instructions in the decisions of the ECHR. It seems that the democratic practise common in other European countries is understood by some ethnic groups in BiH as a threat to the existence of the state and the existence of the community, and as a reaction to the current situation in BiH it has additionally radicalised ethnic divisions and requests for an even greater possibility of blocking the political procedures can be heard. Indeed, instead of removing the obstacles in the decision-making process, an equality in the ability to block is being requested; instead of their removal, the result is their multiplication, which is, as it is fully evident, diametrically opposite to the ECHR decisions and the principle of effective democracy.¹³



13 <https://www.slobodnaevropa.org/a/intervju-bodo-weber-eu-pomaze-promjene-izbornog-zakona-u-korist-hdz/31135261.html>

A POSSIBLE MODEL OR MODELS FOR THE CONSTITUTIONAL REFORM AND THE REFORM OF (ELECTION) LAW IN LINE WITH THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

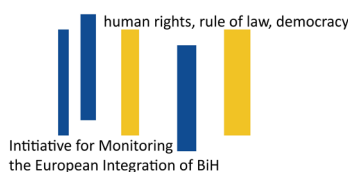
The fundamental elements of the future reform of the election system have been determined in very clear terms and they include several principles which must be included in the solutions¹⁴, and they are as follows:

1. establishing a democratic order
2. establishing effective democracy
3. enabling each citizen to exercise an equal right to participate in the election process
4. abolishing the electoral system based on ethnic discrimination
5. prevent the collectivities from having special rights at the expense of citizens and minorities.

In order to understand the significance of the aforementioned principles, it is necessary to revisit their traditional meanings.

1. Democracy

Democracy is a form of government in which all decisions of a state are made directly or indirectly by the majority of its citizens through fair elections respecting the principle “one person – one vote”. When these criteria are met, a government can be described as democratic. Today, the most common form is representative democracy where people elect their representatives in the parliament through elections and grant them the authority to make decisions. In order to describe a system in a state as democratic, each citizen must have the same rights and freedoms (as long as they do not violate someone else’s rights and freedoms). These freedoms include the freedom of religion, national and ethnic determination, use of language, freedom of media and press, freedom



¹⁴ <https://istraga.ba/sudija-evropskog-suda-za-ljudska-prava-pise-za-istragu-o-reformi-izbornog-sistema-presude-iz-strazbura-su-prioritet-ustavni-sud-bih-je-donosio-diskriminatorske-odluke/>

of assembly and exchange of views or expressing their views, etc. Each (adult) citizen must have the right to vote for their representative in a parliament or government. This right is exercised in the elections which must be regular (every four to six years), secret (possibility to keep one's vote a secret) and fair. Additionally, such society must support all forms of pluralism. This refers to a state having multiple political parties and interest groups and the right of citizens to freely join them or found their own. Traditionally, the aim of democracy is to prevent the accumulation of power in the hands of an individual or several individuals.

2. Effective Democracy

When the term *democracy* is used, most commonly we are speaking of liberal democracy as the most perfect and effective form of democracy since it excludes the literal application of the principle “one person – one vote”, and since it includes “the rule of majority with the respect for the rights of the minority”. While democracy itself is a system of government which is defined and legitimised by elections, a liberal democracy can include constitutional liberalism, where a certain culturally subjective rights of individuals are protected from the sheer vote of the majority. These are some of the characteristics of numerous liberal democracies¹⁵:

- a constitution which limits the power of the government and offers a wide array of civic rights
- universal suffrage, guaranteeing all citizens the right to vote regardless of their ethnicity, race, sex or financial situation
- freedom of speech
- religious freedoms
- cultural freedoms
- freedom of media
- freedom of assembly
- equality before law and the right to a trial in line with the law
- right to private property and privacy
- education which teaches all citizens about their civic rights and responsibilities
- a broad and deeply established civil society

¹⁵ <https://bs.wikipedia.org/wiki/Demokratija>

- an independent judiciary
- a system of mutual supervision between the government branches.

3. Discrimination and Equality

In the simplest terms, discrimination is unfair treatment of a person or a group on the basis of some of their features, which results in the unequal chances to exercise the rights guaranteed by the constitution and laws. It is the unfair treatment, exclusion, or subordinating a person or a group of people who are in the same, similar or comparable situations¹⁶.

