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THE CONSTITUTIONAL REFORM PROCESS IN BOSNIA AND HERZEGOVINA

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ABSTRACT

The paper examines the structural weaknesses of Bosnia and Herzegovina's "consociational" political system, resulting from the 1995 Dayton Agreement. It highlights a high degree of institutional fragmentation, leading to disproportionate costs for bureaucracy, and far-reaching veto modalities which reinforce ethnical divides, rather than providing incentives to work together. Reviewing the various failed attempts to amend the constitution over recent years, the authors also note that the authority and legitimacy of the international community's High Representative/EUSR are fading, and that the EU's traditional approach via the accession incentive will not work here. In conclusion, they argue for a fresh approach to state reform, supported by increased EU commitment to reconciliation and state-rebuilding efforts.

EXECUTIVE SUMMARY

Twelve years after the signing of the General Framework Agreement for Peace (GFAP) at the Dayton Peace Conference, Bosnia and Herzegovina's (BiH) consociational political system today suffers from structural deficits. Central government is weak and lacks substantial authority. BiH's two entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), carry out most essential residual powers. Additionally, the FBiH is institutionally heavily fragmented, using up more than 50 percent of the annual GDP for excessive bureaucratic structures.

Following the anchoring of entity proportionality and ethnic parity in the functional logic of central state institutions, far-reaching veto-rights result in virtually all decisions having to be taken unanimously. The resulting policy logjam could to date be surmounted only by the (threatened) intervention of the High Representative (HR)/ European Union Special Representative (EUSR) and the case-law of the Constitutional Court. In effect the political system reinforces existing ethnical divides by creating strong incentives for kingroup centred patterns of party competition. At the same time the main reason for the central government's weakness lies in the obstructive behaviour of its main political actors.

In order to overcome this situation, to date several external motivated efforts to constitutional reform have been undertaken. An American led initiative originally deemed to be the first phase in a series of constitutional amendments failed in April 2006 to meet the necessary two-thirds majority in parliament by two votes. Also, a concerted approach from the European Union (EU) and the United States (US) dating from October 2006 did not manage to reach agreement on this 'April package'.

A new initiative of June 2007 of the HR/ EUSR, supported by the US and the EU-troika failed already in the phase of "exploratory talks" with the defection of Sulejman Tihić, Dragan Čović, Zlatko Lagumdžija and their respective supporting parties.⁽¹⁾ Hence, despite opinion polls demonstrating a strong citizens' mandate for constitutional reform, by the end of June 2007, all efforts to reach compromise either on substance or process ended in dead-lock.

The basic conflict laying ground for this row includes the Serbs rejecting all attempts to abandon entity voting, while Haris Silajdžić's Bosniac Party for Bosnia and Herzegovina (SBiH) opposes the Serb proposal of a federal or con-federal state. Croat parties are in disagreement whether to push for a Croat entity or for a multi-ethnic model of regionalisation. With the exception of Lagumdžija's Social Democrats (SDP) all parties strongly articulate national interests of their respective ethnicities.

HR/ EUSR Miroslav Lajčák is in the same structural position as his predecessor and confronted with a double conflict: the political and conceptual antagonisms of the main Bosniac and Serb party leaders and the EC and US, in particular with regard to „ownership“ versus „political guidance“. At the same time the authority and legitimacy of his "Bonn powers" are dwindling. Scenarios to remove Silajdžić and Dodik for obstructing reforms would lead to the withdrawal of Serb representatives from state institutions leaving the country in paralysis.

Against this background 'business as usual' from side of the European Commission (EC) by applying simple accession conditionality will not be powerful enough to attract BiH into EU membership. Instead, results of this policy are likely to have adverse consequences: further destabilisation of the already fragile state.

⁽¹⁾ Tihić chairs the Bosniac Party of Democratic Action (SDA), Čović is leader of the Croatian Democratic Union of Bosnia and Herzegovina (HDZ-BiH) while the Bosniac Lagumdžija, heading the Social Democratic Party (SDP) is the only Bosnian politician with measurable support within all three constitutive peoples.

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INTRODUCTION

Twelve years after ending the war in BiH by signing the GFAP ⁽²⁾ at the Dayton Peace Conference, the political situation is still closer to a frozen conflict than to a self-sustained and viable state. In reversion of the famous sentence of Carl von Clausewitz, politics in BiH can be paraphrased as “the continuation of war by other means”. Especially the last year has been disappointing in terms of stability as tensions between ethnic groups and their political representatives have increased and comprehensive reform efforts like the “April package” (see below) failed.

Widespread reluctance of domestic elites to participate in a constructive redesign of the “rules of the game” resulted in incremental reform, being dominated by the Constitutional Court or the HR with the “Bonn powers” up his sleeve ⁽³⁾ (GFAP, Annex X). However, it has become clear that the usage of the Bonn powers has come to its limits and further progress on the road to a viable Bosnian state needs to be decided by the domestic actors themselves. Furthermore, especially the Russian representatives within the Peace Implementation Council (PIC) made clear that they want to see the Office of the High Representative (OHR) closed as soon as possible.

Thus, with both authority and legitimacy of the HR/ EUSR fading, efficient domestic procedures and rules need to be established in order to bindingly guide politics, polity and the policy process. Essentially all earlier attempts to rearrange BiH’s political system proved difficult to overcome what domestic actors view to be a zero-power game governed by distrust. In addition to these internal developments, two external factors have increasing impact on both, problem pressure and its structure. First, the report to be drafted by the Troika ⁽⁴⁾ in December and submitted to the Security Council will lead to the opening of yet another chapter in finding a solution for the Kosovo-conflict. For now it remains unclear how such a solution could look like and which effects it might exert on the actor constellation in BiH. Second, with a verdict from the European Court of Human Rights (ECHR) pending, a core feature of the current constitutional provisions – the *exclusive* consideration of the three constituent peoples in BiH institutions ⁽⁵⁾ – might be declared illegal.

