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Ethnic veto and protection of minority rights on sub-national level in BiH

Dragan Ivanović

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Summary

Ethnic veto is an instrument for protection of vital national interests of the three constituent peoples in Bosnia and Herzegovina in the legislative decision making process. It has been introduced on sub-national (Entity and Cantonal) levels of government by the constitutional reform of 2002, which concentrated on removing ethnic favoritism and discrimination, and enforcing equal collective rights of the three major ethnic groups (the three constituent peoples): Bosniaks, Serbs and Croats.

This paper explores effects and possible improvements in application of ethnic veto on sub-national level, while concentrating on the issue of protecting rights of minority groups. Existence of sub-national levels of government, with their own elected legislative and executive branches, is a new development in BiH constitutional structure typical for post-Dayton period. While BiH as a whole is an ethnically mixed society, individual Entities, Cantons and regions are, with rare exceptions, populated by significant majority of one ethnic group, with other two groups in position of minority. That also means that majorities in sub-national legislatures tend to be less responsive, if not deliberately biased, in ensuring ethnic group rights.

Ethnic veto has been introduced on sub-national level in 2002 as one of instruments for protecting rights and ensuring collective equality of the three constituent peoples in an Entity or Canton, whatever their numbers may be. It has been since criticized for providing minorities power to obstruct the will of majority, for prolonging and complicating legislative process, for stressing collective ethnic rights at expense of individual rights of citizens, and for its abuse in power struggles between ethnic parties within governing coalitions.

This paper looks into these criticisms and facts of ethnic veto application over the past five years to show that in practice: ethnic veto has not been overly used, and has not introduced significant delays in the legislative process; ethnic veto cannot impose solutions that go

against will of majority; in sense of abuse, ethnic veto has proven to be an ineffective instrument of power struggles within ruling coalitions; and, indeed, there were several cases where use of ethnic veto has prevented adoption of discriminatory legislation.
Besides, ethnic veto has been employed mostly by second biggest ethnic groups in Entities, while it is indicative that the third biggest group (i.e. the smallest of the three groups in an Entity) has been either deprived of access or otherwise discouraged of using ethnic veto. And, being used in adoption of new legislation, ethnic veto does not help in elimination of discriminatory provisions of the existing laws.
This study considers and advocates an alternative, improved system of ethnic veto, which: (1) allows third biggest (i.e. smallest) constituent people in a sub-national level of government to have access to ethnic veto as instrument; (2) relaxes requirements for reviewing the existing legislation before Entity constitutional courts; and (3) opening up legislative process and making it more transparent by decreasing percentage of bills adopted on short notice (in «urgent» procedure), allowing minority bills to be discussed without prior sponsorship by majority, and introducing mandatory public hearings on bills.
That alternative is compared to status quo, but also to two other alternatives: a theoretical reversal to the state before introduction of ethnic veto in 2002, a and a more benevolent majority rule which, although not including ethnic veto, includes all other improvements mentioned above. The alternatives are evaluated against criteria of effectiveness, proactivity, cost and flexibility, the latter specifically addressing prospects of the forthcoming national level constitutional reform.
The study argues that improvement and preservation of instruments introduced by 2002 constitutional reform, and especially ethnic veto, must be an integral part of future constitutional negotiations. Otherwise, we may face deterioration of the achieved level of protection of minority rights on sub-national level.

2. PURPOSE OF THE STUDY

2.1. Purpose and subject of the study

Purpose of this research paper is to explore use of *ethnic veto* in the context of the constitutional reform in Bosnia and Herzegovina (BiH) in 2002, and to suggest ways in which ethnic veto, as a specific decision making instrument, can be changed and complemented with purpose of ensuring effective protection of rights of ethnic groups in Bosnia and Herzegovina.

In this paper, the term «ethnic veto» is used as a colloquial name for what is constitutionally termed «*protection of vital national interests of the constituent peoples in Bosnia and Herzegovina,*» or VNI in short. In essence, ethnic veto is a constitutional instrument that enables two thirds of elected representatives belonging to any of the three constituent peoples in BiH to conditionally block adoption of laws and other parliamentary decisions containing (in their view) discriminatory or otherwise harmful provisions pertaining (but not limited) to:

- Rights of each and every constituent people to be adequately represented in legislative, executive and judicial bodies;
- Identity of a constituent people;
- Constitutional amendments;
- Organization of the public administration;
- Equal rights of the constituent peoples in the decision making process;
- Education, religion, language, nourishing culture, tradition, and cultural heritage;
- Territorial organization; and
- Public information system.[1]

Ethnic veto was introduced within the framework of a comprehensive sub-national constitutional reform in BiH in 2002, through which substantial amendments to Entity and Cantonal constitutions were introduced with an overarching goal of asserting and ensuring equal rights of the three constituent peoples in BiH (Serbs, Croats and Bosniaks), in each sub-national level and unit of government, be it Entities (the Federation of BiH (FBiH), and the Republic of Srpska (RS)), 10 Cantons within FBiH, or municipalities (local government level).[2]
Although there is a widespread opinion in some parts of BiH society that ethnic veto, along with some other instruments introduced by the constitutional reform of 2002, is a problem *per se* (and we will review the key aspects of that critique), this study instead tries to concentrate on the root problem which ethnic veto was meant to ameliorate: the problem of ensuring minority rights on sub-national level in BiH.

Therefore, this study discusses ethnic veto in relation to other currently existing mechanisms *on the solution side*, and, as mentioned earlier, tries to asses how successful ethnic veto has been, how it has behaved in relation to other constitutional and decision making instruments, and, finally, tries to suggest ways in which ethnic veto can be modified and/or complemented in order to better contribute to solving the problem for which it was devised.

That is reflected in structure of this study. The remaining subsections of the introduction will deal with formulation of the problem of minority right protection on sub-national level in BiH, and presentation of the research approach. The next section will describe the problem and its background, as well as lay out a framework that will be used for structuring the argument and evaluating options. The section on policy options will look into some old and some new ideas of how the problem can be addressed, and try to point to what we consider the best available option. Final conclusions and recommendations of the study are presented in the final section.

2.2. Defining the problem

Defining the problem of ensuring protection of minority rights on sub-national level in BiH may be a difficult task by itself, since the word «minority» means different things to different people in the country.
On one level of discourse, many people involved in politics tend to take it as a sort of offence, and to react negatively to any application of that "M-word" on members of «the three constituent peoples in Bosnia and Herzegovina:» Croats, Bosniaks and Serbs.

Certainly, the Constitution of BiH stipulates that Bosniaks, Serbs and Croats are the three constituent peoples in BiH with equal collective rights. That was the very foundation for the constitutional reform in 2002. In the opinion of the BiH Constitutional Court, the fact that the three constituent peoples are considered equal in the Constitution of BiH means that neither of them can be given special majority rights in any part of BiH.[3]

If we look at BiH as a whole, neither Serbs, Croats, nor Bosniaks have an overall majority in the population. Therefore, on BiH level, facts and constitutional principles go hand in hand. Even if a future census would indicate that e.g. Bosniaks (who are most numerous) comprise over 50% of country's population, it is almost unthinkable that any agreed constitutional solution would attribute Bosniaks with some special majority rights in BiH, just as it would be unthinkable that collective rights of Croats as a constituent people would be diminished on the account on their present small numbers.

Therefore, in the official speak, the word minority is reserved for *national minorities* (such as Roma, Czechs, Slovenians, Jews, Romanians, etc.) and other citizens who choose not to declare themselves Croats, Bosniaks or Serbs. It is felt that acknowledging a minority status to one group inevitably implies an acknowledgement of a majority status to another. Since it goes against proclaimed constitutional principles, mention of minorities is reserved only for the context of national minorities as a matter of political correctness.

