

**Legal Misunderstandings, False normative Hopes  
and the Ignorance of Political Reality**

**A Commentary on the recent ESI Report  
“Lost in the Bosnian Labyrinth”**

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## LEGAL MISUNDERSTANDINGS, FALSE NORMATIVE HOPES AND THE IGNORANCE OF POLITICAL REALITY

### *A COMMENTARY ON THE RECENT ESI REPORT “LOST IN THE BOSNIAN LABYRINTH”*

The European Stability Initiative recently published a troubling report on Bosnia and Herzegovina (BiH) called “Lost in the Bosnian Labyrinth - Why the Sejdić-Finci case should not block an EU application.”<sup>1</sup> ESI argues that “non-implementation of the Sejdić-Finci decision cannot justify blocking Bosnia and Herzegovina’s application for EU membership,” noting that the reforms the EU expects from Bosnia have not been required of other EU applicants, much less its own member states.<sup>2</sup> ESI argues that a ground-breaking legal ruling by the European Court of Human Rights (ECHR)<sup>3</sup> should not impede Bosnia’s integration into the EU, but instead the EU should quickly give BiH candidate status and expect the constitutional revisions demanded by the ECHR to take place while BiH negotiates with the EU about membership. The paper justifies this with the claim that other countries (including EU member states) include *de facto* discriminatory provisions in their constitutions and are not sanctioned by the EU or the Council of Europe.

As will be shown below, this argument is not only highly flawed, but also demonstrates a troublingly lack of understanding of the fundamentals of BiH politics, as well as constitutional power-sharing arrangements in the member states of the EU. As such, the paper appears to be an effort to provide an ideological framework for the EU to move beyond its continuing failures in BiH that have enabled local politicians to undo many of the highly-touted reforms put in place prior to 2006, when the EU assumed policy leadership. If Brussels uses the ESI paper as ideological justification for dropping conditionality, it would enable the Brussels bureaucracy to move ahead with its “one size fits all” cookie-cutter enlargement policy and pretend that “progress” is occurring, when at best a standstill can be observed, and at worst, previous achievements are slowly being reversed by local party elites.

### **1. Legal Misunderstandings**

The ruling of the ECtHR in the case of Sejdić and Finci states that Bosnia needs to change its constitution, as the current provisions for the Presidency and the House of Peoples are discriminatory. According to the current constitutional framework, only Bosniaks and Croats residing in the Federation, and Serbs residing in the Republika Srpska are allowed to run for the office of the Presidency in Bosnia. Dervo Sejdić, an active member of the Roma community in Bosnia, and Jakob Finci, a member of the Jewish community, argued that they are unable to run for these offices because of their ethnic self-

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<sup>1</sup> See: ESI: *Lost in the Bosnian Labyrinth*, 7 October 2013, available at: [http://www.esiweb.org/pdf/esi\\_document\\_id\\_143.pdf](http://www.esiweb.org/pdf/esi_document_id_143.pdf)

<sup>2</sup> ESI: *Lost in the Bosnian Labyrinth*, p. 2.

<sup>3</sup> Case of Sejdić and Finci vs. Bosnia and Herzegovina, applications 27996/06 and 34836/06.

identification, i.e. their refusal to be from or identify as any of the three constitutionally protected “constituent peoples.” ESI compares this case to voting and selection processes in other EU member states, including Belgium, Italy (South Tyrol) and Cyprus, and concludes that similar provisions (sometimes even stricter) are also applied in other EU member states. These states however, are not sanctioned by the EU. Legally speaking, this assessment is correct. However, the devil is in the details. Two important points need to be clarified to engage with the arguments of ESI.

First, the legal framework of these provisions needs to be contextualised as provisions to ensure power-sharing between different groups in deeply divided societies. All countries mentioned use power-sharing provisions, often characterised by grand coalitions and reserved seats for specified groups. Indeed, while power-sharing (in the form of consociationalism) has been designed to ensure group-inclusion, it can also serve as a tool of exclusion and discrimination. By specifying which groups “share” power, constitutional provisions can also discriminate by excluding certain groups. Often this form of exclusion takes place, because some groups are too small to be represented, or they have no political ambition to participate in day-to-day decision-making.<sup>4</sup> Power-sharing, which focuses on reserved seats and grand coalitions between certain groups, can also implement mechanisms of discrimination and exclusion.

However, systems can be designed to limit and abolish this discrimination. Macedonia, for example, uses a system which talks about “majority” and “non-majority” population, therefore avoiding any reference to a certain group. Furthermore, while the Belgian and the South Tyrolean examples also demonstrate some form of discrimination, it is nevertheless a form of positive discrimination. The aim of the power-sharing arrangements in both countries is to allow for minority groups to participate in decision-making. Hence, the legal framework has to be understood in the context of the intended aims of power-sharing mechanisms. In the case of Brussels, it is a mechanism to engage Flemish speakers in the officially bilingual but mainly French-speaking city, and in the case of South Tyrol it gives representation to German and Ladin speakers.

