

WRITTEN SUBMISSION

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Resolving Bosnia's Electoral Crisis

On 1 December 2016, the Constitutional Court of Bosnia and Herzegovina (BiH) ruled in the Ljubić Case that the BiH election law violated the constitutional rights of the constituent peoples (the Serbs, Croats, and Bosniaks) guaranteed by the Dayton Accords. The court declared that each constituent people should be able to elect its own representatives to the Federation House of the People in free and fair elections. In the current situation, members of one constituent people can elect the representatives of another constituent people (i.e., Bosniaks could elect Serb representatives to the Federation House of Peoples). The court also found that the same principle applies to the election of the members of the three-member Presidency and delegates to the country-level House of Peoples.

This case follows from a Constitutional court ruling from 2000 that declared that the equality of the three Constituent Peoples is the central and overarching principle of the Dayton Constitution.

The court ordered the BiH Parliament to pass election law reforms within six months. Parliament failed to comply with the court ruling. If Parliament does not act by May 8 to replace the struck-out text of the election law, the October 2018 general election risks being nullified, potentially throwing the country into political and governance chaos. However, parliament can still amend the law right up until the election, but that is a dangerous precedent that flies in the face of democratic norms. .

The consequences of nullification include there being no fully functioning government and Parliament at both the country and federation (state) level, as well as the impact this will have, including: possible complete paralysis of the political system, internal constitutional crisis, blocking any future reform efforts, and a high risk for regional instability and outside interference, manipulation and destabilization by those who oppose the United States and European Union, especially Russia.

In parallel to this issue, the European Court of Human Rights has ruled multiple times that the BiH constitutional provisions regarding who can stand for, and be elected to, the state presidency, are incompatible with the European Convention on Human Rights. Specifically, the *Sejdic-Finci* judgment held that the ethnicity requirement for the office of president – that individuals must be either Serb, Croat or Bosniak – discriminates against citizens of BiH who do not identify themselves as a member of one of the three constituent peoples, such as Jews, Roma, or others that make up minority groups that are not part of

the Constituent Peoples. The ECHR required BiH to amend the constitution to remove this discriminatory element in 2009, but several years later no progress has been made.

The European Union has always stated repeatedly that implementing the *Sejdić-Finci* ruling is a prerequisite for BiH making progress towards becoming a candidate for EU membership. These ECHR rulings should be implemented immediately after Bosnia and Herzegovina receives the EU candidacy status, and within the framework of the Dayton Peace Accord and the constituent rights of the three constituent peoples.

Other citizens, such as Ms. Zornić, also won a law suit against BiH, for being ineligible to stand for election to the House of Peoples (second chamber of the State parliament) and to the collective Head of State (the Presidency), as she refused to declare affiliation with any of the constituent people (namely Bosniaks, Croats and Serbs) but simply wanted to run as a citizen of BiH.

Also due to political stalemate, citizens of city of Mostar have been deprived of voting rights both in 2012 and 2016 election. This must not be the case for 2018.

Simply put: Bosnia and Herzegovina government must respect the Dayton Peace Accord and the Courts rulings. The rights of the Constituent Peoples and the rights of citizens and minorities must be protected as required by the law.

The failure by the parliament in Bosnia and Herzegovina to address important constitutional court rulings poses significant concern for the future democratic trajectory of the country and its commitment to the rule of law. This also puts Bosnia and Herzegovina's EU and NATO aspirations at risk.

This isn't just about fixing a problem to deliver one election. Solving this problem will make Bosnia and Herzegovina a stronger, more representative democracy that represents all of its citizens.

Current situation in Bosnia and Herzegovina regarding Electoral Law

As of today, there is no electoral reform proposal under consideration in the BiH Parliamentary assembly. There has been one proposal drafted by the Croat parties which passed the House of Peoples in July 2017, but it was struck down by Bosniak delegates, who have a majority in the House of Representatives. One Bosniak party introduced a proposal around the beginning of 2018, but this was also struck down on the same day as the Croat proposal. As a result, there are no proposals under consideration.

International Response

The international community, particularly the EU and US, have attempted to bring the various parties together to reach a compromise, but so far with little effect.

The Presidency issue relates to the legal requirement to ensure that 1) each of three members of Bosnia's presidency legitimately and distinctly represent one of the three different constituent peoples (from the Ljubić and other cases); and 2) the position can be held by any citizen of any ethnicity (from the Sejdić-Finci and other ECHR cases). In short:

- a. Implementing the fix required by the Ljubić case has been demanded by the Croat and Serb leadership and can be implemented by legislation only.
- b. Implementing the fix required by the Sejdić-Finci case is a prerequisite for EU accession. The changes here require a constitutional amendment.

Without greater political leadership, there is a strong chance this current negotiating process could rapidly disintegrate to the benefit of external powers, namely Russia. The Russians are already preparing to seize on this and are pushing out anti-U.S. propaganda around the failure to reach a solution.