Against this background, the International Community (IC) realised that it has to change its role, becoming a “catalyst” instead of a “motor” of reforms. In playing this role, two sets of questions gain special importance: How does the current constitution shape political life in BiH and how did the constitutional reality evolve beyond the text itself? How does the domestic political constellation shape the prospects of reaching an agreement and how do the main actor’s conceptions of reform look like? It is these two questions this policy brief will be centred around.

⁽²⁾ The GFAP contains the main elements of a peace agreement while its eleven Annexes provide for a state building structure. The Annexes form the foundation for the international presence in BiH, providing detailed prescriptions for military deployment and election supervision.

⁽³⁾ Based on Annex X of the Dayton Agreement and the Conclusions from the Peace Implementation Conference held in Bonn in December 1997, the HR is authorised to dismiss officials from public office and to impose laws. Since the Constitutional Court’s decision on ‘functional duality’ in 2000, however, the Court has asserted and exercised the right to review the constitutionality of laws imposed by the HR.

⁽⁴⁾ The so-called Troika is formed of representatives from the EU, Russia and the US.

⁽⁵⁾ Following the model of the Washington Agreement of April 2004 for the establishment of the Federation of BiH, the Dayton Constitution established an almost ideal-type model of consociational democracy with equal or proportional representation in the institutions of the legislature and executive of the state institutions. Insofar as the Constitution literally provides for a composition of the three member Presidency with one Bosniac, one Serb, and one Croat and the House of Peoples with five Bosniacs, five Serbs, and five Croats, all “Others” are excluded from the right to stand as candidates in elections *ex constitutione*. In addition, the Constitution provides for absolute veto powers for constituent peoples in decision-making processes and cements the “pillarisation” of ethnic groups through such instruments such as Entity voting. For details see below.

THE CONSTITUTIONAL PROVISIONS AND THE VIABILITY OF THE BIH STATE

The most urgent post-war problems in BiH have been tackled. What the country suffers from today are structural deficits posed by its political system which was agreed as an Annex to the GFAP (Annex IV) with 'constitutional rank' ⁽⁶⁾. Reflecting the efforts to end the war, the text shows a number of anomalies in comparison to other basic laws. It was drafted and adopted without participation of the Bosnian citizens, instead signed by BiH, Croatia and Serbia and officially published only in English. A HR was installed by the GFAP and accountable to the IC represented by the PIC; he also assumes the role of the EUSR. ⁽⁷⁾

The Dayton Constitution recreated BiH's political system as consociational democracy made up of two highly asymmetric decentralised entities and a special district (Brčko) ⁽⁸⁾. Government in the RS is centralised with the relations between the entity government and the municipalities heavily dominated by the former. In contrast, the FBiH is institutionally fragmented: The entity's political power is devolved to ten cantons, or down to their municipalities in ethnically mixed cantons respectively. Each canton has a president, a government and a parliament. The numbers illustrating the budgetary effects of this multilayered system are often cited but none the less absurd: FBiH with a population of a mere 2.5 million maintains 11 governments, the same number of parliaments, consuming more than 50% of the annual GDP. Employment in the public sector amounts to 40% of Bosnia's workforce. Combined with the public expenditures for defence and law and order, the expenses are three times higher than the respective average for EU-countries and twice as much for social security.

Using financial resources on excessive bureaucratic structures instead of investment seriously limits the government's capacity to initiate sustainable economic growth. Moreover, there is widespread corruption linked to 'ethnic oligarchies' and poor progress of the privatisation process in general, leading to what commentators labelled as Bosnia's "lost decade" (Tzifakis/ Tsardanidis, 2006). However, also the IC contributed to the economic failures as the International Monetary Fund (IMF) and the World Bank worked out reconstruction programmes and strategies without the consultation of the Bosnian authorities. In that, an effective industrial policy ⁽⁹⁾, tackling the high level of employment but also poverty reduction have not been main priorities.

These economic problems are aggravated by the separation of powers between the entities carrying out all residual powers not mentioned in the Constitution (Constitution of Bosnia and Herzegovina, Art. III.3.a). ⁽¹⁰⁾ Apart from the field of economy, this leaves the entities with their own separate judicial and social security systems as well as educational and cultural policies. The BiH central government in turn is weak and lacks substantial authority.

⁽⁶⁾ The constitutional framework consists of 13 constitutions, namely the BiH Constitution on national level, two entity constitutions on entity level and the constitutions of the ten cantons forming the (Federation of Bosnia and Herzegovina) FBiH. This section will evaluate the BiH Constitution only.

⁽⁷⁾ The PIC is an international (though predominantly 'Western' staffed) body charged with the implementation of the Dayton peace agreement. It comprises 55 countries and agencies that support the peace process.

⁽⁸⁾ Brčko, connecting BiH's Northern border with Croatia as well as the Western and Eastern part of the RS was established as special district following arbitration over its territorial affiliation.

⁽⁹⁾ The secondary sector, which had accounted before the war for half of the country's economy, barely reached 20% of the pre-war equivalent. See Gough, 2002, p. 171. The rise of the service sector is thus not a sign of development, but of 'backward' adjustment.

⁽¹⁰⁾ Currently, the central government is responsible for foreign policy, European affairs, defence, security, justice, human rights, immigration, refugee matters, foreign trade policy, customs policy, monetary policy, common and international communication facilities, international and inter-entity criminal law enforcement, regulation of inter-entity transportation and air traffic control.

However, the Constitution allows for the federal state to acquire additional responsibilities (Art. III.5.a). In addition to the case-law of the Constitutional Court, many activities of the HRs have focused on strengthening state institutions. Hence, besides the introduction of a VAT, a common State Border Service and a State Court were established at central state level. In 2004, the three people's armies were integrated into one command structure through defence reform (Marko, 2007a), whereas a police reform is ongoing until the very day. Police reform, however, is a conditionality for the signing of the SAA which failed – after several failures to reach a compromise over the last couple of years – again by end of October 2007.

