



A ethnic veto and protection of minorities on sub-national level in BiH

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Minorities on Sub-National Level

One of the key generators of tension in the constitutional setup of Bosnia and Herzegovina is related to difference in exercise of collective rights of the three constituent peoples (the three major ethnic groups) - Bosniaks, Serbs and Croats - between the national and sub-national levels of government (Entities and Cantons) within BiH.

On the level of the whole country, and in its institutions, the three constituent peoples are represented in a way that affirms both their identity (in terms of language, culture and religion), and their equality as groups, regardless of their relative numbers. At the same time, almost without exceptions, in each Entity and Canton within BiH, one constituent people comprises overwhelming majority of that sub-national unit's population, and the other two constituent peoples find themselves in position of a *de facto* minority, playing secondary role in agenda shaping and decision making process. The consequences are significant, since sub-national level possesses considerable autonomy in a wide range of issues, from education, housing, property and land use, to social welfare, health care and pension schemes.

Sub-national units, with their own elected legislative and executive branches are specific to post-Dayton constitutional setup of BiH. Although different forms of administrative districts have existed in BiH for centuries, only after 1995 they have incorporated directly elected assemblies with legislative powers. While it was possible for Austro-Hungarian and Yugoslav centralized governments to impose relatively high standards of ethnic impartiality and representation among civil servants in different regions, under the post-Dayton system policies on sub-national level are

much more closely bound to priorities and interests of the majority ethnic group, and much less responsive to legitimate needs and interests of minority ethnic groups.

The ethnic tension is thus continuously generated by practical inability of individuals to assert their ethnic identity and exercise collective rights as members of the three constituent peoples, granted by BiH State constitution, in sub-national units where the most mundane decisions affecting their life are made.

The factual notion of minority may be extended beyond "traditional national minorities," such as Roma, Jewish, Czech, Russines or Vallachian. In a very practical and real political sense, members of the three BiH constituent peoples find themselves in position of minority in sub-national units (Entities and Cantons) in which they comprise smaller proportion of population.

This paper specifically deals with the issue of such *de facto* minorities on sub-national level that are otherwise considered constituent peoples in BiH as a whole. It relates to issues such as:

- Inability of Serbs in Livno Canton (Croat majority) to ensure Serbian language to be taught in elementary schools in Serb majority municipalities
- Inability of Bosniaks and Croats in Republic of Srpska (Serb majority) to significantly influence decision-making processes related to return of refugees, regional development, and land use or property management.
- Inability of Serbs and Croats in Sarajevo Canton (Bosniak majority) to ensure their representation in public administration and (as of lately) to prevent introduction of segregationist policies based on religion in kindergartens.

Therefore, protection of minority rights on sub-national level in BiH remains one of the key challenges for integration of the society along ethnic lines and for development of country's constitutional structure.

Ethnic Veto

So far, the most systematic attempt to protect minority rights on sub-national level has been made in 2002 through a reform of Entity constitutions. The constitutional reform of 2002 revolved around enforcing principles from BiH Constitution on protection of identity and equal collective rights of the three constituent peoples on sub-national level.

In each Entity and Canton, the reform has uniformly included several pillars:

- Removing any special majority rights from any constituent people, and granting Serbs, Croats and Bosniaks equal status, with full recognition of their identity and equal official use of their languages in public correspondence.
- Introduction of ethnic parity-based key positions (vice-presidents of Entities, vice-chairs of Cantonal parliaments), as well as provision that no more than half of Entity and Cantonal government members may belong to the same constituent people.
- Bringing ethnic structure of public services employees in line with 1991 census, to ensure ethnic impartiality of public service and to compensate for war-caused changed of ethnic composition.
- Introduction of ethnic veto, i.e. the mechanism for protection of vital national interests of a constituent people, authorizing two thirds of representatives of a constituent people in a Cantonal parliament (or second chamber of Entity parliaments) to refer new legislation that goes against vital interests of that constituent people to ruling of a special panel of judges at Entity constitutional courts.

