Bosnia and Herzegovina
Electoral and constitutional reforms: Political and legal analysis of the Ljubić case and related legal decisions

SUMMARY
Stabilisation of the internal political situation in Bosnia and Herzegovina, a country that celebrated the 30th anniversary of its independence on 1 March 2022 but risks internal implosion, remains a priority for the European Union. To this end, the President of the European Commission, Ursula von der Leyen, called for ‘urgent progress in the electoral and constitutional reforms’ that are also important ahead of the general elections scheduled for 2 October 2022. This view echoed the European Parliament’s resolution on the 2019-2020 Commission reports on Bosnia and Herzegovina, adopted on 24 June 2021, that called on Bosnia’s authorities ‘to resume inclusive negotiations on electoral reforms’, and regretted the ‘reluctance to implement these rulings by eliminating all forms of inequality and discrimination in the electoral process’.

In the context of the current political crisis that is threatening the constitutional settlement in Bosnia and Herzegovina (BiH), an analysis of the Ljubić case (2016) and associated cases, in particular the Sejdić-Finci case (2009) and the Zornić case (2014), can be of great relevance. Such analysis leads to new ways of understanding the country at a time of increased international interest in it, not least in the context of international support for its European perspective and for regional cooperation.

The Ljubić case’s relationship to other legal decisions by the Constitutional Court of Bosnia and Herzegovina (CC BiH) and the European Court of Human Rights (ECtHR) connects the rights of constituent peoples with universal human rights. The analysis of the political and legal context of the CC BiH and ECtHR decisions makes it clear that effective implementation of these decisions depends on resolving the internal political stalemate in BiH that currently makes any amendment of the Dayton Constitution an unattainable objective.

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Introduction

The Stabilisation and Association Agreement (SAA) between the European Union and Bosnia and Herzegovina (BiH) entered into force in June 2015 without the initial obligation to implement the constitutional amendments required for electoral laws. Instead, the BiH authorities pledged their commitment to making the reforms required for European integration thereafter.

In its 2019 opinion, the European Commission identified 14 key priorities for the country to fulfil before the EU could open accession negotiations, including deep reforms in the areas of democracy, the rule of law and fundamental rights. However, as stated in the 2021 report of the European Commission on Bosnia and Herzegovina, ‘the public political commitment of the authorities at all levels of government to the strategic goal of European integration has not been turned into concrete action, as political leaders continued to engage in divisive rhetoric and unconstructive political disputes’. Furthermore, the 2020 Commission report stated that ‘Bosnia and Herzegovina’s constitution remains in breach of the European Convention on Human Rights (ECHR), as per the Sejdić-Finci and related cases and no progress was made in improving the electoral framework in line with European standards’.

The coronavirus pandemic and consequent social and political unrest have pressured the country’s leaders to shift their focus away from reforms towards nationalistic postures that affected the political climate in 2021. On 8 October 2021, Milorad Dodik, the Serbian member of Bosnia’s tripartite presidency, and leader of the Alliance of Independent Social Democrats (SNSD) party, threatened to withdraw Bosnian Serbs from key institutions of the country. On 10 December 2021, the Parliament of Republika Srpska took legislative steps to initiate this withdrawal through a 49–3 vote, including a declaration that called for the drafting of a new constitution for the entity. The EU declared it would impose sanctions against Republika Srpska representatives if the situation worsened.

Internal challenges are compounded by external interference, including from Russia, as BiH, Serbia and Kosovo are the only three countries of the Western Balkans that have not yet joined NATO. Recently, the Russian ambassador to Bosnia-Herzegovina, Igor Kalabukhov, said that Russia would ‘react’ if Bosnia-Herzegovina decides to join NATO. The most probable scenario is similar to that applied in Ukraine: gradual destabilisation through an internal separatist movement.

In January 2022, the US Treasury imposed economic sanctions on Milorad Dodik and other representatives of Republika Srpska. In a report on the implementation of the Common Foreign and Security Policy, adopted in February 2022, MEPs called on the EU to also impose sanctions on Milorad Dodik and his allies. Another of the disputed issues between BiH and Russia was the latter’s blocking of a UK-sponsored UN resolution that would have recognised the Srebrenica massacre as genocide.

