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Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina

ROBERTO BELLONI

What role do elections play in societies emerging from communal war and what type of institutions can serve as catalysts in deepening peace and compromise? While some analysts argue that ethnicity should be recognized through ‘consociational’ institutions, others maintain that ‘integrative’ devices – in particular, carefully crafted electoral rules – can limit or even break down the salience of ethnicity and increase the possibility for inter-ethnic accommodation. This article examines the post-war electoral experience of Bosnia and Herzegovina (BiH), arguing that elections had a problematic, unintended impact on peacebuilding. First, timid integrative electoral devices were adopted in a consociational system that reifies ethnic division and complicates compromise; second, peacebuilding agencies needlessly manufactured electoral rules that backfired; third, group-based features of the BiH political system run counter to individual human rights. The article ends with suggestions for improving the electoral framework.

The October 2002 elections in Bosnia and Herzegovina (BiH) marked a decisive transition in the country’s post-war experience. After seven years of internationally organized and supervised elections, Bosnian officials were for the first time fully responsible for running the electoral exercise. Technically, this was a success, reflecting the achievement of ‘free and fair’ standards. Substantively, however, the results disappointed most international technocrats and observers. The same nationalist parties that were responsible for the war, and are generally considered as the prevailing obstruction to successful peacebuilding, won the contest. The local independent press featured editorials entitled ‘Back to the Future’ or ‘Forward to the Past’, suggesting disillusion with the peacebuilding process and particularly with the elections as a means of promoting democratization and peace. Some foreign pundits once

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again raised doubts about the ultimate survival of the country within its currently recognized international borders.¹

In spite of these 'doom and gloom' views, what can the Bosnian experience teach us about the use of electoral mechanisms to assist groups to share power and manage their differences peacefully? This article examines the role played by the electoral process and the attempts at electoral engineering in the peacebuilding transition following the signing of the Dayton Peace Agreement in late 1995. Electoral engineering has been an arena of confrontation over different views of BiH and its political future. While international mediators have attempted to use elections to foster moderation and inter-ethnic accommodation, the nationalist parties have systematically used the electoral process to pursue their own agendas, and have prevailed over internationally driven efforts to marginalize them. They have taken full advantage of the consociational structure of the political system and have exploited the short-term approaches of international agencies.

The article begins with an overview of the consociational political system, the reasons why it was chosen, and how it played into the hands of the nationalist parties who easily won the first post-war elections. Then the article analyses the electoral rules for the 2000 and 2002 elections and offers an explanation as to why they were ineffective in fostering moderation. The conclusion reflects on the role of elections in peacebuilding and suggests ways to improve the current electoral legislation.

Consociational Democracy and Early Elections

Rebuilding an institutional framework after a bloody communal war is a daunting task. Because conflict inevitably hardens the identities of those involved – and BiH is no exception – distrust among local parties further complicates the process of institution building. After three and a half years of fierce fighting, it was to be expected that local groups would fear each other's intentions, and would exploit the peace process and international sponsorship to impose their own visions of the country. At least initially, this placed restrictions on the range of acceptable institutions that the local parties were willing to accept. Attempts to strengthen statewide institutions were bound to favour the majority, the Bosniaks, who could turn institutions into tools for domination. Conversely, the Bosniaks feared that their interest would be jeopardized by the development of local autonomies with ties to neighbouring Croatia and Serbia or efforts to partition the territory. When different groups within a polity have radically different opinions about the boundary of

the political community, the nature of the institutions is disputed and becomes the heart of a political struggle.²

In these circumstances the survival of the state depends on a careful balance of different views held by local parties. An elaborate set of checks and balances, grounded in the theory of consociationalism, was created at Dayton to guarantee the political representation of each national group at the institutional level, to protect the groups' rights to self-government, and to promote inter-ethnic accommodation and compromise. The consociational model is a group-based approach centred on cooperation between political elites as the major mechanism to manage dispute. Consociationalists argue that ethnic differences have to be taken as a given, recognized, and made integral in the institutional design. Their chief proponent, Arendt Lijphart, contends that in order to promote bargaining and compromise, consociational systems need to contain four institutional arrangements: 'segmental autonomy', generally involving the adoption of a federal structure when groups are geographically concentrated; minority or mutual veto powers that guarantee no group will be outvoted by the majority when its vital interests are at stake; an inclusive grand coalition government; and proportional representation in public administration and the allocation of resources. In addition, a proportional electoral system, allowing each significant group in society political representation, is essential for the model to work.³ This system has operated successfully in divided societies such as Switzerland and Belgium and was formulated as an institutional solution for deeply divided societies such as BiH.