However, if we look at any statistical estimate on sub-national (Entity, Cantonal and Municipal) levels, it becomes obvious that practically without exception each of those territorial units has a very unbalanced ethnic composition, usually with one group much over 50% of sub-national unit's population. Even in sub-national units where two constituent peoples are nearly equally numerous, members of the third one comprise a disproportionately smaller portion of population.[4]
One does not need a deep and detailed study to understand that the problem of protecting minority rights on sub-national level is very live and present in BiH. In fact, much of country's political life revolves around it on daily basis: right of Bosniaks to reclaim their legally possessed land that has been illegally built upon in RS by refugee Serbs in Kotorsko near Doboj; right of Serbs in Glamoč and Bosansko Grahovo to have Serbian language taught to their children in schools; or right of Croats in Sarajevo to be represented in managerial positions in public sector, just to name some.

Failure to protect or promote specific and legitimate interests of minorities on sub-national level figures high on TV reports, when interviewed disappointed minority members after years spent in attempts to realize their legitimate claims ask themselves aloud whether Mostar, Banja Luka, Sarajevo or Bihać are in the same country.

Realization that one can enjoy certain rights «there,» but not «here» because of his or her individual or group identity is arguably one of the most significant generators of victimization

[1] Cf. Amendment XXXVII to the Constitution of the Federation of Bosnia and Herzegovina, and Amendment LXXVII to the Constitution of the Republic of Srpska

[2] Constitutional amendments to Entity constitutions were decreed by the High Representative of International Community Mr. Wolfgang Petritsch on April 19, 2002 (with some additions decreed on September 22, 2002).

[3] Cf. partial decisions by the Constitutional Court of BiH in case no. U-5/98 (Official Gazette of Bosnia and Herzegovina nos. 11/00, 17/00, 23/00 and 36/00).

[4] Based on pre-war population census of 1991. For newer information and estimates see BiH Agency for Statistics (www.bhas.ba) and other sources such as CIA World fact book.

and destruction of social cohesion in Bosnia and Herzegovina. Conversely, whatever makes BiH citizenship more real and tangible category in daily consumption of individual and collective rights regardless of Entity or Canton one lives in, solidifies the very foundation of connivance and cohesion in BiH society.

I purposefully stress sub-national over national and local levels of government. Historically, sub-national levels arose as para-states and were means of taking over and concentrating powers from national and local level. The process has been somewhat reversed in the past decade, and some important powers (defense, indirect taxation, customs, border police, top-level judiciary, intelligence community, to name some) have been again ceded back to national level, while some others (local taxation, urban planning, communal infrastructure and utilities) have been transferred to local level of government. However, it is reasonable to presume that some key aspects, such as public services, health, social insurance, education, enforcement of property rights, and land use, will remain to be managed on sub-national level of government. Also, when speaking about sub-national levels of government, I stress both Entities *and* Cantons that are part of one of the Entities, namely FBiH.

This study uses terms «minority» and «majority» in their factual, non-normative sense. When I say that Serbs are minority in Livno Canton, that Croats are minority in Sarajevo, or that Bosniaks are minority in RS, I do not mean that they should be separated, as subgroups, from the whole of corresponding constituent peoples and downgraded to a position of a secondary or a subservient political subject. Likewise, when I say that Croats are majority in Livno Canton, Bosniaks in Sarajevo or Serbs in RS, I do not wish to imply that these subgroups of constitutional peoples should be somehow elevated to a privileged status of majority in a particular sub-national unit of government.

Instead, when speaking of minority, I am simply taking the fact that members of a constituent people comprise a (significantly) smaller part of population in a particular sub-national unit. Similarly, when speaking of majority, I am exclusively referring to a fact that members of one constituent people comprise a (huge) majority of a sub-national unit's population. For the sake of clarity, I will try to avoid references to rare bordering cases (such as Mostar) without overwhelming factual majority/minority relationship between groups.

That said, I fully understand and respect reluctance of Serbs in Livno Canton, Croats in Sarajevo or Bosniaks in RS to speak about themselves as minorities. These groups do face very real problems and obstacles in promoting their legitimate and specific needs and interests while being so weakly represented in a majoritarian decision making process on sub-national level, and certainly wouldn't welcome any potentially diminishing or derogatory reference.

I hope this study will be understood as an attempt to bring to attention and help ameliorate problems minorities face on sub-national level in BiH. As in other real life situations, euphemisms are more likely to obscure and confuse. I speak of minorities and majorities, because speaking of protection of rights of three peoples with equal rights looks like dealing with logically impossible problem.
In fact, insisting on political correctness may lead us to be very politically unfair, if we deliberately close our eyes at the fact that minorities throughout BiH have very hard time protecting and promoting their vital interests, or worse, if we try to limit the debate on problems met only by a single constituent people.

2.3. Study approach

Before getting on with problem description, some important clarifications need to be made regarding the overall approach to the problem.

First, this study does make some injustice for not treating *national minorities* in Bosnia and Herzegovina, including Roma, Slovenians, Czechs, Romanians, Jews and other «traditional» national minorities and ethnic groups historically inhabiting parts of BiH, as well as to those citizens who prefer to declare themselves ethnically Bosnians based on BiH citizenship, or who prefer not to declare themselves members of any ethnic group. Certainly, in some local areas these groups are even more numerous than the constituent peoples, Bosniaks, Serbs and Croats themselves, but there are two main reasons for their omission from this study:

- Constitutional position of national minorities is different from position of constituent peoples, and their representation in decision-making processes is implemented differently. Since I am here discussing specific constitutional mechanism of ethnic veto, the position and protection of rights of national minorities, especially in the light of shamefully poor and incomplete implementation of the BiH Law on Protection of National Minorities, must be left to a separate study.

- By declaring themselves «Bosnian» in ethnic sense, citizens of Bosnia and Herzegovina mostly protest against ethnic monopolization and divisiveness of political life in BiH, and in the greatest number of cases express their will to embrace the totality of multi-ethnic and multi-confessional culture and history of Bosnia and Herzegovina as the central part of their collective identity as a super-national «ethnic group.» I fully respect and approve freedom of choice of some of my fellow citizens who reject what they see as particularism and exclusivity of belonging to one of the three constituent peoples (although I declare myself Croat). However, when speaking of ethnic veto and in the context of governmental decision-making, it is clear that ethnic-centered element do not replace individual citizen- (or MP-) based elective and decision making process, but rather complement it. In other words, subjects of the political system are, in the first place, individual citizens, candidates at the elections, parliament members, and ministers who decide by majority of individual votes, regardless of ethnic identity. Only under some special circumstances, minority of an ethnic group may block decisions of majority. In other words, no decision can go against the will of majority, and therefore, citizens as whole («Bosnians» in terms of BiH citizenship) are implicitly protected from decisions they disapprove.

Second point I wish to make is that I believe that *some* mechanism of protection of collective rights of the constituent peoples (Bosniaks, Serbs and Croats) has to exist within the constitutional structure. In other words, I am convinced that constituent peoples, in order to thrive, cannot be protected *only* on the level of general individual political and civil rights. In words of the Venice Commission, it is hard to believe that granting collective rights can be realized without formally acknowledging existence of collective groups and their specific rights. However, in my opinion that does not preclude solutions that embody collective rights of constituent peoples in form of individual rights of their members. In that respect, ethnic veto is seen not as the problem itself, but as one of alternative solutions.

