

# Political Parties in Bosnia and Herzegovina and the Principle of the Constituency of Peoples

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## Abstract

This article provides an overview of how, although the Constitution of Bosnia and Herzegovina itself proclaims the principle of democracy, it still contains many elements that limit the democratic capacity of the country's institutions. In this regard, the study is particularly interested in the scope of the principle of the constituency of the people, which is the product of the activities of ethno-national political parties in the peace negotiations of 1992–1995 and the negotiation of a new constitutional order, on the electoral and political system of Bosnia and Herzegovina. This article contributes to help filling the gap in the existing literature on the study of the interplay between the democratic process, the choice of the electoral systems and the role of the political parties in Bosnia and Herzegovina as a new democracy in the Western Balkans. The novelty to the general theory on the models of democracy is the historical development that led to the application of the model of consociational democracy, which includes a combination of the international factors, internal conflicts, and political parties. The case of Bosnia and Herzegovina is interesting because it shows how the constitutional system has changed from citizen-based to an ethnicity-based fundamentals, because of the activity of political parties.

**Keywords:** democratic transition, ethnicity, constituency of peoples, political parties, electoral system.

## Introduction

After the fall of Communism and the dissolution of Yugoslavia, all the successor states faced the challenge of democratic transition. The bone of

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contention in these countries was the relationship between national, civil, and ethnic ideas, i.e., whether states should be defined as civil states where all members of ethnic groups are treated equally, or nation states of individual ethnic groups. Numerous factors influenced the democratic transition in these states from the fall of Communism to the models of democracy applied in post-Yugoslav states. The 'bloc division' of the world lasted until the fall of the Berlin Wall in 1989, which was also the end of Communism in all the countries of the world where it was applied, except Cuba and North Korea, but also the beginning of transitional processes. There was a kind of euphoria that there would be an end to conflicts and wars, and that there would be a common progress for humanity. Several authors understood such transformations as the culmination of a seemingly irreversible process of democracy, as a dominant type of political regime.<sup>1</sup> Many countries had been experimenting with transition for decades, while others (Northern Macedonia, Serbia, and Montenegro) have relatively recently adopted these reforms. In 2002, the World Bank defined Bosnia and Herzegovina (BiH) as a transition state. Some authors classify Bosnia and Herzegovina in the group of countries that are not in the process of transition, but in the process of stabilization.<sup>2</sup>

In Central and East Europe, transition had its specifics. Claus Offe noted that the CEE region is dominated by territorial disputes, migrations, minority or nationality conflicts, and corresponding secessionist longings as well as the German exception of the only national merger of two previously separate states.<sup>3</sup> All the countries of the former Eastern Bloc had trouble in establishing a new social and constitutional order and there were three complex tasks facing the creators of constitutions in the new democracies. In the first place was the transition from a controlled planned economy to a market economy. Second was the transition from single-party rule to a multi-party democracy, and in the third place was the transition from a system of arbitrary and unlimited power to constitutional rule and the rule of law combined with free and fair elections. Former Communist states faced the problem of transforming all their social, economic, and legal structures, and instead of the expected five years it usually took up to twenty-five years. During the period 1991–1997, most European democracies such as the former

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<sup>1</sup> Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988); Robert Ahdieh, *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy* (University Park, Pennsylvania: Pennsylvania State University Press, 1997).

<sup>2</sup> "Bosnia and Herzegovina Country Procurement Assessment Report: Social Protection," World Bank (2002), accessed February 7, 2022, <https://openknowledge.worldbank.org/handle/10986/15391>; Leonardo Morlino "Hybrid Regimes or Regimes in Transition?" *Fundación para las Relaciones Internacionales y el Diálogo Exterior*, Working Paper 70 (2008).

<sup>3</sup> Claus Offe, "Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe," *Social research* 71, no. 3 (1991): 501–524.

Bosnia and Herzegovina, Bulgaria, Romania, Croatia, Estonia, Slovakia, Poland, Latvia, Slovenia, and Russia adopted a new constitution.

The path to democratization after the dissolution of Yugoslavia has been marked by bloody wars that exploded fueling ethnical and national divisions. The institutional regimes that had been installed in each post-Yugoslav country depend on the role of the political actors leading the democratic process, their political interests, and characteristics. The main research question which this article explores is, to which extent political parties played a role in placing the 'constituent peoples' at the center of the constitutional system? The hypothesis of this article is that in Bosnia and Herzegovina, unlike in other states of the Second Yugoslavia, since the independence of this state, political parties in power have led the process of ethnicization of the constitutional system. We consider the provisions protecting minorities, civil rights, the balance of power, and the national or federal organization of the state as reproducing internal differences that emerged also during the democratic transition. We have structured the article so that after the theoretical part, it contains a historical overview of inter-ethnic relations in the period of socialism, and their development in the period of aggression against Bosnia and Herzegovina. Next, after presenting the concepts of ethnicity and demos and their constitutional relations, the analysis of key components of the model of democracy applied in the constitutional system follows, together with the theoretical consequences it caused, especially the negative ones such as open constitutional discrimination. This article follows the neo-institutionalist approach, and explores how political parties operate within institutions, and how institutional processes construct and maintain dynamics of political parties.

