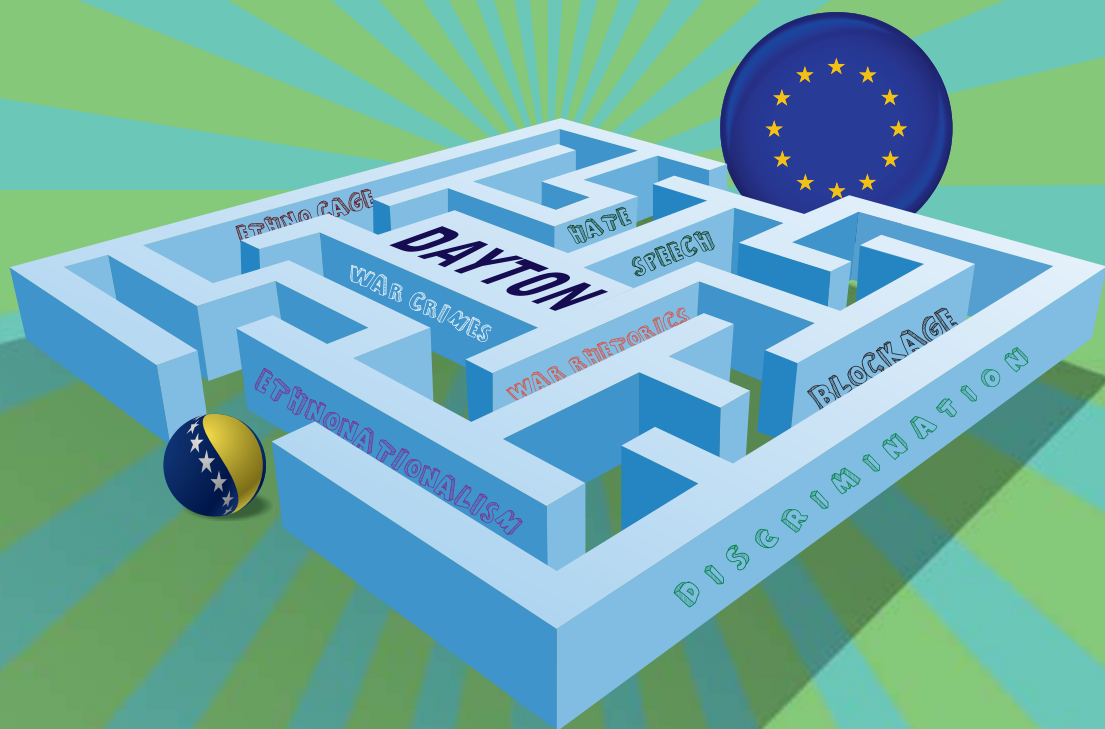


25 YEARS AFTER DAYTON

PATH FOR A DEMOCRATIC AND PROSPEROUS
BOSNIA AND HERZEGOVINA



SARAJEVO, JANUARY 2021

25 YEARS AFTER DAYTON - PATH FOR A DEMOCRATIC AND PROSPEROUS BOSNIA AND HERZEGOVINA

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exit strategy

USHER IN A NEW ERA FOR THE CITIZENS, REMOVE THE ETHNO-CARTELS FROM POWER

Marion Kraske*



The shot that killed Marko Radić outside his apartment building in mid-November 2020 in Mostar was fired with that in mind. After twelve years in prison, the Bosnian Croat was released, having been convicted of offences against humanity for killings and rape in the 'Vojno' concentration camp near Mostar. The crimes took place during the Bosnian war (1992-95), when the Herzegovinian Croats waged a war against everything non-Croatian.

*"Human Rights" by Andres
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For all the invocations of Bosnia's European future, it holds little interest for the three ethnic clans, who predominantly use the political system for their personal enrichment and exploitation of resources. The capture of state institutions by nationalist parties is almost complete, corruption is endemic – the country has thus far been trailing far behind the rest of the region on the path to EU integration in the region.

After Radić's shooting, in mid-November, attendees paying homage sat in rows at the convicted felon's funeral service: women in front, behind them politicians from the nationalist Croat CDU BH. The very party that had just promised a "City with European standards" in the Mostar elections. The very party that, led by Dragan Čović, had over the past years developed into the most efficient obstructor of reforms in Bosnia.

A few weeks earlier, another funeral took place in another place, this one in the Serb-dominated part of the country, the Republic of Srpska (RS), where the convicted war criminal Momčilo Krajišnik was buried having died from coronavirus. Milorad Dodik, the Serb representative in the BH Presidency who made celebrating Serb war criminals his hobby, arranged for an official minute's silence to be held, explaining that after all, Krajišnik was the founder of the Republic of Srpska.

25 years after the Dayton Peace Agreement, Croats and Serbs quite openly celebrated those who had once, during the Bosnian war, sent others to their deaths, who killed and raped. The Peace Accord, signed on 21 November 1995 in Ohio, USA, publicly orchestrated with the international political elite, did make it possible for the armed conflict to end, while the ideologies that were behind it are still very much at work. Not least thanks to high-ranking officeholders.

In order to understand why the war was waged in Bosnia, one must return to the year 1991: when the presidents of two Yugoslavian federal units, Franjo Tuđman from Croatia and Slobodan Milošević from Serbia, met in Karadžević and reached an agreement to partition Bosnia.

The establishment of the Republic of Srpska signalled the beginning of a Serb policy of annihilation of all that was non-Serb, which culminated in the 1995 genocide in Srebrenica. More than 8000 Muslim youth and men were killed, in a protection zone where protection was precisely what the UN troops had failed to provide. The overwhelming violence was carried out under the Serb general Ratko Mladić's command.