3. Problem description

3.1. Background

The central problem of post-war nation-building of BiH has been how to build a modern European country based on democracy, rule of law and protection of civil, political and human rights of its citizens, while at the same time protecting identity and other collective rights of the three major ethnic groups - Serbs, Croats and Bosniaks.

In that context, novelty in the post-war (or post-Dayton) era is existence of strong sub-national levels of government - FBiH, RS and Cantons inside FBiH with their own elected legislative and executive branches, over areas strongly dominated by one of the three ethnic groups. Therefore, although the problem of reconciling individual and collective rights and freedoms is essentially nothing new in BiH, protection of minority rights on sub-national level is a distinct feature of post-Dayton constitutional debate.

In RS and eight out of ten Cantons in FBiH, one ethnic group - either Serbs, Croats, or Bosniaks - strongly dominate, and power has been held (with minor interruptions) by political parties with strong ethnic profile corresponding to the majority constituent people. Even in cases of FBiH and so-called «mixed cantons» of Central Bosnia (centered in Travnik) and Hercegovina-Neretva (centered in Mostar), with comparable proportions of two ethnic groups (e.g. Bosniaks and Croats), the third group has been strongly marginalized (e.g. Serbs).[5]

Although some regions of BiH have been populated by majority of one ethnic group for decades and centuries (e.g. Cazinska Krajina, Western Herzegovina, etc.), the problem was significantly aggravated by wartime atrocities, expulsions and "ethnic cleansing."

The biggest individual institutional effort aimed towards protection of minorities in that period took place in 1998, when Alija Izetbegović, at that time Bosniak member of BiH Presidency, supported the request made by Serb Civil Council, FBiH based NGO, and officially requested the BiH Constitutional Court to bring sub-national (Entity and Cantonal) constitutions in line with BiH Constitution and its designation of Croats, Bosniaks and Serbs as the three constituent peoples with equal rights in BiH. In the ensuing case known as U-5/98 occupied the BiH Constitutional Court for next two years and resulted in a series of decisions in 2000 which nullified a number of discriminatory provisions in sub-national constitutions (of RS and FBiH).[6]

3.2. The current solution

Based on the partial decisions in the case U-5/98, the constitutional reform of 2002 was a political compromise that did not mention of majorities and minorities in the way this study does (for reasons mentioned earlier), but revolved around «realization of constituent status of the three peoples (Bosniaks, Serbs, and Croats) throughout BiH.»

The pillars of the current solution, instituted in 2002, for protection of minorities on sub-national level were:

- Removal of any exclusive majority status ascribed to Serbs in RS and Bosniaks and Croats in FBiH. Prior to the reform, RS Constitution defined it as «the state of Serb people and all citizens,» while preamble to the FBiH Constitution spoke of its creation as a result of endeavor by «the Bosniaks and the Croats, as constituent peoples (along with Others and citizens of the Republic of Bosnia and Herzegovina,» acting «in exercise of their

[5] For an overview and assesment of historic (1991) and current demographic structure of BiH, see the pages of the BiH Agency for Statistics at (www.bhas.ba) and Entity statustical agencies for FBiH (www.fzs.ba) and RS (www.rzs.rs.ba).

[6] For reference, see the set of the four partial decisions of the Constitutional Court of BiH in case no. U-5/98 available at http://www.ccbh.ba/eng/odluke/ .

sovereign rights.» Now, constitutions of both Entities and all Cantons in FBiH uniformly defined Serbs, Croats and Bosniaks constituent peoples with equal collective rights in each sub-national unit of government. Official use of Croat, Bosnian or Serb language was mandated throughout the country.

- New positions were created within executive branches on all levels, including two Entity Vice-Presidents and two Vice-Chairs of Cantonal parliaments, to ensure parity of the three constituent peoples. Besides, no sub-national government could have more than 50% of its members from a single ethnic group.
- Legislative branch was also reformed to ensure ethnic representation. For that purpose, elected representatives from the three constituent peoples in second chamber of FBiH Parliament, newly created RS Council of Peoples, and within unicameral Cantonal parliaments were organized in ethnic caucuses with power to move ethnic veto (alongside their regular work as MPs).
- Sub-national constitutions mandated that the employment structure in public administration has to be brought in line with pre-war ethnic composition of the respective territory, based on 1991 census,

The agreement on constitutional changes was signed by leaders of then ruling reformist coalition in March 2002, under the sponsorship of the High Representative. Foreseeing problems in implementation (constitutional changes require 2/3 majority), the High Representative used his special authority under UN mandate and decreed the amendments to RS and FBiH constitutions in April 2002 (with some additional changes relating to Cantonal constitutions and judiciary introduced by decree in September same year). At the same time, amendments were officially submitted to Entity parliaments for confirmation. In FBiH, their confirmation had to wait until February 2007.

The new scheme was put in place after general elections in October 2002. However, on Cantonal level, the process of constitutional changes long exceeded the mandated period of six months. Most Cantons adjusted their constitutions in 2003 and 2004, and some (like Livno Canton) only recently changed some of its constitutional provisions that endow one of the constituent peoples in BiH with special majority rights.

3.3. Assessing effects of the current solution

Although it can be argued that a period of five years may not be long enough for a full assessment of effects of a constitutional change, there are, however, sufficient clues on relative effects of each of the four pillars of the reform in context of protection of rights of minorities on sub-national level.

In this study, I argue that the ethnic veto is the only practically functioning pillar of the 2002 constitutional reform. That said, I do not wish to imply that it is a perfect, or even desirable tool in its present shape.

- Constitutional recognition of the three constituent peoples in BiH: Bosniaks, Serbs and Croats, as equal in sense of their collective rights in each and every unit of sub-national government, has not significantly altered rhetoric of principal political actors in Bosnia and Herzegovina.
  In fact, the perception of RS as en exclusively Serb Entity, as well as FBiH (and individual Cantons) as exclusively to Croats and Bosniaks entities, is as strong as ever since 1995. In particular, the principle of reciprocity in relations between Entities and Cantons, typical for relationships between mutually independent entities, is still very present in political discourse.

- Creation of new ethnic parity-based key positions in sub-national institutions did not effectively give more voice to minorities.
  Newly created positions of Vice-Presidents of Entities and Vice-Chairs of Cantonal parliaments are figureheads devoid of real authority, legal powers and governmental responsibilities. Directly elected vice-presidents of RS and vice-chairs of cantonal parliaments are far removed from powers of the corresponding presidents and chairs, and appointed vice-presidents of FBiH are mere sinecures embedded in wider coalition schemes.
  Ethnic parity has thus produced little benefit for minorities, but has increased complexity and cost of government institutions, and has therefore fed unfavorable public perception of the overall system of the parliamentary democracy.
  Furthermore, major ethnic parties have found little problem in filling quotas of minority ministers in governments, usually picking either politically feeble or non-political representatives, who are in both cases unwilling or incapacitated to speak for minorities.
- Nothing has been effectively done towards reemployment of minorities in public administration on local and sub-national level.
  Not only that the goal of restoring the pre-war ethnic composition in public administration has not been remotely achieved, but also minorities remain underrepresented in public administration even in comparison to their present proportion in population on sub-national level.[7]
  One is stricken by lack of any initiative, any strategy or any action plan by any government on sub-national level over past five years aimed at realization of the constitutional norm of ensuring proportional pre-war ethnic composition of public administration through reemployment of minorities.

[7] See, for instance, a recent study on ethnic composition of public administration on local level, conducted and published by GROZD, at http://www.grozd.ba/v2/?opcija=sadrzaji&program=2&id=2 .