The post-Dayton institutional framework is a 'classic example of consociational settlement'⁴ where institutions correspond to an ideal-typical consociational democracy. The DPA divided the country internally between a Serb Republic (RS) and a Bosniak/Croat Federation (internally divided into ten Cantons), each with wide-ranging powers of self-government. Ethnic quotas guaranteed group representation at all levels of government and in the statewide public administration. Each group was also granted the right to veto decisions that might violate its own 'vital interests', while a proportional electoral system guaranteed political representation for all major groups in society. There are strong reasons to suggest that this consociational framework was the only feasible model for BiH at the time of the peace agreement in 1995, and some argue it still remains the only realistic institutional option for the country.⁵

The main problem has been that consociationalism has had limited effectiveness in promoting long-term cooperation and inter-ethnic compromise. Ethnic quotas reinforced the salience of ethnic identity and cleavages, entrenched many of the ethnic divisions that international

intervention was supposed to soften and eventually overcome, and risked perpetuating instability. Without incentives for cooperation, it has been easy for politicians to win popularity by defending their national group and by portraying others as enemies. Consociationalism has an intrinsic dynamic that makes the political system inherently unstable and subject to collapse. Even without a reversion to violent conflict (which the international community has mobilized to prevent), the post-Dayton experience has highlighted how consociationalism, combined with frequent elections and proportional representation, not only does not build the conditions for cooperation but is at odds with respect for individual human rights. Consociational arrangements favour collective over individual rights and contradict the liberal individualist paradigm underpinning international human rights norms.

The DPA attempted a difficult balancing act, guaranteeing both the rights of groups to exclusive self-government and the rights of individuals to return to the places from which they were expelled. By bolstering the ethnic character of local institutions, the group-based features of the model have constrained the political and social choices of individual Bosnians of all ethnicities. An individual belonging to group X is often not welcome to return to an area that the DPA assigned to group Y. Moreover, the same individual is likely to be discouraged from returning by their leadership. As a result, the pace of minority return to locations where an individual is part of a minority has been one of the two most frustrating aspects of the peace process. The second has been the nationalist grip on the electoral process.

The first round of post-war elections (from 1996 to 1998) helped to consolidate ethnic exclusivism with little impact on the promotion of peacebuilding and democratization. As the local elections of 1996 demonstrated, in conditions of group insecurity and mutual distrust, with no incentive for politicians to appeal beyond their own ethnic constituencies, elections predictably turned into an ethnic census. By granting constitutional guarantees to protect the safety and survival of all three national groups and ensure their representation at all levels of governance, the DPA played into the hands of the ethno-nationalist parties who conducted the war. These parties were quick to take advantage of the post-war electoral process to legitimize themselves and occupy the newly established institutions by democratic means.

The consociational electoral system facilitated the victory of the main nationalist parties and thus contributed to the subsequent legitimization of new social (dis)order arising from the war. The system of proportional representation (PR) with closed party lists was adopted for the legislative bodies in the Federation, RS, and at state-level. The system attempted to

ensure that the ratio of votes to seats was observed. In a post-settlement context, the need for inclusion and representation of all groups provides a strong theoretical justification for the desirability of PR over majoritarian or semi-proportional systems. However, it also has deleterious effects. As Benjamin Reilly argues, PR allows for 'the development of hard-line nationalist political parties, who can achieve electoral success by making narrow, sectarian appeals to their core ethno-political bases ... the surest route to electoral victory under PR is to play the ethnic card – with disastrous consequences for the longer-term process of democratization.'⁶ These first post-war elections set the pace for later electoral exercises in 1997 (RS National Assembly and municipal elections) and 1998 (general elections): democratic procedures gave the stamp of legitimacy to those very leaders who led BiH into war and whose behaviour during and after the conflict gave them the reputation of ethnic cleansers, thugs and war criminals. The frequency of the elections actually provided political parties with an opportunity to expound their nationalist rhetoric for narrow short-term political goals. Politicians engaged in frequent electoral campaigns were re-elected by appealing only to the voters from their own ethnic group, and had no incentive to moderate their behaviour and act cooperatively.⁷

In sum, elections empowered nationalist parties, made the reversal of ethnic cleansing more difficult and complicated plans for the departure of international peacebuilders from the country. This created the paradoxical situation whereby the implementation of the peace agreement depended on those most likely to sabotage it. Predictably, instead of promoting reconciliation, these parties inverted Clausewitz – the continuation of war by (relatively) peaceful means. As a result, BiH has been characterized by constant tension among the three major ethnic groups, the decision-making process has been burdensome, and the institutional structures inefficient.⁸

International peacebuilding agencies have reacted in two ways. First, they have progressively increased their control of domestic political processes. The more elections legitimated unpalatable local nationalists, the more the international community intervened, for example, by firing un-cooperative but democratically elected local officials. Ironically, elections have triggered a mechanism that, instead of favouring the creation of responsive and democratically accountable institutions, has led to the removal of power from local parties and undermined the autonomy and democratic self-government of local communities.⁹ Second, international agencies attempted to promote non-nationalist parties, foster cooperation and compromise, and increase politicians' accountability towards their constituencies – an approach often labelled as 'integrative'.

Integrationism and Electoral Engineering

The integrative approach to conflict management is a recognized alternative to consociational arrangements. As Donald Horowitz contends, the key to making moderation pay is 'to secure the adoption of electoral and governmental structures that give politicians incentives to behave in one way rather than another'.¹⁰ According to Benjamin Reilly, who builds on Horowitz's pioneering work, alternative institutional design can change the conditions that encourage ethnic conflict: 'Centripetal institutions are designed to encourage moderate, centrist forms of political competition, rather than polarizing extremes and centrifugal patterns that characterize so many divided societies.'¹¹ This approach is more promising for democratizing states than consociational approaches that take the politicization of ethnic groups as given.

