

WHAT IS A NORMAL DEMOCRACY?¹

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Abstract The author argues there is no such thing as a "normal democracy", and that the decision made by the European Court of Human Rights in Sejdić-Finci case does not pay enough respect to consociational democracy as one of the legitimate forms of democracy. As human rights have to be balanced against one another, they also have to be balanced against other values, including peace and stability. As the practical solution in the election of the three-person collective Presidency in Bosnia and Herzegovina, the author suggests three separate electoral colleges in the three territorial districts that would settle the tension between the politically viable power-sharing arrangements and the demand to respect human rights. The author concludes that more moral modesty is in place when foreign political advice in democratic constitutional design is issued for the divided societies.

Keywords Bosnia and Herzegovina, Sejdić-Finci case, consociational democracy, power-sharing, human rights, electoral colleges, collective Presidency

I heard one speaker say, I think it was Dr. Silajdžić, that he wanted a *normal democracy* in Bosnia and Herzegovina. I'm a political scientist. My first question is: what is a *normal democracy*?

Is it the United States, where the head of state has to be born in the United States? I, as a US citizen, as an immigrant, am not entitled to compete to be the President of the United States. I don't complain about that fact. I don't head to the Supreme Court to complain about it, but it is a fact that the Presidency of the United

¹ *Editorial note.* The text is corrected and authorized transcript of the presentation held at the international conference "The Legacy of Peace – 25 Years of the Dayton-Paris Peace Agreement" in Zagreb, 15th December 2020, in the panel "Linking the Principle of Three Constituent Peoples and the Sejdić-Finci Judgement: What is the Way Forward?". The full video of the conference is available on the Croatian Ministry of Foreign and European Affairs YouTube channel (<https://www.youtube.com/watch?v=RPu6gesgkmk>). The presentation begins at 2:57:10 and the question posed by the panel moderator Tihomir Vinković followed by the author's answer begin at 3:54:30. Since this publication comes to light in the year of 700th anniversary of Dante's death, an additional remark is appropriate. For this special occasion, the author suggested to accompany the transcript with a similar although perhaps more optimistic warning than the dull *Lasciate ogne speranza, voi ch'intrate* of the Italian poet. The author's intervention concerning the problems of democracy building in Bosnia and Herzegovina – unlike the case of hope in hell – should be read with somewhat ironic but still practically minded: "Read now or forever hold your peace!"

States is ethnically restricted. The United States' President is elected by an electoral college, not by popular majority, so is the US a *normal democracy*?

Is the United Kingdom, where I lived for 20 years, a *normal democracy*? The role of its head of state is filled by the Crown. The office has to be filled by an Anglican, Protestant in belief. The head of government, the prime minister, cannot be a practicing Catholic. Prime Ministers have to advise on the appointment of bishops to the House of Lords, Protestant bishops. That's "feudal democracy," I suppose.

Is a *normal democracy* Belgium, which has three regions, one of which is linguistically mixed, whereas two others practice linguistic majoritarianism? The Cabinet has to have equal numbers of French speakers and Dutch speakers.

What about the European Union itself? It has 27 constituent peoples, it's organized according to a rigorous system of power-sharing, super-qualified majority voting, veto rights, and extensive recognition of cultural autonomy.

I say all this to make the key point about the decision made by the European Court of Human Rights that we are discussing here. It did not appear to me to appreciate the variety of legitimate forms of democracy, one of which is, to give its correct name – *consociational democracy*. That's a system in which there is parity among the constituent peoples, there is proportionality in representation and in the allocation of resources, there is autonomy on matters of fundamental importance to communities such as education, and lastly there are constitutional veto rights to inhibit majorities from depriving minorities of their rights.

This system of consociational democracy has been a partial success in other European locations, notably in Northern Ireland where I grew up. It has also been a success in the Netherlands between 1917 and 1966; it organically dissolved, but it did inhibit serious conflict in the Netherlands. Both Belgium and Switzerland combine, like Bosnia and Herzegovina, federal and consociational principles.

So, arguably, there was nothing extraordinarily democratically improper about the structure of what was agreed in the Dayton Agreement. The Court of Human Rights, of course, specializes in human rights. It is not the general court of comparative constitutionalism, still less is it the court of comparative democracies. It chose however to override the Constitutional Court of Bosnia and Herzegovina on which there already sat international judges who were not associated with any of the major communities inside Bosnia and Herzegovina itself, and it chose to do so, it seems to me, on rather absolutist understanding of human rights.

Of course, Roma and Jews [Sejdić-Finci] and Others should be entitled to their full human rights in every polity in Europe, and anywhere else where they reside. But that, I think, was not the issue. Human rights have to be balanced against one another, and they also have to be balanced against other values, including peace and stability. I make this point as a political scientist, because I have been a constitutional advisor at many peace agreements around the world. I worked for the United Nations as part of its Mediation Support Unit. I'm its former senior advisor on power-sharing.