4. Collective Rights

The term “collective” human rights refers to those rights enjoyed by a collective. A distinction should be made in regards to the individual rights which can only be practised collectively (voting rights). The requests for “collective” human rights lead to a confusion regarding the terms and to difficulties in explaining them, since a universal, egalitarian and categorical postulate of the human rights cannot be established equally for collectivities and individuals. Hence the protection of the interests of minorities/collectivities can be assured only through the respect of individual human interest, in a limited understanding. In particular cases, collective rights were conceived in order to protect the vulnerable minorities, but they were presented in the spirit of equalising justice. Yet, such collective rights are not possible at the human rights’ level, but they are subnational rights. Thus they are limited by not violating the individual human rights.¹⁷

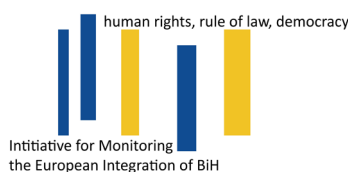
All of these elements must be considered in the process of creation of the future solutions for the electoral reform, which is definitely not an easy task in such a complicated constitutional system where the decisions in the parliamentary procedure are made with much difficulty, especially if it includes such type of changes which could take away the “acquired rights” from certain, primarily ethnically oriented political parties.

5. Possible Models for the Elimination of Discrimination from the Constitution of BiH and BiH Election Law

Speaking of the possible models of the reform of the Constitution of

¹⁶ Among others, Case of Valianatos and Others v. Greece, [29381/09](#), [32684/09](#), Judgement of 07/11/2013.

¹⁷ Harvard Lohmann, G. (1999). “‘Collective’ Human Rights for the Protection of Minorities?”, *Politička misao*, 36(4), pp. 38-48. Downloaded from: <https://hrcak.srce.hr/31203> (Date of access: 15.10.2021)



BiH and BiH election law, several scenarios are possible in the future:

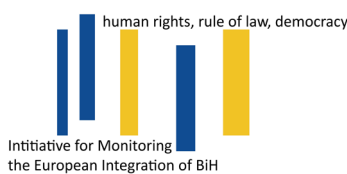
- a) that the decisions of the European Court of Human Rights are consistently implemented with respect for all the elements;
- b) that the decisions are formally implemented, and that one type of discrimination is replaced by another one;
- c) that a mode is found so that decisions are basically implemented, but which would represent a compromise and include constituent peoples in the decision-making process in a limited sense; and finally,
- d) that the decisions are not implemented and that the situation remains unchanged.

5.1. Considering the political climate in BiH and the heated rhetoric which follows the political events, it is difficult to expect that there exist the necessary critical masses needed for the consistent implementation of the decisions of ECHR on the principles of liberal democracy which would allow the rule of the majority with complete regards for the political minority (where we of course do not refer to any ethnic groups while using the terms *minority* and *majority*). Additionally, it should be emphasised that the consistent implementation of the decisions would create all the prerequisites for the development of a democratic society where there would be no room for guarantees of participation in the government, thus it is not realistic for the political representatives who have so far enjoyed these privileges to accept their removal or reduction. As a result it seems that this will be another missed opportunity for BiH to finally spring from the Dayton phase in the long term and move over to the phase of establishing democratic institutions and procedures which would be able to address all the challenges the contemporary world presents, and particularly the challenges of the integration processes. In this manner, the sluggishness of actions, the impossibility of reaching a consensus regarding any issue – which, even when there are no ethnic or territorial connotations, is blocked even when it is a technical issue – offer no hope that these issues can be solved in a manner that BiH citizens could experience concrete benefits from the possible changes to the electoral system.

The consistent implementation of the ECHR decisions includes the establishment of a civic society with equal chances for each citizen who is in the centre of political events in a society which protects the individual rights and regularly organises honest elections with the aim of establishing a government accountable for their actions before the citizens, with the full respect of the rights of all groups and all particularities. A consistent implementation of the decisions of the European Court is possible only with the strong support of the international community which would maintain a strong and principled stance regarding this issue. However, our experience teaches us that the international community, or its most important elements in the form of the EU, USA and UK, have not shown willingness to step out of the *vicious circle of Dayton* and that they still maintain the position that what is applicable in their multi-ethnic societies is not and should not be applicable in Bosnia and Herzegovina. It remains completely unclear why there is no readiness to incorporate mechanisms into the constitutional system of a multi-ethnic country, such as BiH, which would allow the state to perfect itself through the democratic procedures applied in all democratic states, but there is room for this process of constitutional and electoral changes which further reinforce the *ethnic breaks* which have been incorporated through the Dayton Accords, which can lead to a complete dissolution of BiH.