The entanglement of the concepts of ethnicity and entity as one of the fundamental problems resulting from the Dayton constitution are reflected in the functional logic of the institutions and the way they are intertwined in the policy process. In part the Constitutional Court tried to reverse the de facto recognition of entities as ethno-territorial power bases.¹¹ The basis for these rulings is the fact, that entities are recognised in the Constitution, but not defined as autonomous units of the constituent peoples (the Bosniacs, the Croats and the Serbs). Extensive usage of entity-based veto-rights however thwarted all attempts to loosen this connection and met fierce resistance especially from the RS. This 'ethnification' of the entities is reflected most notably in BiH's legislative structure.

The bicameral Parliamentary Assembly (Art. IV) comprises a House of Representatives and a House of Peoples. The former is assembled according to *entity proportionality*: one third of its members are elected in the RS, two-thirds in the FBiH. The latter chamber is a federative representation set-up according to *ethnic parity* consisting of five Bosniacs, five Croats and five Serbs, elected from the two entity parliaments. The Presidencies of both Houses consist of one Bosniac, one Croat and one Serb. The majority of the Bosniac, the Croat or the Serb delegates within the House of Peoples can veto a decision proposal by declaring it as destructive to the vital interest of its respective people (Art. IV.3.e).⁽¹²⁾ Additionally, an entity veto (Art. IV.3.d) can be imposed.⁽¹³⁾ Experience with this body shows that it is used as an additional mechanism favouring the interests of the constituent peoples, which is merely used as 'a chamber where the vital interest veto is exercised' (Venice Commission, 2005: 10).

This logic of vetoing is perpetuated in the executive somewhat concealed with the logic of consent. The collective Presidency (Art. V) is set-up according to the *ethnic parity* principle, consisting of one Bosniac, one Croat and one Serb, who share a rotating chair. In case two members arrive at a majority decision and former attempts to find a consensus failed, the outvoted member can impose a vital interest veto. Thus, virtually all decisions have to be made unanimously. As the Venice Commission (2005: 11) notes, a collective Presidency is 'a highly unusual arrangement' as representational functions can be more easily carried out by a single president. Entwined with the Presidency, the Council of Ministers (Art. V.4) acts

⁽¹¹⁾ See in particular Decision U 5/98 which was published in four partial decisions in 2000 and the article by the judge rapporteur in this case Joseph Marko, "United in Diversity"? Problems of State- and Nation-building in Post-conflict Situations: The Case of Bosnia-Herzegovina, in Vermont Law Review, Vol 30/Nr. 3, spring 2006, pp 503-550.

⁽¹²⁾ A majority of another people may object to the invocation of the clause, which results in an obligatory conciliation procedure. In case of continued dissent, the Constitutional Court defines the notion of the particular vital interest veto. In a decision to specify the vital interest of Croats on university education in Croatian language (Judgment of the Constitutional Court on 25 June 2004 in Case U-8/04 [2004]), the Constitutional Court surprisingly ruled that only multi-lingual instruction would fit the best interest of the people.

⁽¹³⁾ An entity veto can be imposed if a simple majority does not contain at least one third of the members of the respective Entity. If efforts to obtain approval fail within three days, voting will be repeated and again requires a simple majority of those present and voting under the condition that "the dissenting votes do not include two-thirds or more of the Delegates or Members elected from each Entity."

as government on national level and is composed according to the principle of *entity proportionality*.⁽¹⁴⁾ The ‘Chair of the Council’, who is nominated by the Presidency has to be approved (together with the cabinet members of his choice) by the House of Representatives. Decisions in the ministries are taken unanimously and if that is not possible they are referred to the Council. While the Presidency is rather poorly equipped with technical and analytical resources, the Council chairmanship was streamlined and the number of ministries increased to ten from the original three following diverse reforms (again, headed by the HR/ EUSR).⁽¹⁵⁾ There is a considerable risk of overlap and competition for competencies between the executive functions of the Presidency with respect to the Parliamentary Assembly (Art V.3.e) and of the Council of Ministers concerning the policies of the federal level (Art. V.4.a) (Venice Commission, 2005: 11).

Although the veto rights foreseen by the Constitution are invoked rather rarely, the mere threat to use them prevents decisions from being taken. Furthermore, while consociational power-sharing systems usually require major decisions to be subject to consent, in BiH virtually all decisions have to be taken unanimously. This combination of an exhaustive institutional fragmentation with a consociational environment of multiple veto-players pursuing opposing agendas results in a permanent policy logjam, which could to date be surmounted only by the (threatened) intervention of the HR/ EUSR. Yet, despite the importance of the institutionally motivated deadlock, it should not be overlooked that the main reason for the central government’s weakness lies in the obstructive behaviour of its main political actors. This ‘spirit of disagreement’ is reflected first and foremost in the exclusive protection of the interests of the BiH constituent peoples. It is against this special background that a UNDP Human Development Report emphasized: “The decentralized administrative structure of BiH was not introduced primarily as a means for the efficient and user-oriented provision of services, ... but above all as a means to protect ethnic interests [...] The key principles of good governance (effectiveness and efficiency, transparency and accountability, and participation) have thus remained neglected; [...]” (UNDP, 2003: 26).

With its ruling on the matter of “constituent peoples”⁽¹⁶⁾ the Constitutional Court (Art. VI)⁽¹⁷⁾ declared positive discrimination of the ethnicities predominant in their respective entities (i.e. Serbs in the RS and Bosniacs and Croats in the FBiH) incompatible with the Constitution reasoning that all constituent peoples had equal rights throughout Bosnia. This adjudication triggered an agreement between the main political parties which foresaw consequent implementation of power-sharing mechanisms at all state levels down to municipalities.⁽¹⁸⁾ This however increased the extent of ethnic representation even more as representatives of the constituent peoples now have strong blocking positions within the entities instead of reducing them as initially intended by the Court.