As a result of this Court decision in Sejdić-Finci, which has so far proved unworkable, I would be obliged as an advisor in the making of future peace agreements to advise people not to give to a regional court of human rights any definitive jurisdiction over any element of the constitutional bargain being struck, precisely because there would be a serious possibility that the bargain could be unwound. I deeply regret that I would have to give that kind of advice. It is possible to combine

power-sharing arrangements with respect for human rights, and this Court decision unfortunately makes doing that a little bit more difficult.

To conclude this brief intervention: what is to be done? I'm a foreigner, I'm an Irish citizen, EU citizen, and a United States' citizen, and I don't think I have any jurisdiction in this case. It does seem to me, however, that the Venice Commission in advising the European Court of Human Rights did not adequately spell out an alternative form of power-sharing that would not have the difficulties regarding human rights which the Court identified. What could that formula look like? It could involve an electoral college like the one in the United States, except it would have to be territorially composed. Somebody could be elected from the Serb Republic, two people could be elected from the Federation, but in order to achieve equity across the three constituent peoples, as well as the Others, there would have to be at least two, and better three, territorial electoral colleges inside Bosnia and Herzegovina.

I don't have a solution to the restructuring of the Senate, and I think that's appropriate because it doesn't seem to me, given the question of the margin of the appreciation, that the Court should have commented on the design of the second chamber of the legislature. The key question was on the executive, and there are ways of accomplishing the relevant objectives but the Venice Commission did not point them out. What I can say as a professional political scientist is – under no circumstances should the alternative vote be used in Bosnia and Herzegovina. That experiment has been tried before and failed, and it should not be repeated.

Thank you very much.

Professor O'Leary, you are advisor on different topics in different parts of the world trying to find a solution that is workable and viable. How do you look at it concerning that Sejdić-Finci is not implemented? What is the workable and viable solution?

I think it is a very good question and I was expecting to hear answers to it from the other participants. I explained that in my view, the easiest way to do it would be to have three territorially based jurisdictions. One would be the Serb Republic, the other would be a certain set of cantons in which there is a Croat majority and the other one would be the rest of the Federation. If three people were to be elected, they could be from any background, one of the three constituent peoples or others, they would all be viable candidates, and they would be elected in three separate electoral colleges in the three territorial districts. That would satisfy the Court of Human Rights and it would keep the three-person collective Presidency that many people want to keep. That's a practical way of doing things.

I have no solution immediately on offer for the Senate. There I believe strongly that the Court overstepped *the mark*, because the Court usually does not engage in any deliberation of the composition of legislatures, particularly their second chambers. So, I think it would be a reasonable response on the part of the people in Bosnia and Herzegovina to design a solution to the executive composition problem and to go ahead with that, and leave the existing Senate alone. Not everyone would be happy with that but I think that would be a reasonable response.

I would like to say something as an American citizen in conclusion. Americans cannot preach with moral authority on these questions. America has dependent nations – Native Americans – they are called dependent nations by the US Supreme Court. There is a long history of ethnic expulsion of the Native Americans in the

United States. We have a nativist rule for the election of the President and the Vice President. You have to be born in the United States, you can't be an immigrant. We therefore have differentiated forms of citizenship in the United States. So, it is not accurate for Americans to preach to others that we practice a policy of complete equality. And I've said all that without mentioning Americans' acknowledged history – and unresolved present – of racial discrimination inside the United States. So, we Americans need to get our house in order before we preach morally to others about their constitutional design. That doesn't mean that America has no role to play, but a little moral modesty would be in order.

Što je normalna demokracija?

Sažetak Autor tvrdi da ne postoji tako nešto poput "normalne demokracije" te da odluka Europskog suda za ljudska prava u slučaju Sejdić-Finci ne uvažava dovoljno konsocijacijsku demokraciju kao jedan od legitimnih oblika demokracije. Kao što se ljudska prava moraju uravnotežiti jedna s drugima, tako se moraju uravnotežiti i s drugim vrijednostima, uključujući mir i stabilnost. Kao praktično rješenje u izborima tročlanoga kolektivnog predsjedništva u Bosni i Hercegovini, autor predlaže tri odvojena izbornička kolegija u trima teritorijalnim okruzima, što bi riješilo napetost između politički održivih aranžmana za podjelu vlasti i zahtjeva za poštivanjem ljudskih prava. Autor zaključuje kako je potrebno više moralne skromnosti kada se podijeljenim društvima daju inozemni politički savjeti o demokratskom ustavnom dizajnu.

Ključne riječi Bosna i Hercegovina, slučaj Sejdić-Finci, konsocijacijska demokracija, podjela vlasti, ljudska prava, izbornički kolegiji, kolektivno predsjedništvo

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