The choice of electoral system can be particularly important in dampening the appeal of inter-ethnic confrontation, as scholars have documented.¹² Integrationists place great confidence in electoral incentives and the ability to manipulate them to induce changes in actors' behaviour. The central mechanism to foster inter-ethnic cooperation in electoral design is to 'make politicians reciprocally dependent on the votes of members of groups other than their own'.¹³ Only if office-seekers recognize the need to seek second-preference votes from outside their own core constituencies will they privilege shared interests across groups over narrow parochialism. Furthermore, this system encourages legislators to consider their political adversaries as part of the same political and moral universe.

Rules that favour vote-pooling and preference-swapping, such as the alternative vote (AV), are the preferred integrationist approaches to foster compromise. The AV system enables voters to rank candidates, with the assumption that the first choice will be given typically to a member of the ethnic group to which the voter belongs. If no candidate gains an absolute majority of first preferences, the candidate with the lowest number of preferences will be eliminated and their ballots redistributed to another candidate according to the second preference. The process continues until a candidate gains a majority. If there are enough moderate constituencies within a polarized society to make cross-voting possible, this type of electoral engineering can have significant impact. If, however, voters are so polarized they either do not indicate a second preference or give that preference to another member of their own ethnic group, then the system loses its thrust.

In the Bosnian context international agencies have been pushing an integrative agenda into a deeply consociational system. This is precisely

why, despite the timid sponsorship of integrationist electoral devices, they have had limited effect in sustaining multi-ethnic politics. Without altering the consociational structure of BiH institutions, any positive effects of electoral engineering can occur only under the most unusual and unpredictable circumstances. Compromise and moderation are also stifled when the international community imposes solutions on recalcitrant local parties, depriving them of the political breathing space to reach compromises and preventing the possibility of local institutions developing legitimacy and effectiveness. As the 2000 elections confirm, this does not invalidate integrationist designs, but calls into question the *ad hoc* and shortsighted use of electoral engineering in a system that can easily be exploited by nationalist parties.

The 2000 Elections

The 2000 elections differed from the previous elections in three important aspects. First, open lists and multi-member constituencies were introduced. Second, a preferential voting system was adopted for the election of the RS Presidency. Third, new rules for the election of members of the House of Peoples in the Federation were introduced. Of the three innovations, the first did not specifically foster inter-ethnic accommodation but rather disadvantaged multi-ethnic and civic parties; the second and the third, both inspired by an integrationist approach, backfired because of the timing and method of their adoption. As the experience of the 2000 elections shows, there is a narrow line between fine-tuning election rules and manipulating them. The international community's approach, leaning more towards manipulation, backfired.

Open-lists and Multi-Member Constituencies

Up to the 2000 elections, Bosnians could vote only for a party and not for a specific candidate. All elections were conducted using a closed list system, whereby the party fixed the order of candidates elected and voters were unable to express a preference for a particular candidate. This provision placed considerable power in the hands of political parties. The rules and regulations of 2000 provided for open lists, whereby voters could indicate both their favoured party and favoured candidate, in an effort to forge a link of accountability between elected representatives and the electorate as well as to the party.

This system alleviates one of the major drawbacks of proportional representation, that is, the lack of direct accountability of representatives to voters.¹⁴ Indeed, 'The intention is to increase the level of accountability for elected officials at all levels by having them rely on the positive

approval of the electorate rather than relying on influence within their party to be placed high on the party candidate list. By using open lists, voters have the option of selecting candidates whom they like irrespective of their order on the party list.¹⁵ Open lists were institutionalized in the final election law, with the aim of ‘fostering a direct link between the voters and the candidates and offering an opportunity to the voters to get around parties’ hierarchies by indicating the candidates of their own choice.’¹⁶

However, this system does not take into account the uniqueness of a society divided along ethnic lines. Open lists might increase accountability but do not necessarily favour moderation. Nor do they promote multi-ethnicity and multi-ethnic parties – both explicit goals that the election law was supposed to achieve. When ethnic affiliation remains the primary basis of voter choice and voters can choose only party candidates of their own ethnicity, multi-ethnic parties fail. Unsurprisingly, this provision was contested by the Social Democratic Party (SDP), the most multi-ethnic party in the country.

The creation of multi-member constituencies (MMCs) for the elections of the statewide and two entity parliaments were implemented with a similar rationale, that is the attempt to establish a direct relationship of accountability between voters and their representatives. The entities were divided into smaller districts: five multi-member constituencies were created in the Federation and three in the RS. The official justification was that: ‘The system will make legislative bodies more representative geographically. Candidates will run in local constituencies, and the voters will have a chance to know their elected representatives and their record in office.’¹⁷ When combined with alternative voting (see below), the multi-member AV system can lead to very skewed election results, making it inappropriate for most societies, and certainly for ethnically divided ones. As Reilly explains, in multi-member districts it produces overwhelming majoritarian features when the stability of party support in the electorate ensures that preferences flow from the first candidate on the party list to the next on the list.¹⁸ To offset this possible flaw, ‘compensatory mandates’ were created to make up for insufficient proportionality that could derive from adding up the results from the individual multi-member constituency races. Compensatory mandates not only ensure proportionality but also open greater opportunity to smaller parties or coalitions that may not have received enough votes in a given constituency race to win a seat, but have received enough votes in the overall electoral unit to win a mandate.