However, the fact that state institutions ensure exclusive representation of the constituent peoples instead of representing *citizens* might be at odds with the strong emphasis

⁽¹⁴⁾ The number of ministers needs to be equally distributed among the ethnic groups, while each minister has two deputies of the remaining two peoples.

⁽¹⁵⁾ It has to be noted however that the establishment of new ministries often had a rather symbolic character with the main competencies remaining at the entity level.

⁽¹⁶⁾ Judgment of the Constitutional Court, 19 February 2000 in Case U-5/98 [2000], partial decision II at paragraph 12 and 13.

⁽¹⁷⁾ The Constitutional Court consists of nine judges, two appointed by the RS National Assembly, four by the Federation House of Representatives, and three international judges appointed by the President of the European Court of Human Rights.

⁽¹⁸⁾ Due to the reluctant implementation especially of the RS, this agreement initially struck in 2000 had to be imposed by the HR in 2002.

in the Constitution to prohibit discrimination by granting priority to the European Convention on Human Rights and its protocols (ECHR) over other law ⁽¹⁹⁾:

- Interests of non-members of one of the constituent peoples might be neglected or people will be forced to artificially identify with one the constituent peoples,
- Political issues might be evaluated according to their fit to a people's interest rather than to the common weal
- Elections might not fulfil their role of allowing alternation between opposition and majority as ethnic identity is a far more permanent reason for party-membership than individual choices for programmatic platforms on a traditional left-right cleavage

The resulting political system reinforces existing ethnical divides by creating strong incentives for kingroup centred patterns of party competition. Considering the above depicted prescriptions, this entails that running for office for the Presidency or for a seat in the House of Peoples ⁽²⁰⁾ requires affiliation to one of the three constituent peoples. ⁽²¹⁾ At the same time the choice of candidates for both institutions is limited to Bosniacs and Croats in the FBiH and to Serbs in the RS, while Serbs cannot be elected from the FBiH and Bosniacs and Croats cannot be elected from the RS.

Recurring to the above discussion, the basic problem is in this context, that the concepts of entity and ethnicity are mixed in a way that votes from an entity are interpreted to represent its major constituent people instead of representing the plurality of its citizens. This line of argumentation is reflected in the lawsuit filed by the Bosnian human rights activist and member of the Jewish minority Jacob Finci before the European Court of Human Rights against the discrimination of Others in their passive voting rights. Should the Court confirm this reasoning, this will profoundly add to the existing problem pressure to constitutional reform.

⁽¹⁹⁾ In detail, the Venice Commission (2005: 20) assesses the rules on the composition of the House of Peoples potentially incompatible with Art. 14 of the ECHR. The rules on the composition and election of the Presidency seem incompatible with protocol No. 12.

⁽²⁰⁾ The same holds true for Bosniac and Croat delegates for the House of Peoples of the Federation.

⁽²¹⁾ Thus, besides the members of the minorities of BiH, referred to in the preamble of the Constitution as 'Others', also those who declare themselves as 'Bosnian' and 'Bosnian and Herzegovinian' are excluded.

CONSTITUTIONAL REFORM EFFORTS SINCE 2005

3.1. The initial American approach

With the beginning of 2005, more and more actors started to blame the constitutional and institutional set up of the Dayton constitution as being the main obstacle to necessary political, economic and cultural reforms, such as in the field of higher education (Marko, 2007a). Again it was left to the Americans to take the lead in a fresh reform initiative when the former Deputy High Representative Donald Hayes established the ‘Dayton Project’ and started to broker a reform package with the leaders of the six major parties in the Bosnian parliament. After having exerted strong pressure on party leaders, not only by the United States (US), but also by representatives of EU institutions, a package of amendments to the Dayton Constitution was finally brought into parliament in April 2006 deemed to be a ‘first phase’ of overall constitutional reform, but failed to meet the necessary two-thirds majority requirement for constitutional amendments by two votes.

A closer look into the proposed amendments shows that these amendments could have been a starting point for constitutional reform with the effect of overcoming the political blockade even if they were technically – as far as the legislative drafting is concerned – and systematically unsatisfying. Amendment I tried to constitutionally ‘guarantee’ those competencies for the state level which had been delegated to the state level before by the incremental reform process. It aimed at opening the system of mutually exclusive responsibilities by introducing the category of ‘shared competencies’ for the tax system, the electoral process, the judiciary, agriculture, science and technology, ecology and local self-government. Nevertheless, from a comparative perspective, BiH still would have remained the weakest federation in the world. The only potentially powerful mechanism could have been a new clause like the “necessary and proper”-clause of the US constitution making the state institutions responsible for European integration.

Amendment II foresaw several changes in the composition, competencies and procedures of the bi-cameral system, including a definition of the vital national interest veto. However, the entity veto in the House of Representatives was – due to strong resistance from RS party leaders – not even taken into consideration for amendment.

Amendment III was to transform the three member collective presidency into a system with one president and two vice-presidents, again with the ethnic parity rule applied. A similar change was foreseen for the Council of Ministers, transforming it into a government with one Prime Minister. At first glance, these changes were only of cosmetic nature and it seemed to be questionable whether they would have been effective to overcome the strict ethnic quota system applied in practice so far. Moreover, the original draft package contained also a comprehensive catalogue of human rights, but was dropped and not submitted to parliament after strong criticism from international experts for the many flaws and inconsistencies in the draft.

3.2. The EU-US approach since October 2006

With the elections of both parliament and presidency in October 2006, the two party leaders with obviously opposing concepts for the future of the country, i.e. Haris Silajdžić of the SBiH and Milorad Dodik’s Alliance of Independent Social Democrats (SNSD), had won the elections. The concept of then HR/ EUSR Christian Schwarz-Schilling was three-fold: first, he tried to bring in the EU and leave constitutional reform no longer to the American administration only; secondly, to start a new approach by clearly dividing process from substance in order to overcome the blockade of Bosnian political parties, and, thirdly, after the failure of the American elite-oriented approach, to establish a broader public process

including voices from NGO initiatives, interest organisations and religious communities in order to achieve more legitimacy for the product, but also to prevent these organisations from spoiling the process through uncontrolled comments via mass media.