## The Constitutional Relation between Ethnos and Demos

The state and law influence the creation, development, and maintenance of the nation because they bind people together and influence the strengthening of other social ties. The state has a dominant role in building national identity, because national identity is mostly realized through coercive categories, coherent norms: citizenship institutions, use of common language, use of state symbols, but also through emotional relations of an individual towards the state that legal norms cannot regulate.

The legal regime and the content of the terms 'people,' 'nation,' 'state' in the constitutions and other normative acts in comparative law are different. However, a distinction is most often made between a nation (ethnos) and a nation (demos), but a nation and a state are most often seen as identical. The constitutional formulations of the people-nation-state relationship in Western

democracies are very diverse, in both homogeneous and heterogeneous societies. The Preamble to the French Constitution mentions the *French people* who solemnly proclaim their commitment to human rights and certain principles of *national sovereignty*. Heterogeneous countries such as Belgium and Switzerland have built a kind of national identity in the form of *Belgian* and *Swiss* coins, although nowhere in the constitutions of these countries are the Belgian and Swiss nations mentioned.

The relationship between civil society and national identity lies at the heart of the transition process in post-communist states.<sup>4</sup> The Western state-law approach clearly distinguishes a nation from a people, where a nation is a state people (citizens of one state), and a people is a community of origin. Conversely, the Eastern, cultural-biological approach substantially identifies the nation and the people. The Charter of the United Nations speaks of relations between nations when it comes to the members of the United Nations. This is one of the arguments that, to a large extent, the universalization of the distinction between ‘people’ and ‘nation,’ i.e., that public law is dominated by the ascendancy of the Western, state conception of the nation, in which the nation and citizenship are synonymous. Emerich Francis productively used the difference between *ethnos* and *demos* to research the phenomenon of the national, and he understood *ethnos* as the “general realities of people,” and under the term *demos* the “historical type of modern nation.”<sup>5</sup> *Ethnos* and *demos* correspond to other ideal types, the most famous of which are Friedrich Meinecke’s *cultural nation* and *state nation*, Karl Renner’s *organic* and *atomistic nation* and Hans Kohn’s *Eastern* and *Western* type of nation.<sup>6</sup> The positive constitution of Bosnia and Herzegovina (the Annex 4 of the Dayton Peace Agreement) has accepted the Western concept of the nation, because the prefix “*bosanskohercegovački*” (Bosnian-Herzegovinian) binds to citizenship, while *ethnos* binds to the constituent peoples.

## Inter-ethnic Relations in the Period of Socialism

The specific societal feature of Bosnia and Herzegovina, as a multiethnic and multi-religious state, lies in the fact that its population has always been

<sup>4</sup> Taras Kuzio, “Transition in Post-Communist States: Triple or Quadruple?” *Politics* 21, no. 3 (2001): 168–177.

<sup>5</sup> Emerich Francis, *Ethnos and Demos. Sociological Publications on Folklore Theory* (Berlin: Duncker und Humblot, 1965).

<sup>6</sup> Friedrich Meinecke, *World Citizenship and Nation State* (München: R. Oldenbourg, 1907); Karl Renner, *The Nation’s Right to Self-determination. Part One: Nation and State*, (Vienna: F. Deuticke, 1918); Hans Kohn, *The Idea of Nationalism: A Study of Its Origins and Background* (New York: The Macmillan Co., 1994).

diverse and that never before the entry into force of the Dayton Peace Agreement was there a territorial organization of government where the boundaries of political-territorial units were drawn in accordance with the ethnic or religious grouping of the population. The mutual knowledge of equality of population of Bosnia and Herzegovina came to the fore, especially during the Second World War, when the idea of anti-fascism confirmed the principle of brotherhood and unity of all peoples. In the Resolution of the National Anti-Fascist Council of People's Liberation of BiH, the highest representative body for Bosnia and Herzegovina established in 1943, the principle of equality and impartiality of peoples is most emphatically emphasized by stating that the peoples of BiH:

“want their country, which is neither Serbian nor Muslim, but also Serb and Muslim and Croat, Bosnia and Herzegovina will be free and twinned, in which full equality and equality of all Serbs, Muslims and Croats will be ensured.”<sup>7</sup>

The category of freedom of peoples and citizens was further underlined at the Second Session of this body in 1944, where the common character of the homeland and its indivisibility was emphasized, as well as individual civil rights, from freedom of religion to the right to direct and secret ballot.