5.2. If we only consider the Constitution of BiH, it is theoretically possible to partially implement the decisions of ECHR by removing the ethnic stipulations in Article V of the BiH Constitution, so that a member of BiH Presidency is elected from the territory of RS and that two members are elected from the territory of FBiH. However, the problem arises when we consider the House of Peoples (and the ECHR decisions refer to House of Peoples too)¹⁸.

Models from the past – such as Fule’s model the content of which could have been guessed from the statements made by the participants in these talks – were based on somewhat different solutions although they did not touch upon the crux of the issue – the ethnic stipulations in the BiH Constitution and the existence of the House of Peoples in the same



¹⁸ <https://istraga.ba/autorski-tekst-farisa-vehabovica-sudije-evropskog-suda-za-ljudska-prava-ponudenim-izmjenama-izbornog-zakona-se-uvodi-nova-diskriminacija/>

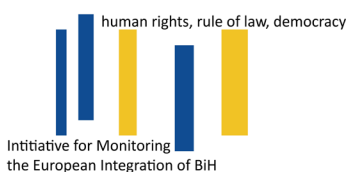
form as it is today. Such propositions have never received the needed political support. Both then and now (if we are solely discussing the *digestibility* of this model for the representatives of the political parties and in relation to the BiH Presidency and House of Peoples), the problem at heart was always the lack of guarantees that the representatives of certain parties with an ethnic determination in their names would be members of the BiH Presidency, or House of Peoples.

However, this and similar models contain certain elements which require attention, but, unfortunately, it does not provide the answer to the question of the implementation of the ECHR decisions since it introduces a new, different form of discrimination.

This and similar proposals remove the ethnic determination with *floating* electoral units in FBiH within which the BiH Presidency members would then be elected.

In fact, the political representatives in the BiH Presidency from the territory of FBiH would then be elected between Bosniaks and Croats, in the manner that the Bosniak member would be *de facto* elected by the three cantons – Sarajevo, Tuzla and Zenica-Doboj where there is the highest concentration of Bosniaks in terms of territory and numbers. On the other hand, the other member of the BiH Presidency (it is certain that it would be a Croat) would be elected from the West Herzegovina region (Herzegovina-Neretva, West Herzegovina, Central Bosnia Canton and Canton 10 as the cantons with the Croatian majority) as well as Posavina.

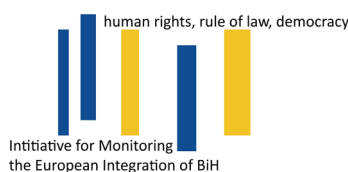
The proposed electoral system is a representative-political closure of the post-war territoriality which had been established on the premises of ethnic cleansing and serious war crimes. The votes from the *indecisive* electoral units/cantons, which would not be considered nor affect the election for the BiH Presidency would simply be thrown away. In this manner, another form of discrimination would be established and it would not necessarily be ethnic, but it would represent discrimination of citizens regarding their right to influence the final results of the political struggle. Thus, the citizens from this territory would be deprived of their right to



free election and their active voting rights would *de facto* be removed¹⁹.

The inclusion of such practices into the political and electoral system in BiH is particularly dangerous since it would introduce the category of unequal votes and it would then be, considering the aforementioned, most likely that the elections are not won by those who win the most votes, but the territorial distribution of votes would matter the most. For an example, a candidate who would win roughly the same number of votes as their rival candidate in Sarajevo, Tuzla and Zenica-Doboj cantons would likely have more votes than the candidate who won most votes in Herzegovina-Neretva, West Herzegovina, Central Bosnia, Canton 10, and Posavina. In this case what is insisted upon today, and what is called *legitimate ethnic representation*, would replace an essential element of a democratic society which is *legitimate political representation* and thus create a new form of discrimination.