During the past six years, Entity and Cantonal constitutions have been changed to accommodate the changes, but implementation of the most of the pillars of 2002 reform has failed:

- Introduction of ethnic-parity based key positions has not given voice to minorities. Ruling mono-ethnic political parties found little problem with filling required positions with loyal minority members without least changing own mono-ethnic political outlook. In case of directly elected minority representatives (vice-presidents of RS and vice-chairs of Cantonal parliaments), their positions have been deprived of any real authority and have remained purely ceremonial.
- Nothing has been seriously or systematically attempted towards bringing the ethnic composition of public services in line with 1991 census. What is even worse, in some areas minorities have remained even less represented in public services than within the general population. That means that not only that effects of ethnic cleansing have not been ameliorated in public services, but quite contrary, that public services have remained more ethnically cleansed than the society in general. Over the past six years, practicality no sub-national government has ever attempted to create a single action plan, or any other instrument aimed at increasing minority representation in public services. The international community has remained equally disinterested.

Therefore, ethnic veto has remained the only functioning artifact of the constitutional reform of 2002. Quite understandably, ethnic veto has not been popular, being essentially a blocking mechanism. In each Entity or Canton where it was used, it clearly went against the will of majority - coincidentally also the ethnic majority. However, evidence on first five years of employment of ethnic veto on sub-national level (2002-2007) clearly shows that:

- The instrument of ethnic veto has been justified by the fact that the responsible Entity constitutional court panels have ruled five Entity/Cantonal laws and other parliamen-



tary decisions harmful for vital national interests of one or more constituent peoples. Was it not for existence of ethnic veto, number of discriminatory laws and actual human rights injuries would have been greater.

- However, any fear from a “tyranny of minority” has been unfounded. By its very construction, the mechanism of ethnic veto cannot be used to impose laws and decisions that go against the will of majority. In fact, it is superimposed on top of regular one person-one vote system. Minority can use ethnic veto only to try to stop potentially harmful legislation, and even that conditional upon ruling of constitutional court panels of judges.
- Ethnic veto has not been employed frequently and has not introduced any significant delays in parliamentary decision-making process. During the five-year period, there were 13 cases in the Federation of BiH (including Cantons and the City of Mostar), and 21 cases in Republic of Srpska (including 8 cases that did not relate to legislation, but more vaguely to parliamentary resolutions and declarations). In all, it related to less than 1% of the legislative.
- Entity constitutional court panels were quite conservative in ruling on cases of ethnic veto. Out of total 34 cases of ethnic veto, only in 5 cases veto has been upheld (4 in FBiH, 1 in RS).
- Ethnic veto has proven to be an ineffective instrument of resolving quarrels between different ethnic parties within ruling coalitions. For instance, in FBiH, out of 9 cases of ethnic veto submitted by members of ruling coalition (as a result of their inability to reach coalition-wide agreement), only one case was upheld by the constitutional court panel. However, 3 out of 4 cases of ethnic veto moved by minority representatives in opposition were upheld.
- Ethnic veto is completely ineffective means for removing discriminatory provisions of the existing legislation. Representatives of minorities have no access to review mechanisms at the constitutional courts, and are

procedurally disabled to propose legislation without support from the (ethnic) majority.

- Finally, although by no means less importantly, the evidence shows that ethnic veto has been mostly used by second largest constituent people in an Entity (Croats in FBiH and Bosniaks in RS), while the third largest constituent people (i.e. the smallest of the three: Serbs in FBiH and Croats in RS) had no access to ethnic veto.

Some more liberal criticisms of ethnic veto tend to come from people who renounce domination of ethnic particularism in BiH politics, and who therefore identify themselves as “ethnic Bosnians,” in sense of (politically) belonging not to any particular ethnic group, but to the society of citizens as such. Many of “ethnic Bosnians” in politics advocate abolition of any form of institutionalized ethnic representation and consider the institution of ethnic veto as a sublime expression of domination of ethnic over civic. Yet, in light of actual evidence, it becomes immediately clear that criticisms that blame prevailing ethnic outlook of BiH politics on ethnic veto and explicit ethnic representation miss the point: ethnic discrimination and favoritism are instituted by political parties and coalitions that regularly win majority of citizen votes on sub-national level. Unrestrained rule of majority in a multi-ethnic society is a far greater threat to social cohesion and human rights than instituted voice of minorities.