Similar inhumane activities were also afoot in Herzegovina: there, the Croats declared the para-state of Herzeg-Bosnia and began to "cleanse" Herzegovina; the Bosniaks and the Serbs did not fit into the image of an ethnically clean

territorial unit. The six ringleaders of this violent undertaking were sentenced by the International Criminal Tribunal for the former Yugoslavia to a total of 111 years in prison.

Meanwhile, rulings handed down by the International Court have had barely any healing effect on developments. On the contrary, both sides have defiantly held in high esteem their supposed heroes and their brutal crimes. In the western, Croat-dominated part of Mostar, the flags of the Herzeg-Bosnia para-state flutter now as they did before. In late November, Dragan Čović duped the UN Security Council during a hearing, placing as his backdrop the para-state flag in whose name crimes against humanity had been committed, among other things.

Croatia and Serbia endangered the peace agreement

It is interesting that barely any attention is paid in Brussels to the fact that it was the youngest EU member, Croatia, that did not abandon its support for the bellicose agendas of the Nineties in neighbouring Bosnia and Herzegovina. The Croatian Prime Minister Andrej Plenković and the newly-elected Croatian President, Zoran Milanović, keep meddling in Bosna and Herzegovina's internal affairs. Instead of processing criminals, Zagreb has aimed to stir up tensions in the neighbouring country.

Meanwhile in Belgrade, Aleksandar Vučić has supported his Serbian “bridgehead” in Banja Luka. It is a malign alliance between neighbours with suspect agendas, used by the Croat and Serb extremists in Bosnia – chiefly Dragan Čović and Milorad Dodik – for their domestic policy of obstruction.

The dream of establishing ethnically clean areas and zones of control in Bosnia, a Greater Serbia and a Greater Croatia – both sides still pursue these ‘90s wartime goals; Croatia embellishes its agenda with “federalisation”, or rather, the “third entity”, while Dodik openly champions the unification of the Republic of Srpska and Serbia.

The former High Representative Christian Schwarz-Schilling, a German, has harshly criticised the way Croatia and Serbia have treated Bosnia as their colony, warning sternly that they have thus imperilled the peace agreement.

Indeed, over the past years, as the protagonists have grown ever more radicalised, the inner disintegration of Bosnia has been in full swing. Both the Croats and the Serbs have exploited the weaknesses of the Constitution adopted as part of the Dayton Agreement, in order to permanently enfeeble Bosnian institutions by means of the rhetoric of hate and policies of obstruction, thus undermining the functionality of the common state.

In this way, the Dayton Agreement will be abused in order to cement the existing ethnic centres; in this context the erstwhile state founder Alija

Izetbegović's Bosniak party, the Democratic Action Party, is in on the act. The state-building process has thus for years remained waylaid.

For all the invocations of Bosnia's European future, it holds little interest for the three ethnic clans, who predominantly use the political system for their personal enrichment and exploitation of resources. The capture of state institutions by nationalist parties is almost complete, corruption is endemic – the country has thus far been trailing far behind the rest of the region on the path to EU integration in the region.

Design approaches towards a solution to the pressing economic and environmental problems are sought in vain – according to a World Bank study, Bosnia and Herzegovina would as things stand need one hundred years to catch up with the rest of Europe in terms of living standards.

a historic peace agreement with collateral damage

Nevertheless, the historic conclusion of the Dayton Accords should be appropriately recognised today, as it did achieve its primary goal, which was to end the horrible crimes against the population after three years of war. As late as it might have been, and after its own failures, especially in the context of the Srebrenica genocide, the international community had finally grasped that it needed to act.

This was a genuine achievement, to bring the warring sides around a single table after long November negotiations to shake hands and finally sign the peace treaty.

However, the peace thus achieved came at a high price: recognising the ethnic cleansing in the Republic of Srpska, which became a separate entity, and the codifying of injustice and inequality on the basis of questionable principles. A three-headed ethnocracy was created, while individual and civil rights were abolished. This is the collateral damage that Bosnia has been struggling with to this day.

The Dayton Agreement is centred around a warped, ethnicised view that accords a special role in the state to the three constitutional peoples – the Bosniaks, the Croats and the Serbs. The overall population, the citizens, the *citoyens* were effectively stripped of their powers; the individual person degraded – existing merely as an instrument of ethnic power cartels.

The European Court of Human Rights has already ascertained in a number of cases that the systematic discrimination created by the Dayton Constitution is incompatible with the European and international legal norms. In the Sejdić/Finci case, a Roma person and a Jewish person complained that they were not allowed to run as candidates for the Presidency. Azra Zornić did not

It is time, 25 years after the war ended, to end the cold war that has continued inside and against Bosnia and Herzegovina. It is also high time to finally involve women and their ideas about a peaceful future. Studies world-wide have shown that women have achieved more sustainable results in peace processes – this formative element has hitherto been entirely absent in Bosnia. A politics that betrays precisely those forces that are the true allies of a peaceful Europe must come to an end. An era of citizens must be ushered in; an era of those civil actors who defend human rights and fundamental freedoms in Bosnia in the face of all resistance and threats. It is ultimately they who need uncompromising support from the entire international community, from Berlin, through Brussels, to Washington.

want to identify in ethnic categories, and could not run simply as a BH citizen. Furthermore, Iljaz Pilav (a Bosniak), Samir Šlaku (an Albanian) and Svetozar Pudarić (a Serb), all three members of ethnic minorities in the regions in which they live, cannot therefore run for a seat in the Presidency.