Apart from this, it remains unclear how, in the light of the text of the decisions, “without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina”, the application of this model would approach the implementation of the ECHR decisions regarding House of Peoples. In particular if we consider the competence of the House of Peoples, both at the level of BiH and FBiH. These two houses have almost identical competencies to the houses of representatives, and it is known that they implement the special decision-making procedures which are not identical to those of the houses of representatives and which allow for a greater possibility of blocking the entire legislative process than it is the case with houses of representatives. Additionally, the ethnic clubs have the possibility of referring to the vital interests which is a repeated discrimination against those who do not declare their ethnicity as representatives of the constituent peoples and of the ethnically undetermined citizens of BiH, since they are excluded from the decision-making process.²⁰



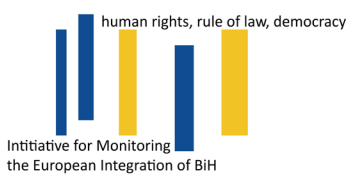
¹⁹ Position of PLC regarding SDP-HDZ proposal for the harmonisation of Annex 4 (BiH Constitution) with the requests in the Decision Sejdić/Finci, http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Stav_CJP_o_SDP_HDZ.pdf.

²⁰ There is a difference in the members of House of Peoples PABiH and House of Peoples of Parliament BiH considering that the club of Others participates in the House of Peoples of Parliament BiH, it has seven members and it does not have the decision-making mechanisms available to the representatives of the clubs of the constituent peoples, where there is not club of Others at the level of House of Peoples PABiH.

We can conclude from all of this it is not even a partial solution in this case, and that it would essentially represent the introduction of a new form of discrimination and inequality between the value of the votes of the citizens participating in the elections as voters or candidates.

Such electoral solution would allow the domination by the (national, once more) political parties which can cover the territories with the higher density of population of ethnic groups and allow the rule over national product, natural wealth and resources, cultural goods, control of the state and the majority ethnic groups which represent themselves as the majority from the concrete electoral area.

While on the topic of discrimination, it is worth mentioning that the method of establishing potential discrimination in the process of proving the discrimination also uses numerical data which can cast a doubt over seemingly neutral regulation and reveal the existence of indirect discrimination which is evident in its final outcome considering the manner of its implementation and the final result achieved through the application. In other words, the data can be used to prove the positions of the members of constituent groups and those who are not constituent in equal situations and the realistic possibilities for both if this or similar model is applied. The possibility of election is not at the same level as the right to choose and they must not be mixed.²¹ We can already say that these or similar models support the conclusion that the chances of the Others are dropped below the realistic levels of the possibility of being elected as a member of the Presidency. While on the topic of House of Peoples, it is still unclear what the concrete suggestions are, but even now we can say that as long as there is a legislative body which provides the constitutional people with a guarantee to participate in the legislative process under the same conditions as the representatives in the houses of representatives, with the special procedures of using veto based on the vital interests and which does not provide such rights for the Others – this represents a clear contradiction to the decisions of ECHR and the request that everyone must have an equal right to participate in the electoral process without granting any special rights



²¹ Position of PLC regarding SDP-HDZ proposal for the harmonisation of Annex 4 (BiH Constitution) with the requests in the Decision Sejdić/Finci, http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Stav_CJP_o_SDP_HDZ.pdf.

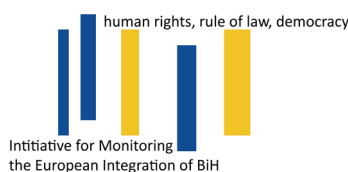
to the members of the constituent peoples and exclusion of minorities and citizens of BiH.

Before any of this, if there is an honest will to implement the decisions of the European Court of Human rights, it is then necessary to take a stance which will not be exclusive, but which will stick to the principle that there is no compromise and that there must not be any compromise. And the principles are included in the decisions of the European Court of Human Rights and the respect of the right to free election and prohibition of discrimination pursuant to Article II of BiH Constitution. There cannot be a compromise regarding these principles, and it is clear that this mode can be found through the search for a balance between the civic and ethnic, However, the question is if the intentions are honest and whether there is willingness to undertake these steps. In other words, this and similar models which are based on the formal implementations of the decisions without any essential procedures into the electoral system from the perspective of the decisions of the European Court of Human Rights would lead the state into a situation of additional ethnic divisions and blockades in the legislative process which would for a state construction, such as BiH, denote the final dissolution.