The governance structure of BiH (see the map in Figure 1) is outlined in the constitutions of the two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina (Federacija Bosna i Hercegovina), as well as the statute of the Brčko District, which provide for the internal organisation and separation of powers at their level of government. While the Republika Srpska entity is a single administrative unit organised into eight cities and 56 municipalities, the Federation entity consists of 10 cantons, entrusted with shared and exclusive legislative competences. The entity and cantonal constitutions, as well as the Brčko District statute, have been amended multiple times either by their respective legislatures or by decisions of the Office of the High Representative (OHR).

Each entity has its own constitutional court that ensures legislation complies with the entity’s constitution, and which is the final instance on motions of vital national interest of constituent peoples brought by the respective entity or cantonal legislature. The constitutional court of the Federation entity is also competent to decide on disputes over competence between the entity and cantons.
Overall, the constitution of Bosnia and Herzegovina enshrines the basic principles necessary for a parliamentary democracy, based on the rule of law, protection of human rights and division of powers. However, the constitution needs to be amended to be brought into line with EU membership requirements. The intricate constitutional architecture and the frequent disputes over the distribution of competences between levels of government affect the alignment of legislation with the EU acquis and its implementation in a large number of chapters.

The Ljubić case

The Ljubić case concerns elections at the level of the Federation of Bosnia and Herzegovina and laws in the Federation entity’s constitution, not elections to Bosnia’s tripartite presidency and Bosnia’s constitution (at the State level). It was issued in response to a complaint by Božo Ljubić, president of the General Council of the Croatian National Congress of Bosnia and Herzegovina at the time the request was filed.

The applicant held that the challenged provisions of the Election Law of Bosnia and Herzegovina are not in conformity with Articles I(2), II(1) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention on Human Rights, or with Article 25 of the International Covenant on Civil and Political Rights in conjunction with Article 3 of Protocol No 1 and Article 1 of Protocol No 12 of the European Convention, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which constitute an integral part of the Constitution of Bosnia and Herzegovina.
On 17 October 2016, the Venice Commission, the Council of Europe’s independent advisory body on constitutional matters, submitted the Amicus Curiae Brief for the CC BiH on the Mode of Election of Delegates (adopted at its 108th plenary session on 14-15 October 2016) to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina. The Brief explained the legal context and institutional settings of the Federation of Bosnia and Herzegovina, stressing that ‘the Venice Commission considers that, although this distortion of proportionality in the electoral system might not be consistent with principles of European electoral heritage if the election was for a directly elected part of the legislature, it can be justified that the concept of equal voting should not apply to the special parts of the BiH legislature, which are designed to ensure representation of constituent peoples and others’.

Ruling and its political implications

The Constitutional Court of Bosnia and Herzegovina (CC BiH) decision of 1 December 2016 on the Ljubić case found that a law in the Federation entity’s constitution, which obliges the 10 constituent cantons to put forward at least one delegate to the House of Peoples from each of the three main ethnic groups (Bosniaks, Serbs and Croats) – even if there are only a handful of that ethnic group living in the canton – was inconsistent with the principle of equality enshrined in the State-level constitution and international treaties. Thus, the ‘1-1-1 rule’ was declared unconstitutional at the level of the Federation.

The amendments were adopted in the BiH House of Peoples on 19 July 2017, but they failed to be adopted in the BiH House of Representatives. In the meantime, since the BiH Parliamentary Assembly failed to harmonise the provisions of the BiH Election Law with the BiH Constitution by the established 30 June 2017 deadline, the CC BiH adopted a ruling on non-enforcement on 6 July 2017 which repealed these provisions. The consequent ‘legal loophole’ (which has also been evoked in conjunction with the enforcement of the Ljubić decision by the European Parliament – see box) was addressed within the constitution of the Federation. Furthermore, the results of the October 2018 general elections were implemented following an ad hoc decision by the Central Electoral Commission.