All these cases confirm that the Dayton Constitution established a wild maze of discrimination and blackmail. The injustice towards individuals who are either not members of one of the dominant ethnies, or do not wish to identify as members of the constitutional peoples, has been gnawing at the system from within.

As a consequence, political debates in the Bosnian day-to-day political life are rarely debates about facts, but are almost always replaced by ethnicised pseudo-disputes. Jobs in the public sector are awarded almost exclusively along the lines of ethnic affiliations rather than competence – thus it turns out that in the highest positions, one can find persons whose sole qualifications are their memberships of one of the nationalist parties or family ties to a leading person in one of the decisive clans. The lack of true expertise among these hangers-on has led to systematic nepotism and bad governance. The situation in the judiciary is especially worrying, where there are also hardly any independent sitting judges, and the politically compliant prevail; the OSCE has noted that there is a “crisis of ethics” in this sensitive sphere.

All in all, the authors of a book on the fundamental principles of the BH Constitution have concluded that the Dayton Agreement, whose Annex 4 constitutes the basis of the Constitution of Bosnia and Herzegovina, “has the character more of a project than of clear leadership”.

It is precisely this missing leadership that nationalist forces have used for decades in order to more firmly secure the established ethnocracies, to retain their grasp on power and preclude any reforms.

regression in the development of democracy

Nationalist officials openly oppose individual rights. In Brussels, the CDU's Zagreb-based sister party purposefully spread the narrative of the supposed political discrimination of Croats in Bosnia; what goes unmentioned though is that the reality looks quite different, that it is in fact the so-called Others (the Jews, the Roma, the citizens) whom the ethnic blocks discriminate against.

And thus the ethnocrats rule with almost no trace of a corrective – a fact for which the international community, chiefly the EU, is certainly not the last to carry a large share of the blame.

In 2006, the UN's High Representative for Bosnia and Herzegovina was effectively deprived of his powers, as a suspect approach labelled ownership was prioritised under EU patronage. While up until that point, important successes had been achieved on the way to a normalisation in internal relations and the denationalisation of politics (common army / numberplates / anthem), from then on, development has evidently gone in reverse; from time to time, reforms have even been reversed.

With support from Moscow and Belgrade, the Republic of Srpska and Milorad Dodik as its representative in the Presidency have openly pushed for the end of Bosnia's statehood and secession from the federation. The SDA regularly responds to such provocations by resorting to warmongering rhetoric. The Croats strive to cement the Bosnian-Herzegovinian CDU's domination over other Croats (those who are not members of the extremist CDU), as was the case with the elected member of the Bosnian-Herzegovinian state presidency, Željko Komšić, whose legitimacy has been disputed at every turn.

Both the chief troublemakers in the Bosnian process of democratisation, Dragan Čović and Milorad Dodik, have used such misguiding discussions and manipulations to lead the international community a merry dance through the Dayton-made labyrinth of national excesses. That the current head of the EU Delegation to Bosnia and Herzegovina, Johann Sattler, has publicly praised the leader of the Bosnian CDU as a champion of the EU integration path against this backdrop is not only inappropriate, but unproductive.

In terms of political democracy, Bosnia is today in any case, and in many aspects, worse off than it was ten years ago, in the deliberately fomented dysfunctionality in which the nationalist elites have comfortably ensconced themselves. But among the citizens of Bosnia and Herzegovina, these developments have engendered a widespread feeling of hopelessness, with tens of thousands packing their bags and leaving the country.

the European Union must take responsibility

With the aforementioned nationalist actors and their policies of obstruction, the integrity of Bosnia and Herzegovina as a country is increasingly at stake. The incumbent High Representative Valentin Inzko also warned of the current dangers in his regular report to the UN Security Council in November 2020.

The international community stands before the ruins of its engagement in Bosnia – hardly any headway has been achieved on reforms over the past decades. Recently, the so-called Mostar Agreement was adopted with the dubious support of the EU and the USA. After twelve years of the SDA's and CDU's politics of obstruction, this agreement did finally pave the way for local elections, while still de facto legitimising the corrosive ethnic principle.

On 21 November, the anniversary of the Dayton Agreement, EU foreign affairs representative Josep Borrell travelled to Sarajevo and declared: the future of Bosnia is in the EU. In fact, today, Bosnia is far closer to Karadordovo than the gates of Brussels, attacks by Serbs and Croats both from inside and out, the power of the corrupt ethnic cartels, the cemented structures of state capture – instead of strengthening the country's powers of resilience, the continued monitoring of the exceptionally important state-building process and focussing on the rule of law, the international community allowed precisely those powers to rule, that have no interest in the functioning of Bosnia and Herzegovina. This is a grave error, fraught with consequences.

If the EU takes its leading diplomat's statement seriously, it will have to regain visibility as the decisive actor. Then, the time will come for Brussels to truly take responsibility and strengthen the principles that play a substantial role in the development of democratic cooperation.

In this context, the EU delegation to Bosnia and Herzegovina needs to finally distance itself from suspicious deals made with nationalists behind closed doors (as was the case in Mostar). "We are not a project, we are a state", raged Amna Popovac, a Mostar activist and politician, referring to the controversial agreements concluded there to the exclusion of citizens and opposition parties.

The Mostar example shows that the international community has for years ignored and marginalised precisely those actors who are real Europeans and who work to democratise Bosnia. To stop leaking credibility in the region, the EU needs to start investing in participatory approaches in a purposeful and sustainable way. One thing is certain: without strategic involvement by democracy-minded agents in political decision-making processes, there will be no democracy in Bosnia.

