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Bosnia and Herzegovina's Federal System
An (A)symmetrical "Twin State"

Bosnia and Herzegovina (BiH) is often cited as a "complex State" and a highly asymmetrical constitutional system created as a result of differences in identity and related territorial claims. A closer look reveals that BiH certainly contains some asymmetric constitutional solutions, but it is not necessarily a highly asymmetrical system. When compared to symmetrical federal systems such as Germany or the United States of America (USA), where relationships among the substate units are based on uniformity, BiH certainly may look highly asymmetrical. However, differences also exist in the systems that are considered symmetrical: education in Germany, ecology and the death penalty in USA, and local, cantonal, federal, and church taxes in Switzerland. Differences also exist among the asymmetrical systems regarding the scope of asymmetries: mild – the United Kingdom (UK), moderate – Belgium, strong – India as a borderline case. However, whether the differences are theoretical, practical, or both, and what their cause is, depends on the specific system.

Definitions and types of asymmetries. There are two types of asymmetries: political and constitutional. *Political asymmetries* are relationships that are based on actual differences in the size of territory and population, economy, but also on political narratives, and most importantly, identity (language, religion, culture, ethnicity). These relations are practically prerequisites for constitutional asymmetries. *Constitutional asymmetries* are political asymmetries that are established in the constitutional and legal framework of a particular system so that they produce and enshrine a differentiated position of certain groups and/or substate entities. Differences in identity are, in fact, the most important causes of constitutional asymmetries, but they are usually supported by economic and political factors. Both types of asymmetries may arise in systems with federal features.

Asymmetries in status, distribution of powers, and fiscal autonomy. Asymmetries in a constitutional system reflect on the institutional framework and procedures at all levels of government. Their particular influence is projected through *status* (such as the different status of sub-state entities, their ability to organise legislature and executive independently from the central authorities, differentiated representation at the central level, differentiated participation in constitutional amendment procedures, veto including specific locks for the protection of autonomy, etc.), *distribution of powers* (such as increased powers in specific areas, power to opt-in/out, differences in the techniques for distributing powers, etc.), and *fiscal autonomy* (differences in tax returns, reliance on transfers, borrowing control, etc.).

Asymmetries in BiH. Article I.3. of the Constitution of BiH defines BiH as a state consisting of two sub-state entities (the Entities), the Federation of Bosnia and Herzegovina (FBiH) and the Republic of Srpska (RS), while Article VI.4. establishes a special territorial entity, Brčko District (BD, the District) of BiH. The constitutional structure of the two Entities is defined by their constitutions, while the structure of the BD is defined by its statute. Thus, Article I.2. of the Constitution of FBiH stipulates that FBiH consists of 10 cantons, while RS is a unitary entity according to its Constitution, and BD is a special administrative unit of local self-government according to the Article 1.1 of the BD Statute. Thus, the internal organisation of all three sub-state entities is combined with a high degree of institutional autonomy, which enables the application of a different institutional organisation in the Entities and the District.