3.4. Use of ethnic veto

The preceding subsection has suggested that other three pillars of 2002 constitutional reform aimed towards protection of rights of minorities (besides ethnic veto) have effectively failed to overcome the fundamental imbalance between equal rights of groups on BiH level and actual position of minorities on sub-national level in BiH. Failure of other mechanism has left us with ethnic veto as the only *functioning,* although certainly imperfect, instrument for protecting rights of minorities on sub-national level.

There are many criticisms of the current constitutional setup of BiH, and one line of liberal-democratic criticism is turned against ethnic veto as a distinct and easily recognizable feature of the political system in BiH. In this paper I will use the opportunity and actual data to briefly answer the following ideologically based misconceptions specific for well intended, but ill-informed liberal-democratic outlook:

- Ethnic veto complicates and chokes decision-making process;
- Ethnic veto is usually abused for power struggles;
- Cases of ethnic veto are usually unfounded;
- Ethnic veto is unnecessary, because minority rights can be protected by other means within the normal political decision making process;
- Ethnic veto is retrograde and undemocratic instrument that imposes the will of minority on majority of citizens;

I will base my analysis of application of ethnic veto on data published by RS and BiH Constitutional Courts, whose special panels of judges (Councils for Protection of Vital National Interests) review and rule on each case of ethnic veto. I consider data from the period January 2003-October 2007, as published by the two constitutional courts.[8]

[8] Web sites of the Constitutional Court of FBiH (www.ustavnisudfbih.ba) and the Constitutional Court of RS (www.ustavnisud.org) contain exhaustive information on all cases of ethnic veto.

3.4.1. Frequency of ethnic veto

Contrary to a popular belief, ethnic veto has been used comparatively rarely, in a relatively small number of high-profile cases. Over the last five years, there have been altogether 13 cases of ethnic veto in FBiH, and 23 cases in RS. Distribution of cases per sub-national unit of government is:

Sub-national level	No. of cases
Republic of Srpska Parliament	23
Federation of BiH (total)	13
- Parliament of FBiH	2
- City council of Mostar	1
- Cantonal Parliament Sarajevo	2
- Cantonal Parliament Zenica-Doboj	1
- Cantonal Parliament Central Bosnia	4
- Cantonal Parliament Herzegovina-Neretva	2
- Cantonal Parliament Posavina	1

Estimating a lower boundary for annual volume of business before each parliament at 100 drafts, laws and parliamentary decisions, it is clear that the upper bound of business affected by ethnic veto has been around 5% of business in RS Parliament, and less than 1% of business in FBiH Parliament and Cantonal parliaments.[9]

Therefore, ethnic veto obviously does not create a significant overhead on legislative process (not even in RS, due to structure of claims).[10] It does not overly contribute to complexity of the legislative process, and definitely does not choke it.

[9] Cf. annual reports of Entity parliaments available from their web sites: Parliament of FBiH (www.parlamentfbih.gov.ba) and National Assembly of RS (www.narodnask-upstinars.net).

[10] Out of 23 claims in RS, 11 were not related to bills, but to parliamentary declarations and conclusions.

3.4.2. Structure of groups claiming ethnic veto

Structure of ethnic veto claims per Entity and ethnic group is given in the following tables:

Sub-national level	Constituent people	Number of claims
FBiH	Bosniaks	4
	Croats	9
	Serbs	0
RS	Bosniaks	19
	Serbs	3
	Croats	1

The above structure shows an interesting pattern. Second biggest constituent people group in Entity (largest minority) has tended to claim by far the greatest number of ethnic veto cases, followed by majority group (with some, but significantly smaller number of ethnic veto claims), while the smallest group practically didn't use the mechanism of ethnic veto (Croats in RS eventually actually dropped their single case of ethnic veto).

The structure of ethnic veto claims per Entity and ethnic group suggests that the mechanism is not suited for the smallest of the three constituent people.

3.4.3. Issues for ethnic veto

The following table categorizes issues that were subject of ethnic veto claims:

Issue	No. in FBiH	No. in RS
Issues explicitly listed under ethnic veto	8	12
- Constitutional amendments	2	0
- Decision making process	1	1
- Education	2	0
- System of public information	2	0
- National identity and symbols	0	4
- Organization of public administration	1	7
Issues not explicitly listed under ethnic veto	5	11
- Public finances	1	0
- War veterans rights	1	0
- Return of refugees	0	1
- Property rights, expropriation & compensations	0	3
- Prosecution of war criminals	0	1
- Process against Serbia for genocide in BiH	0	3
- Industry	1	0
- Citizenship	0	1
- Health care	1	0
- Housing	1	0
- Land use, planning and construction	0	2

The above table shows that majority of ethnic veto claims in both Entities (8 against 5 in FBiH and 12 against 11 in RS) were related to issues explicitly listed in constitutional provisions for protection of vital national interests.

That indicates that the majority of cases of ethnic veto remain within the confines of its primary or intended use, directly relevant for protection of vital national interest. Unlike popular wisdom, ethnic veto is not used wildly on issues that have no real bearing to minority rights. Besides, it is obvious that some other unlisted issues, like citizenship, prosecution of war criminals, housing, property rights and return of refugees, may have great significance for minorities, especially returnees, in post-conflict period.

Structure of ethnic veto claims per type of parliamentary decision is given in the next table:

Type of parliamentary decision	FBiH	RS
Amendments to cantonal constitutions	2	0
Elections & appointments	1	1
Laws	11	11
Resolutions and declarations	0	11

The above table indicates that, if we take out ethnic veto moved against parliamentary resolutions and declarations, and if we ignore two amendments to Cantonal constitutions in FBiH (since Cantons do not exist in RS), we get stunningly identical structure of ethnic veto claims in both entities.

Peculiarity of use of ethnic veto by Bosniak representatives in RS Parliament is great number of claims against resolutions and declarations. These cases concentrated on the following issues deemed important by Bosniaks in RS: process against Serbia for genocide in BiH (3 cases), defense reform (1 case), police reform (5 cases), the name of RS (1 case) and prosecution of war criminals (1 case). These cases of ethnic veto were response of Bosniaks on resolutions and declarations proposed by ruling coalition in the RS Parliament. Aim of these resolutions and declarations was to support, advise and legitimize actions of RS government in issues that were essentially responsibility of national BiH institutions.

3.4.4. Justifiability of ethnic veto and political dysfunction

If we judge justifiability of ethnic veto cases according to rulings of FBiH and RS Constitutional Courts, we find that just a small minority of ethnic veto claims were supported: 4 (out of total 13) in FBiH, and 1 (out of total 23) in RS.

In one hand it means that ethnic veto is not an uncontrolled instrument in hands of minority. It does not become effective only because minority representatives want it to, but has to go through a rigorous scrutiny by members of a special judicial panel at the Entity constitutional courts. In 9 out of 13 cases in FBiH, and in 22 out of 23 cases in RS, majority decisions carried.

Therefore, ethnic veto is not a means of perverting the normal democratic decision making process based on majority vote, and majorities may rest assured that they are protected by Entity constitutional courts against vehement and arbitrary use of ethnic veto.

In the other hand, minorities do not necessarily need to see ethnic veto as ineffective instrument just because of low percentage of positive rulings by Entity constitutional courts. If we look closely at cases of ethnic veto, we can see that out of total 13 cases, 9 cases were moved by groups that are mostly parts of governing coalitions, while in 4 cases, veto was moved by groups mostly in opposition. This fact requires some analysis.

