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OHR claims that state constitution, state laws and rulings of the Constitutional court of BiH do not obligate entities to respect them and implement them

High Representative Valentin Inzko gave an interview to the news portal Vijesti.ba on November 21, 2018. While referring to the inappropriately suggestive question on the necessity for the Central Election Commission (CEC) to implement the election results for the clubs in the House of Peoples of the Parliament of the FBiH, Inzko stated that such implementation must be based on the 1991 census and the so-called 1/1/1 rule.

> Our stance in relation to the House of Peoples of the Federation and the use of the Constitution of the FBiH, which we repeated on multiple occasions, has always been principled: until the end of the electoral reform, the Constitution of the FBiH should be enforced in full, both when it comes to the census and when it comes to the so-called rule 1/1/1. To allow primacy to the Election law of BiH in relation to the Constitution of the FBiH, in the part pertaining to the composition of the institution in the Federation, can have very serious influence in the future.

The viewpoints expressed in the quotation above, especially the claim that the Constitution of FBiH is above the Election law of BiH, the Office of High Representative (OHR) directs the current constitutional, legal and political crisis towards solutions which are anti-constitutional and illegal and introduces precedents which can unravel the whole constitutional and legal order of BiH.

To better understand OHR stances we can use the following examples. What would happen to federal and other decentralized states if a lower level of government would usurp the right to decide on the criteria for election legislation which is regulated by a state law? Does Flanders have a right to determine its own rules and criteria according to which the Belgian central electoral commission, which is regulated by the state election law, should operate? Can Swiss cantons decide on the way that the Council of States is filled, if that decision is not in accordance to the federal constitution? The answer, of course, no. In the same way, the Constitution of the FBiH is not and cannot be above the Constitution of BiH or laws at the state level. This is confirmed, among other things, by the Constitutional court of BiH ruling U-5/98 from 2000, which explicitly states that the constituency and the mutual equality of the three constituent peoples "an overarching principle of the Constitution of BiH with which the Entities, according to Article III.3 (b) of the Constitution of BiH, must fully comply." "Entities" in the quote above from the Constitutional court of BiH ruling refers to the constitutions and laws at the entity level. That is especially true with the election law of BiH, because it is used to directly operationalize the mentioned overarching principle of the Constitution of BiH, the principle of the constituency and the mutual equality of the three constituent peoples.

As additional explanation of the above-mentioned claims we will offer a detailed analysis of the specific stances elaborated in the mentioned interview of the High Representative Valentin Inzko.

(1) In the quoted part of the interview Valentin Inzko states that "**until the end of the electoral reform, the Constitution of the FBiH should be enforced in full, both when it comes to the census and when it comes to the so-called rule 1/1/1.“** Deliberately or not, Inzko in his interpretation starts with the wrong assumption when he says "**until the end of the electoral reform."**

From his statement, we could conclude that there is still a full and valid Election law of BiH in effect, and that currently there are negotiations on how to reform it. In that case, it would be valid to claim that "until the end of the electoral reform" the legal norms and provisions of the existing Election law of BiH should be valid. The issue with this assumption is that it is simply not correct. The Constitutional court of BiH in its ruling U-23/14 ("Ljubić") has declared unconstitutional certain provisions of the Election law of BiH which are pertaining to the indirect election for the clubs in the House of Peoples of the Parliament of the FBiH. In the same ruling the Constitutional court of BiH has explicitly ordered the Parlimentary Assembly (PA) of BiH to change the challenged provisions and to align them with the ruling of the Constitutional court and the Constitution of BiH. The court gave a six-month deadline within which the PA of BiH has the duty to implement the ruling and align the challenged provisions with the Constitution of BiH and its overarching principle of constituency and mutual equality of the three constituent peoples. Given that the PA of BiH did not align the challenged provisions of the Election law of BiH with the Constitution of BiH within the given deadline, the Constitutional court of BiH erased the challenged provisions of the Election law of BiH on July 6, 2017. Therefore, we currently have an Election law in effect which is missing certain provisions governing the election of delegate to the clubs of Constituent peoples and Others in the House of Peoples of the Parliament of the FBiH. These provisions were erased by the Constitutional court of BiH.