It is important to stress that Bosnia and Herzegovina had a long tradition of ethnic equality, one that was specifically regulated in former Yugoslavia, but also implemented in practice. According to the Article 3 of the Constitution of the Socialist Federal Republic of Yugoslavia from 1974: “The Socialist Republic is a state based on the sovereignty of the people and the government and self-government of the working class and all working people.”<sup>8</sup> BiH was defined as:

“a socialist democratic state and a socialist self-governing democratic community of working people and citizens, the people of Bosnia and Herzegovina - Muslims, Serbs and Croats, members of other peoples and ethnicities living in it.”<sup>9</sup>

From the above, it was concluded that Bosnia and Herzegovina is a tri-ethnic state in which the three peoples who make it exercise their rights “jointly and in mutual connection with the other two peoples.”<sup>10</sup> Bosnia and

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<sup>7</sup> Paragraph 5 of Resolution of State Anti-fascist Council for the National Liberation of Bosnia and Herzegovina (ZAVNOBiH).

<sup>8</sup> Constitution of the Socialist Federal Republic of Yugoslavia from 1974, Basic Principles, Chapter I, *Official Gazette of SFRY*, no. 3/74, 1974.

<sup>9</sup> Article 1 of Constitution of the Socialist Republic of Bosnia and Herzegovina from 1974.

<sup>10</sup> Kasim Trnka, *Constitutivity of the People: On the Occasion of the Decision of the Constitutional Court of Bosnia and Herzegovina on the Constitutivity of Bosniaks, Croats and Serbs at the Entity Level* (Sarajevo: Council of the Congress of Bosniak Intellectuals, 2000), 49.

Herzegovina, although a tri-ethnic state, according to the said Constitution, had the right to self-determination and the right to secession, since it voluntarily and by agreement previously had united with other republics to form the federal state of Yugoslavia.

According to the 1991 census, the ethnic structure was such that Bosniaks accounted for 43.6%, Serbs for 31.3%, Croats for 17.3%, while the share of others was 7.6%.<sup>11</sup> The war resulted in a violent ethnic redistribution of the population in such a way that there was a territorial - ethnic grouping which was politically legitimized by the end of the war and the Dayton Peace Agreement. The two BiH entities were ethnically defined: the Republika Srpska as an explicitly mono-ethnic entity, while the Federation of BiH recognized only the constituency of Croats and Bosniaks. The creators of the Dayton Constitution defined Bosnia and Herzegovina as a state composed of three ethno-nations or constituent peoples. In this way, *others* and *citizens* remained discriminated against because they did not belong to any of the constituent peoples.

The difficulties of democratic functionality in ethnically plural societies were well known from the onset of formulating of the theory of democracy. For example, John Stewart Mill (1861) wrote that: “democracy is almost impossible in societies having different linguistic, ethnic groups and divisions.”<sup>12</sup> Mill also emphasized that some minimum of (preexistent) social harmony in sharing the basic values and consensus is necessary. But, according to the common assessment of observers “the multiethnic societies that appeared after the fall of communism are below that conceived minimum.”<sup>13</sup>

### Ethnicization of the Constitutional System

After the beginning of the democratic transition in Bosnia and Herzegovina, the constitutional and political system of this former Yugoslav republic became more and more focused on ethnicity. In a first phase, the shift from the constitution of the *Serb republic* to the constitution of the *Republic Srpska* was an example of how the people are a constitution-maker. This can be marked as an example of exclusive ethnocracy. The process was led and streamlined by the Serb Democratic Party of BiH. The next phase was the making and adopting of the Constitution of the Federation of Bosnia and

<sup>11</sup> Census of 1991. Federalni zavod za statistiku [Federal Office for Statistics], accessed February 7, 2022, <http://fzs.ba/index.php/popis-stanovnistva/popis-stanovnistva-1991-i-stariji/>.

<sup>12</sup> G.S. Mill, *Considerations of Representative Government*, 1st ed. (London: Parker, Son & Bourn, 1861).

<sup>13</sup> Ljubomir D. Frckoski, “Certain Aspects of Democracy in Multiethnic Societies,” *Perceptions – Journal of International Affairs* 4, no. 4 (December 1999 – February 2000), <https://dergipark.org.tr/en/download/article-file/817086>.

Herzegovina. This complementary ethnocracy phase was managed by the Party of Democratic Action and the Croatian Democratic Community of BiH. All three parties, with strong intervention from the international community did everything to make the new constitutional agreement meet with the “agreement of peoples.” The result was the final phase of constitutional development in Bosnia and Herzegovina, which was set out in the Dayton Peace Agreement, with Annex 4 of that agreement as the Constitution of BiH. The latter legal and political act also adopted a principle of constituent peoples (previously introduced in the Constitution of the Federation of Bosnia and Herzegovina), an epilogue of the adjustment of the constitutional system of the agreement of peoples. It seems that the Party of Democratic Action acted out of necessity in this transformation of the constitutional system of Bosnia and Herzegovina, and that happened from the beginning, when the Serb Democratic Party of BiH and the Croatian Democratic Community of BiH wanted new political-territorial units on the field of Bosnia and Herzegovina which were based on ethnical principle. Alija Izetbegović, president of the Party of Democratic Progress, and former President of Bosnia and Herzegovina, managed to instigate a process before the Constitutional Court of Bosnia and Herzegovina, with a verdict that determined that all constituent peoples are equal on the whole of territory of Bosnia and Herzegovina.