In order to promote sustainable democratic steps, the EU must immediately proactively end the discrimination matrices of Dayton that have endured for far

too long, and demand that European standards are implemented. The systematic discrimination of individuals must be ended. The verdicts in the Sejdić/Finci case, as well as all the others heard by the European Court of Human Rights, must finally be implemented – no excuses and no more delays.

Likewise, the apartheid system of “Two schools under one roof” must be ended – a system that separates Bosniak children from Croatian children, above all in Herzegovina, on the basis of an inhuman ethnic principle, in order to bring up a new generation of nationalists.

thinking from the end: defending democratic values

In order for BH to reach the European level, the international community might be well advised to think from the end: the stated goal is Bosnia and Herzegovina's membership in the EU – something that accordingly requires focussed work. In order for new emphases to prevail in the face of resistance from political actors, the EU would be well advised against this backdrop to create a task force with the new US administration and define the relevant milestones, together with a strict timeframe for a sustainable reform process. A clear exit strategy is necessary in order to break the vicious circle of undemocratic and anticivilisational practice, glorification of war and dissemination of inhumane narratives. In this context it would seem that a law to criminalise denying war crimes and glorifying offenders and criminal acts as well as their symbols, similar to the Holocaust Denial Act in Germany or the Prohibition Act in Austria, would be of the greatest importance.

Not least, it is necessary to define a regime of sanctions, including concrete measures – such as freezing foreign accounts, travel restrictions and similar – in order to put those spreading hate speech with their attacks on the state and the Constitution firmly in their place.

The ethnic principle has functioned thus far as an instrument of total exertion of power, for instance by blackmailing citizens when voting. The November 2020 local elections have however shown that there are enough citizens who no longer trust the old criminal ethnic cartels. Citizens want European standards and no suspicious compromises with the powerful ethnic clans for the sake of an ostensible “stability” in the region, whose engendering of crime-infiltrated stabilocracies has merely further imperilled the already fragile peace framework.

Germany – invisible as a corrective

In this context, the question especially arises for German foreign policy, how to constructively and sustainably work as a constructive force in the entire region of the West Balkans. In autumn 2020, foreign affairs minister Heiko Maas asked the Bundestag not to leave war criminals unpunished; the Federal Government

has worked on creating a regime to sanction human rights abuses in the EU. However, in that case, it is also necessary to have words with political decision-makers in Zagreb – in 2017, the Croatian Parliament ended its session with a minute's silence for one of the main perpetrators of the Herzeg-Bosnia parastate. This was no isolated incident; the CDU, the ruling party in Croatia, has time and again supported revanchist approaches in order to justify its own belligerent history.

Serbia too has made clear that it will not give up its disruptive meddling in Bosnia and Herzegovina's democratic development and its state sovereignty. These are the consequences of Berlin's lack of a coherent strategy for the Balkans; instead having relied for ages on its good contacts with the good "draught horse", Aleksandar Vučić.

Not least, in view of the growing damage engendered by Russia all over the Balkans region, with a policy centred around support for nationalists and autocrats, Berlin and Brussels should defend the values they often invoke, especially the principle of ethnic diversity.

Whether with a new High Representative, clearly introduced into the discussion by Germany, or the current High Representative Valentin Inzko, who recently heralded a tougher stance, a "change of paradigm" towards the nationalists and destroyers, in order to finally put through reforms after the failed ownership approach, is currently of secondary importance. In any case, it is important to decisively stifle the Greater-Croatian and Greater-Serbian ambitions in order to give long-lasting support to the process of state building and denationalisation in Bosnia.

In its diversity, Bosnia and Herzegovina is no less than a reflection of Europe. In order to defend its diversity, it is essential to transform the Dayton stage into a true stage of EU integration. The policies of Slobodan Milošević, Franjo Tuđman, Radovan Karadžić, Ratko Mladić and the protagonists of Herzeg-Bosnia, and above all their fiery spiritual successors, need to be stopped once and for all, if no new violent conflicts are to be kindled in the region.

It is time, 25 years after the war ended, to end the cold war that has continued inside and against Bosnia and Herzegovina. It is also high time to finally involve women and their ideas about a peaceful future.¹ Studies world-wide have shown that women have achieved more sustainable results in peace processes – this formative element has hitherto been entirely absent in Bosnia.

A politics that betrays precisely those forces that are the true allies of a peaceful Europe must come to an end. An era of citizens must be ushered in; an era of those civil actors who defend human rights and fundamental

¹ <https://gradjankezaustavnepromjene.wordpress.com/>

freedoms in Bosnia in the face of all resistance and threats. It is ultimately they who need uncompromising support from the entire international community, from Berlin, through Brussels, to Washington.² Because they are the guarantors of a direly needed restart, that could still turn Bosnia and Herzegovina into a success story. ■■■

Sarajevo, December 2020

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2 Recently the newly elected US President Joe Biden and his advisers for the Western Balkans region formulated new ideas for a comprehensive process of democratisation in Bosnia and Herzegovina: <https://www.peacefare.net/2020/12/08/my-balkans-recommendations-for-president-biden/>

THE POWER OF THE EFFECTIVE: WHY DAYTON HAS NOTHING TO DO WITH JUSTICE

Christian Schwarz-Schilling

Bosnia and Herzegovina is the greatest loser of the so-called Yugoslavian Wars. 25 years on from Dayton, the power of the effective has determined political functioning and coexistence in every sphere in Bosnia and Herzegovina – which has nothing to do with reconciliation and justice that should have been the takeaway from the war. Indeed, it was just the opposite, as the Dayton Accords have cemented the path for the nationalist and secessionist powers in Bosnia and Herzegovina that have for decades strived for the shattering of the state.