A draft law was to establish a Constitutional Reform Commission consisting of a Council formed by party representatives and a technical Secretariat composed of domestic and international experts which had been negotiated between US and OHR/EUSR from October 2006 to February 2007. The Commission met fierce resistance not only from the German Ambassador then representing the EU-Presidency, but even more so from the side of the European Commission (EC). The major points of objection can be summarised as follows:

- there is no need to establish such a Commission through law outside parliament;
- a system of three co-chairs for the Council, one Bosnian, one US, one EU contradicts the principle of ownership for political and institutional reform;
- the number of staff for the Secretariat is too high; there is no need to employ international experts full-time; these experts can be flown-in from Strasbourg and Brussels when needed;
- the time frame with the unspoken allegation that the establishment of the commission and a serious debate on constitutional reform would spoil the ongoing police reform as a necessary condition for signing the SAA.

At the same time, the US Ambassador negotiated on a bi-lateral basis with Bosnian party leaders more or less publicly on the renewed adoption of the failed April package in Parliament since October 2006 without co-ordinating or even consulting any of his steps in advance with the HR/ EUSR, whereas Schwarz-Schilling had promised the US-Ambassador not to go public with his approach to establish the Constitutional Commission so as not to „spoil“ US efforts. In effect, he was accused by mass media and ambassadors of the IC to be ineffective.

It became obvious, however, from public statements made in regard to the US efforts that the Entity veto in the House of Representatives was the issue which could not be circumvented. The US initiative to press through the April package failed again despite summoning Silajdžić and Dodik to Washington in May 2007 in order to put pressure on them to sign a political agreement. At the same time EU actors had meanwhile successfully prevented the draft law approach.

Hence, in the beginning of June 2007 the HR/ EUSR, supported by the US-EU troika, met with eight party leaders ⁽²²⁾ on a bilateral basis for “exploratory talks.” Based on this response from exploratory talks a “Political Agreement” of party leaders was drafted and presented to them in a further round of talks on Saturday, 16 June. The Political Agreement, co-ordinated between US, EU and HR/ EUSR tried to commit party leaders by their signature to establish a Constitutional Reform Commission within Parliament and thus without a law necessary. However, Sulejman Tihić from the Bosniac Party of Democratic Action (SDA) did not join the meeting, nor did Dragan Čović from the Croatian Democratic Union of Bosnia and Herzegovina (HDZ). Zlatko Lagumdžija from the SDP came only to give a statement that he does not agree on anything and left. All other party leaders mentioned above discussed the draft agreement. It became clear from the statements, in particular of Silajdžić and Dodik, that there are opposite concepts for the future constitutional make up whereas the strong disagreement between US and EC on ownership versus international co-chairs did not surface. There was finally agreement among the party leaders and the IC representatives that the

⁽²²⁾ Dragan Čović, Božo Ljubić, Zlatko Lagumdžija, Mladen Bosić, Mladen Ivanić, Haris Silajdžić, Milorad Dodik, Sulejman Tihić.

prepared document cannot be signed without the presence of both the strongest Bosniac and strongest Croat party on board.

Hence, by the end of June 2007, all efforts to reach a compromise for constitutional reform either on substance or process ended in a dead-lock. So, what are the main reasons for this failure of reform, despite of the fact that all Bosnian party leaders and most representatives of the IC had committed themselves publicly to this goal?

4. Main conflicts to be overcome for constitutional reform

4.1. The conceptual level

The political concepts of Silajdžić and Dodik and all other Serb parties how to re-arrange the territorial and institutional structures of BiH are opposing. Silajdžić, strengthened by the judgement of the International Court of Justice on Srebrenica ⁽²³⁾, wants to abolish entities, in particular the RS, and to remove any institutionalisation of ethnic elements. In promoting this stance he uses the catch word „gradjanska država (civic state)“; Silajdžić leaves the question of decentralisation or even regionalisation open, but opposes federalisation. On the other hand, all Serb parties stand for federalisation or even a confederal model of BiH and are in no way willing to give up the instrument of entity veto. As a consequence, RS with its territory, competencies and institutions as well as the ethnic keys and veto mechanisms for constituent peoples on state level are to remain. The catch-words „regions“ or „regionalisation“ are understood by them as attack against the existing RS. The Croat parties are split and are in disagreement whether they should push for a third, Croat entity, on ethnic basis or for a model of regionalisation thereby carving out new regions based on economic criteria combined with the idea of multi-ethnicity. In October 2007 they have signed a common political declaration which remains, however, rather vague on all of these issues.

4.2. The level of party politics

All parties with the exception of Lagumdžija's SDP remain, in their perception, strong defenders of the respective national interests of Bosniacs, Serbs and Croats. None of them has an economic, social or cultural program or strategy. In actual practice, each and every legislative reform is seen through the lens of national interests triggering thereby immediately the mechanisms of power play based on veto threats as can be seen from the stalemate of the legislative process over the last two years. Secondly, parties have by now learned the democratic mechanisms of change of government and opposition. They are aware that they can lose elections and their influence in terms of political power through public mandates and well paid jobs. This democratic learning process starts to cut across ethnic lines with Croat and Bosniac parties, not so much Serb parties. Paradoxically, for constitutional reform this is, however, counter-productive since this decreases their willingness to compromise for fear that any step ahead they make could bring them renewed defeat in the next elections.