Despite the fact that the Election law of BiH was not complete, the General elections of 2018 were scheduled and held for the direct elections of cantonal assemblies and lower chambers (House of Representatives) of state and entity parliaments. Even though the decision to schedule the election without complete election law of BiH can be considered legally dubious, we think that there was a legal basis for scheduling and implementation of the direct portion of elections (the election of the Members of the Presidency of BiH, or more precisely the results of these elections, created unconstitutional and illegal conditions, but given that this is not the main subject of this text, we will deal with this in a subsequent text). It would not be reasonable to conclude that indirect elections to the clubs of the House of Peoples of the Parliament of the FBiH can be implemented before the PA of BiH implements the Constitutional court of BiH ruling U-23/14 within the legal and constitutional procedures, and instead of the challenged and erased provisions of the Election law of BiH adopts new provisions which regulate the election of delegates to the clubs of the House of Peoples of the Parliament of the FBiH and which are in accordance with the mentioned ruling and the Constitution of BiH.

If the PA of BiH, due to the lack of political agreement or due to procedural or legal norms does not implement the mentioned ruling of Constitutional court of BiH and does not adopt new provisions of the Election law of BiH concerning the House of Peoples of the Parliament of the FBiH, then the only institution which can resolve such situation is OHR. Even though it is currently dubious whether the OHR has such powers, what is clear is the fact that such a decision of the OHR, if it was made, would have to be in line with the rulings of the Constitutional court of BiH U-23/14 ("Ljubić") and U-3/17 ("Čolak") and in line with the Constitution of BiH and its overarching principle of the constituency and mutual equality of the three constituent peoples.

Therefore, BiH is not in the process of electoral reform because there is no valid and complete Election law of BiH which political parties are trying to reform. BiH is currently in a constitutional, legal and political crisis because the indirect elections for the clubs of the House of Peoples of the Parliament of the FBiH cannot be implemented. These elections cannot be implemented because the Constitutional court of BiH erased the provisions of the Election law of BiH which govern how the election is carried. The Constitutional court of BiH, while doing so, clearly stated which institution has the authority to implement new provisions of the

Election law of BiH governing the election of delegates to the clubs of the House of Peoples of the Parliament of the FBiH. This institution is the Parliamentary Assembly of BiH.

(2) Despite unitarist spins and deceits, **it is clear that the Central Election Commission (CEC) in the current circumstances does not have the authority to adopt any document which would allow the implementation of the indirect elections to the clubs of the House of Peoples of the Parliament of the FBiH.** As the IDPI has already stated in its analysis from November 2, 2018, the Constitutional court of BiH in its ruling U-23-14 ("Ljubić") has only given the authority to the Parlimentary Assembly of BiH to change the Election law of BiH. Moreover, by only erasing provisions a-j of the article 20.16.A.(2), rather than the whole article, the Constitutional court of BiH has clearly stated that the conditions have not been met for the CEC to decide how the clubs in the House of Peoples of the Parliament of the FBiH should be filled. The Constitutional court of BiH has ordered the PA of BiH to change the challenged and unconstitutional provisions a-j to provisions which will be in line with the Constitution of BiH. CEC referencing Article 10.12 of the Election law of BiH to justify its actions is unsubstantiated, given that Article 20.16.A is still in effect.

The Constitutional court of BiH has in the meantime erased the mentioned unconstitutional provisions and currently there is no legal basis in the Election law of BiH for the implementation of the indirect elections to the clubs of in the House of Peoples of the Parliament of the FBiH. Only the PA of BiH has constitutional and legal authority, but also the obligation, to implement the Ljubić ruling and adopt new provisions of the Election law of BiH which will define how the clubs in the House of Peoples of the Parliament of the FBiH are filled. Only after the PA of BiH adopts new provisions of the Election law of BiH, CEC can start to implement election results based on these new provisions.