This year is the 25th anniversary of the entry into history of Dayton, Ohio. There, almost four years of devastating war in Bosnia and Herzegovina (BH) were brought to an end on 21st November 1995. The Dayton Accords agreed there was signed in Paris on 14 December 1995 by the three then-presidents: Alija Izetbegović of Bosnia, Franjo Tuđman of Croatia, and Slobodan Milošević of Serbia.



"Srebrenica Genocide Memorial or Srebrenica–Potočari Memorial" by Jelle Visser
CC-BY 2.0

And so 25 years on, in order to understand the current situation in Bosnia and Herzegovina, we need to look at the origins, substance and ramifications of the Dayton Accords.

the origin

In early 1994, for various reasons the American government under Bill Clinton became more engaged in the BH war, managing to persuade the Bosniaks (Muslims) and the Bosnian Croats to establish the Federation of Bosnia and Herzegovina. The federation model was to serve the “contact group” (the US, Great Britain, France, Russia and Germany) that was subsequently brought to life as the cornerstone of all the peace plans negotiated afterwards. The then-contact group’s plan was based on the proposal by Russia, Great Britain and France to give territorial recognition to the expulsions, that is, “ethnic cleansing”, committed by the Serbs, relinquishing 49% of the land to their control even though according to the 1991 census, Serbs made up only 31% of the population of BH. Later on, it was even accepted that different ethnic groups might be resettled, merely so that the two “homogeneous” groups – Serbs on one side, and the Federation with the Bosniaks and the Croats on the other – could be better separated.

The USA, which had long opposed recognising wartime conquests, committed a U-turn in early 1995, assenting to such conquests, that is, the status of “ethnic cleansing” and with it the territorial partitioning that favoured the Serbs. Eventually, Germany also joined this paradigm change. The partitioning of the territory that ensued after the Dayton Agreement ultimately rewarded the aggressor, and punished the victim of the aggression.

Is it possible to talk about this as a fairly negotiated peace agreement?

Bosnia and Herzegovina today is unstable, the rule of law is next to non-existent, there are high levels of corruption, poverty and social insecurity are rising constantly, while the process of depopulation, with young qualified people leaving BH, has been unstoppable for years. But the Dayton Agreement and the BH Constitution have remained unchanged, undermining democratic rights, depriving the country of its perspective and pushing it further away from the EU.

the substance

Under strong pressure from the American intermediaries led by Richard Holbrooke, the war in Bosnia and Herzegovina was ended in Dayton, on 21 November 1995. Bosnia and Herzegovina was preserved as a state, but split up into two entities: the Federation of BH, with the Croatian and Muslim population, and the Republic of Srpska, with a dominantly Serb population. In addition, there is Brčko, a special administrative unit. The international community designated a High Representative to oversee the implementation of the civilian aspect of the Dayton Accords. The three ethnic groups were given veto rights to protect their “vital national interests”, in order to avoid tensions and possible conflicts. This however also meant that ever since, Members of the Presidency and the House of Peoples of BH have blocked every decision that any of the “constituent peoples” saw as threatening their own vital interests.

After nearly four years of war, with more than 100,000 victims, more than two million refugees, mass rapes, prisoner of war camps, and a genocide in Srebrenica, the Bosnian Serbs were awarded half of Bosnia and Herzegovina. Facing up to the crimes committed could and still today can only be arduous. The Dayton Accords favoured the protagonists of war crimes.

Despite everything, they all breathed a sigh of relief when the Accords were signed.

After almost four years, the international community picked up the pieces of its own weaknesses from the BH war – unfortunately, for many this came too late.

And so Bosnians had to reorient themselves. The Dayton Agreement gave refugees the right to return to their homes, meaning, to the newly-created, ethnically divided entities. In practice however, this return to the old country looked quite different. Many gave up after years-long fruitless efforts, sold up and moved out. The state continued to divide and “cleanse” itself.

Essentially, the Dayton Accords took away all the minorities’ democratic rights; they practically no longer exist in the BH Constitution, only the three ethnic groups (Bosniak Muslims, Croats and Serbs) envisaged as the constituent peoples. The Dayton Agreement erased the fundamental rights of many Bosnian and Herzegovinians, degrading them into a legal stump.

the consequences

One can only reach the conclusion that the Dayton Agreement rendered Bosnia and Herzegovina ungovernable. (*See the January 2020 comment in the DW magazine*)¹

I have been engaged on the Dayton Agreement and the part of it that makes up the Constitution of Bosnia and Herzegovina for years, having unsuccessfully tried to change it in 2006, during my time as High Representative.

All the negotiators in Dayton at the time knew that the actual peace treaty and constitution were too complicated, incomplete and replete with stumbling blocks, but, as Richard Holbrooke told me back then in Dayton, hoped that with time, the High Representatives would gradually modify the agreement as need arose.

No-one managed to change the Constitution or the Dayton Agreement over the past 25 years – neither the international community, nor the Bosnians themselves. In the view of Wolfgang Ischinger, the head of the German delegation in Dayton at the time, there ought to have been an obligatory revision clause built into the agreement, which would have mandated that it be amended in around three years.

Bosnia and Herzegovina today is unstable, the rule of law is next to non-existent, there are high levels of corruption, poverty and social insecurity are rising constantly, while the process of depopulation, with young qualified people leaving BH, has been unstoppable for years. But the Dayton Agreement and the BH Constitution have remained unchanged, undermining democratic rights, depriving the country of its perspective and pushing it further away from the EU.