4.3. Interrelatedness of political reform and three schools of thought

- Many economists from the World Bank or even people in the OHR economic department think that constitutional reform is a superfluous undertaking. In their eyes it would be sufficient to simply impose fiscal restraints in order to force BiH politicians to reduce the unaffordable civil service on entity and cantonal level and to improve at the same time the effectiveness of public services. Therefore they strongly oppose a ‚big-bang‘ approach, as they call it, of replacing Dayton through a new, modern constitution and seem even to think that a political system will simply work on the basis of economic incentives without any constitutional backing.
- The EC, the majority of ambassadors from EU Member States and several lawyers in the OHR are of the opinion that only the ‚incremental‘ approach to amend the Constitution step by step for which the April package was seen as the starting point

⁽²³⁾ In a landmark court case the ICJ for the first time had to rule on genocide accusations of BiH against Serbia and Montenegro. The ICJ concluded the massacre of Muslim men by Bosnian Serb forces at Srebrenica did constitute genocide, but that the Serbian state could not be held responsible for the mass killing, or complicity. (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) - case 91 - Judgment of 26 February 2007).

can 'realistically' be successful to achieve political progress, whereas others are afraid that the beginning of constitutional reform would hamper ongoing and urgently needed reform projects, in particular police reform as a conditionality for signing the SAA. So they do not want to stop constitutional reform as such, but postpone it for a time when political circumstances would have significantly improved.

- Finally, a third school of thought is of the opinion that state reconstruction, sustainable economic reform and ethnic reconciliation are interrelated and mutually reinforce each other. This can be seen from the incremental legislative reform process between 2000 and 2004, always overshadowed by the problem of transfer of powers to the state level, the stagnation of economic growth and employment efforts, the three years of troubles before passing the law on higher education in the House of Representatives in June 2007 - which did not resolve the problems but transferred them to the implementation phase - and the still unresolved issue of two schools under one roof for primary education in the Federation. And last but not least, all political party leaders and some of the representatives of the IC have moved BiH into a position of political blockade with regard to police reform and constitutional reform since February 2007. Police reform was used as main argument to evade constitutional reform (and sometimes vice versa). Hence, this school of thought sees politics, economics and culture mutually reinforcing each other: The identification of territory and ethnicity following from the constitutional set-up cements ethno-national attitudes of the people and the strict ethnic pillarisation of society, prevents the creation of civic identities and state loyalty, or even legitimises ethnic segregation. As a consequence the same political parties form a cartel of power which is constantly re-elected into parliament where the block each other along ethnic lines through the veto mechanisms described above. In effect, necessary legal reforms such as the police reform to fulfil the conditionality criteria or to trigger sustainable economic progress end in a deadlock. These "predatory elites" hold a strong grip on power through a "negative" elite consensus to divide along ethnic lines and to dominate the respective "national" territory. In order to overcome this vicious circle, this school of thought is of the opinion that only a comprehensive constitutional reform can break up this vicious circle.

4.4. Attitudes of the population

Brand new figures from an opinion poll by Oxford International Ltd. from March/April 2007 obviously demonstrate that there is meanwhile also a strong mandate for constitutional reform. Around 90% of the population want a change of the political-legal system, only about 20% stand for the division of the country into three Entities or even an Anschluss to Croatia or Serbia. Even a majority of people in RS is against a split. Around 70% of the population advocate a strong state *and* a strong mid-layer of government which would be, in essence, a normal federal state. It becomes clear from all of the figures of the opinion poll that none of the political parties in BiH represents the interests of the majority of voters.

5. Conclusions

The political stalemate by June to October 2007 is not necessarily the end of constitutional reform. Tihić (SDA) has no chance to mobilise enough votes in parliament for his approach. On the other hand, without HDZ and SDA even a ‘political agreement’ on constitutional reform imposing nothing in substance, lacks the necessary political legitimacy and would make a reform process much more difficult. At the same time almost everybody both in the IC and among local politicians nourished the expectation that with the beginning of the mandate of Ambassador Miroslav Lajčák as HR/ EUSR quick and successful progress can be made since he would be more decision-oriented and use Bonn powers without hesitation. He is, however, in the same structural position as his predecessor as could be seen from the events on the (preliminary) failure of police reform until end of October and thus confronted with a double conflict: the political and conceptual antagonisms of both Bosnian party leaders and the EC and US, in particular with regard to „ownership“ versus „political guidance“. None of these differences can, however, be resolved by applying Bonn powers in order to dismiss obstructing politicians despite repeated public threats by the US Deputy HR/ EUSR in the last months. Nine representatives from the RS in the House of Representatives can make use of the entity veto mechanism: the SNSD alone holds seven seats. Supported by two Serb representatives from other Serb parties or, in theory, by both one SDA and one SBiH representative, RS Prime Minister Dodik is in the position to block everything. A closer look into the composition of the Presidency, Parliamentary Assembly, and the National Assembly of RS reveals that all ideas to remove Silajdžić and Dodik for obstructing the police reform from office through applying Bonn powers is wishful thinking at best. In reality this would leave BiH in chaos for at least a year, since all Serb parties would withdraw their representatives from state institutions with new elections on state level and in the RS at the beginning of next year at best. Finally the results of new elections would give the conceptually opposing ideas of Silajdžić and Dodik probably much stronger democratic legitimacy. The events of the last weeks when HR/ EUSR Lajčák imposed amendments to the Rules of Procedure of both the Parliament and the Council of Ministers in order to ease the veto mechanisms, clearly support this prognosis: The chair of the Council of Ministers resigned after Dodik had threatened to withdraw all Serb representatives from state institutions and had organised street protests in several towns of RS.

From the presentation of the three schools above, it will have become obvious that in our opinion the line of argumentation of economists will not produce the desired results. Much more important is, however, the line of argumentation of „realists“ (the second school above). The „realists“ have certainly good intentions, but no strategic approach so that they overlook the interrelatedness of problems and believe in an ongoing process of “muddling through.” Phrases about the „complexity“ of problems (using phrases such as „složena država“ [complex state] or „složeno društvo“ [complex society]), are not accompanied with the readiness to tackle this complexity through strategic thinking taking the interrelatedness of politics, economics, and culture described above into account. The results of this approach can be seen: the political blockade has not been overcome by Lajčák through focussing on police reform only and setting aside constitutional reform. Thus, BiH is now not only at the end of the queue in the SAA process, but the economy is further deteriorating and the political climate for reform has become much worse than at the end of June.