From a political perspective, it has been argued that the Ljubić case manifests efforts by the Croatian Democratic Union (HDZ, EPP) to obtain a complete amendment of the electoral law. Bosnian Croats have complained for years that, unlike Bosniaks and Serbs, they do not have their own majority in any ‘entity’ under the Dayton framework. The prescribed Croat member of Bosnia’s ethnically tripartite presidency has been elected in each of the past two polls on the strength of votes from the Bosniak majority, without the backing of the largest ethnic Croat party, the HDZ. However, calls for a third entity for Bosnian Croats were, according to the main Bosnian party – the Party of Democratic Action (SDA) – characterised as ‘unrealistic maximalist demands’, as Croats make up a smaller proportion of the population than either Bosniaks or Bosnian Serbs.

The Ljubić case constituted a political request (later refused by the CC BiH) for ‘legitimate representation’, implemented through a ‘credit points system’ by which Croat candidates from different cantons would have different credit points. Croat candidates elected in three majority Croatian cantons would have more ‘credit points’, but this would be against the equality of other Croatian candidates (from other cantons where Croats are not a majority) and was therefore refused by the CC BiH. Ivo Miro Jović (HDZ), who lost against Željko Komšić (Social Democratic Party, SDP) in the 2006 general election, enabling the SDP to win a majority of Bosniaks’ votes, was among the supporters of this solution.
Relation to other legal decisions

The Ljubić case can be interpreted in the context of similar cases submitted to the CC BiH or European Court of Human Rights (ECtHR), such as the Sejdić-Finci case of 22 December 2009 and the Zornić case of 15 July 2014. In December 2009, the Strasbourg court was called to rule on the compatibility of Bosnia’s ethnic federal system with the European Convention on Human Rights in the Sejdić-Finci case. It seems that the organising principle of Bosnia’s political system is ethnic parity; however, the Dayton Constitution of BiH (Annex 4, Dayton Agreement) mentions Bosniaks, Croats and Serbs, along with ‘Others’, as constituent peoples. The Dayton Constitution also refers to ‘citizens’ as those who determine the Constitution of BiH: ‘Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina’.

The introduction of specific rights for the constituent peoples of BiH was determined by the political situation at a particular moment in the country’s history, following the civil war that ended with the signature of the Dayton Agreement. Some argue that the Dayton constitutional settlement was a ‘bandage for a bleeding wound … that stopped the conflict but has locked Bosnia into a set of Kafkaesque institutional structures’. Today, civil society organisations in BiH are calling for the constitution to be modelled on ‘civic principles’ as is the case in democracies worldwide.

The European Parliament has been vocal on the need for electoral reform in BiH to move forward. In its resolution on the 2019-2020 Commission reports on Bosnia and Herzegovina, adopted on 24 June 2021, the Parliament called on Bosnia’s authorities ‘to resume inclusive negotiations on electoral reform’ and regretted the ‘reluctance to implement these rulings by eliminating all forms of inequality and discrimination in the electoral process’. The resolution of 13 February 2019 on the Commission’s 2018 report said that ‘political parties have not been able to agree on the changes to the electoral law needed to address the legal loophole resulting from the Constitutional Court decisions in the Ljubić case concerning the election of the members of the Federation’s House of Peoples’.

In the context of the current political crisis in BiH, parliamentary diplomacy can be of great value as it opens new ways and communication channels to strengthen international support for the European perspective of the country and for regional cooperation. On 15 March 2022, the European Parliament’s Foreign Affairs Committee (AFET) met with Željko Komšić, Šefik Džaferović and Milorad Dodik, members of Bosnia’s tripartite presidency, and with Dragan Čović, Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, to discuss internal challenges facing the country.

The very important ECtHR decision in the Zornić case ruled in the same direction, as it stressed that ‘in view of the need to ensure effective political democracy, 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’ (see Article 43 of the judgment in the Zornić case, application no. 3681/06 of 15 July 2014).

Full implementation of the ECtHR decision would therefore mean change in the tripartite presidency (Bosniaks, Croats and Serb) to include the fourth representative of ‘Others’ or any citizen of Bosnia and Herzegovina. However, due to the longstanding and current political stalemate, it seems that such an amendment of the Dayton Constitution is currently an unattainable objective.
MAIN REFERENCES


Vehabović, F. et al., *Democracy Without Citizens? Looking for a Model of Political Participation of All Constitutional Categories in Bosnia and Herzegovina*, University of Sarajevo, Center for Interdisciplinary Postgraduate Studies, 2012.

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ENDNOTE

1 This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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