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2021: A Window of Opportunity for Bosnia and Herzegovina?

by Jens Woelk

25 years since the Dayton Peace Agreement,[1] Bosnia and Herzegovina (BiH) seems lost in eternal transition. Necessary for ending the war, its cease-fire logic is an obstacle on the way towards European integration.

Already in 2005, the Council of Europe's Venice Commission criticised the constitutional situation in BiH, outlining an array of problems.[2] A US sponsored attempt to amend the Constitution in 2006 (the "April Package") failed by only two votes in the Parliamentary Assembly. Attempts to broker agreements between party leaders failed again in 2008 and 2009.

Constitutional reform was therefore gradually abandoned by the international community, which also strongly reduced its presence and active engagement in the country. The international semi-protectorate and the coercive "Bonn powers" by the Office of the High Representative (OHR) were to be substituted by "local ownership" combined with the attractiveness of future accession to the EU. After post-war stabilisation, this concept appeared as the necessary and logical next step in the transition.

Yet, the preconditions were completely lacking: There was neither *détente* in the cold war-like relations within the country, nor reconciliation. Without an overarching consensus on the future of the country, no *perestroika* could be expected.

In 2009, the European Court of Human Rights (EctHR) certified that the country's Constitution violated the political rights of those citizens

[1] See Embassy of Italy in Sarajevo, *Twenty-five Years Later: The Dayton Agreement and the European Pathway of Bosnia and Herzegovina* (video), 18 December 2020, https://ambsarajevo.esteri.it/ambasciata_sarajevo/tiny/886.

[2] Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005) 004), 11 March 2005, https://www.venice.coe.int/webforms/documents/CDL-AD(2005)004-e.aspx.

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who do not belong to one of the three constituent peoples (Sejdić-Finci case). Other judgements followed (Zornić 2014, Pilav 2016 and recently Pudarić 2020), none of them implemented until today.[3]

Bosnia and Herzegovina nevertheless applied for EU membership in 2016. The European Commission's opinion on the country's application, published in May 2019, made it clear that EU accession will not happen without amendments to the Dayton Constitution.[4] Thus, after a decade of silence, constitutional reform has become an issue again.

Is it possible to change the Dayton Constitution?

The Dayton Constitution has been in force for 25 years, or one generation. It is true that the text was negotiated in Dayton, in English and imposed as an essential part of the peace compromise, rather than being elaborated in the country and adopted by the people.

Yet, the continuous application of the Dayton Constitution since its adoption may itself be considered a source of legitimacy. Even bad constitutions (can) work, if there is sufficient political will. Conversely, even good constitutions can fail to work if that will is lacking.

Dayton is not set in stone. It has been amended already, to include arbitration regarding the Brcko District.[5] Surprisingly this has remained the only amendment so far. The amendment-procedure only requires a decision by the Parliamentary Assembly, including a two-thirds-majority in the House of Representatives (Article X).

This simple procedure may be considered an indication for the transitional character of the Constitution, conceived as a basis for a consolidation phase, but not being supposed to last indefinitely in its original form. Yet, most of the dominant political actors either do not want change or advocate changes that would further entrench the current ethno-authoritarian system, as demonstrated by calls by the Bosnian Croat party, the Croatian Democratic Union of Bosnia and Herzegovina (HDZ), for a third, Croat-majority Entity.[6]

Constitutional change by interpretation has already occurred through the Constitutional Court, in particular with landmark judgments on the

[3] See e.g. Council of Europe, *Sejdić and Finci - After 10 Years of Absence of Progress, New Hopes for a Solution for the 2022 Elections*, 22 December 2019, https://go.coe.int/nl32B; and *Human Rights Watch, Bosnia and Herzgeovina: Ethnic Discrimination a Key Barrier*, 12 December 2019, https://www.hrw.org/node/336681.

[4] European Commission, *Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union* (COM/2019/261), 29 May 2019, see in particular p. 13, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0261.

