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**BOSNIA AND HERZEGOVINA: MULTINATIONAL OR MULTI-ETHNIC?**

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Bosnia and Herzegovina: Multinational or Multi-ethnic ?

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1. The European Court of Human Rights (ECtHR) has recently found in the case *Sejdić and Finci* that the Dayton Constitution of 1995 violates the European Convention on Human Rights (ECHR). The political compromise achieved in the peace settlement in 1995 in Dayton/Ohio after NATO-intervention had been based on two central elements: first, Annex 4, the so-called Dayton Constitution, recognized the warring parties - the secessionist Republika Srpska and the Federation of BiH - as new legal "Entities" of the state of BiH without any interference into their legal and institutional systems created during the war between 1992 and 1995. Second, on state-level, three so-called "constituent peoples", Bosniacs, Croats and Serbs, are to be represented in the legislature and the executive, in particular in the Presidency and the House of Peoples according to the parity principle: 1 Bosniac, 1 Croat, and 1 Serb for the composition of the Presidency, and 5 Bosniacs, 5 Croats, and 5 Serbs for the second chamber of the parliament. In both institutions members of the constituent peoples also have veto power. This strong power sharing system based on a strict, pre-determined ethnic key and the principle of territorial de-limitation, insofar as the Federation of BiH as a bi-national Entity of Bosniacs and Serbs is in itself again subdivided into 10 cantons with eight of them with a "national" majority population, was and is still seen as the backbone of the entire peace settlement and reconstruction efforts. However, this almost ideal-typical legal construction of Arend Lijphart's model of "consociational democracy" did not work so far as it is presumed in theory: instead of fostering elite cooperation through powersharing, the mono-ethnic parties and their leaders have formed a cartel of power and rule the country after the formula "divide et impera" with dramatic consequences for the functioning of the country: the legislative process is almost permanently blocked so that the international civilian administration represented by the High Representative substitutes the parliament. Hence, the ethno-nationalist elites have no incentive to compromise and – by presenting them as defenders of the "vital national interest" of their respective ethno-national community – win elections after elections since they can blame the international community for austerity measures. Due the blockade of the legislative process, also the economy has no framework which can overcome the ethnic divide with the effect that BiH remains until the very day aid-dependent. Finally, the ethnic divide – which had been created through genocide and ethnic cleansing during the war - is even cemented by the institutional and territorial structures of BiH and the principle, supported by most party leaders, of the identity of territory and ethnicity also on Entity level. The decision of the Constitutional Court of BiH on "constituent peoples" in 2000 wanted to break up the territorialisation and institutional homogenisation through ethnicity, but the following amendments of the constitutions of the Entities, enforced by High Representative Petritsch in 2002, did not follow this logic. Since 2004 there is now a permanent public debate on constitutional reform in BiH in order to reform the territorial and institutional system, however without any success so far. The case *Sejdić and Finci v. BiH* is now a further strong reform incentive since the ECtHR declared the pre-determination of ethnicity in the composition of highest state institutions with the effect to de jure exclude

all "Others" from their right to stand as candidates in the elections a violation of the 12<sup>th</sup> Protocol of the ECHR.

2. As can be seen from all public and scholarly debates on what is going wrong in BiH, it is not the fact that there are territorial delimitations and institutional mechanisms for the representation and participation of ethnic groups in political decision-making processes as such, but the strict identification of territory and institutions with ethnicity and thus the "model" of the multi-national state. This model was obviously developed after the history and experience of Switzerland and Belgium. In the case of Switzerland, the creation of half-cantons in the 19<sup>th</sup> century, the creation of the new canton Jura in 1974 as well as the jurisprudence of the Supreme Court with reference to a constitutional "territoriality" principle followed the idea of territorial delimitation and separation in order to preserve "peace" between religions or language groups. The same holds true for the process of federalization in Belgium with the creation of three regions. All the debates on violation of minority rights for French speakers living in the Flemish region and whether they have a right to be represented by a French speaker in parliamentary institutions, now concentrate on the two cities Halle and Vilvoorde and there are strong proposals by the Flemish party leaders to bring the territorial split of Belgium finally to an end against Walloon party leaders who argue that the individual right to use one's mother tongue in public space must be upheld against territorial restrictions. Hence, not only BiH is on the brink of collapse, there are also hot debates how long Belgium will and can keep together, if not only territories, but also parties and institutions are ethnically more and more fragmented by sticking to the model of the multi-national state which cannot satisfy ethno-nationalist demands without a break-up of the state.
3. With the request following from the identification of territory and ethnicity on sub-national level to assimilate into the majority culture, and the consequence that minorities remain second-class citizens at best in a power-sharing system of co-nations, the model of the multi-national state as a legacy of state-formation and nation-building in European history is thus no longer a panacea for peace and good governance, not even in Europe itself. Cultural diversity as a new European value, now legally entrenched in the European Charter of Fundamental Rights, requires a new approach, a new model of cultural diversity management which can reconcile equality and diversity without territorial separation and institutional segregation not only for the protection of "old" minorities, but also for the integration of new minorities stemming from immigration into European societies. Personal and cultural autonomy with self-governing institutions, invented by the Austro-marxist thinkers Karl Renner and Otto Bauer almost at the end of the Habsburg monarchy, since they were perfectly aware that a territorial concentration of language groups does not exist in Central and South Eastern Europe so that the "Swiss model" could not be exported, and then also established in Belgium in the course of constitutional reform might thus be a first step for the de-territorialization of ethnicity and a new conceptualization of multi-ethnic federations and states.