Consequence of Failure to Reform the Election Law

If the law is not amended before the election, BiH would face the following consequences:

1. The October 2018 election will occur, but many of the results will be invalid.
2. The country will only have a partial government, with no ability to pass laws, including a law to fix this crisis. The BIH federation (one of the two sub-state entities that make up the country) will have no government or parliament.
3. Republika Srpska (the other sub-state entity) will have a full government. Its leader, Milorad Dodik is a close ally of Vladimir Putin, has been sanctioned by the United States, and has regularly called for Republika Srpska to secede from the rest of BiH – this crisis may give him that excuse.
4. The path to NATO and the EU will be closed to BiH for the foreseeable future.
5. Neighboring Croatia and Serbia will likely be drawn into this crisis, hurting regional stability and Serbia's chances of joining the EU.
6. Russia will be able to take advantage of this instability to push their own agendas.
7. Instability could also increase the risk that Islamic extremists will use BiH as a transit route and base of operations.

Path Forward

There seems to be consensus that it is possible to implement the reforms to the electoral law related to the House of the People by legislation. However, implementing the Sejdić-Finci and other ECHR rulings cannot be done at this time without a constitutional amendment and there is not enough support in the parliament to pass an amendment. Changes to the electoral law related to the presidency that implement the Ljubić case, but not the ECHR rulings, can be achieved by legislation only, but, ideally, all changes to the presidency should be made at one time.

The political parties all agree that reforming the House of the Peoples' election law must happen, but there is not agreement on how to do this and no parties are offering new proposals. Several parties' red line is that election code for the Presidency must be reformed as part of this process, ideally to be in line with both the Ljubić case, Zornić and Sejdić-Finci.

This result will create a government that has true legitimacy to the people it is supposed to represent. Such a government would therefore also have the legitimacy to make changes to the constitution to not only implement long-ignored ECHR rulings, but also make more fundamental and necessary changes to how the country is organized and governed.

- 1) Resolving the election issue is a key indicator of whether the rule of law and a true functioning democracy exists in Bosnia and Herzegovina.
 - a. Leaders in Bosnia and Herzegovina have developed a bad habit of ignoring court rulings they don't agree with and to attend to important issues at a very last minute, often only if pressured.
 - b. Bosnian leaders must respect the Dayton Peace Accords, the BiH Constitutional Court, and the European Court of Human Rights or they have no hope for NATO or EU membership.
 - c. Bosnia and Herzegovina must develop a new habit of respecting court judgments even if politically unpopular.

A band aid, half measure approach will not suffice. Both ECHR ruling in 2009, and the Constitutional Court's rulings in 2016 and 2017 striking down the unconstitutional provisions of the election law is very clear: any election reform must respect the rights of the Constituent People enshrined in the Dayton Agreement and must address fixes to the election law for both the House of the Peoples and the Presidency and to include implementation of "Sejdic-Finci" ruling.

Clearly, with the May 8 deadline looming, there is little time and lack of political will to address Sejdic-Finci and the Presidency, and in this light, fixing the House of Peoples and voting in the city of Mostar, a city that has been deprived of voting rights both in 2012 and 2016 elections, due to failure of political parties to implement the decision of the country's Constitutional Court, are essential.

Over 8 years now, political leaders in Bosnia and Herzegovina failed to implement ECHR ruling. Youth of the country is leaving. Brain drain in Bosnia and Herzegovina is alarming. People feel hopeless and discouraged with lack of progress. The US should make it clear to political leaders who obstruct and procrastinate BiH transatlantic integrations that there will be serious consequences and the US should be ready to act and lead this reform as soon as Bosnia and Herzegovina receives the EU candidacy status.

Recommendations for the Committee:

Given this, I would like to present the committee with 3 recommendations.

- 2) Congress and the Trump Administration should take a leadership role in finding a solution and strongly support our Embassy in Bosnia and Herzegovina and the EU representatives in their joint effort to mediate a positive solution to the electoral law and other court verdicts. It is encouraging that Wess Mitchell, our Assistant Secretary of State for European and Eurasian Affairs is now more engaged in the Balkans.
- 3) The U.S. should reach out to our European partners and request them to follow U.S. sanctions on Milorad Dodik, with the set of their own, as Dodik's separatist rhetoric continues to represent a serious threat to regional stability.
- 4) To counter Russia influence the US should work with its NATO partners to reach political decision and activate NATO Membership Action Plan (MAP) for Bosnia and Herzegovina, as early as this July, at the NATO's summit in Brussels.

This would be also an opportunity for Turkey to play a constructive role in advancing security and stability in the Western Balkans, through NATO's institutions, by help bringing Bosnia and Herzegovina step closer to full NATO membership.

Activation of MAP for Bosnia and Herzegovina would help reduce wide spread corruption and would send a strong signal to political elites to stop interfering in justice system, currently under their heavy influence, and would reduce their elevated ethnic rhetoric with which they manipulate masses times and over again.

Improving independence of judiciary system in Bosnia and Herzegovina is key to stopping political elites in using their mechanisms of power to prosecute business community leaders who hold different political views, often being racketeered by the politicians for not bowing to their pressures.

America must devote its energy and influence to help Bosnia and Herzegovina reform the way its presidents and representatives are elected.

A strong, democratic, multiethnic, and Euro-Atlantic Bosnia and Herzegovina is in the US interest. American leaders should do all they can to help make this happen.