The international community continues to play no constructive role; it is divided, uninterested, and keeps committing the same mistakes it did in the '90s. Has the horrible war already been forgotten? The international community tolerates the aggressive and nationalist rhetoric of many BH politicians who have for years glorified convicted war criminals. The High Representative could be asked to step in and use their authority, but this isn't done.

We need to appeal to the international community's responsibility right now, to attend to Bosnia and Herzegovina more seriously in order to find a solution that would provide a way out of the status quo of the Dayton Agreement. Or are we to let BH collapse?

Russia, a strong player, has been meddling in the region in its own interests for a long time, particularly using the Serbs as its extended arm in order to foster unrest in the political landscape and to confront the EU and the USA. The most

¹ <https://www.dw.com/de/gastkommentar-dayton-hat-bosnien-herzegovina-unregierbar-gemacht/a-52190243>

recent example of nationalist unrest that followed in the wake of the elections in Montenegro should serve as a warning sign.

Bosnia and Herzegovina is the greatest loser of the so-called Yugoslavian Wars. 25 years on from Dayton, the power of the effective has determined political functioning and coexistence in every sphere in Bosnia and Herzegovina – which has nothing to do with reconciliation and justice that should have been the takeaway from the war. Indeed, it was just the opposite, as the Dayton Accords have cemented the path for the nationalist and secessionist powers in Bosnia and Herzegovina that have for decades strived for the shattering of the state.

25 years ago, after the signing of the Dayton Accords, then-president of Bosnia and Herzegovina Alija Izetbegović said: “I will say this to my people: ‘This may not be a just peace, but it is more just than the continuance of the war. In the situation, and the world, we find ourselves in, a better peace could not have been achieved. God is our witness that we did all that was in our power to reduce the injustice to our land and for our people.’”²

But we all know that without justice, there cannot be lasting peace.

It is time for Bosnia and Herzegovina to experience justice. ■■

2 <https://secretsof.world/izjava-predsjednika-alije-izetbegovica-nakon-ceremonije-potpisivanja-dejtonskog-mirovnog-sporazuma-21-11-1995-godine/>

BOSNIA AND HERZEGOVINA: HOW TO EXIT FROM THE DAYTON MAZE?

Jens Woelk

“We can choose a path of becoming angrier, less hopeful, more divided, a path of shadow and suspicion, or we can choose a different path and together take this chance to heal, to reform, to unite.” This is how Joe Biden, President elect of the US, addressed the challenge of a politically deeply divided society some months ago.¹ Does BiH have a “chance to heal, to reform, to unite”, too? And when does its chance come?

lost in the maze of eternal transition? introduction

25 years after the end of the war and the Dayton Peace Agreement (DPA), Bosnia and Herzegovina (BiH) seems stuck in a kind of cold war maze. A means for ending the war and starting a transition, the cease-fire logic based on strong guarantees for the groups in order to stabilize the situation turned out to become an obstacle on the way towards European integration: stability and status quo-thinking as the dominant features in politics and institutions (‘stabilitocracy’)², blocking dynamic evolution and adaptation.

Already 10 years after the war, in 2005, after a profound analysis, the Council of Europe’s Venice Commission criticized the constitutional situation with harsh words listing the problems one by one.³ A US sponsored attempt to amend the Constitution in 2006 (known as the “April Package”) failed by only two votes in the Parliamentary Assembly. Attempts to broker agreements between party leaders behind closed doors followed in 2008 and 2009 and failed. The

1 Joe Biden, when accepting the nomination of the Democratic Party in August 2020 (politi.co/21et8U8 via @politico).

2 This is not unique in the Balkans.

3 European Commission for Democracy through Law (Venice Commission), “Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative”, Venice (11 March 2005).



"Longleat Maze" by Kevin Botto, CC-BY-ND 2.0

topic 'constitutional reform' was abandoned by the International Community, which in parallel strongly reduced its presence and active engagement in the country. BiH's transition entered into a new phase, without constitutional reform.

From 'push' to 'pull', from Dayton to Brussels: the international semi-protectorate and the exercise of OHR's "Bonn powers" were to be substituted by "local ownership" combined with the attractiveness of future accession to the EU as the pull factor.⁴ After post-war stabilization, this concept appeared as the necessary and logical next step in the post-war transition.

4 The Bonn Powers were first recognized to be within the High Representative's authority under the Dayton Agreement (annex 10) by the Peace Implementation Council (PIC) at its Bonn Conference in December 1997. They comprise the enactment of laws and the removal of obstructionist elected officials. See the famous critique of the Bonn powers in Knaus, Gerald, and Felix Martin. "Lessons from Bosnia and Herzegovina: Travails of the European Raj." *Journal of Democracy* 14, no. 3 (2003): 60–74, and Venice Commission (2005), above.

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

But the preconditions for “ownership” based upon democratic legitimacy and responsibility were completely lacking: There was neither *détente* in the cold war-like relations within the country, nor (any sign of) reconciliation. Without an overarching consensus on the future of the country, however, no *perestrojka* could be expected.

On top of this, in December 2009, the European Court of Human Rights in Strasbourg certified that the country’s Constitution violated the political rights of those citizens who do not belong to one of the three constituent peoples;⁵ other judgements followed,⁶ none of them implemented until today. Bosnia and Herzegovina anyway applied for membership in the EU. The European Commission’s Opinion on the country’s application for membership,⁷ a document with concrete indications and clear priorities for the path towards EU accession, published in May 2019, explicitly refers to issues requiring constitutional change. Although it did not have much impact, considering the Commission’s own assessment,⁸ it made crystal-clear that EU accession will not happen without amendments to the Dayton Constitution. Thus, after a decade of silence, constitutional reform is an issue again.