5.3. Finding a mode which would basically allow for the decisions to be implemented, and which would represent a compromise and offer a compromise solution and include the constituent peoples in the decision-making process, can be achieved in two ways:

House/Council of Peoples

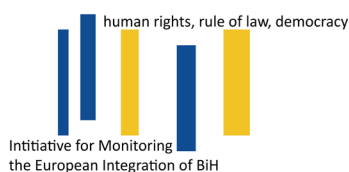
1. Designing House of Peoples as a body consisted of a certain number of constituent representatives and representatives who are not constituent. They could be elected at the state level, directly. The solution is simple: each BiH citizen must be allowed to elect each member of the House of Peoples and by giving them a vote, or not, creating the accountability for their actions. This approach to the election for the House of Peoples of PABiH has a limited reach towards the Sejdić/Finci decision and can be considered compatible with its demands.



2. The second way of designing a House of Peoples would be by forming constituent peoples clubs, and the Others club, which would have the same rights in the decision-making process as the remaining three clubs. The jurisdictions of this body – a more suitable name would be Council of Peoples – would be the predefined issues which can be understood as issues of vital interest, and not all issues proclaimed as such by the clubs (which is the current situation). In this way, the House of Representatives would be a place for decision-making, and the Council of Peoples a place where the discussion happens only regarding the questions from the predefined list of vital interests for the constituent peoples and for the Others, that is for the minorities in BiH, and consequently their collective rights following the equal terms as it would be the case regarding the constituent people.
3. The third way of protecting the collective rights could take place within the framework of houses of representatives and ethnic clubs which would not exclude the representatives of Others, based on the predefined list of issues worthy of the collective protection.
4. Of course that the modalities are not limited to these three possible models, but these are definitely possible as models in the future discussions on the reform of the electoral system of BiH which would be based on the ECHR decisions. Any model not discussed here and which would meet the basic criteria stipulated in the ECHR decisions in the so-called *electoral cases* would be acceptable, and that would involve the equal right to participation in the electoral process for all citizens, regardless of whether they are a member of the constituent peoples, a minority or ethnically undetermined citizen, with the same conditions and without the provision of any special status or right for any group or individual.

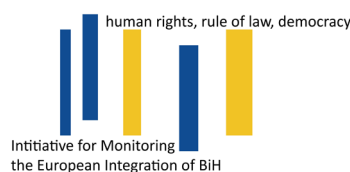
The Presidency

1. If the ethnic stipulation is removed from the Constitution of BiH, the elections from the Presidency could be held in a single electoral unit (possibly two) at the level of BiH (or entity level) and four members of the Presidency would be chosen – three members representing the constituent peoples and one representing the Others.



2. Direct elections of a president in the Parliamentary Assembly of BiH with the distribution of key functions at the state level. The key functions could be: 1) Chairperson of the House of Representatives PABiH, 2) Chairperson of the Council of Peoples PABiH, 3) BiH President, 4) Chairperson of the Council of Ministers, and they would be elected precisely in that order, with the limitation that there cannot be two key function holders from the same constituent people, or the Others, with mandatory rotation following each electoral cycle. In this manner would all the constituent peoples and Others get a key function and would have the chance to perform another function during the following electoral cycle. The election of the President of BiH would be conducted in the Council of Peoples (or within a suitable body within the House of Representatives) and it would guarantee what is called *legitimate ethnic*, as well *legitimate political* representation, which would not allow for any discrimination.
3. As is the case with the House of Peoples, there are other models that would be possible and acceptable, if they would be in line with the ECHR decisions and if they would not lead towards the discrimination of any BiH citizen who would have the equal right to participate in the BiH Presidency Elections.

The models which were proposed (and some were rejected in the past²²) more or less provided the answers to these questions. The most significant attempt was the *April Package*²³, which, among other things, addressed the issue of elections for the BiH Presidency with a single President who is rotated and with the functioning of the House of Peoples²⁴, the competences of which were solely limited to the vital interests, with the additional constitutional procedures. It was followed by the *Butmir Package* which was essentially a reduced *April Package*, but it was, unfortunately, also rejected. There was a series of various models and suggestions which ensued and all of which were reduced



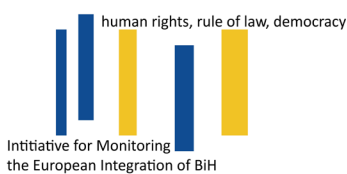
22 <https://www.klix.ba/vijesti/bih/svi-neuspjeli-pokusaji-ustavnih-promjena-u-bih-od-aprilskog-do-butmirskog-paketa/210125052>