The organization of Bosnia and Herzegovina as a federal state owes most to the international community, which has advocated since 1993 for the organization of the state based on the “agreements of the people.” First, the Federation of BiH was created, as a legal epilogue to the ethnicization of Bosnian society, which took place in the first two years of the war in Bosnia and Herzegovina. The federal state was not immediately advocated in the first years of the war, or before its outbreak (after the ethno-national parties won power in the elections), but by events on the front, the activity of the international community, and the constant strengthening of Republika Srpska and Herceg-Bosna on the ground. Edin Šarčević noted that Alija Izetbegović advocated for the whole of Bosnia and Herzegovina, but that there were suspicions that he had a “hidden goal” – that is, as the leader of the Muslim people, he wanted to get as much territory as possible where Muslim ethnolites would dominate all segments of social life.<sup>14</sup> Ethnic territorialization and the merging with the home states of the Republika Srpska and Herceg-Bosna leadership have been an undisguised strategic goal from the beginning of the war for Serbian and Croat rebels. However, by the end of 1993, the vision of ethnic-territorial organization of the government could not be clearly distinguished in the leadership of the Republic of Bosnia and Herzegovina,

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<sup>14</sup> Edin Šarčević, *Constitution Out of Necessity* (Sarajevo: Rabic, 2010), 241.

The establishment of Herceg-Bosna was an expression of efforts to territorialize the Croat area in BiH. The key political principle was that “Croats in Bosnia and Herzegovina through their party the Croatian Democratic Union” rejected the unitary model of state organization in multinational communities and that, aware of ‘historical responsibility,’ established HZ H-B to defend Croat ethnic and historical areas and interests.<sup>15</sup> Intellectual circles around the Serb Democratic Party (SDS) produced the Constitution of Republic of Srpska in 1992.<sup>16</sup> With the seventh and eighth amendment to this constitution, the Republic of Srpska which was the *de facto* regime at the time was defined as the “state of the Serb people.”<sup>17</sup>

Even after the dissolution of this community, the strategy of Croatian politics remained and was implemented, until the abolition of Croatian self-government. The goal of Serb politics from the very beginning was to create an ethnically pure Serb territory. The members of the Bosnian delegation were formally understood to be representatives of the Republic of Bosnia and Herzegovina, but in material terms they acted as representatives of the Bosniak people. Alija Izetbegović was mentioned in the negotiations with the Serbian and Croat sides as a representative of the Bosniak people, and in that capacity, he was thusly considered by international officials (although they appropriately addressed him as head of state). Only the founding of the party that enabled him to be President of Bosnia and Herzegovina foresaw that. Reports have appeared since 1993 attributing violence to all warring parties as a method of homogenization, and thereafter Izetbegović was more explicitly a representative of the Muslims, trying to secure a territory in negotiations that he would have under effective control. A more common view is that this stance from official Bosnian politics was a product of the then state of siege, war crimes and ethnic cleansing than an actual the goal of the Party of Democratic Action (SDA), led by Izetbegović, which enabled him to be the head of state.

In the Dayton Peace Agreements (1995), it was agreed that the principle of constituency of people should be included into Annex 4. Before that, this principle was proclaimed in the Constitution of the Federation of BiH. The

<sup>15</sup> “Dear Mr. President, this Decision is a historical act and an expression of the political will and historical aspirations of the Croatian people in Bosnia and Herzegovina,”: the conclusion of the short letter the President of “Herceg-Bosna” Mato Boban wrote to the President of Croatia, Franjo Tuđman, immediately after the Basic decision on the establishment and proclamation of the Croatian Republic of Herceg-Bosna (November 1991).

<sup>16</sup> On January 9, 1992, the SDS formally declared “autonomous areas,” which are areas in Bosnia and Herzegovina where the majority of the population was Serb, the so-called the Serb Republic of Bosnia and Herzegovina, which was later renamed the Republika Srpska (RS). Members of the National Assembly of Serb Republic adopted the Declaration on the Proclamation of the Republic of the Serb People of Bosnia and Herzegovina. On February 28, 1992, the National Assembly adopted the Constitution of Republic of Srpska.

<sup>17</sup> Amendments VII and VIII, *Official Gazette*, 15/1992.



constitutional system of Bosnia and Herzegovina in the post-Dayton era is determined by constituent peoples (Bosniaks, Serbs, Croats), the others and the citizens.<sup>18</sup> Kasim Trnka explains that the ‘constitutionality of peoples’ is a collective right narrower than the right to sovereignty, but broader than the individual right to ethnic Identity.<sup>19</sup> Constitutionality means that all three peoples have mutual rights to regulate the constitutional order (together with the citizens and others) and to use all available mechanisms for the protection of ethnic equality.