But how can the country exit the constitutional maze and reform its constitutional structures for overcoming the current stalemate? Can the system of ethno-federalism, which has developed into ethno-authoritarianism be overcome? It has been established and consolidated over the last 15 years by nationalist elites using the Dayton framework and profiting from the disengagement of the IC. The apparent stability created serves above all the same elites and their system of partition and clientelism: “stabilitocracy”.⁹ But it does neither guarantee the rights of all citizens nor a sustainable future for the country. Without any perspective for change, transition seems to have become the new “normal”. In which the country is stuck, guaranteeing the status quo.

The current stalemate raises three fundamental questions:

- 1 Can Dayton be changed?
- 2 What needs to be changed?
- 3 How can it be changed?

5 European Court of Human Rights judgment Sejdic-Finci, 22 December 2009 (ECtHR, Grand Chamber, application nos. 27996/06 and 34836/06).

6 European Court of Human Rights judgments Zornić v. Bosnia and Herzegovina, 15 July 2014 (application no. 3681/06), and Pilav v. Bosnia and Herzegovina, 9 June 2016 (application no. 41939/07).

7 EC Commission, Commission Opinion on Bosnia and Herzegovina’s application for membership of the European Union, Brussels, 29 May 2019 COM(2019) 261 final (<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion.pdf>).

8 EC Commission, Bosnia and Herzegovina 2020, 6 October 2020, SWD(2020) 350 final (https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf).

9 See for this concept Florian Bieber, What is stabilitocracy?, BiEPAG Blog, 5 May 2017 (<https://biepag.eu/what-is-a-stabilitocracy/>) and Heinrich Boell Stiftung (ed.), ‘Stabilitocracy’ and/or radicalism, Perspectives, Issue no. 7, November 2019 (<https://www.boell.de/sites/default/files/2019-12/perspectives%20-%2011-2019%20-%20web%281%29.pdf>).

is it possible to change the Dayton constitution?

The Dayton Constitution does not have a “sunset-clause”, i.e. an expiry date, which would highlight its transitional function. But its transitional character was always implicit, as it was clear that international engagement (even labelled as “fourth constituent part”)¹⁰ was of temporary nature only and would be reduced after some time. This notion was at the basis of the ownership debate. But the handover from international to local responsibility did not work and occurred without constitutional change.

Thus, the Dayton Constitution is now in force for 25 years, already for one generation. It is true that it has been negotiated in Dayton, in English language, and imposed as an essential part of the peace compromise, rather than being elaborated in Bosnia and Herzegovina and adopted by the people. But its continuous application over 25 years may itself be considered a source of legitimacy.¹¹ And even bad constitutions (can) work, if there is a political will to make them work. Conversely, not even good constitutions can work against that will.

But Dayton is not set in stone. It has been amended already, for including the arbitration regarding the Brcko District.¹² Surprisingly this has remained the only amendment so far. The Constitution can actually be amended quite easily, from a comparative point of view: the amendment-procedure only requires a decision by the Parliamentary Assembly, including a two-thirds-majority in the House of Representatives (article X).¹³ This simple procedure, in theory facilitating change, may be considered another indicator for the transitional character of the Constitution, conceived as a basis for a consolidation phase, but not being supposed to last long in its original form. But its adaptation depends on the political will to agree upon changes regarding the common denominator of State and society. And most of the dominant political actors do not want change or advocate changes that would entrench the current ethno-authoritarian system further.¹⁴

10 Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention*, Oxford University Press, Oxford, 2002, p. 267; this efficiently describes the IC’s essential role, in addition to the three constituent peoples.

11 The constituent power of the people has been substituted by external imposition in other cases, too, e.g. the denial of a “Deutsch-Österreich” after WW I, the creation of two German States after WW II and the influence exercised by the Western Allies on Western Germany in the process of elaborating the Basic Law. But in these cases, legitimacy has been gradually created later on.

12 The Brcko-District has been recognized by Amendment I to the Constitution of BiH (31 March 2009).

13 This is very different from the complex procedure for amending the US Constitution and very similar to the German Basic Law. There are no further requirements like referenda (e.g. Italy), ratification by sub-national Parliaments (e.g. US) or dissolution of Parliament in order to elect a new one which needs to confirm the constitutional reform adopted by the previous one (Serbia).

14 Those, in particular the Bosnian Croat party HDZ, who call for a third Croat-majority Entity which would be a further step towards complete ethno-federal division of the country.

In reality, constitutional change has already occurred: by interpretation through the Constitutional Court, in particular with landmark judgments on the character of the constitutional system and some fundamental elements.¹⁵ Indeed, no legal document can be applied literally, interpretation is always necessary. A constitution comprises many rights and principles which may contrast with each other and thus have to be interpreted, balanced and accommodated in the individual case. Thus, for the 'Living tree'-doctrine¹⁶ a constitution is an organic system which like a growing tree may change in limbs and leaves but always remains the same tree based on its trunk of core values and principles.