There is now one big alternative:

- Simply to focus on the further “implementation” of the existing Dayton framework without any political push to start the change of the territorial and institutional framework will not resolve any of the political, economic or cultural issues analysed above. The

unwillingness of the political elites for reform through compromise will hold the people of Bosnia hostage for the next years until the next elections, which will probably – as in the past – not make any difference. At the same time, since the mandate of the OHR and thereby the exercise of Bonn powers is terminated with the end of June 2008, almost all Bosnian politicians will try to overcome this period through passive resistance against international intervention (as they see it) and thereby to present themselves for their electorate as staunch defenders of the respective national interest for the next elections.

- Based on the opinion poll of Oxford International Ltd. mentioned above, it is obvious that there is a clear mandate for a major change of the entire political and constitutional system. However, as far as political concepts, normative principles and constitutional models are concerned, there is a lot of confusion among party leaders and their experts. As far as the territorial division of powers is concerned, there is a lot of discussion on decentralisation, regionalisation or federalisation, but none of the party leaders has a clear idea what these phrases would mean in concrete terms with regard to institutions or competencies. Thus, the US, Germany, Switzerland, or Italy are mentioned at the same time as possible “models” for BiH, but when asked in debates which elements of federalism or regionalism of these countries despite of their obvious differences could be transferred to BiH, Bosnian politicians and their experts will escape into phrases that BiH is so “complex.” The same holds true for all discussions on the need for balancing individual human rights with group rights against vague phrases of a “civic” state, civil society etc.

Thus, there are only two things which can be excluded from the outset: Neither the Bosniac nor Croat parties and their electorate will accept a confederal model as proclaimed by the Serb parties with reference to the Yugoslav Federal Constitution 1974 under the political heading “federalisation” since they see this as a path to dissolution of the country as experienced under the former Yugoslav communist regime. On the other hand, as one of the authors had to experience in a conference with party representatives of SDP, HDZ 1990 and SDA in Banja Luka at the end of September 2007, Serb politicians always misunderstood the claim for a “regionalisation” of the country as an attack against the status, institutions and competencies of the RS. They are not (yet) ready to learn from political and constitutional developments of Central and Western European states such as Austria, Italy or Spain. At the same time, an abolition of all ethnic elements in the institutional set up of BiH over night and the creation of a “pure” civic state as claimed by Silajdžić is – in an ethnically divided society – not only rejected by all Serb and Croat parties, but also not possible in our opinion.

Hence, both major challenges of BiH, the necessary reform of the entire system of (territorial) division of powers and the balancing of the ethnic with the civic principle in institution-engineering, need a new reform impetus through the establishment of a Constitutional Commission which prepares and drafts with the participation of Bosnian politicians and Bosnian and foreign experts a comprehensive plan for constitutional reform. This institution cannot work behind closed doors, but must go public based on a media strategy in order to foster a broad public debate on all of these issues so as to create as much legitimacy as possible for a new constitutional framework.

Finally, not the least important aspect is the recognition by EC institutions that the future of BiH is a genuine European challenge! From participating observation through talks with civil servants of DG Enlargement, it seems that the EC sees the Western Balkan countries including BiH as ‘left overs’ from the so-called Eastern enlargement process. The strategy employed is thus rather simple: take over the *acquis communautaire* and implement it by fulfilling ‘your’ homework in regard to conditionality criteria. This then will resolve all political and economic problems like the infamous ‘invisible hand’ of Adam Smith. However, BiH, Kosovo, Serbia etc. cannot be compared to Poland, Hungary or the Czech Republic (see

Marko, 2007b). Most of the Western Balkan states are war-torn countries where even basic arrangements like state borders are not settled. Moreover, ethno-nationalism as a legitimising ideology is firmly entrenched in the electorates of many of these countries as elections and mono-ethnic party systems until the very day clearly demonstrate. Hence, the 'normal' strategy of enlargement will not work as this was proven in the case of Cyprus where even full EU membership does not resolve any of the problems of the divided country. A cynical response to this observation may be that the EU should not repeat the mistake with Cyprus. However, if the problems of the Western Balkan countries are not firmly tackled and the process of reaching an SAA agreement is slowed down and full EU membership not only as a legal commitment, but perspective for the future of now young generations is postponed beyond their life expectations, the consequences will be the following: the massive brain-drain, in particular of young, educated people, as well as labour migration will go on putting more pressure on the EU Member States. The countries in the region will remain weak at best with massive corruption and ethnic patronage linked to organised crime, let alone the possibility of renewed violent conflict. Thus, the financial costs for the ESDP will probably be much higher than a strong commitment of the EU to firmly engage in state re-construction and reconciliation efforts in the Western Balkan countries, in particular also in BiH which might seriously be affected by the forthcoming regional effects of any Kosovo settlement.

ANNEX I: Constitution of Bosnia and Herzegovina

PREAMBLE

Based on respect for human dignity, liberty, and equality,
Dedicated to peace, justice, tolerance, and reconciliation,
Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,
Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,
Guided by the Purposes and Principles of the Charter of the United Nations,
Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,
Determined to ensure full respect for international humanitarian law,
Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,
Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,
Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article I: *Bosnia and Herzegovina*

1. Continuation

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

2. Democratic Principles

Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

3. Composition

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities").

4. Movement of Goods

Services. Capital. and Persons. There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

5. Capital

The capital of Bosnia and Herzegovina shall be Sarajevo.

6. Symbols

Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency.

7. Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

- a) All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.
- b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina

or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- c) All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.
- d) Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.
- e) A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity. There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

Article II:

Human Rights and Fundamental Freedoms

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

- a) The right to life.
- b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
- c) The right not to be held in slavery or servitude or to perform forced or compulsory labor.
- d) The rights to liberty and security of person.
- e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.
- f) The right to private and family life, home, and correspondence.
- g) Freedom of thought, conscience, and religion.
- h) Freedom of expression.
- i) Freedom of peaceful assembly and freedom of association with others.
- j) The right to marry and to found a family.
- k) The right to property.
- l) The right to education.
- m) The right to liberty of movement and residence.