In two cases of ethnic veto moved by Croats in FBiH Parliament, the caucus of Croats consisted of 17 members, majority of which belonged to HDZ that was part of the ruling coalition in FBiH. Without votes of HDZ members, ethnic veto could not have been moved in these two cases. These two cases of ethnic veto emerged because HDZ did not manage to reach agreement with other parties in governing coalition (SDA and SBiH), which would be a normal thing to do. We can say that these two and other seven cases of ethnic veto in FBiH emerged as an anomaly and indication of failure of normal political process and split between political parties in governing coalition. These cases include one case from City Council of Mostar, four cases from Central Bosnia Canton, and two cases from Herzegovina-Neretva Canton. In all these cases, ethnic veto claims resulted from government split over a tough ethnically charged issue. Out of those nine government split ethnic veto claims, only one claim received positive ruling.

Minority representatives who were mostly in opposition moved four other cases of ethnic veto in FBiH. These included two cases moved by Croats in Sarajevo Canton, one case moved by Croats in Zenica-Doboj Canton, and one case moved by Bosniaks in Posavina Canton. These claims did not originate from a split in government, but as the a safety net used by minority groups that are in opposition to block decisions imposed by ruling parliamentary majority. Out of these four safety net claims, three claims received positive ruling.

From this information, we can conclude that the system of ethnic veto review and ruling by FBiH Constitutional Court does not lend itself as a convenient tool for settling disagreements and shortcutting negotiating processes inside ruling coalitions and similar power-sharing schemes. FBiH Constitutional Court rulings seem have favored ethnic veto claims made by minority groups who use ethnic veto as a safety net for protection of vital national interests against the prevailing will of majority.

In RS, Bosniak representatives were included in ruling coalition before 2006 on the account of a wider power-sharing scheme on BiH level. Early in 2006, the power-sharing scheme broke down, and since then Bosniaks representatives have been in opposition. Bosniaks have moved ethnic veto 19 times, 11 times in period 2003-2005, and 8 times in period 2006-7, and received one positive ruling in 2007.

If we concentrate only on cases of ethnic veto moved by Bosniaks and related to bills, there were 8 cases, 3 in period 2002-2005 and 5 in period 2006-2007. However, if we take a closer look at rulings of the RS Constitutional Court, we find a case of thee claims submitted on bills on a single parliamentary session in 2006 with nonexistent explanation of the basis on which ethnic veto was moved, and therefore discarded as incomplete. So, in the end, we speak of three cases in 2002-2005 (zero positive rulings), and two cases in 2007 (one positive ruling). This doesn't seem to contradict the above-mentioned pattern of ruling on government split and safety net claims observed in FBiH.

To summarize, we can say that actual evidence does not indicate that ethnic veto represents a viable form for pursuing power struggles within ruling coalitions. Cases of ethnic veto that have received positive ruling in the past were overwhelmingly cases moved by minority representatives who did not have other ways of voicing their concerns against overwhelming will of ruling majority.

In that respect, ethnic veto has had positive impact and, on five occasions over the past five years, across Entities and Cantons, has helped minorities protect themselves against laws that were demonstrably ethnically discriminating and biased.

3.5. Relevance for the ongoing debate

Consideration of the problem of minority protection on sub-national level is very important for improving quality of the ongoing debate about reforming constitutional setup of BiH as a whole.

For the past five years, no major appraisal of 2002 constitutional reform and its mechanisms that include ethnic veto has been undertaken. When it comes to actual evidence on effectiveness of decision-making mechanisms for protection of minority rights on sub-national level, especially on use and effects of ethnic veto, we have been in almost complete darkness. And, without such critical appraisal of ethnic veto, it would be very hard to meaningfully and responsibly speak about its alternatives and improvements.

Once again, a debate on changing the BiH Constitution and reshaping BiH into more functional country that is able to deal with challenges with European integration is opening. It is obvious that, unlike in the unsuccessful «April 2006 package» of constitutional amendments, this time political leaders will consider much deeper changes in the structure, with significant reshaping on sub-national level.

Sub-national level is not likely to disappear. Almost all political actors have announced their views of future constitutional arrangements, and in all of them we can see sub-national level with legislative, executive and judicial powers. Yet, regardless of possible sub-national structures (ranging from minor changes to the current Entity/Cantonal setup, through various forms of federal units, to establishment of economic regions), there is a remarkable lack of innovative ideas on how to ensure equal rights of constituent peoples in these new sub-national units.
Uncritical, mechanical application of the current solutions, including ethnic veto, as well as their equally uncritical and mechanical abolition, would mean running into the same mistakes and facing the same frustration we have now. In the worst case, it may mean returning the country to the political situation from the beginning of 1990s.

4. POLICY OPTIONS

4.1. Possible approaches

As was mentioned in sections dedicated to problem definition and description, the problem of protecting rights of minorities on sub-national level arose with creation of sub-national units of government, during and after the war of 1992-95. Furthermore, the very fact that we have minorities is in many areas of the country a direct consequence of wartime ethnic «cleansing» and post-war failure to ensure significant return of refugees to their pre-war dwellings.

However, the sequence of events that has brought us into the problem does not necessarily represent useful pointer towards solving the problem as such. Rather than taking a walk back through time and attempting to revert to pre-war state of affairs, this study tries to see how we can address and influence underlying dynamic generating the problem.

In discussing different approaches towards solving the problem of protection of minority rights on sub-national level in BiH, while focusing on the context of decision making process and ethnic veto, this study will consider two alternatives relevant to the public debate on reform of constitutional structure of BiH, and compare them to the existing «status quo.»

The first alternative approach to be considered, «improved ethnic veto,» will be based on the current mechanisms on 2002 reforms, with some additional elements that may improve effectiveness of ethnic veto in protection of minority rights.

The second alternative approach, «majority rule,» will be based on reverting to the state existing before 2002, i.e. on abolishing special mechanisms such as ethnic veto. However, this alternative will not be discussed as an obviously wrong solution. Instead, we will look into ways to use other mechanisms, such as enforcing constitutional norms through court decisions to protect interests of minorities on sub-national level. A special variation of this approach, called «benevolent majority rule» will incorporate as many enhancements from the «improved ethnic veto.»

4.2. Framework of analysis

Discussion of the two alternative approaches will be based on a number of aspects that reflect relevant properties of alternative solutions. These aspects are effectiveness, proactivity, cost and flexibility.

- **Effectiveness.** Ultimately, quality of ethnic veto or any replacement mechanism must be measured by how successfully it protects minority rights in the decision making process against prevailing will of majority, *provided that* normal political processes based on will of majority fails in providing such protection.
  In other words, mechanisms like ethnic veto should not supplant or suspend normal political processes, based on will of majority of citizens or elected representatives. They should step in only when majoritarian decision making processes fail to provide the necessary level of protection of minority rights.
  For the sake of this study, we will break down the aspect of effectiveness into the following criteria:

◊ *Availability to 2nd biggest group*: likelihood that the elected representatives of the constituent people comprising the largest minority (i.e. second biggest) can use the system for protection of their vital national interests, if necessary.

◊ *Availability to 3rd biggest group*: likelihood that the elected representatives of the least numerous constituent people (i.e. third biggest) can use the system for protection of their vital national interests, if necessary.

◊ *Estimated safety net effectiveness:* likelihood that ethnic veto or replacement instrument will succeed, when used as a safety net tool of last resort against the will of ruling parliamentary majority.

◊ *Protection against abuse: likelihood* that ethnic veto or replacement instrument will fail, when used as a result of split over an issue inside ruling parliamentary majority.