Improving the System of Ethnic Veto

Relative success of ethnic veto, in sense of protecting minority rights on sub-national level, compared to other pillars of the constitutional reform of 2002, should not come as a complete surprise. In fact, all other rights given to the three constituent peoples by Entity and Cantonal constitutions are merely declarative and lack any practical mechanisms for protection or implementation. Therefore, if not supported by procedural safeguards, affirmation of identity and protection of collective equality on sub-national level can be practically enjoyed only by those ethnic groups who represent majority of citizens.



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was born on April 13, 1970 in Sarajevo. He received his MSc and BSc degrees from the University of Sarajevo, School of Electric Engineering, Department of Computer Science and Information Systems. Between 1994 and 1997, he worked as an associate at the Sarajevo office of Instituto de Europa Oriental, University Complutense, Madrid. Between 1997 and 2006, he was elected to duties of municipal councillor in Sarajevo's central municipality, representative in Sarajevo's cantonal assembly, and in the House of Peoples of the Parliament of FBiH. In 2001 and 2002, he worked as foreign policy advisor to the Presidency of BiH. Since 2006, he directs research at the Center for Policy Research and Development, a young NGO located in Sarajevo.

In that respect, further evolution of the constitutional structure of BiH should only constructively move towards improvement of institutional safeguards of minority rights, not towards their abolishment. Internationally stimulated discussion on further constitutional reform in BiH (especially advised by EU) has to take that fact into consideration. To ease long-term ethnic tension and strengthen social cohesion along ethnic lines, the constitutional structure of BiH has to evolve towards closing the gap between strong enforcement of collective rights of Bosniaks, Serbs and Croats on State level and still weak enforcement of the same rights on sub-national level, not towards widening it.

Therefore, the system of ethnic veto can be further enhanced by introduction of the following improvements:

- Allowing the third biggest (i.e. the smallest) constituent people in a sub-national unit to have access to the instrument of ethnic veto, even if insufficient number of representatives is elected to the appropriate parliamentary chamber.
- Relaxing requirements for sending the existing legislation to Entity constitutional courts for review. Currently, entity constitutions require at least one third of parliament members for initiating the review, which is usually way above reach of minorities. By enabling caucuses of minority representatives in sub-national parliaments to initiate review of legislation would open way for removing discriminatory provisions adopted prior to introduction of ethnic veto in 2002.
- Making parliamentary procedure more open and transparent in order to have minority voice heard. In particular, that means:
 - Introducing mandatory public hearings on bills, without restriction on who can participate in public debate (i.e. bypassing usual public discussion that stays only within ministries and other administrative bodies).
- Slashing down the widespread use of "urgent procedure" for adoption of laws. Under "urgent procedure" (which is nowadays frequently used at convenience of governments), there is very limited (if any) debate and no public debate and public hearings on bills.
- Guaranteeing caucuses of minority representatives in sub-national parliaments that their proposals will be taken into parliamentary deliberation and given for discussion and voting. Presently, most sub-national parliaments have rulebooks that maintain firm control over agenda in the hands of ruling parties and coalitions, so that it is almost impossible even to bring up an issue on the agenda without sponsorship of government or parliamentary majority.



A "Policy Development Fellowship Program" has been launched by the Open Society Fund BiH in early 2004 with the aim to improve BiH policy research and dialogue and to contribute to the development of a sound policy-making culture based on informative and empirically grounded policy options. The program provides an opportunity for selected fellows to collaborate with the Open Society Fund in conducting policy research and writing a policy study with the support of mentors and trainers during the whole process. Thirty eight fellowships have been granted in three cycles since the starting of the Program. All policy studies are available at www.soros.org.ba