The flaw with MMCs as constituted in BiH is similar to the problem with open lists. While sensible in theory, to improve accountability, in

practice its impact on fostering inter-ethnic moderation is small. Indeed, the way the MMCs were drawn up (preserving a clear ethnic majority within each constituency) made it unlikely that candidates would seek support across ethnic lines. Furthermore, the sheer complexity of the system was likely to be difficult for voters to understand, and thus discourage electoral participation. Finally, compensatory mandates increase the number of parties represented in parliament, encouraging political fragmentation at the expense of stable government, as the 2002 elections confirmed.¹⁹

Preferential Voting

The adoption of preferential voting for the election of the RS Presidency was motivated by previous experience. At the 1998 presidential elections, 17.19 per cent of votes for the Serb member of the Presidency were invalid – mainly unmarked ballots – suggesting that Bosniak and Croats did not support any of the candidates, all Serbs, running for the presidency. Had preferential voting been in place in 1998, allowing voters to express more than one preference, Biljana Plavšić (then the West's preference) would probably have won, rather than the ultranationalist, Nikola Poplasen. The adoption of preferential voting for the 2000 election was intended to promote the new favourite, the relatively moderate Milorad Dodik. Strong theoretical reasons also justified the adoption of the system.

Alternative voting, or 'preferential voting' as international agencies defined it, is a key integrationist feature aimed at fostering inter-ethnic accommodation. It was hoped, in Horowitz fashion, that this would moderate BiH politics. According to the Organization for Security and Cooperation in Europe (OSCE) which was in charge of elections, preferential voting was 'the key change in the electoral system . . . Candidates who want to be elected will be encouraged to adopt more moderate programs to attract these secondary preferences.'²⁰ As peacebuilders explained: 'When more than just the first preference votes are taken into consideration, the moderate candidates stand a better chance of winning the elections, as they will have from a large cross-section of the electorate. Extreme or radical candidates have less chance to win the elections.'²¹

In practice, as Sumantra Bose has convincingly shown, the preferential voting system did not work as intended. Second preferences were almost superfluous, as the ultranationalist Serb Democratic Party (SDS), founded by wartime leader and indicted war criminal Radovan Karadžić, almost gained an outright majority with 49.8 per cent of votes in the first round. More importantly, 60 per cent of Serb voters

made the SDS their first choice in the RS Presidential elections to defeat the absentee Bosniak vote, but only 44 per cent and 48 per cent respectively chose the SDS for the RS and BiH parliaments where the absentee vote was less critical.²² It is possible that Serb voters understood the intention to undermine the SDS and decided to support it more than they would have done otherwise. The system did not work even in convincing minorities to vote for a moderate candidate of another ethnic group. For example, 98 per cent of Bosniak voters of the Federation-based Bosnian Party, which gained the least number of votes, gave their second preference to other Bosniak parties rather than to moderate Bosnian Serb candidates.²³

Bose concludes that 'it is probably fortunate that the designers of Bosnia's Election Law eventually decided not to make the elections to the tripartite BiH state presidency dependent on an AV-type multiple/preferential voting system.'²⁴ Nevertheless, preferential voting for the RS Presidency was unlikely to be a reliable test for at least for two reasons. First, this system is unlikely to produce conciliatory behaviour where ethnic groups are concentrated in particular geographic regions. In these instances, the politicians' incentive to seek support from various groups depends on the presence and size of minority groups. Because the RS electorate was not ethnically heterogeneous, only under the most unusual circumstances could AV have influenced the results. Since 2000, however, an increasing number of minorities have returned to their pre-war homes, creating the possibility of ethnically mixed constituencies.²⁵ Second, because the system itself was introduced (more or less openly) to support Dodik, it was likely to be recognized as such by Serb voters. This reflected a broader shortcoming in the international community's strategies at peacebuilding, that is the attempt to manipulate short-term electoral results by manufacturing electoral rules to favour specific candidates, instead of strengthening local institutions and creating a stable and locally-accepted electoral system. The constant changes in the electoral rules do not improve voter capacity to understand the electoral system, thus diminishing its intended impact, and possibly providing a further incentive for nationalist parties to rally constituency support, as the changes in the 2000 rules for the election of the Federation House of Peoples demonstrated.

Electing the Federation House of Peoples

The House of Peoples in the Federation is one of the several BiH institutions elected indirectly. It is meant to represent the nations rather than citizens, and is designed to uphold the 'vital interest' of each ethnic group in the country. Until 2000, members of the cantonal

parliaments belonging to the same community elected members to the House of Peoples. A month prior to the elections, the OSCE introduced new procedures, strongly desired and supported by OSCE Ambassador Robert Barry (thus known as the 'Barry Rule').²⁶ The rule aimed at regulating the method Cantonal Assemblies used to elect members to the Federation House of Peoples. Under the previous rule, each national group in the cantonal assemblies selected its own representatives. The new rule decreed that all members vote for all candidates, so that Croats would vote for Bosniak representatives and vice versa. Quotas for each canton secured 30 seats for Croats in the Federation House of Peoples, 30 for Bosniaks and 20 for 'Others' (Jews, Roma, and other minorities), thus respecting the principle of equitable representation of all communities.