In BiH, however, the aim of the 1995 Dayton Peace Agreement’s power-sharing arrangement was to secure equality for the three constituent peoples and therefore prevent another violent conflict. Rather than empowering otherwise marginalised minorities, the system has been structured as a way of stabilizing the country after a prolonged war, during which Serbs and Croats at various points attempted to secede from the country (with active political and military support from Serbia and Croatia).<sup>5</sup> Furthermore, in Bosnia, power-sharing is much more rigidly applied than in either Belgium or Italy, where -- while people have to select language groups -- electoral rules and genuine inter-party competition allow for a high degree of flexibility in both cases. Evidence can be seen in the fact that a

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<sup>4</sup> This is often the case with aboriginal or immigrant communities.

<sup>5</sup> On the war in Bosnia see the best description in: Steven Burg and Paul Shoup: *The War in Bosnia and Herzegovina: Ethnic Conflict and International Intervention*, M.E. Sharpe, 2000.

Francophone Walloon currently heads the Belgian government (even though French speakers are actually a minority); with Francesco Palermo, South Tyroleans elected a native Italian-speaker for the first time as their representative in the Italian senate (on the ticket of the German-speaking party in South Tyrol).

It is therefore important to look at the intended aim of power-sharing arrangements within the constitutional framework of different countries. Furthermore, a look at the flexibility often highlights a different political reality in contrast to some more rigid structures. This is particularly true when comparing South Tyrol, Belgium, and BiH. While the first two cases have indeed rather strict power-sharing arrangements, there has nevertheless been a high degree of flexibility in the system. Furthermore, both systems have been reformed constantly over the last decades to adjust to new realities. However, the ostensibly flexible structures in BiH that the ESI report describes and even praises, in particular in terms of self-identification and the ability to run on different “ethnic” tickets at different times, while theoretically possible, have not been applied and are impossible in the current political context. There are no examples of high-level politicians using the ability to run on different ethnic tickets at different elections. In fact, when Željko Komšić was elected as the Croat member of the Bosnian Presidency, he was deemed to be “the wrong kind of Croat” by the main nationalist Croat parties, because of his more moderate and civic understanding of politics (and the fact that he was elected by a majority of Bosniaks rather than Croats), which led to a breakdown in Bosniak-Croat relations during Komšić’s mandates. A political system that is characterized by ethnically exclusive parties does not allow for flexibility.

## 2. False Normative Hopes

The ESI report concludes with a request for the EU to drop its condition for Sejdić-Finci implementation for BiH. Instead, the authors argue that the EU should allow BiH to file an application for candidate status and leave constitutional reform to be resolved at a later date as an integral part of membership negotiations. The high point of this assumption is an explanatory note, which ESI suggests as an addition to Bosnia’s application for EU candidate country status. It would highlight the willingness of all parties and groups to reform the constitution, but ask for more time and for a new focus on reform during EU membership negotiations. While this might strike some readers as an encouraging gesture, it sends the wrong message entirely. What ESI basically suggests is that EU’s conditionality, in particular the focus on fundamental human rights, should not apply to BiH at this stage. Taking into account the poor track-record of EU conditionality in the country (see for example the failed police reform; the roll-back of reforms that were preconditions for signing the SAA; the failure to establish a functional anti-corruption body even after visa liberalization required it, the weakening of state judicial structures under the EU’s “Structured Dialogue,” etc.), this will result only in negative consequences.

Should the EU drop Sejdić-Finci implementation as a condition for candidate status, it would encourage and embolden all those politicians who have successfully resisted reform thus far. BiH politicians would

be reassured that they do not have to abide by fundamental, rights-based principles; instead, their policy of obstruction and disagreement would be rewarded. Furthermore, those Bosnians that strongly support implementation of the Sejdić-Finci ruling (in addition to minority groups, there are also many civil society groups that support changes to the constitution) would once again be disappointed by the EU, seeing that BiH politicians have indeed learned to manipulate not only the domestic political system but the EU bureaucratic framework as well. Finally, the EU's already damaged credibility would take a further hit, delaying any future reform efforts, due to the fact that no BiH politician would take EU conditionality seriously. It remains a mystery to any serious observer how ESI can think that a reform that cannot be agreed upon now where the stakes are high (EU candidate status and vital financial support), will be agreed upon later, when the stakes will be lower.