4. Non-Discrimination

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status.

5. Non-Discrimination

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

6. Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

7. International Agreements

Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

8. Cooperation

All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

Article III:

Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities

1. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

- a) Foreign policy.
- b) Foreign trade policy.
- c) Customs policy.
- d) Monetary policy as provided in Article VII.
- e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.
- f) Immigration, refugee, and asylum policy and regulation.
- g) International and inter-Entity criminal law enforcement, including relations with Interpol.
- h) Establishment and operation of common and international communications facilities.
- i) Regulation of inter-Entity transportation.
- j) Air traffic control.

2. Responsibilities of the Entities

- a) The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.
- b) Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization.

- c) The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate.
- d) Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

3. Law and Responsibilities of the Entities and the Institutions

- a) All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.
- 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.

4. Coordination

The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.

5. Additional Responsibilities

- a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.
- b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

Article IV:

Parliamentary Assembly

The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

1. House of Peoples

The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

- a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.
- b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.

2. House of Representatives

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

- a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.
- b) A majority of all members elected to the House of Representatives shall comprise a quorum.

3. Procedures

- a) Each chamber shall be convened in Sarajevo not more than 30 days after its selection or election.
- b) Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.
- c) All legislation shall require the approval of both chambers.
- d) All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.
- e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph l(a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting.
- f) When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.
- g) The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.
- h) Decisions of the Parliamentary Assembly shall not take effect before publication.
- i) Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.
- j) Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. Powers

The Parliamentary Assembly shall have responsibility for:

- a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.
- b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

- c) Approving a budget for the institutions of Bosnia and Herzegovina.
- d) Deciding whether to consent to the ratification of treaties.
- e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

Article V:
Presidency

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

1. Election and Term

- a) Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.
- b) The term of the Members of the Presidency elected in the first election shall be two years; the term of Members subsequently elected shall be four years. Members shall be eligible to succeed themselves once and shall thereafter be ineligible for four years.

2. Procedures

- a) The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.
- b) The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3).
- c) The Presidency shall endeavor to adopt all Presidency Decisions (i.e., those concerning matters arising under Article V(3)(a) - (e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.
- d) A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

3. Powers

The Presidency shall have responsibility for:

- a) Conducting the foreign policy of Bosnia and Herzegovina.
- b) Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.
- c) Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member.

- d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.
- e) Executing decisions of the Parliamentary Assembly.
- f) Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.
- g) Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.
- h) Coordinating as necessary with international and nongovernmental organizations in Bosnia and Herzegovina.
- i) Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

4. Council of Ministers

The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

- a) Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).
- b) No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.
- c) The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.

5. Standing Committee

- a) Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.
- b) The members of the Presidency shall select a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Members of the Presidency shall be members of the Standing Committee.

Article VI: ***Constitutional Court***

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

- a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.
- b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.

- c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.
- d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

- a) A majority of all members of the Court shall constitute a quorum.
- b) The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

- a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

- b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.
- c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

4. Decisions

Decisions of the Constitutional Court shall be final and binding.

Article VII: Central Bank

There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

1. The Central Bank's responsibilities will be determined by the Parliamentary Assembly. For the first six years after the entry into force of this Constitution, however, it may not extend credit by creating money, operating in this respect as a currency board; thereafter, the Parliamentary Assembly may give it that authority.

2. The first Governing Board of the Central Bank shall consist of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members

appointed by the Presidency, two from the Federation (one Bosniac, one Croat, who shall share one vote) and one from the Republika Srpska, all of whom shall serve a six-year term. The Governor, who shall not be a citizen of Bosnia and Herzegovina or any neighbouring state, may cast tie-breaking votes on the Governing Board.

3. Thereafter, the Governing Board of the Central Bank of Bosnia and Herzegovina shall consist of five persons appointed by the Presidency for a term of six years. The Board shall appoint, from among its members, a Governor for a term of six years.

Article VIII:
Finances

1. The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina.

2. If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis.

3. The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly.

Article IX:
General Provisions

1. No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.

2. Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

3. Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

Article X:
Amendment

1. Amendment Procedure. This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

2. Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

Article XI:
Transitional Arrangements

Transitional arrangements concerning public offices, law, and other matters are set forth in Annex II to this Constitution.

Article XII:
Entry into Force

1. This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.

2. Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III(3)(b).

Annex I:
Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide
2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto
3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto
4. 1957 Convention on the Nationality of Married Women
5. 1961 Convention on the Reduction of Statelessness
6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination
7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto
8. 1966 Covenant on Economic, Social and Cultural Rights
9. 1979 Convention on the Elimination of All Forms of Discrimination against Women
10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
12. 1989 Convention on the Rights of the Child
13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
14. 1992 European Charter for Regional or Minority Languages
15. 1994 Framework Convention for the Protection of National Minorities

**Annex II:
Transitional Arrangements**

1. Joint Interim Commission

- a) The Parties hereby establish a Joint Interim Commission with a mandate to discuss practical questions related to the implementation of the Constitution of Bosnia and Herzegovina and of the General Framework Agreement and its Annexes, and to make recommendations and proposals.
- b) The Joint Interim Commission shall be composed of four persons from the Federation, three persons from the Republika Srpska, and one representative of Bosnia and Herzegovina.
- c) Meetings of the Commission shall be chaired by the High Representative or his or designee.

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina .

3. Judicial and Administrative Proceedings

All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.

4. Offices

Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.

5. Treaties

Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.

Declaration On Behalf Of The Republic Of Bosnia And Herzegovina

The Republic of Bosnia and Herzegovina approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Muhamed Šaćirbegović

For the Republic of Bosnia and Herzegovina

Declaration On Behalf Of The Federation Of Bosnia And Herzegovina

The Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens, approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Krešimir Zubak

For the Federation of Bosnia and Herzegovina

Declaration On Behalf Of The Republika Srpska

The Republika Srpska approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Nikola Koljević

For the Republika Srpska

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