23 https://bs.wikipedia.org/wiki/Aprilski_paket

24 House of Peoples should have consisted of 21 members, seven from each of the constituent peoples which would not necessarily be problematic if the competencies of the House of Peoples were limited solely to the protection of the collective rights acknowledged by the Constitution. Hence, House of Peoples stopped being an equal legislative body to the House of Representatives.

and focused solely on addressing the ECHR decisions, such as the last proposal by Naša Stranka, which is the only one which is in the parliamentary procedure, but there are slim chances that it will receive the necessary political support. In essence, the *April Package* was the most comprehensive²⁵ and it offered the most for all the political actors, as well as a chance for the integrative processes in BiH since it included strengthening the state and transferring the competences from the entity to the state, as well as the *EU Key*, i.e. the constitutional stipulation which would automatically be applied in all situations when the EU would push a requirement which would be an obstacle on the path of BiH to the EU membership. This would help avoid the unnecessary discussion on the transfer of competences since this clause was included in the proposal, so all such issues would automatically become the state competence. Unfortunately, it is hard to reach such level of harmonisation of a proposal which had gathered the vast majority of the participants in the decision-making processes at the time and offered solutions which today seem unattainable. Of course, it did not solve all the open questions and blockades, such as the entity voting and other less important issues, but it is clear that some representatives were ready to reject such proposal, which offered many positive elements, and choose nothing as an alternative, and the nothing they chose is leading BiH today into the greatest existential crisis ever.

5.4. Unfortunately, due to the impossibility of accepting any solution and the evident lack of willingness to seek solutions which would be based on compromise which would not be harmful to the principle, it is quite possible that the entire process, and consequently the implementation of the ECHR decisions too, is stopped indefinitely. This outcome is the least desirable, but most likely considering the current political turbulence in BiH. It seems much more probable that the political climate following the next general election will be established in such a way that it will be possible during the first year of the mandate to change the electoral system in a suitable way. It is very hard to be an optimist and to expect that in the remaining period of several months, which is when the general elections 2022 will be announced, there will be changes in these political circumstances, so

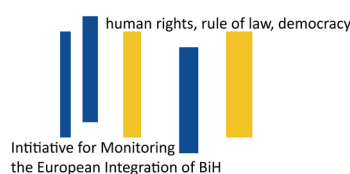


²⁵ <https://www.klix.ba/vijesti/bih/koje-su-reforme-planirane-aprilskim-paketom-jacanje-drzave-u-odnosu-na-entitete/190923067>

the aforementioned becomes the most realistic outcome. However, it is not possible to permanently remove this issue from the agenda, since the obligation stems from the ECHR decisions, and is thus imposed as an international obligation of BiH towards the Council of Europe membership. All political actors in BiH most share this determination in order for the solution which will achieve the two-way aim to be found – ensure the electoral process void of any discrimination and ensure that each BiH citizen, regardless of their ethnicity or other characteristics, feels protected within the framework of the rights guaranteed by the constitution.

6. Decision-Making System for the Changes to the BiH Constitution and BiH Election Law

Considering the complexity of the decision-making system in BiH, it is necessary to get the consent from all the relevant political actors who participate in the work of the Parliamentary Assembly of BiH, whether through the political representatives in the House of Representatives PABiH²⁶, which also includes the suitable ethnic majority, or through the ethnic representatives of the constituent people who participate in the work of the House of Peoples of PABiH. The needed levels of consent in the complex decision-making procedure in the House of Representatives of PABiH requires, at minimum, the majority of the votes by the present representatives and who are voting with the minimum of a third of representatives from each of the entities. Further, the quorum required for decision-making in the House of Peoples²⁷ consists of nine delegates, with the condition that minimally three Bosniak, Croat, and Serbian representatives each are present, and, according to the Rulebook of the house, the decisions in the House are made by the majority of the delegates who are present and who vote, and again with a third of the elected delegates from the territory of each of the entities. In this way we can conclude that a 7/8 majority is needed in order to change the BiH Constitution, regardless of the extent of the changes, which seems impossible.