◊ *Estimated level of intended use*: likelihood that ethnic veto or replacement instrument would be used in relation to issues that were primarily designated as matters relevant for protection of vital national interest.

◊ *Applicability on new legislation:* likelihood of blocking new pieces of legislation that violate vital national interests of minorities.

◊ *Applicability on existing legislation:* likelihood of removing existing pieces of legislation that violate vital national interests of minorities.

- **Proactivity**. Ethnic veto is a blocking mechanism, used in reaction to an act of majority, and does not provide minority with means to influence agenda and have their voice heard. Aspect of proactivity will be broken into:

◊ *Minority's impact on parliamentary agenda*: ability of minorities to place issues they consider relevant to their vital interests on the agenda, without being supported by parliamentary majority.

◊ *Minority's voice in the debate*: likelihood that voice of minority members will have a fair chance to voice their opinion on issues discussed in the parliament.

- **Cost** of an alternative will be assessed on rough and qualitative basis through the following two criteria:

◊ *Policy resistance:* the level of resistance likely to be faced in both adopting and enforcing alternative solution.

◊ *Administrative cost:* whether overall costs of institutional setup would rise, fall or stay the same.

- **Flexibility**. This aspect relates to possibility to keep the key aspects of the solution in case of major restructuring that would change structure and layout of sub-national levels of government, as a result of a future agreement on constitutional changes in BiH.

4.3. Assessment of status quo

We will take the first step in analysis of alternative solution by assessing different aspects of the current situation, or status quo.

Effectiveness criteria	Assessment of status quo»	Comment
Availability to 2nd biggest group	High	Evidence shows that the second biggest group (Croats in FBiH, Bosniaks in RS) has used ethnic veto most frequently
Availability to 3rd biggest group	Very Low	Evidence show shat the third largest group (Serbs in FBiH, Croats in RS) did not have effective access to ethnic veto
Estimated safety net effectiveness	Reasonable	4 out of 6 ethnic veto claims (3 of 4 in FBiH and 1 of 2 in RS) moved by minorities that were not members of ruling coalition received positive ruling
Protection against abuse	High	1 of 18 ethnic veto claims (1 of 9 in FBiH and 0 of 9 in RS) moved as a result of split in ruling coalition received positive ruling
Estimated level of intended use	Reasonable	Most of ethnic veto claims have been related to issues explicitly listed as primary to protection of vital national interests
Applicability on new legislation	Absolute	All new legislation can be subjected to ethnic veto.
Applicability on existing legislation	Very Low	Ethnic veto does not apply to existing legislation. Review of law by Entity Constitutional Courts requires petition by at least one third of parliament members, which is way above number of minority representatives in most of parliaments.

Proactivity criteria	Assessment of «status quo»	Comment
Minority's impact on parliamentary agenda	Very Low	Rulebooks of almost all sub-national parliaments require majority of votes to include new item in the agenda.
Minority's voice in the debate	Low	Many laws adopted on short notice without public debate (urgent procedure). Public debate when held usually limited to administrative bodies and organizations, where minorities are underrepresented.

Cost criteria	Assessment of «status quo»	Comment
Policy resistance	Low to Medium	Principles of 2002 constitutional reform are certainly not wholeheartedly supported by ruling ethnic parties, but there is no open obstruction. However, increased pressure may lead to more resistance.
Administrative cost	Medium to High	The current system is certainly not anywhere near the ideal, but number of newly created positions by is cca. 25 throughout BiH.

Flexibility criteria	Assessment of «status quo»	Comment
Flexibility	Medium	The current system is quite flexible. Reorganizing sub-national level (abolishing or rearranging entities/cantons/regions/federal units) would essentially mean only defining new authority for ruling on ethnic veto claims instead of Entity constitutional courts. (BiH Constitutional Court would be one of obvious choices.)

4.4. Curing illnesses: improved ethnic veto system

The above assessment of «status quo» provides us with clues on what can be improved towards improving its performance primarily along effectiveness and proactivity axis.

The weakest points of the existing system of ethnic veto are:

- Very low availability of ethnic veto to third biggest group in Entity (Serbs in FBiH and Croats in RS).
- Very low applicability of ethnic veto on already existing legislation that may contain discriminatory or otherwise harmful provisions against rights of minorities.
- Very low impact of minorities on legislative agenda.
- Very low chance for minorities to voice their opinion in public debate on legislation.

Therefore, the «improved ethnic veto» alternative includes the following improvements in comparison to the current system:

- To enable access to ethnic veto for the third biggest (i.e. smallest) constituent people in Entity, right to move ethnic veto on cantonal level should be extended to representatives that ethnic group on Entity level (in House of Peoples of FBiH Parliament, and Council of Peoples of RS, respectively).
  In that way, third biggest constituent people in Entities would be given better access to ethnic veto.
- Requirement of 1/3 Entity or Cantonal parliament members for starting procedure of reviewing existing laws before Entity constitutional courts should be softened by extending that right to majorities of elected representatives from each constituent people on Entity or Cantonal level.
  That would unblock the process of bringing existing (pre-2002 legislation) in line with principles of 2002 constitutional reform.
- Requirement of majority of votes for placing an issue on parliamentary agenda for discussion should be abolished. Minorities should be able to present issues and proposals to parliaments without prior permission from majority.
- Use of «urgent procedure» for adoption of laws on short notice without prior public debate should be significantly restricted. At the same time, public debate should include mandatory public hearings.

The assessment of «improved ethnic veto» based on the same criteria as before is given in the following tables.

Effectiveness criteria	Assessment of «improved veto»	Comment
Availability to 2nd biggest group	High (Unchanged)	
Availability to 3rd biggest group	Medium to High (Improved)	Action by 3rd largest group's representatives on Entity level may compensate lack of elected representatives.
Estimated safety net effectiveness	Reasonable (Unchanged)	
Protection against abuse	High (Unchanged)	
Estimated level of intended use	Reasonable (Unchanged)	
Applicability on new legislation	Absolute (Unchanged)	All new legislation can be subjected to ethnic veto.
Applicability on existing legislation	Reasonable (Improved)	Existing legislation can be reviewed by Entity Constitutional courts upon request from minority representatives

Proactivity criteria	**Assessment of «improved veto»**	**Comment**
Minority's impact on parliamentary agenda	Reasonable (Improved)	Minorities can nominate issues for debate and decisions for adoption in parliaments. However, in deciding majority rules.
Minority's voice in the debate	Reasonable (Improved)	Minorities get a fair chance to take part in public debate and hearing.

Cost criteria	**Assessment of «improved veto»**	**Comment**
Policy resistance	Medium to High (Increased = less viable)	Ruling ethnic parties may oppose anything that empowers minorities on what they see as their «ethnic turf.»
Administrative cost	Medium to High (Unchanged)	New system does not require establishment of any new institutions and positions within the government

Flexibility criteria	**Assessment of «improved veto»**	**Comment**
Flexibility	Medium (Unchanged)	

4.5. One person, one vote: when majority rules

Let us now take one intellectual experiment and go back to times before 2002, and let us imagine that the course of constitutional reform lead to adoption of all pillars of 2002 constitutional reform *except ethnic vote.*

In that way, just by eliminating ethnic veto and *keeping everything else* from 2002 constitutional reform (instead of just reverting to 2002), we come to an alternative named «majority rules.» We mean majority on sub-national level, of course.

With hindsight, we of course know that evidence shows that (unfortunately) ethnic veto is the only part of 2002 reform that functions to greater or smaller extent. But, let us Asses possibility of getting rid of ethnic veto and keeping everything else, against «status quo.»