ESI bases its analysis on false normative hopes, that as part of EU membership negotiations all Bosnian politicians will (finally) show themselves willing to reform, compromise and agree on needed constitutional changes. There is absolutely no evidence for such a misguided suggestion. Bosnian politicians have failed thus far to implement important reforms agreed under the 2009 Stabilization and Association Agreement (SAA) between BiH and the EU, and many of the preconditions for the SAA (Public Administration Reform) have been undone in the meantime. Furthermore, since Croatia has joined the EU, BiH's economy, particularly its agriculture, has taken a hard hit, because politicians cannot agree on common standards and who should have the right to control and label agricultural products, which are required for export to the EU. Bosnia's farmers and producers suffer, yet politicians continue to discuss the issue without any willingness to find a solution.<sup>6</sup> The problem in Bosnia is not that a lack of EU engagement is preventing politicians from becoming more willing to reform once they negotiate membership with the EU. The problem is that politicians see politics as a zero-sum game, and leading political and economic elites profit from the status-quo. Change is not desired by those who benefit from the current situation and who see reforms as a threat to their financial patronage networks and political privileges. BiH's politicians are acting rationally in light of the country's electoral and constitutional structure, and doing so has no negative consequences for the elites. Hence, the third fault in the ESI's report is a complete ignorance of Bosnia's political dynamics.

### 3. Ignorance of Political Reality

Bosnia is a country in which a violent conflict has been frozen in the institutional architecture of the post-Dayton system.<sup>7</sup> There is absolutely no willingness to compromise and agree even on basic decisions such as country-wide standards for health and safety in agriculture. The EU has long ignored this reality in Bosnia. Instead, representatives of the Union pretended that EU enlargement is a technical issue, and that all elites have to agree upon is how to adopt the technical and procedural standards of Europe. They ignore the centrifugal, secessionist forces that work against the very existence of a unified

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<sup>6</sup> See on this issue the report by the Green Council:

[http://green-council.org/WP/wp-content/uploads/2013/09/Broshura\\_engleska-verzija\\_v3.pdf](http://green-council.org/WP/wp-content/uploads/2013/09/Broshura_engleska-verzija_v3.pdf)

<sup>7</sup> On this issue see: Valery Perry: "Barriers to EU Conditionality in Bosnia and Herzegovina, available at: <http://www.wilsoncenter.org/publication/working-paper-v-barriers-to-eu-conditionality-bosnia-and-herzegovina>

state. Yet, the EU continues to treat the adoption of constitutional amendments to implement the Sejdić-Finci ruling as mere technical adjustments needed for eventual membership. The prevailing EU wisdom even considered the controversial recent census as a “technical” exercise.

However, elites in Brussels know very well that what the country needs is a fundamental reform of its system. The current political framework is inefficient, expensive, discriminatory and has been failing in recent years. The Republika Srpska’s calls for secession have become louder, while Croats undermine the current constitutional framework with their demand for a *de facto* or *de jure* third entity. No reform that involves the current elites within the current framework will be able to cure these problems. Instead, a fundamental change is needed. Some hoped that the “Baby-revolution,” popular demonstrations by Bosnians frustrated over the political deadlock preventing the assigning of personal ID numbers to newborns, would be a new start. However, it remains difficult to see how the diverging interests of the main parties can be brought together in a constitutional framework that would satisfy everyone. Many argue that a more active role of the EU would help to forge such a consensus, but this would go beyond the nature of the EU as a technical rather than political actor.

While the EU has demonstrated in the case of Serbia (and its relation with Kosovo) that it can act as a political actor in the post-Yugoslav states, this required substantial heavy lifting by the United States, and the EU has yet failed to engage in Bosnia. What the country needs is not less EU conditionality, as demanded in the ESI report, but instead for the EU to clearly define guidelines for the required reforms and how it will support any reform efforts. But this also means that the unwillingness to reform must be penalised and that Bosnian elites should be punished for non-compliance. This might eventually result in changing electoral patterns, once people feel that elites are not taking their main demands and wishes into account. In this regard, it is important that the EU makes robust use of its financial incentives and carries through with such threats as holding back important funding until reforms have been agreed and implemented. This will change the incentives for reforms and for political compromises among leading political elites.

What Bosnia needs is a new consensus on the state among its people. Countries like Iceland and Ireland have demonstrated in recent years how constitutions can be changed with direct involvement of citizens (rather than parties). While the future Bosnia will still be based on power-sharing between different groups, a space must be created for those that do not identify with any of the main groups to participate, engage and create changes within the political system. Power-sharing itself is not the problem in Bosnia. However, power-sharing should not function as a disabling tool to prevent certain groups from participation in the political system. Instead, it should be seen as an enabling tool that engages otherwise marginalised groups in the political decision-making process. In the past, the system has been undermined by uncoordinated international intervention, but now the problem is the opposite. International incentives alone do not work and political elites are not held to account within

the existing political structures. Changing the incentive structure (by withholding funds) and providing more mechanisms for political accountability (for example by strengthening the rule of law) should be the main focus of international and local engagement in BiH in the future.

The EU has applied the ESI's longstanding prescription for promoting "ownership" in the country, but it has completely failed. The international community, with the EU at the fore, continues to plead with domestic elites to change behaviour, rather than press for a change to the perverse incentive structures inherent in the Dayton Constitution to which those elites are rationally responding. As a result, the country has come to a standstill. With its new report on the Sejdić-Finci case, the ESI counsels further ineffectual floundering. As such, it appears to be no more than a new ideological framework for the Brussels bureaucracy to use to justify or evade its failures to date, while going through the motions of generating non-existent "progress."