The Barry Rule was intended to foster moderation by making elected members rely on votes other than those of their own community. The main Croat nationalist party, the Croatian Democratic Union (HDZ) objected vigorously. It argued that when all members of the Canton Assembly elected the delegates in one election, there would be an influence of the majority group – the Bosniaks – on the selection of the delegates from the smaller groups. The HDZ began its 2001 rebellion against international policy as a protest against the Barry Rule, leading to a major confrontation between the party and international peace-builders.²⁷ The quarrel terminated only with the international community's dismissal of the HDZ's party leader and the eventual decision to delete the rule from the permanent election law.

The short-term impact of this rule, however, was the opposite to that intended. The HDZ – a party machine that thrives on the fear of Bosniak domination – was able, predictably, to rally the Croat community in support of its stand against unjust electoral rules. The way this rule was adopted, less than a month before election day, confirmed in Croat eyes a bias against them. Even the International Crisis Group, an influential think-tank usually willing to censure the Croat leadership for pursuing narrow self-interest, recognized how the Barry Rule had 'evoked genuine concern by Croats that they risk being marginalized in a state where Bosniaks and Serbs enjoy special advantages'.²⁸

The 2000 election results proved disappointing for the international community. The electorate, by and large, still voted along ethnic lines. In the Federation, the HDZ was able to garner enough seats in the cantonal assemblies to win a majority of the Croat representatives to the House of Peoples. In the RS, the SDS was the clear winner. Only the main Bosniak nationalist party, the Party for Democratic Action (SDA), lost votes to the moderate SDP. However, the 40 per cent of votes received

by moderate parties highlights the existence of cross-cutting interests and a body of the electorate potentially amenable to integrative devices.

In sum, the 2000 election demonstrated that, while the international community had shown an increasing interest in promoting moderate politicians, the *ad hoc* approach made intervention prone to failure. It is likely that the introduction of open lists damaged multi-ethnic parties. Preferential voting in the RS was introduced to support a politician with little grassroots support, triggering instead voters' support for the SDS. The Barry Rule raised legitimate fears that cross-ethnic moderation was 'unidirectional,' that is, applied only to the Croats.

The Permanent Election Law and the 2002 Elections

After the 2000 elections, international agencies focused on completion of the permanent election law. The July 2000 Constitutional Court Decision on Constituent Peoples provided an opportunity to draft the law in integrative terms, for it established collective political equality of Bosniaks, Croats, and Serbs throughout BiH and demanded that the entity constitutions be amended accordingly. Instead, the permanent election law, adopted in August 2001, further entrenched the discriminatory features of the political system.²⁹ As the regulation of the election of the collective presidency and the issue of the voting rights of displaced people show, the balance between the principles of individual rights and representation of national groups was less than ideal.³⁰

Electing the Three-Member Presidency

Confirming the choice made for the previous 2000 elections, the permanent election law adopted a preferential voting system combined with open lists giving voters a more direct choice in selecting candidates. It also applied the preferential voting system to the elections of the tripartite presidency, without, however, changing the electoral basis. Instead, the law maintained the principle that the Croat and Bosniak members of the three-member presidency be elected directly from the Federation, while the Serb member was still to be elected by voters registered in the RS.

This provision, entrenched in the consociational agreement that ended the war, has at least two important shortcomings. First, it is questionable according to international human rights standards. Citizens who do not identify themselves as Bosniak, Serb or Croat are effectively barred from the State Presidency and other offices, which runs contrary to international standards for democratic elections. Moreover, because about 30 per cent of the Bosnian electorate is estimated to live in an area where it

constitutes a minority, such electors might prefer to cast their vote where they are not eligible to do so. For this reason, local advocates of multi-ethnic pluralism argued that the provision violated the European Human Rights Convention, which according to the DPA applies directly to BiH and takes precedence over any other law.³¹ Second, because this provision preserved the rigid consociational structure that reified ethno-national rule and excluded any version of vote-pooling likely to favour moderate parties, it disadvantaged the same civic-minded parties that the international community explicitly set out to support.³²

In contrast, the engineers argued that the election law could not contradict the constitution, and that group-based features should be respected. They cited the case of Belgium, where an elected candidate must take an oath in French and then join the French-speaking group in the House of Representatives, or else must take an oath in Flemish and belong to the Flemish group. In practice, a French speaker could belong to the Flemish group by taking the oath in Flemish, but would lose their status as a French speaker with important political consequences, not least for the French voters who elected them. In the mid-1980s, the Belgian case was brought to the Strasbourg Court of Human Rights, which ruled that the system did not violate the European Convention and that the principle of equal treatment of all citizens in the exercise of their right to vote and their right to stand for election was respected.³³ The international community in BiH erroneously cited this case to justify the electoral rule supporting discrimination in the election of the three-member presidency.³⁴