(3) The claim of Valentin Inzko that the Constitution of FBIH requires that the 1991 census is used for the implementation of elections to the clubs in the House of Peoples of the Parliament of the FBiH is not valid. Firstly, the Constitution of FBiH clearly lists which public institutions of the FBiH must use 1991 census:

Article IX.11.a.

> (1) Constituent peoples and members of the group of the Others shall be proportionately represented in public institutions in the Federation of Bosnia and Herzegovina.
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> (2) As a constitutional principle, such proportionate representation shall follow the 1991 census until Annex 7 is fully implemented, in line with the Civil Service Law of Bosnia and Herzegovina. Further and concrete specification of this general principle shall be implemented by Entity legislation. Such legislation shall include concrete time lines and shall develop the aforementioned principle in line with the regional ethnic structure in the Entities and the Cantons.
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> (3) Public institutions as mentioned above are the ministries of the Government of the Federation of BiH and of Cantonal Governments, municipal governments, Cantonal and Municipal Courts in the Federation of Bosnia and Herzegovina.

Item (3) of the mentioned article clearly states which institutions of the FBiH must use the 1991 census. The legislative bodies are not a part of these provisions of the Constitution of FBiH, so it is clear that the 1991 census cannot be used for the House of Peoples of the Parliament of the FBiH.

Secondly, after some Bosniak political parties requested the court to examine whether the Election law reform proposal was constitutional, on the basis of protection of their vital national interest, the Constitutional court of BiH in its ruling U-3/17 ("Čolak"), ruled on July 6, 2017, has undoubtedly emphasized that the use of 2013

census is valid and in accordance with the Constitution, as well as in accordance with the Constitutional court of BiH ruling U-23/14 which talks about legitimate representation of constituent peoples and Others in the House of Peoples of the Parliament of the FBiH.

Thirdly, from Article 20.16.A.(2) it is clear that the 1991 census data should be used for the election of delegates to the House of Peoples of the Parliament of the FBiH **only "until a new census is organized."** The new census was organized in 2013 and its results were published in the "Official gazette of BiH" number 60/16.

Therefore, use of the 1991 census data would be contrary to the Constitutional court of BiH rulings U-23/14 (December 1, 2016) and U-3/17 (July 6, 2017), and therefore unconstitutional and illegal given the current parts of the Election law of BiH which are in effect. Supporting the claim that the implementation of indirect elections for the clubs in the House of Peoples of the Parliament of the FBiH should be done based on the 1991 census is an open call for violation the Constitution of BiH and the Election law of BiH, as well as the call for violation of the Constitutional court of BiH rulings.

(4) The Constitutional court of BiH has declared unconstitutional so-called 1/1/1 formula on which the OHR is insisting. In the "Ljubić" ruling, the Constitutional court of BiH erased the provision that "each constituent people shall be allocated one seat in every canton," justifying its decision in the following way:

> (§ 52) Accordingly, the Constitutional Court finds that not only that the provisions of Article 10.12(2), in the part reading that *each constituent people shall be allocated one seat in every canton,* and the provision of Article 20.16 A of the Election Law are not based on the precisely clear criteria but they also imply that right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates. The Constitutional Court finds that the mentioned is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina.

The Constitutional court of BiH in its ruling U-5/98 from 2000 has ruled that the constituent peoples are "the overarching principle of the Constitution of BiH with which the Entities, according to Article III.3 (b) of the Constitution of BiH, must fully comply." The so-called 1/1/1 formula which the High Representative Inzko is mentioning is identical to the provisions of the Article 10.12 of the Election law of BiH "each constituent people shall be allocated one seat in every canton" which the Constitutional court of BiH has declared unconstitutional and erased from the Election law of BiH.

Therefore, any attempt to reactivate that unconstitutional provision represents a threat to the constitutional and legal order in BiH, as that would mean that entities (in this case FBiH) do not respect the Constitution of BiH according to the Article III/3.(b) "The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."

In short, the Constitutional court of BiH has declared that the so-called formula 1/1/1 is unconstitutional and not in accordance with the overarching principle of the Constitution of BiH, the principle of constituency and mutual equality of the three constituent peoples. Both entities and all lower administrative units must comply with this principle, so "legal mental gymnastics" put forward by the OHR, who wants to reactivate the unconstitutional provision, means advocating and supporting an entity coup against the state.