The Constitutional Court of Bosnia and Herzegovina, in the Decision No. U 5/98 from 2000 declared that constituency of peoples applies to the whole territory of Bosnia and Herzegovina (in this decision, it was ruled that the Preamble of the Constitution of BiH has normative effects).<sup>20</sup> It is important to emphasize that this procedure was initiated by Alija Izetbegović who was, at the time, Chair of the Presidency of Bosnia and Herzegovina and the president of the Party of Democratic Action. The Constitutional Court of BiH considered the issue of incompatibility of the Constitution of BiH with the European Convention on Human Rights, concluding that it was excluded entirely from the system of representation individually in favor of collective law, and in a corrective manner, it was ordered that the category of *Others* to be integrated into the system of political representation.<sup>21</sup>

The Constitution of BiH gives two mechanisms for the protection of ethnic interests to constituent peoples, but it did not put them in an equal position. Entity voting (a consequence of federalism) is used more than vital national interest (a consequence of democracy) in the decision-making process. It also gives Serbs a favorable position in relation with Bosniaks and Serbs, since Serb delegates can prevent the adoption of decisions that clash with the perceived interests of the Serb people from Republic of Srpska, without using the mechanism of vital national interest. The mechanism of *entity voting* was the reason why previous constitutional reforms did not pass (the most important was the “April Package” of 2006).<sup>22</sup> Most of the political parties in the Parliamentary Assembly are mono-ethnic. They dominate the legislative body (the exception was 2000–2002). Also, political grand coalitions are a characteristic of the functioning of the Parliamentary Assembly. They are always made up of political parties from all three constituent peoples. Until

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<sup>18</sup> Preamble of Constitution of Bosnia and Herzegovina.

<sup>19</sup> Kasim Trnka, *Constitutional Law* (Sarajevo: Fakultet za javnu Upravu, 2006), 178.

<sup>20</sup> In 5/98-III, point 49, 1. VII 2000.

<sup>21</sup> In 5/98-III, point 116, 1.VII 2000.

<sup>22</sup> From this point, political system of BiH saw the growth and influence of The Alliance of Independent Social Democrats (SNSD). This party basically replaced SDS and made Republic Srpska a *de facto* one-party regime. The SDS from this became more a pro-Bosnian party.

now, no political party in such a coalition has represented the will of a single constituent people.

The current Constitution of Bosnia and Herzegovina gives priority to the collective over individual identity and rights, but such a model fails to overcome many political and social antagonisms. One of the solutions is the model of *constitutional patriotism* which would ensure the reconstruction of a common identity by forming a sphere of loyalty to the principles, values and procedures that arise from the constitutional solution itself. It means that the Constitution would be

“the highest legal act, which would democratically stabilize and functionally integrate BiH, should be established as its own reference – it is a so-called self-referential constitution.”<sup>23</sup>

In this way, citizens would base their identity on a set of constitutional values that would be integrative for the community and identification with the state would be replaced by identification with the Constitution.

## Model of Democracy

Arendt Lijphart theorized consociational democracy which includes four elements: a grand coalition formed through the participation of representatives of all major groups in political decision making; the autonomy of segments by giving three (constitutional) ethnic groups the right to perform certain duties determined by the constitution; proportionality through equal representation of ethnic groups; and the veto power enabling these groups to protect their “vital interests.”<sup>24</sup> Several authors noted that the democratic regime established by the Constitution of Bosnia and Herzegovina matches all four consociational criteria.<sup>25</sup>

However, Bosnia and Herzegovina is not the ideal type of consensual democracy, because it does not have one of Lijphart’s ten elements on the central level of authority, and this relates to activities of political parties. This element of consensus democracy, which is not in the constitutional and political system of

<sup>23</sup> Dražen Pechar, “Establishment of Bosnia and Herzegovina on the Principles of Constitutional Patriotism,” *Političke analize* 5, no. 19 (2014): 12.

<sup>24</sup> Arendt Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Connecticut: Yale University Press, 1977).

<sup>25</sup> Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention*, (London: Hurst & Co., 2002); Florian Bieber, “The Challenge of Institutionalising Ethnicity in the Western Balkans: Managing Change in Deeply Divided Societies,” *European Yearbook of Minority Issues* 3 (2004): 89–107; Sherrill Stroschein, “Consociational Settlements and Reconstruction Bosnia in Comparative Perspective, 1995-Present,” *WIDER Working Paper no. 2013/089*.

Bosnia and Herzegovina, is corporatism, as a system of balancing interest groups. Since BiH political parties are strongly associated with the economic sector and a small number of pressure groups, it can be easily concluded that according to this parameter, the model of democracy does not fully correspond to the consensual democracy described by Lijphart.<sup>26</sup> Two more elements of consensual democracy, both applied in Bosnia and Herzegovina, are in a deep inter-relation with political parties. That relation will be explained below.