[5] In March 2009, the Parliamentary Assembly added a new Article VI, 4 to the Constitution to include the Brcko district final award. See "Amendment I to the Constitution of Bosnia and Herzegovina", in *Official Gazette of Bosnia and Herzegovina*, No. 25/09 (31 March 2009), http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20Amendment%20I%20to%20BH%20Constitution%2025-09.pdf.

[6] Elvira M. Jukic, "HDZ Chiefs Back Croat Demands in Bosnia", in *Balkan Insight*, 8 April 2014, https://balkaninsight.com/?p=112522.

character of the constitutional system and some fundamental elements (e.g. the "constituent peoples" case No. U 5/98-III of 1 July 2000).[7] Indeed, no legal document can be applied literally, interpretation is always necessary.

Clarification through interpretation has been unavoidable, as the Dayton Peace Agreement is a – deliberately – ambiguous, diplomatic text. It allowed contradictory understandings of the territorial organisation of the state: while some provisions might suggest that the Entities are "ethnic homelands", others point to the multinational character of the whole country, at all levels.

The same is true for the rights of individuals and groups ("constituent peoples"), which are both guaranteed. Yet, in some cases of frontal collision, sustainable interpretation of those contradictory arrangements is impossible. So far, Constitutional Courts (at state and Entity levels) and the ECtHR have tried to untie these knots through legal means. Yet, their judgments have not been implemented, as this would require legislative or even constitutional change, necessitating political will.

The context is a political culture which has neither developed trust nor valued compromise. Instead, it is characterised by continuous election campaign rhetoric with ethno-nationalistic leaders repeating empty promises or expressing threats rather than dealing with concrete problems. The institutional context favours such behaviour, through permanent competition due to elections every two years and with numerous veto players and positions. Group representation in the institutions means particular interests instead of cooperation for the common good resulting in division, control and patronage, effectively described as "state capture".

It is evident that those benefitting from such a system do not have any interest in change. This also explains the paradoxical situation that the same people lamenting the imposed character of the Constitution defend it against any requests for reform.

What needs to be changed?

Fifteen years ago, the Venice Commission came up with a detailed analysis and clear indications on what needs to be changed. The ECtHR judgments followed. Several of the 14 "key priorities" in the European Commission's opinion also require constitutional change.

Any constitutional reform would above all need to disentangle the confusing combination between the ethnic power sharing principle and elements of ethnic federalism. Nothing less than the fundaments of Bosnia and Herzegovina's multinational system need to be identified.

All options will have to be based on a differentiation of territorial and ethnic representation. While the first refer to the whole population and

[7] International Crisis Group, "Implementing Equality: The 'Constituent Peoples' Decision in Bosnia & Herzegovina", in *ICG Balkans Reports*, No. 128 (16 April 2002), https://www.crisisgroup.org/node/2147.

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rights of citizens, group interests as an expression for the respect of diversity refer to specific issues of particular relevance for a distinct group within the population. By contrast, the current arrangement reflects the identification of (parts of a) territory with one dominant group, according to the scheme of ethnic federalism in Yugoslavia, in combination with a defensive, cease-fire logic.

There is an underlying assumption that territorial interests are identical with those of the respective dominant group in a given territory (e.g. Serbs in the Republika Srpska, Croats in some parts of the Federation and Bosniacs in others). The respective ambiguities in the Dayton Peace Agreement are reinforced by the system of ethnically divided political parties and media. By contrast with most other federal systems, federalism in BiH does not increase democratic participation of all citizens, but rather serves ethnic interests.

A second essential issue regards fundamental rights and freedoms, i.e. the adjustment of balances between individual and group rights. This is not an issue of "either ... or", as the collective dimension has certainly been important in BiH historically (not only due to the war, but from the Ottoman Empire's millet system to multinational Yugoslavia) and is important also today.

Yet, the current dominance of ethnic and collective representation needs to be balanced with a guarantee for the individual rights of citizens. This is the obligation resulting from the Sejdić-Finci case with regard to "others", but a correction is also necessary for those constituent peoples which are excluded or limited in their rights on grounds of residence (Zornić case).