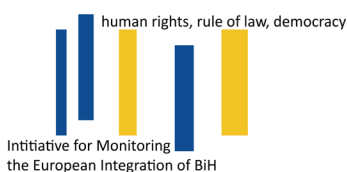
26 <https://www.parlament.ba/Content/Read/59?title=Poslovnik>

27 <https://www.parlament.ba/Content/Read/37?title=Poslovnik>

CONCLUSION AND RECOMMENDATIONS

If there is an expectation from Bosnia and Herzegovina to be structured as a modern European state, which are the implicit request by both the EU institutions and Council of Europe, then it should be constituted as a democratic, rule of law and secular state, which takes care of the social and economic protection of all of its citizens, and the political government in principle should be legitimized by an abstract group of all citizens. The process of constitutional reform and the reform of the electoral system implies that the fundamental determination of the constitutional system of BiH is the establishment and consistent exercise of human rights and freedoms in line with the European standards, in its entire territory. The future electoral process and electoral rules should definitely be based on the idea of the state for all its citizens, with the improved system of the so-called personal (cultural) autonomies, or the “collective rights of the constituent peoples” in the entire territory of BiH, of course, if it is established that this system should be kept. In order for Bosnia and Herzegovina to come closer to this model, it is necessary to consider the following recommendations:

- It is important that the collective rights of the *constituent peoples* are not treated as sovereign rights which are determined in territorial terms. They should, however, be treated as special collective rights, which are not transferable rights and which must not be imposed on other groups. These rights should be exercised by the members of certain groups as a *personal autonomy*, which implies their guarantee in the Constitution and their protection in the government institutions.²⁸
- Regarding the determination of the bearers of the sovereignty of the state of BiH, the electoral system should insist on the principle of sovereignty for all citizens with the request for equality of special cultural collectivities, and thus the state cannot be organised neither as the simple classic state (unitary), nor as the current hybrid



²⁸ *Democracy without Citizens? - Looking for a Model of Political Participation of All Constitutional Categories in Bosnia and Herzegovina*, The Association Alumni of the Center for Interdisciplinary Postgraduate Studies (ACIPS), BiH, September 2012.

confederate-consocial state, in which the entities, or cantons, manage the *surplus* of state competencies, and the representation of the ethno-cultural collectivities is not systematised consistently, but based on the stronger state unity, with the optimised territorial federalism and personal autonomy, which would be manifested through the election results and the governance of the state affairs.

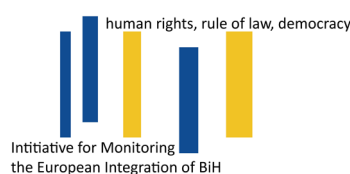
- Human rights of the so-called third generation, which can also include the collective rights, only make sense if the system is already stabilised based on the human rights of the so-called first and second generations, or the classical civic and political, and economic-social rights.
- Considering the role of the abstract BiH citizen as the bearer of the state sovereignty, the legitimacy of BiH organs would not be questionable. Hence, the representatives should be elected directly by the BiH citizens. The protection of the *vital interests*, or *collective rights*, would be achieved in line with the specific mechanism in the Council/House of Representatives (or within a body established within the representative bodies, whose task would be to protect the collective rights), with the right to exercise veto which had a suspending function. This automatically includes the reduction of the competencies of the Council/House of Peoples to only those issues which have the element of protection of the *collective rights*, or *vital interests*. However, under these circumstances, the list of the *vital interests* would need to be precisely defined in advance.
- The constitutional and electoral reform needs to ensure the unity of the economic territory with the full guarantee for the movement of people, goods, services, and capital in the entire territory of BiH, on the one hand, and the distribution of competences between the state and lower governance levels, on the other hand, with the special characteristics of the regional and local autonomies. All the listed requests and recommendations are framed by the final court decisions: 1) the interpretation of the Constitutional Court BiH on the normativity of the Preamble, and 2) the decision of the ECHR in the cases Sejdić and Finci, Zornić, Pilav, Šlaku, and Pudarić. Although it is completely legitimate to question, both

theoretically and critically, their purpose and social significance, it is not possible to do so from the legal aspect. On the contrary, they need to be applied. These recommendations do not discuss the numerous issues and problems, primarily those of the essential nature, such as the concept of *constituent peoples* itself, as well as some structural issues of lower government levels – the entities and the cantons, where the many aspects of classical statehood are much more present in practice, than it is the case with the BiH institutions. Of course, all of these positions must be long-term aims since they imply the comprehensive reform which would result in the votes for the completely new constitution and election law based on the idea of de-ethnisation and which would strive for the balance between the liberally-civic, democratic principle *one person – one vote* and the full respect for the collective rights inherent to collectivities. The aforementioned principles would then have to find their own institutional reflection in the legislative body at the central level of BiH state whether we are discussing a two-house legislative body or single-house body which would also include the decision-making regarding the protection of the collective rights.