Effectiveness criteria	**Assessment of «majority rules»**	**Comment**
Availability to 2nd biggest group	None (Diminished)	No ethnic veto
Availability to 3rd biggest group	None (Diminished)	No such thing
Estimated safety net effectiveness	None (Diminished)	No ethnic veto
Protection against abuse	Perfect (Improved)	No ethnic veto, no abuse
Estimated level of intended use	None (Diminished)	No such thing
Applicability on new legislation	None (Diminished)	Majority rules
Applicability on existing legislation	Very Low (Unchanged)	

Proactivity criteria	Assessment of «majority rules»	Comment
Minority's impact on parliamentary agenda	Very Low (Unchanged)	
Minority's voice in the debate	Low (Unchanged)	

Cost criteria	Assessment of «majority rules»	Comment
Policy resistance	Medium (Decreased = more viable)	Minorities would definitely mind, but it is not excluded that the ruling ethnic parties would be able to agree upon abolishment of ethnic veto.
Administrative cost	Low to Medium (Improved)	Abolishing ethnic veto makes administration somewhat cheaper

Flexibility criteria	Assessment of «majority rules»	Comment
Flexibility	High (Improved)	Not affected by rearrangement of sub-national units of government

4.6. Inclusive democracy: benevolent majority rule

To avert any thought that this study includes the «majority rules» alternative only as a mean to make pro-ethnic-veto alternatives look more appealing, the next alternative will try to incorporate as many improvements from the «improved ethnic veto» into «majority rules» as possible, while leaving out ethnic veto itself.

We will term the new alternative «benevolent majority rule.» In fact, many benevolent people in Bosnia and Herzegovina, who are sick and tired of ethnic particularism and political divisions, tend to intuitively opt for this alternative.

One disadvantage with «benevolent majority rule» is in the fact that its proponents usually concentrate on BiH level solutions, while giving only vague outlines of country's arrangement on sub-national level (however, they do not tend to deny a need for having sub-national level of government in BiH, if very different from the present state).

Therefore, in order to make things more concrete, let us define «benevolent majority rule» as «majority rule» plus the following improvements from «improved ethnic veto:»

- Requirement of 1/3 Entity or Cantonal parliament members for starting procedure of reviewing existing laws before Entity constitutional courts should be softened by extending that right to majorities of elected representatives from each constituent people on Entity or Cantonal level.
  That would unblock the process of bringing existing (pre-2002 legislation) in line with principles of 2002 constitutional reform.

- Requirement of majority of votes for placing an issue on parliamentary agenda for discussion should be abolished. Minorities should be able to present issues and proposals to parliaments without prior permission from majority.
- Use of «urgent procedure» for adoption of laws on short notice without prior public debate should be significantly restricted. At the same time, public debate should include mandatory public hearings.

The assessment of «benevolent majority rule» against «status quo» is given in the following tables:

Effectiveness criteria	**Assessment of «benev. majority»**	**Comment**
Availability to 2nd biggest group	None (Diminished)	No ethnic veto
Availability to 3rd biggest group	None (Diminished)	No such thing
Estimated safety net effectiveness	None (Diminished)	No ethnic veto
Protection against abuse	Perfect (Improved)	No ethnic veto, no abuse
Estimated level of intended use	None (Diminished)	No such thing
Applicability on new legislation	None (Diminished)	Majority rules
Applicability on existing legislation	Reasonable (Improved)	Existing legislation can be reviewed by Entity Constitutional courts upon request of minority representatives

Proactivity criteria	**Assessment of «benev. majority»**	**Comment**
Minority’s impact on parliamentary agenda	Reasonable (Improved)	Minorities can nominate issues for debate and decisions for adoption in parliaments. However, in deciding majority rules.
Minority’s voice in the debate	Reasonable (Improved)	Minorities get a fair chance to take part in public debate and hearing.

Cost criteria	**Assessment of «benev. majority»**	**Comment**
Policy resistance	Medium to High (Increased= less viable)	Adoption of this alternative would mean prior adoption of same key democratic practices by ruling majorities.
Administrative cost	Low to Medium (Improved)	Abolishing ethnic veto makes administration somewhat cheaper

Flexibility criteria	**Assessment of «benev. majority»**	**Comment**
Flexibility	High (Improved)	Not affected by rearrangement of sub-national units of government

4.7. Comparative analysis

If we compare the three alternatives against status quo, we get the following picture:

Criteria	«improved ethnic veto»	«majority rules»	«benevolent majority rules»
Effectiveness criteria			
Availability to 2nd biggest group	High (Unchanged)	None (Diminished)	None (Diminished)
Availability to 3rd biggest group	Medium to High (Improved)	None (Diminished)	None (Diminished)
Estimated safety net effectiveness	Reasonable (unchanged)	None (Diminished)	None (Diminished)
Protection against abuse	High (unchanged)	Perfect (Improved)	Perfect (Improved)
Estimated level of intended use	Reasonable (Unchanged)	None (Diminished)	None (Diminished)
Applicability on new legislation	Absolute (Unchanged)	None (Diminished)	None (Diminished)
Applicability on existing legislation	Reasonable (Improved)	Very Low (Unchanged)	Reasonable (Improved)
Proactivity criteria			
Minority's impact on parliamentary agenda	Reasonable (Improved)	Very Low (Unchanged)	Reasonable (Improved)
Minority's voice in the debate	Reasonable (Improved)	Low (Unchanged)	Reasonable (Improved)
Cost criteria			
Policy resistance	Medium to High (less viable)	Medium (more viable)	Medium to High (less viable)
Administrative cost	Medium to High (Unchanged)	Low to Medium (Improved)	Low to Medium (Improved)
Flexibility criteria			
Flexibility	Medium (Unchanged)	High (Improved)	High (Improved)

Let us briefly summarize the above table:

- «Improved ethnic veto» dominates than «status quo» according to almost all criteria. If extra resistance can be overcome, «status quo» has to be ceded to «improved ethnic veto.»
- «Improved ethnic veto» wins by landslide over other options with respect to effectiveness of protection of minority rights in decision- making process. «Majority rules» and «benevolent majority rules» are better than «improved ethnic veto» on protection against abuse of minority rights for power struggles between members of ruling coalitions. «Improved ethnic veto» and «benevolent majority rules» are close when it comes to removal of discriminatory provisions of existing (pre-2002) laws.
- «Improved ethnic veto» and «benevolent majority rules» offer comparable space for proactive behavior of minorities, much wider than the other two options.
- «Majority rules» beats «status quo», «improved ethnic veto», and «benevolent majority rules» in terms of costs. It is probably less resisted and certainly less expensive solution than the rest. It is probably the path of least resistance, and it is likely that BiH would go down that path without international supervision.
- We can expect comparable resistance to taking either «improved ethnic veto» or «benevolent majority rules» approach, higher than resistance to keeping the status quo. However, «benevolent majority rules» has advantage of being less expensive in terms of administration.

- Finally, in terms of flexibility, i.e. ability to adapt solution to a new rearrangement or reorganization of sub-national level of government in BiH, «majority rules» and «benevolent majority rules» enjoy advantage over both «status quo» and «improved ethnic veto.» That probably means that a new constitutional arrangement on BiH level is likely to lead to majoritarian (probably not so benevolent) model if details of sub-national level are not precisely specified.

5. Conclusions and recommendations

5.1. Anatomy of minority protection problem and ethnic veto

Problem of protection of minority rights on sub-national (Entity and Cantonal) level of government in Bosnia and Herzegovina is very real. On five occasions in the last five years, during the period 2003-2007, Entity constitutional courts reverted discriminatory parliamentary decisions, upon ethnic veto claims by minority representatives.