The primacy of individual rights is constitutionally established: article II.2 provides for the direct application of the European Convention of Human Rights and its Protocols, which "have priority over all other law". While certain restrictions of fundamental rights are possible in general, and in particular after a conflict, they are subject to a proportionality test which limits their reach and duration.

This is exactly the line of the ECtHR's argument: a system that was justified to end a war may no longer be justified long after its end. Nowadays, the logic needs to be changed. Individual rights are the rule and the safeguard of group characteristics the exception to be specifically justified.

Efficient territorial governance is a third important issue. In a country with less than 3.5 million inhabitants, any reduction of institutional complexity would be a huge gain for the democratic system (clarity in decision-making and political responsibility) and save resources. Ideally, a number of regions are to be established at a sub-national level according to historical, economic and geographic criteria in order to favour decentralised economic development following the example of Italian Regions in 1948 and German Länder in 1949, which over the following decades developed their own political identities as sub-national, political communities.

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However, the current structure with two pre-existing, often antagonistic Entities can only be changed by means of a total revision of the Dayton Constitution, which does not seem politically feasible. A reform of the Federation offers considerable potential for improvement, by reducing the number of Cantons and transforming them into an efficient intermediate level of territorial governance with economic and planning functions. In the past, such proposals have been regularly rejected. In any case, cooperation between territorial bodies at all levels of government is key for more efficient territorial governance.

Thus, the relations between territorial government, constituent peoples and individual citizens are to be corrected. Territorial and civic elements need to be strengthened and group rights linked to areas of specific collective interests. Some adjustments to the current federal setting are also necessary, if federalism shall effectively work like a system and guarantee all three of its central purposes: the integrative function ("self-rule *and* shared rule"), the "vertical" separation and limitation of power as well as more participation for citizens.

Finally, a clause which would declare international and European integration a state objective would express the openness of the constitutional system and its outward orientation. Throughout its history, BiH has always been a recognisable territorial unit, but also part of wider systems. Constitutional provisions on the (possible) transfer of sovereign rights to international and European organisations are common in most states.

The adoption of such an integration clause would confirm the readiness and willingness of BiH's institutional actors to give the accession process (and later EU membership) priority and a secure constitutional basis. It should also contain technical issues, such as the adaptation of institutions and procedures for guaranteeing participation in the decision-making process as well as timely and thorough implementation of EU law through the coordination and cooperation of all levels of government.

How to build up momentum for reform?

Constitutional reform has to take place in the institutions through amendment procedures. However, any open process for change needs to include civil society in order to be sustainable.

A staged, differentiated process may help to build momentum for constitutional reform: the elements of reform should be discussed at different levels, with different actors and in different fora. Deliberative processes and participatory democracy for preparing constitutional amendments are currently practiced in more and more countries. Deliberation shall make different voices heard, guarantee quality and sustainability, while wider participation adds legitimacy to the process, thus preparing the final phase of decision-making in the Parliamentary Assembly with indications on scope and principles of reform.

Looking at the current stalemate, this may sound like science-fiction, but a bottom-up initiative with randomly selected citizens from different parts of the country promises dynamics and perspectives different from those of political actors in the institutions.

The European Union and the Council of Europe must support this process by providing expert advice and guidelines for reform. Supporting a reform debate and, later a reform process, would add to the EU's credibility. Indeed, the EU currently imposes tasks on BiH that the country cannot fulfil. Essential for any reform is coordination with and support by the US; there may indeed be a window of opportunity in 2021, if the new US administration were willing to engage in constitutional reform.

In this way, constitutional reform could actually mark the end of transition and the transformation from an imposed system to a sustainable one. Thus, the choice is between the guarantee of further consolidation of the status quo (with high risks for the apparent stability) and the attempt of reforming the system.

In essence, this reflects the choice expressed by candidate Joe Biden for the US elections: "more divided..., or to reform and to unite". For Bosnia and Herzegovina, 2021 offers a unique window opportunity for constitutional reform that should not be missed. The alternative is that divisions and transition become eternal.

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