Finally, it is important to remember that there is no democracy, and there cannot be democracy, without the citizen which is in the centre of all democratic societies. The society which is solely based on collectivities and their rules is not and cannot be called democratic society and that is why it is important that the basic elements in the decisions of ECHR are fulfilled in order for BiH to even come closer to achieving that aim.

ABOUT THE AUTHOR

Faris Vehabović was born on May 23rd, 1967 in Sarajevo. He graduated and passed his bar in Sarajevo. He completed his master studies in 2005 in the Center for Interdisciplinary Studies of the University of Sarajevo, University of Bologna and London School of Economics, and he received the title of Master of European Studies. Since 2012, he has been a judge of the European Court of Human Rights, vice-president of the IV Council of the European Court of Human Rights, from January 2010 to December 2012 an *ad hoc* judge of the European Court of Human Rights, from 2001 to 2007 a registrar of the Constitutional Court of BiH, from 1996 to the end of 2000 a legal expert in the Office of the Ombudsperson for Human Rights in BiH. He is the author of the book *Relationship Between Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms*, an analysis of the Constitution of BiH and initiatives for the changes of the Constitution of BiH, and a number of articles in various legal magazines regarding the protection of human rights and Constitution of BiH. He is proficient in English and French.



ABOUT THE INITIATIVE

The Initiative for Monitoring the European Integration of Bosnia and Herzegovina is an informal coalition of forty civil society organisations which contributes to monitoring the reforms and oversees the implementation of policies, rights and standards of the European Union, focusing on the issues of democratisation, rule of law, and human and minority rights. Learn more about the Initiative at: <https://eu-monitoring.ba/en/about-the-initiative/>.

Active member organizations:

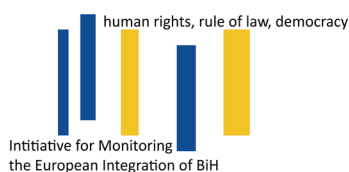
Aarhus Centre in BiH, Sarajevo
Association for Democratic Initiatives, Sarajevo
Association Network for Building Peace, Sarajevo
Balkan Investigative Reporting Network in BiH, Sarajevo
BH Journalists, Sarajevo
Centre for Investigative Reporting, Sarajevo
Civil Society Promotion Centre, Sarajevo
Forum ZFD, Sarajevo
Foundation 787, Sarajevo
Foundation Cure, Sarajevo
Helsinki Citizens' Assembly, Banja Luka
Kali Sara – Roma Information Centre, Sarajevo
Land of Children, Tuzla
MyRight – Empowers People with Disabilities, Sarajevo
Oštra Nula, Banja Luka
Sarajevo Open Centre, Sarajevo
Transitional Justice, Responsibility and Remembrance, Sarajevo
Transparency International in BiH, Banja Luka/Sarajevo
TRIAL International, Sarajevo
Vaša prava BiH (Your Rights BiH), Sarajevo
Youth Centre Kwart, Prijedor
Youth Initiative for Human Rights in BiH, Sarajevo
Zašto ne (Why Not), Sarajevo

Coordinators of the Initiative:


Sarajevo Open Centre
info@eu-monitoring.ba

Supporting organisations:

Centre for Socio-Ecological Development, Banja Luka; Human Rights Centre of the University of Sarajevo; Crvena (Red), Sarajevo; ELSA, Sarajevo; Green Council, Sarajevo; Infohouse, Sarajevo; OKC Abrašević, Mostar; Perpetuum mobile, Banja Luka; Association PEKS, Tuzla; Vesta, Tuzla; Foreign Policy Initiative BiH, Sarajevo; Green Neretva, Konjic.



human rights, rule of law, democracy



Bar Index	Color	Relative Height
1	Blue	Low
2	Blue	High
3	Yellow	Medium
4	Blue	Low
5	Yellow	Medium

Intitiative for Monitoring
the European Integration of BiH