Of those discriminatory decisions, three were laws passed in FBiH Parliament, RS Parliament and Canton Sarajevo Parliament. The remaining discriminatory decision was related to election of parliamentary officers in Zenica-Doboj Canton and constitutional amandments in Posavina Canton. In these five cases of ethnic veto, respective Entity constitutional courts found that the reversed decisions have violated vital national interests of minorities, i.e. of constituent peoples that constitute minority of population in FBiH, RS, Sarajevo Canton, Zenica-Doboj Canton, and Posavina Canton respectively.

Protection of minorities on sub-national level is a new problem that emerged along with creation of sub-national levels of government with independently elected legislative, executive and judicial bodies in post-Dayton BiH. Unlike BiH as whole, almost each sub-national level of government (Entity or Canton) has significant majority of one, and significantly smaller proportion of population consisting of members of other two constituent peoples: Croats, Bosnians and Serbs.

Ethnic veto is one of four pillars of constitutional reform of 2002, which has changed sub-national constitutions with aim of asserting and enforcing status of the three constituent peoples as groups with equal collective rights in each and every sub-national unit of government.

Other pillars of 2002 constitutional reform – proclamation of equality of Bosniaks, Serbs and Croats in constitutions of both Entities and all Cantons in FBiH, creation of additional key positions in legislative and executive branches to ensure representation of all constituent peoples, and promise of bringing ethnic structure of public administration in line with pre-war structure of population – either have not been fully implemented, or have not (yet) produced intended results. Evidence indicates that ethnic veto is (unfortunately) the only mechanism introduced by 2002 constitutional reform that has been effectively used to protect minority rights.

In spite of its unpopularity in more civil and liberal circles, evidence shows that ethnic veto does not obstruct legitimate will of majority and does not choke legislative process. Altogether, there were 36 ethnic veto cases over last five years, constituting well under cca. 5% of all business in RS Parliament, and less than one percent of business in FBiH Parliament and cantonal parliaments.

Also, in spite of more cynical outlook, the evidence shows that ethnic veto has not been convenient instrument for internal power struggles between ethnic parties within ruling coalitions. Significantly more cases of ethnic veto were approved by entity constitutional courts when moved as a safety net against the will of ruling parliamentary majority.

Evidence also indicates that the greatest number of ethnic veto cases were moved by second biggest ethnic groups in Entities: Croats in FBiH and Bosniaks in RS, while smallest ethnic groups in Entities (Serbs in FBiH and Croats in RS) were effectively unable to use ethnic veto.
As a blocking mechanism, ethnic veto affects new legislation passed by parliaments. However, a significant body of legislation adopted before 2002 contains provisions that minorities on sub-national level find problematic, but are unable, due to their small numbers, to challenge by starting procedure of review at entity constitutional courts.

Also, rules of procedure in parliaments at sub-national level disable minority representatives from nominating issues for debate and presenting motions for deliberation, against will or priorities of parliamentary majority.
Besides, a significant number of laws are passed on sub-national level using so-called «urgent procedure,» i.e. on short notice and without public debate. That also significantly limits possibility of minority representatives to participate in decision-making and voice their concerns. Public debate usually does not include public hearings and is limited to public administration bodies and organizations in which minorities are underrepresented.

5.2. Alternative approaches

This study explores the reality of ethnic veto use (current state or «status quo»), one theoretical case of simple abolishment of ethnic veto and return to majoritarian decision making on sub-national level, as well as two more desirable options: improvement of ethnic veto by alleviating key deficiencies in the system, and more liberal and benevolent majoritarian system without employment of ethnic veto.

The best option from the perspective of continued protection of right of minorities on sub-national level is to improve the ethnic veto system. Although it would incur additional cost of overcoming extra resistance to change, and would not decrease administrative costs of the system, it is the most democratic option that promotes inclusion and openness.

Liberal and benevolent majoritarian system that would abolish ethnic veto, but embrace policies of openness and inclusion, would still represent a step back in the sense of protecting minority rights on sub-national level, although not such a big step as reversal to situation before 2002. Appeal of liberal and benevolent majoritarian system is in its promise of simpler and less expensive system. Yet, that option also requires overcoming resistance to embracement of democratic, open and inclusive practices in political life.

A worrying fact is that reversal to majoritarian rule before 2002 *without* introducing elements of inclusion and openness probably represents the path of least resistance that BiH would follow without international presence and supervision.

5.3. Policy context

The debate on constitutional reform in BiH seems to be about to start again, after year and a half of being stalled by internal conflict. One of the central, if not the very central issue of the

forthcoming constitutional debate will be rearrangement and reshuffling of sub-national levels of government: Entities and Cantons. For all differences between different actors, it seems that the only thing that will *not* happen is abolishment of sub-national level of government.

Therefore, the problem of protecting rights of minorities on sub-national level is not going to disappear, whatever the deal on BiH level may look like. It would be mistake would be to ignore that fact in context of constitutional debate, repeat errors of past, or to apply even less effective «solutions.»

5.4. Recommendations

This study calls for improvements of the system of ethnic veto, not its abolishment, however intuitively unpopular or non-liberal that instrument may seem.

In spite of proclaimed equality of constituent peoples on BiH (national) level, violations of minority rights on sub-national level continue to happen. Responsible politics aimed at respect of constitutional principles and rule of law cannot turn blind eye on that fact and discount reality of minority rights protection in the name of abstract ideals such as "perfectly" democratic majoritarian system that idealizes individual while completely ignoring collective rights of real life groups of people.

Even if we wish we had different history, we still have to deal with the only reality we have got and look for ways to improve it. The problem and how we got into it are interconnected, but different things. We will not solve the problem of protecting minority rights on sub-national level in BiH by walking back in time or by discarding the current state of affairs as irrelevant. That problem, just like any other complex problem in human society, can be solved only by changing the underlying structure that creates dynamics that in turn generates the problem day after day, year after year.

An action plan for improving the current state of protection of minority rights would consist of elements introduced through our alternative called "improved ethnic veto." These elements include:

- Enabling constituent peoples comprising smallest proportions of Entity populations (Serbs in FBiH, Croats in RS) to access mechanism of ethnic veto on Entity and Cantonal level, even if underrepresented in Entity or Cantonal parliaments.
- Relaxing restrictions requiring at least 1/3 of Entity/Cantonal parliament members for initiating review of compliance of laws with Entity constitutions before Entity constitutional courts. Right to initiate such procedure should be granted to majority of representatives from any constituent people in all Entity/Cantonal parliaments.
- Removing harsh requirements in rules of procedure in Entity/Cantonal parliaments that require support of parliamentary majority for nominating issue for debate or proposing laws, which effectively bans any initiative by minority representatives.
- Limiting the use of "urgent procedure" for adoption of laws on short notice and without public debate only on very specific emergency cases, and mandating public hearings as part of public debate on laws, in order to give minorities fair chance to voice their opinions.

Dragan Ivanović
was born on April 13, 1970 in Sarajevo. He received his MSc and BSc degrees from the University of Sarajvo, 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 councellor 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 reasearch at the Center for Policy Research and Development, a young NGO located in Sarajevo.

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Cases of ethnic veto: An overview and disposition of all cases of ethnic veto (i.e. mechanism for protection of vital national interests) can be found on portals of Entity Constitutional courts:

Constitutional Court of FBiH: URL www.ustavnisudfbih.ba

Constitutional Court of RS: URL: www.ustavnisud.org

Open
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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