Multipartyism has been applied in Bosnia and Herzegovina. In the consensual model of democracy, Lijphart speaks of the existence of several important political parties that play a major role in the decision-making process in parliament. After the end of the armed conflict in BiH, the dominance of ethnic political parties in the political system of BiH (the Party of Democratic Action, the Serbian Democratic Party, and the Croatian Democratic Union) continued, with some multiethnic political parties briefly managing to challenge their monopoly. In Bosnia and Herzegovina, strong party fragmentation is in force, and we can even talk about three ethnically based party subsystems – Bosniak, Serbian and Croat. Multiethnic political parties are rare (an example would be the Social Democratic Party of Bosnia and Herzegovina, and Our Party). Due to the impossibility of achieving an absolute majority in parliaments, unnatural coalitions are formed in order to secure that majority.

Consensual democracy allows all or most important parties to share power in a broad coalition. This is a characteristic of proportional representation systems that is different from majoritarian (Westminster-style) systems, in which one party has most of the power. In Bosnia and Herzegovina, the grand coalition functions in such a way that instead of a positive consensus on cooperation in the political, economic, and social development of Bosnia and Herzegovina, a systematic blocking of the adoption of necessary decisions (negative consensus) for the development of the state and its bodies is in force. The structure and composition of the authorities of Bosnia and Herzegovina correspond to Lijphart model of consensual democracy. The BiH Council of Ministers does not fit the Westminster model because no party has an absolute majority in the Parliamentary Assembly, no government is a majoritarian and cannot make decisions by ignoring or bypassing other relevant political entities that represent the will of ethnic groups.

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<sup>26</sup> The party connection with the managerial functions of companies is very visible in both Entities. The analysis of a sample of 68 director positions in RS public companies shows a connection with the ruling parties in 68% of cases. The leading role for a period of 10 years is played by the SNSD with 49 appointments, followed by the DNS, SP, US, DEMOS and SDS. In the Federation for the period 2010-2019, analyzing 46 director positions, party affiliation with this function was determined in 78% of cases. SDA has the most party appointments for this period, followed by SDP, SBB, HDZ BiH, NS RZB and DF. "Parties view public enterprises as something of their own," "Fair employment," Centri civilnih inicijativa, accessed February 07, 2022, <https://ferzaposljavanje.ba/stranke-posmatraju-javna-preduzeca-kao-nesto-sto-je-njihovo/#>.

## Theoretical and Practical Consequences of Consociational Democracy on the Electoral System

According to Arend Lijphart, “the electoral system is an essential element of representative democracy,” while for Giovanni Sartori “electoral systems are not only the most manipulative instrument of politics, but also shape the party system and influence the determination of representation.”<sup>27</sup> There are three basic types of electoral systems, according to the criterion of mechanism to convert votes into seats in parliament: majority (plurality) electoral systems, systems of proportional representation, and mixed (semi-proportional) systems. This classification can be found in the works of many political theorists.<sup>28</sup> According to Blais and Reilly, these types of electoral systems have their subtypes, and they all affect the character of the political system. Lijphart identified four basic dimensions of electoral systems: (1) the electoral formula, (2) the number of representatives elected in a constituency, (3) the electoral threshold, and (4) the number of deputies in one legislature.<sup>29</sup>

In the last decade of the last century, as a result of significant challenges in understanding the legitimacy of state power, the issue of electoral reform was raised. At the same time, as Huntington noted, there was a wave of constitutional formation, which followed the explosion in the numbers of new democracies in Central and Eastern Europe, Asia, and Africa.<sup>30</sup> In these states, the choice of electoral system produced fierce debates, which had to be resolved before all other constitutional issues. Newer democracies, such as Ecuador, Hungary, Russia, and Taiwan, have adopted mixed electoral systems, believing that they combined the best of the proportional and majority systems. In Eastern Europe, in the first multi-party elections, out of twelve countries, nine used the majority electoral system. Eight states changed the electoral system for the next elections: four introduced a mixed (combined) system and two used proportional systems. According to Klaus Von Beyme, among those countries

<sup>27</sup> Arendt Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990* (Oxford: Oxford University Press, 1994); Giovanni Sartori, *Comparative Constitutional Engineering* (Beograd: “Filip Višnjić”, 2003), 14.

<sup>28</sup> Pippa Norris, “Choosing Electoral Systems,” *International Political Science Review* 18, no. 3 (1997): 297–312; Arendt Lijphart, *Electoral Systems and Party Systems*; Arendt Lijphart and Bernard Groffman, *Choosing an Electoral System: Issues and Alternatives* (New York: Praeger, 1984); Douglas W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press, 1971); André Blais and Louis Massicote, “Electoral Systems” in *Comparing Democracies*, 2nd ed., eds. Lawrence Leduc, Richard G. Niemi and Pippa Norris (London: SAGE Publications, 1996), 40–70; Maurice Duverger, *Political Parties* (New York: Wiley, 1954).

<sup>29</sup> Arendt Lijphart, *Electoral Systems and Party Systems*.