There were both legal and political reasons to reconsider the creation of a statewide electoral base. First, the July 2000 Constitutional Court decision provided a legal justification for the statewide option. The Court had openly criticized the rigidity of the ethnic structure of the presidency, and explicitly rejected the principle that the method used for electing this body could be compared to the Belgian system.³⁵ Supporters of electoral change in the direction of a statewide electoral basis argued that the opinion of the Court could have been incorporated into the electoral law, while the international community argued that only after the conclusion of the work by constitutional commissions (created in January 2001 to harmonize the entity constitutions with the Court decision) were such changes possible. In retrospect, this was a self-defeating argument, since the High Representative eventually decided to impose constitutional changes. Second, the Council of Ministers, at the time backed by moderate parties, advocated that Bosniaks and Croats outside the Federation and Serbs outside the RS should be able to run for the presidency. Furthermore, a poll conducted in April 2001,

shortly before the adoption of the law, showed that in addition to the predictable support of Bosniaks (80.4 per cent), 49.3 per cent of Croats and 47.6 per cent of Serbs supported the idea of every voter being able to vote for every member of the collective presidency.³⁶ This local institutional and popular backing for change would have provided political support for a different approach.

Displaced Persons and Their Voting Rights

In addition to that controversy, another involved the voting rights of displaced persons. For all post-war elections, this has been the crux of political debate and outright manipulation by the nationalist parties. At the first post-war elections, it was expected that most Bosnians would vote at their pre-war residence, either in person or with an absentee ballot. An exception was made, however, for those who wished to live in a new municipality. Although all groups took advantage of this regulation, the Serbs fraudulently arranged absentee Serb majorities in key strategic towns that previously had a Bosniak or Croat majority. Because of this the first municipal elections had to be postponed several times, and were held only in September 1997. International organizations revised the electoral rules to make manipulation less likely. Voters displaced within Bosnia were required to provide proof of residence in a new municipality in order to be permitted to vote there. Refugees outside Bosnia had to provide a 'pre-existing, legitimate, and non-transitory nexus with the future municipality', such as an offer of employment or a property title. Because refugees had to show their documentation in the municipality where they intended to live, few actually took advantage of this option.

The voting rights of displaced persons continued to be a point of contention when the permanent election law was drafted. The draft limited passive electoral rights in cases of illegal occupancy by making it impossible for an individual to stand for election if living illegally in someone else's apartment. It was also crafted under pressure from Bosniak nationalists so as to restrict the citizens' constitutionally guaranteed right to vote. The SDA in particular argued that citizens should not have been allowed to vote in the communities where they lived as displaced persons. Instead, they should have voted where they lived before the war, an idea opposed by Serb and Croat parties. As a compromise the OSCE initially offered to give voters a choice.³⁷ Eventually, the election law prescribed that illegal occupants of property were allowed to vote in the municipalities of their pre-war residency only, and not in the place of their current illegal residency.

Thus, in the effort to defend and promote the individual rights of the displaced population, the law violated internationally-accepted human rights standards, which prohibit linking voting rights with property rights, and left unaffected the structural elements of discrimination embodied in the consociational framework. Moreover, in addition to being debatable in principle, the mechanism to prove illegal residency proved unworkable in practice. The law did not clarify from which moment illegal occupancy was considered, whether at the moment of registration or at the moment of going to the polls. The law also failed to identify exactly who was an 'illegal occupant', and did not clearly spell out which type of executive decision would determine someone's legal status. Moreover, even in the presence of a legally binding decision, there remained the question of whether the status of illegal occupant is to be extended to the family of the person identified as such. Ultimately, the decision to leave local authorities with the politically sensitive responsibility to determine claims of legality ensured that very few cases were reported to the Election Commission.³⁸

This analysis of both the presidency election and of the voting rights of displaced persons highlights the misshapen application of human rights norms by international organizations in BiH. In both cases, international agencies declared themselves in favour of integrationism through electoral design. In practice they endorsed consociational measures that complicated the affirmation of multi-ethnic parties and opened themselves to the criticism of violating the rights of citizens, either by disenfranchising them, or by permitting the adoption of questionable and unenforceable provisions that infringed the voting rights of the displaced population.

The Election Test

The October 2002 elections, the first under the permanent election law, confirmed the limited impact of the law in promoting cross-ethnic accommodation. The adoption of PR favoured extreme fragmentation and proliferation of political parties (57 parties, 9 coalitions and three independent candidates ran). The parties often competed on similar platforms, making it more difficult for voters to distinguish among them, and thus discouraging participation. Only 54 per cent of eligible voters went to the polls (compared to 1996 when high incentives and fraud ensured a 104 per cent turnout). Absenteeism was particularly high in urban areas, traditionally more supportive of non-nationalist and civic alternatives. Among the explanations for decline in voter turnout, one should include: the frequency of elections since 1996 (in combination with little visible political change following each electoral round); the complexity of the electoral system; and the perception that the preponderant

role played by the international community made the election of local politicians redundant.