Regarding *status*, both Entities and the District have constitutions and statutes that give them broad powers in the organisation of legislative, executive, and judicial bodies. For example, while the Parliament of FBiH is bicameral, the National Assembly of RS and the Assembly of BD are unicameral. Furthermore, in FBiH, the president of FBiH and two vice-presidents are elected indirectly through the Parliament of FBiH, while the president and vice-presidents in RS are elected directly by the people. BD only has a government, but no president. At the state level, the territorial representation of the entity coincides with the representation of the constituent peoples, which introduces constitutional asymmetry. For example, the House of Representatives of the Parliamentary Assembly of BiH consists of 42 representatives, two-thirds of whom are elected in FBiH and one-third in RS. Undoubtedly, this directly elected lower house represents the Entities, but also the constituent peoples – considering the way the representatives are elected. This has two consequences. First, FBiH is overrepresented (2:1), which is due to the principle of parity of constituent peoples. At the time when the Constitution of BiH was adopted, FBiH was understood as a territory predominantly made up of two constituent peoples (Bosniaks and Croats), while RS was viewed as the territory of one dominant constituent people (Serbs). Second, the District is not represented, which is related to the fact that it was established later. It is defined as a condominium of both Entities, i.e., the residents of the District must decide in which of the two Entities they vote in the local and parliamentary elections in BiH. With respect to ethno-territorial representation, the constitutional provisions on decision-making procedures in the Parliamentary Assembly guarantee a balance of different interests. As the principles of parity and consensus are essential guarantees within the constitutional structure of BiH, the procedure for protecting the vital interests of the constituent peoples serves to protect their interests when consensus cannot be reached. However, this institute has rarely been used. Instead, the so-called entity voting, which is intended to protect the interests of the entity (i.e., territory), is (mis-)used as a veto mechanism to protect the constituent peoples, although constituent peoples can rely on the procedure to protect vital national interests. Another constitutional asymmetry between the three constituent peoples is related to the so-called entity voting as a veto mechanism. Unlike Bosniaks and Serbs, Croats, given their small number, may only use the procedure for the protection of vital interests as a veto mechanism (see: Veto Rights).

Concerning the *distribution of powers*, the constitutional system of BiH consists of a comparatively weak state level with narrow, exclusive competences and strong entities and the District. The Entities are symmetrically vested with a vast range of powers. They can, of course, decide to transfer competence to the state level, but such a decision must be mutual. Any differences in the distribution of powers are not a result of asymmetrical constitutional provisions but are asymmetries in the outcome. This is because there are several techniques for the allocation of powers in FBiH. Even though the powers are distributed in favour of FBiH, FBiH and the cantons also exercise exclusive and concurrent powers. As each canton can opt to exercise concurrent powers in different ways, differentiation among cantons is inevitable. The District's position, however, is asymmetric, given that its approval is not required for the transfer of powers and competences. This can be explained by the unfinished legal relations between the state level and the District after the adoption of Amendment I to the Constitution of BiH.

The fiscal system of BiH follows the general trend of centralising income and decentralising expenditure. After the fiscal system was reorganised in 2006, *fiscal autonomy* of the Entities was symmetrised. Direct taxes remained under the jurisdiction of the Entities and District, but indirect taxes were centralised. Broad fiscal autonomy produces a decentralised system of vertical and horizontal distribution of funds. Eventual differences are a consequence of autonomy and not necessarily an asymmetric position. Before the reorganisation of the fiscal system, the financing of the state level depended on entity transfers, since both entities were under the constitutional obligation to provide financial resources necessary for the execution of obligations under the jurisdiction of the state. Thus, it was established that two-thirds of the international obligations of BiH were provided by FBiH and one-third by RS. Since the reorganisation of the fiscal system, the amounts are paid directly into the state budget in the same proportion, which means that this approach still represents a constitutional asymmetry. The same is the case with the amount of income remitted to the District. If the District's income is below the prescribed coefficient, the entities compensate for the difference in the same ratio as in the previous example. Finally, the Management Board of the Directorate for Indirect Taxation is the most important organ of BiH's fiscal policy. However, unlike both Entities whose representatives have the right to vote, District representatives only have observer status.

BiH as a mildly asymmetrical system. The initial constitutional structure of BiH exhibited constitutional asymmetries, some of which disappeared over time. Those that remain are sufficient to mark BiH as a system that manifests comparatively "mild" constitutional asymmetry. The constitutional status of the Entities and the District is the most immediate marker of constitutional asymmetry. However, apart from that, constitutional asymmetries are not particularly emphasised. In terms of *territory*, the Entities and the District have equal powers and responsibilities; the situation is similar regarding fiscal autonomy. In terms of the difference in *identity*, however, the asymmetric status is strengthened by the principles of constituency of the peoples and their institutional equality ("power-sharing") and the overlap of these with the territorial principle in the practical application of the Constitution.

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