<sup>30</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman and London: University of Oklahoma Press, 1993).

that started with a combined and proportional system, five attempts at institutional design have been recorded.<sup>31</sup> The collapse of authoritarian regimes since the 1970s has created a need to apply knowledge in the design of political institutions. Along with this, the acceleration of the application of the constitutional design models (institutional engineering) has occurred due to changes in the field of constitutional law and in the political sciences. In theory, the view has emerged that democracy, among other things, depends on the design of political institutions.<sup>32</sup>

The Unified Election Law of Bosnia and Herzegovina was adopted in 2002. This law fully regulates the electoral system at the level of the state of Bosnia and Herzegovina, its entities, cantons, and local self-government units. Given the complex structure of the state, the legislators opted for a proportional electoral system and the existence of a larger number of multi-member units. Professor Mirjana Kasapović believes that, given the two-entity structure of the state, it was necessary to determine the proportional and compensatory electoral system.<sup>33</sup> In order to protect the equality of the three constituent peoples of Bosnia and Herzegovina (Bosniaks, Serbs and Croats), especially given that at the time of the law the return of their members to pre-war residences was still insufficient in most parts of the country, the legislators opted for a mixture of two electoral thresholds (from 3–5%).

The Parliamentary Assembly of Bosnia and Herzegovina consists of two houses, the House of Peoples, and the House of Representatives. The House of Peoples consists of fifteen members, of which ten members (five Bosniaks and five Croats) are elected in the House of Peoples of the BiH Parliament, and five members, the Serb representatives, are elected by the Republika Srpska (RS) National Assembly. Out of a total of 42 seats, the Federation of BiH has 28 deputies, and the Republika Srpska has 14 deputies. Suad Arnautović notes that this solution is the result of compromise agreed in Dayton.<sup>34</sup> When electing deputies from the Federation of Bosnia and Herzegovina, all members of the Parliamentary Assembly are elected in multi-member constituencies, with twenty-one deputies elected by a proportional electoral system, and using the Sainte-Laguë redistribution method with a 3% threshold. The remaining seven mandates are the so-called compensatory mandates, and the Sainte-Laguë method is applied with a 5% threshold. Only political parties and coalitions participate in the distribution of

<sup>31</sup> Klaus Von Beyme, "Institutional Engineering and Transition to Democracy" in *Democratic Consolidation in Eastern Europe*, vol. 1, ed. Jan Zielonka (Oxford: Oxford University Press, 2001), 3–25.

<sup>32</sup> James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *American Political Science Review* 78, no. 3 (1984): 734–749.

<sup>33</sup> Mirjana Kasapović, *Elective Lexicon* (Zagreb: Politička kultura, 2003).

<sup>34</sup> Suad Arnautović, "The Presidentialisation of Political Parties in Bosnia and Herzegovina: A Mitigated Presidentialism" in *The Presidentialisation of Political Parties in the Western Balkans*, ed. Gianluca Passarelli (Cham: Palgrave Macmillan, 2019), 73–96.

these mandates, but independent candidates do not, which is an attempt to preserve the guaranteed participation of all ethnic communities in the BiH legislative representative body. According to the same electoral principle, fourteen parliamentary seats are distributed from the Republika Srpska, so that nine deputies are elected based on a pure proportional electoral system, while the rest are elected in accordance with the compensation system.

Although some solutions of the Election Law tried to circumvent ethnical divisions, the deep three-ethnic and two-entity division of the state had an impact on the electoral system in terms of applying elements of the consociational model of democracy, which formally and directly guarantees the participation of constituent peoples in the organization and functioning of the representative bodies in Bosnia and Herzegovina and of the lower political-territorial units.

## Open Constitutional Discrimination

An integral part of the Constitution is the European Convention for the Protection of Human Rights and Fundamental Freedoms, which takes precedence over domestic law. This Convention, among other things, guarantees the right of all citizens to exercise the right to vote and to participate in state power without discrimination on any principle. However, as Asim Mujkić claims:

“equality of peoples as prescribed by the Dayton Constitution and as implemented in ethnopolitical practice in BiH has the necessary consequence of the grossest inequality of citizens, i.e., flagrant discrimination of individual rights and freedoms.”<sup>35</sup>

Citizens who do not declare themselves as members of one of the three constituent peoples are deprived of the passive right to vote, do not have the right to participate in public affairs and public functions are not equally accessible to them.

The creators of Annex 4 established elections as one of the fundamental postulates of the representative system. Hardcore nationalists were elected in the first elections and today seats in the legislative bodies of Bosnia and Herzegovina are predominantly filled with politicians with the same or similar profiles. Political elites, under the guise of protecting ethnic interests, kept the decision-making process in the legislature at a standstill. Several relevant international organizations have warned that several state bodies act in a discriminatory manner.<sup>36</sup> On December 22, 2009, the Grand Chamber of the European Court of Human Rights (ECHR) handed down a judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, finding that the constitutional system of Bosnia and Herzegovina

<sup>35</sup> Asim Mujkić, *We, Citizens of Ethnopolis* (Sarajevo: TKD Šahinpašić, 2007).

<sup>36</sup> International crisis group, 1999; Venice Commission, 2001.

violated the rights of ethnic groups other than Bosniaks, Serbs and Croats for political representation in state bodies – the House of Peoples of the Parliamentary Assembly of BiH and the Presidency of BiH.<sup>37</sup> Pursuant to this judgment, Bosnia and Herzegovina must reform the electoral law to allow for the representation of citizens who do not identify with any of the three constituent peoples.