The nationalists were re-elected at all levels of government.³⁹ The civic-minded parties supported by international agencies were especially penalized. Their experience in government following the 2000 elections had proved disappointing to many voters who, instead of voting for the main nationalist parties, often chose not to abstain. The SDP, for example, lost about half the votes it had gained previously. As predicted, the much-debated provision upholding the rights of displaced persons proved difficult to enforce. The rule was applied to just 200 people out of the many thousands of registered voters who may have been illegal occupants.⁴⁰

Even the provision of compensatory seats to parties that failed to pass the three per cent threshold, initially created for the 2000 elections, came under fire. International agencies sponsored this idea in a barely disguised effort to dilute support for the SDA, HDZ and SDS. Because of this provision, 14 additional parties were given seats in the Federation Assembly (in the absence of these rules only four parties would have been represented). In the RS Assembly, ten parties were granted seats in addition to the six that passed the threshold. The victorious nationalist parties not only complained that the compensatory seats skewed the election results but also argued that the fragmentation of the political system complicated the formation of a government. Whether or not this is true (government formation took three months), it is undeniable that compensatory seats further complicated an already complex electoral system and probably antagonized ordinary electors.

Conclusion

In the attempt to undermine the support of nationalist parties, international agencies have created three additional problems through electoral engineering: extreme multi-party fragmentation, potentially ineffective governments, and a crisis of accountability deriving from the assertive presence of international agencies. The evidence also suggests that none of these problems stems directly from 'integrative' policies. Instead, it is the timid, short-term, and contradictory use of these policies in a deeply consociational context that has proved ineffective. What lessons can be learned from this experience and how could this situation be improved?

The first lesson concerns the futility of promoting non-nationalist and moderate politicians and political parties in a context where politicians

can get re-elected by making narrow nationalist appeals. Since the early twentieth century Bosnians have voted along ethno-nationalist lines when given the opportunity. It is unsurprising that they continue to do so in the aftermath of the 1992–95 war; Bosnians believe that only ethno-nationalist parties will provide security and safety to their own respective communal groups. Instead of considering nationalist leaders as a pathological outcome of Bosnian society, international peacebuilding agencies need to accept the choices of the electorate, a basic pre-condition for democratic development. The opposite approach puts international peacebuilders on a collision course with the majority of Bosnians who vote for nationalist parties.

The second lesson concerns the methods adopted by international agencies to promote moderation and accommodation. The excessive emphasis on elections (BiH has had 16 electoral races since 1996) has been counter-productive. Politicians in constant campaign mode are more interested in being re-elected than adopting policies requiring moderation and compromise. Furthermore, the electoral system allows them to be elected on an ethnic platform, further reducing the incentives for accommodation. Finally, the frequent elections and changes of electoral rules make it more complicated for voters to fully understand the complexity of the system and vote strategically. As experience from other cases confirms, a gradual process of political learning only occurs if successive elections are held under the same rules.⁴¹

The third lesson derives from the international community's response to continued nationalist dominance. Its interventions have undermined the consolidation of Bosnian institutions whose accountability is directed towards international agencies rather than local constituencies. As a result, voter preferences are not translated into policy changes, and local democratic institutions are failing to develop the necessary legitimacy and effectiveness. After almost eight years of international peacebuilding, the gradual erosion and de-legitimization of democratic institutions has become a challenge to democracy and democratization as much as to the excesses of ethnic politics.

What changes would improve this situation? It has been suggested that the international community should stop using its extraordinary powers to impose solutions on the local parties.⁴² It has also been recommended that only a change in the underlying social, economic, political, and security-related conditions can bring about substantive progress.⁴³ The evidence presented here adds another perspective: BiH needs to move beyond its current consociational structures that perpetuate ethnic division and political fragmentation. While this goal requires a much broader rethinking of the institutional framework created at Dayton, at

least two changes in the current electoral legislation could have a positive impact.

The first is the creation of a nation-wide electoral base for the election of the three-member presidency, a key change in the direction of an effective 'integrationist' approach. Each national group would preserve guaranteed representation at the presidential level. Presidential candidates, however, would have much stronger incentives to moderate their campaigns so as to attract second-preference votes from groups other than their own. The main objection to this proposal is that it would give an unfair advantage to the Bosniaks, the largest group, because it would allow them to have a disproportionate influence in the selection of the two non-Bosniak members of the presidency. However, the objection is misplaced. Bosniaks *are* the majority and therefore it would not be a shocking outcome if their votes weighed more in determining political outcomes. On the contrary, one could argue that a collective presidency elected by all Bosnian citizens would even be more legitimate because it would be more representative.

The second change to the election law would be to relax the strict proportionality of the consociational system by, among other things, applying the three per cent threshold for parliamentary representation to the allocation of compensatory seats. This measure would alleviate the excessive fragmentation of the legislative bodies and improve their capacity to form a solid parliamentary majority able to produce an effective government. While neither of these two measures alone could solve the Bosnian conundrum, they would be an important first step in the direction of improving the legitimacy and efficiency of local institutions.

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NOTES

1. See, William Pfaff, 'Time to Concede Defeat in Bosnia', *International Herald Tribune*, 10 Oct. 2002.
2. Roberto Belloni, 'Bosnia-Herzegovina Conflict Profile', *Foreign Policy in Focus*, Feb. 2002, accessed at www.pfif.org.
3. Arendt Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977.
4. Sumantra Bose, *Bosnia After Dayton: Nationalist Partition and International Intervention*, Oxford: Oxford University Press, 2002, p.216.