Arguing that the provision from the **FBiH Constitution** "*In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body*" is different than the challenged and erased provision of the **Election law of BiH** "*each constituent people shall be allocated one seat in every canton*" is both legally and logically invalid, as both provisions in all possible situations result in the exact same outcome. If the mentioned provision of the Election law of BiH was declared unconstitutional and if it was erased from the Election law by the Constitutional court of BiH, then it is necessary to conclude that the mentioned provision of the FBiH Constitution is unconstitutional, as both provisions, as we already stated, in all possible scenarios result in the exact same outcome.

(5) We find especially scandalous and dangerous High Representative Inzko's statement "*To allow primacy to the Election law of BiH in relation to the Constitution of the FBiH, in the part pertaining to the composition of the institution in the Federation, can have very serious influence in the future*." Even though the statement itself is ambiguous, the rest of the interview clearly indicates that according to Valentin Inzko the provisions of the Constitution of the FBiH should be above the Election law of BiH, or in other words that provisions of an entity constitution are above the state law. This statement is even more scandalous and dangerous if we realize that Inzko supports the use of the provisions of the Constitution of FBiH which the Constitutional court of BiH has declared unconstitutional and which it erased from the Election law of BiH. Valentin Inzko, is therefore, claiming that provisions of entity constitution is above the rulings of the Constitutional court of BiH and the Constitution of BiH. This means that the OHR thinks that the FBiH entity is above the state of BiH, or in other words, claims that state constitution, state laws and the rulings of the state Constitutional court of BiH do not require the entities to implement and respect them.

(6) Taking into consideration the above-mentioned, we can claim that **OHR supports and encourages the destruction of the constitutional and legal order in BiH in the moment in which the constitutional, legal and political crisis is leading to the situation which happened in Yugoslavia in 1989 and 1990.** During this time, the lower level of government in Yugoslavia has unconstitutionally, justifying it with their own legislation, imposed constitutional and legal solutions which were opposite to the Constitution of Yugoslavia. The process in question was the disempowering of the Federal Autonomous Region of Kosovo and the Federal Autonomous Region of Vojvodina by the Federal Republic of Serbia. This was done in opposition to the Constitution of Yugoslavia. Therefore, there was a coup from a lower level of government on the state, as well as the dissolution of the vertical dimensions of government, according to which the legal acts of lower levels of government must be in accordance with legal acts of higher levels of government. The provisions which were valid at the higher level of government (state level) were suspended unconstitutionally in relation to the lower levels of government (republics and regions). Consequently, the crisis which resulted from this unconstitutional act of imposing the will of the lower level of government over the state level in the end resulted with the dissolution of Yugoslavia.

(7) In accordance with everything already mentioned, we think that it is extremely important to publicly state that **OHR is not above the Constitution of BiH and the Dayton Peace Accords.** OHR, according to the Annex 10 of the Dayton Peace Agreement, is monitoring the civilian implementation of the Agreement, but the OHR cannot suspend or unilaterally change the Constitution of BiH and the Dayton Agreement because it simply does not have the mandate to do so. Moreover, the Peace Implementation Council (PIC) during the Bonn conference on December 10, 1997, did not authorize OHR to degrade the Constitution of BiH or to put the entity constitutions and laws above it. Quite the contrary, PIC has emphasized "the necessity for the Constitutions and the other laws of the Entities to be consistent with the Constitution of Bosnia and

Herzegovina", and it specifically emphasized that "any provisions of the Entity Constitutions that discriminate against the members of an ethnic group are incompatible with the Constitution of Bosnia and Herzegovina".

By pressuring CEC and by interpreting the current constitutional, legal, electoral and political crisis, OHR and Inzko support and encourage illegal derogation of the rulings of the Constitutional court of BiH, the suspension of the Constitution of BiH and changing of the constitutional and legal order established by the Dayton Agreement. Dayton Peace Accords is an international agreement and it can only be changed by the parties which have signed it.

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