The constitutional reform in BiH comes down to the question of how to ensure to the *others* an appropriate status in the political structure of BiH. The temporary joint commission of both houses of the BiH Parliamentary Assembly agreed that the implementation of the Sejdić-Finci decision will be taken through minimal changes to the Constitution, the position of the *others* will be resolved by putting them in the BiH Presidency and the House of Peoples. The implementation of the judgement has been slowed down, due to the prominent demands of certain political parties regarding issues not mentioned in the judgment, and they are trying to bring it under the potential that, according to those political parties, the judgment carries (in relation to the entity vote, the vital national interest, the change in the nature of federalism, and the legitimization base of public officials and civil servants). After this, there were more judgments of the European Court of Human Rights that determined ethnic discrimination in favor of constituent peoples, combined with the territorial principle. So far, political parties have not changed the provisions of the Constitution in accordance with the judgments of the ECHR.

## Conclusion

This kind of revision to the Constitution of BiH must be done in accordance with the verdict of the European Court of Human Rights, especially *Sejdić and Finci v. Bosnia and Herzegovina*. The political elites in BiH have so far not implemented any of these decisions. The political parties in the Parliamentary Assembly of BiH also use blockade mechanisms in the decision-making process, more often voting in line with their entity than in terms of the “vital national interest.” This makes the process of the adoption of legal and other acts very slow. There are no institutions of direct democracy in the Constitution of BiH, so the decision-making process remains closed and represents a form of elitism in consociational democracy.

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<sup>37</sup> According to this judgment, it has been established that there has been a violation of Article 14 in conjunction with Article 3 of Protocol no. 1.1. of European Convention on Human Rights and Fundamental Freedoms, which refers to the inability of the applicants to run for the House of Peoples of the Parliamentary Assembly of BiH, as well as the violation of Article 1 of Protocol no. 1.12. due to the inability of the applicants to run in the elections for the Presidency of BiH.

Citizens should have more opportunities to express their interests. There should be a channel through which these requirements, goals, interests, etc. can be transmitted to the elected representatives, with an obligation for the representatives to respect them. Such a place could be the plenums, which were already organized as a result of the February 2014 protests, but they did not have a legal basis. However, they can serve as a general rehearsal for the eventual future democratic dictates of the citizens. Until then, the fate of Bosnian citizens will be decided by several political parties, or rather several leaders of those parties. We can safely say that there is no intra-party democracy in any of the strongest political parties and the opinion of only one leader rules in all of them. They are dominated by the charisma of one person, and everyone else follows the leader which is a relic of the former system.

Partocracies in Bosnia and Herzegovina pursue their interests to the greatest extent by producing mutual enmity, and by provoking fear among the members of the ethnic group whose interests they represent. In political rhetoric, almost every day, most often in political statements, phrases about the secession of the Republika Srpska,<sup>38</sup> a united Bosnia and Herzegovina<sup>39</sup> and the third entity<sup>40</sup> are used, although those who pronounce them know there is no constitutional or legal basis for them, and that the international community will not allow these political processes to unfold without the consensus of the constituent peoples, and without an appropriate legal framework. That the constituent peoples are not generally enemies of each other has been shown by certain events of the last decades, such as the large protests against the authorities, protests over the unique identification number and floods caused by cyclone Tamara in many parts of BiH. These events have shown that the ethno-nationalist rhetoric and political speeches by means of which the people of Bosnia and Herzegovina have been intimidated for more than twenty years, and in which even the possibility of a new armed conflict was presented, simply do not reflect reality. Entity borders were not an obstacle in these natural and social troubles, so it seems that the fear of insecurity was largely overcome by most members of the demos of Bosnia and Herzegovina, as there were many examples of people from different entities and cantons showing solidarity in saving people and material goods when these events took place, and they helped to repair the damage done by these events.

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<sup>38</sup> Una Hajdari, "Secession threats and nationalist strife shock Bosnia as EU offers limited response," January 18, 2022, accessed May 17, 2022, <https://www.politico.eu/article/secession-threat-bosnia-milorad-dodik-eu-limited-options/>.

<sup>39</sup> Zeljko Trkanjec, "Civic, unitary model only acceptable solution for BiH, says Bosniak party leader," March 22, 2021, accessed May 17, 2022, [https://www.euractiv.com/section/politics/short\\_news/civic-unitary-model-only-acceptable-solution-for-bih-says-bosniak-party-leader/](https://www.euractiv.com/section/politics/short_news/civic-unitary-model-only-acceptable-solution-for-bih-says-bosniak-party-leader/).

<sup>40</sup> "Bosnia's Civic: There is still a chance for election law reform," March 22, 2022, accessed May 17, 2022, <https://hr.n1info.com/english/news/bosnias-civic-there-is-still-a-chance-for-election-law-reform/>.