5. Most notably Bose (*ibid.*).
6. Benjamin Reilly, 'Elections Post-Conflicts: Constraints and Dangers', *International Peacekeeping*, Vol.9, No.2, 2002, p.132.
7. The Bosnian Constitution is silent about the length of mandates at all levels. Consequently, until the adoption of the final election law, the Election Commission (chaired by an American Ambassador) had the discretion to decide the frequency of elections.
8. For example, about a quarter of all parliamentary sessions between 1996 and 2000 were wasted because of internal wrangling over the agenda. International Crisis Group, *Is Dayton Failing?* 28 Oct. 1999, Sarajevo, p.53, n.99.
9. David Chandler, *Bosnia: Faking Democracy After Dayton*. London: Pluto, 1999; Gerald Knaus and Felix Martin, 'Travails of the European Raj', *Journal of Democracy*, Vol.14, No.3, 2003, pp.60–74.
10. Donald Horowitz, 'Democracy in Divided Societies', *Journal of Democracy*, Vol.4, No.4, 1993, p.35.
11. Benjamin Reilly, *Democracy in Deeply Divided Societies*, Cambridge: Cambridge University Press, 2001, p.7.
12. *Ibid.*
13. Donald Horowitz, 'Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management', in Joseph V. Montville (ed.), *Conflict and Peacemaking in Multi-Ethnic Societies*, New York: Lexington, 1991, p.471.
14. Bose (see n.4 above), pp.223–4.
15. Association of Election Officials of BiH, 'Technical Series No. 1/2001', accessed at www.aeobih.com.ba/tech_series1p7.htm.
16. OSCE-BiH, 'Fact Sheet on the 2002 BiH Elections', Sarajevo [nd], p.4.
17. Association of Election Officials in BiH (n.15 above), p.9.
18. Reilly (see n.11 above), p.153.
19. For an opposite view see Bose (n.4 above) who suggests that 'it is really difficult to find fault with this measure', p.228.
20. OSCE-BiH, 'Domi Reaffirms Draft Election Law's Preferential Voting System', Sarajevo, 5 Jan. 2000.
21. Association of Election Officials in BiH (n.15 above), p.8.
22. Bose, pp.231–2.
23. *Ibid.*
24. *Ibid.*, p.238.
25. Roberto Belloni, 'Towards a Multi-Ethnic Bosnian State? Promoting Peace and Reconciliation Through Minority Return', *East European Human Rights Review*, Vol.8, No.1, pp.1–43.
26. Press release, OSCE-BiH, 'PEC Adopts Rules on Federation House of Peoples and Federation President, Vice President', Sarajevo, 19 Oct. 2000.
27. Florian Bieber, 'Croat Self-Government in Bosnia – A Challenge for Bosnia?', European Centre for Minority Issues, Brief 5, 2001.
28. ICG, *Turning Strife to Advantage*, Sarajevo, 15 Mar. 2001, p.6.
29. Text accessed at www.izbori.ba/English%20Law.htm.
30. For the opposite view see Carrie Manning and Miljenko Antic, 'The Limits of Electoral Engineering', *Journal of Democracy*, Vol.14, No.3, 2003, pp.45–59.
31. The Council of Europe, in approving BiH's membership, also noted how 'the provisions regulating elections to the Presidency and the House of Peoples . . . raised some questions in terms of their compatibility with international standards.' Council of Europe, 'Electoral Law in Bosnia and Herzegovina: Council of Europe's Venice Commission Issues its Opinion', Press Release, Strasbourg, 30 Oct. 2001.
32. In response to the charge of timidity, the OSCE argued that because the law had to be consistent with the constitutional provisions in Annex 4 of the DPA the range of options to foster electoral moderation was severely limited. OSCE, Press statement on the Election Law, Sarajevo, 21 Jan. 2000.

33. Mathieu Mohin and Clerfayt v. Belgium, No. case 9/1985/95/143, of 2 Feb. 1987, accessed at www.menneskeret.dk/englishdoc.
34. Vildana Selimbegovic, *Dani* Interview, 'Robert Barry "Nije to ta diskriminacija" [No to Discrimination]', *Dani* (Sarajevo), 20 April 2001.
35. As the Court explained: 'The Belgian system does not preclude per se the right to stand as a candidate solely on the ground of language. Every citizen can stand as a candidate, but has – upon his election – to decide whether he will take oath in French or Flemish . . . whereas provision of the Constitution of the Federation of BiH provide for a priori ethnically defined Bosniak and Croat delegates, caucus and veto powers for them'. Partial Decision of the Constitutional Court, 1 July 2000, para.120, accessed at www.ccbh.ba/en/decisions.
36. UNDP, 'Early Warning System', UNDP Report, Sarajevo, April–June 2001, p.12, accessed at www.ews.undp.ba/eng.
37. OSCE-BiH, 'Press Statement on the Election Law', Sarajevo, 21 Jan. 2000.
38. The lack of enforceability was suggested by the OSCE Director of Elections in a personal interview, 13 July 2002, Sarajevo.
39. UNDP, 'Early Warning System: Bosnia and Herzegovina 2002 – Election Special', UNDP Report, Sarajevo, accessed at www.ews.undp.ba/eng.
40. International Election Observation Mission: 2002 General Elections – Bosnia and Herzegovina, IEOM Report, Sarajevo, 6 Oct. 2002, p.4.
41. Reilly (see n.11 above).
42. Knaus and Martin (see n.9 above).
43. Manning and Antic (see n.30 above).