Clarification through interpretation has been necessary, as the Dayton Peace Agreement is a – deliberately – ambiguous, diplomatic text. It actually allowed contradictory understandings of the territorial organization 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, in particular the annex on minority returns, requiring a dynamic approach.¹⁷ The same is true for the rights of individuals and groups (“constituent peoples”), both guaranteed. But 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 European Court of Human Rights have tried to untie these knots the legal way. But their judgments have not been implemented,¹⁸ as they would require legislative or even constitutional change. Such change is possible, as seen above, but requires political will and agreement; but the main political actors lack compatible views of the State and its organization.¹⁹ The context is a political culture which has neither developed trust nor valued compromise. Instead it is characterized by continuous election campaign rhetoric with ethno-nationalistic and semi-authoritarian leaders repeating empty promises or expressing threats rather than dealing with and

15 In particular the 'constituent peoples'-case (U-5/98-III, 2000): For the Constitutional Court, the Dayton Peace Agreement had established a multinational system at all levels of government, with institutional equality of the three constituent peoples, which led to the incompatibility of those provisions in the Entity Constitutions with the Dayton Constitution, which had privileged one (RS) or two (FBiH) of them, respectively. The Entity Constitutions have been changed by the High Representative in 2002 (based upon a previous political agreement).

16 See Canadian Supreme Court, Reference re Same Sex Marriage, 2004 SCC 79 (CanLII) and the brief explanation of the Centre for Constitutional Studies (<https://ualawccsprod.srv.ualberta.ca/2019/07/living-tree-doctrine/>).

17 Walsh, D. 2019. 'Guaranteeing Federalism in Post-Conflict Societies'. 50 Shades of Federalism, p.3, available at (<http://50shadesoffederalism.com/federalism-conflict/guaranteeing-federalism-in-post-conflict-societies/>). This was also the main line of argument in the 'constituent peoples'-case decision, see above.

18 Reference is in particular to the Sejdic and Finci case, and the following cases Zornic and Pilav (references above), but also many domestic judgments are not implemented, in particular of the FBiH Constitutional Court.

19 A concise re-construction of the different layers and interests of the main actors in BiH can be found, among others, in ICG, Bosnia's Future, Europe Report no. 232, Brussels, 12 July 2014, p. 5-26.

Multinational diversity needs to be reflected in a multinational State, in addition to the civic principle. But there is no blueprint ready. For a sustainable multinational Bosnia and Herzegovina, it is important to turn around the current logic of the Dayton system based upon the ethnic principle. Individual rights, functioning institutions, efficient services and solidarity are the glue for a sustainable State. This means finding a setting which balances citizens' rights and group interests and uses decentralization and federalism as means for creating more democratic participation, not less, and accountability in order to create a positive dynamic for all citizens and groups.

solving concrete problems. The institutional context favours such behaviour, in particular through permanent competition of political parties due to elections every two years and with numerous veto players and positions. The transformation of the guarantee of representation of all groups in the institutions is the consequence: particular interests instead of cooperation for the common good, division, control and patronage dominate, 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 often the same people lament the imposed character of the Constitution but at the same time defend it against any reform requests pointing at the peculiar character of BiH and its sovereignty as a State. But any constitutional reform would itself be an expression of sovereignty and of responsibility.

talking substance: what needs to be changed?

There is no doubt on what needs to be changed. A detailed analysis and clear indications have been presented by the Venice Commission already in 2005, i.e. 15 years ago! The main critical points identified are the confusing overlap of territorial structures and ethnicity as well as the composition of the State Presidency and the House of Peoples, the weakness of the structures at State level, and the lack of both a clear definition and a limitation of the “vital interest”-veto.²⁰ The ECtHR judgments on Sejdic-Finci and other cases followed, the last one being the Mostar case (October 2019). Some of the 14 ‘key priorities’ in the EC Commission’s Opinion (May 2019) also require constitutional change.

²⁰ The proposed amendments in the April Package (2006) included enhanced State-level competencies, improved and simplified decision-making procedures and representation of minorities in the State Parliament. See R. Bruce Hitchner, From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina, The Fletcher Forum of World Affairs, Vol. 30.1, 2006, Joseph Marko, Constitutional Reform in Bosnia and Herzegovina 2005-06, in European Yearbook of Minority Issues (EYMI), Vol 5, 2006/07 (Brill).

Any constitutional reform would therefore above all need to address and disentangle the confusing combination between the ethnic principle in power sharing and the elements of ethnic federalism. This is even true for a minimal implementation of the Sejdic-Finci case law. Nothing less than the fundamentals of Bosnia and Herzegovina's multinational system need to be identified. All options for implementing the judgments will have to be based on a differentiation of territorial and ethnic representation. A distinction (and separation) is needed between the territorial interests expressed through territorial units and those for the guarantee of group rights and collective identities. While the first refer to the whole population and rights of citizens, group interests as expression of 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 RS, Croats in some parts of the Federation and Bosniacs in others). The respective ambiguities in the DPA are reinforced in practice 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 Bosnia and Herzegovina historically (not only due to the war, but from the Ottoman Empire's millet system to multinational Yugoslavia) and is important also today. But the current dominance of ethnic and collective representation needs to be balanced with the guarantee of individual rights of citizens. This is the obligation resulting from the Sejdic-Finci case with regard to "Others", but a correction is also necessary for those members of constituent peoples which are excluded or limited in their rights on grounds of residence (Zornic 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". The provisions of article II are expressly protected against any change of the Constitution (article X.2). This is a further proof of their quality as supreme law of the land: as they incorporate general, international values into the constitutional system, the guarantees of individual rights are beyond the reach of the constitutional legislator. While certain restrictions of fundamental rights are possible in general, and in particular after a conflict, they are subject to a proportionality test which shall guarantee that only least restrictive measures are applied and only as long as necessary. This is exactly the line of the ECtHR's argument in the Sejdic-Finci

decision: a system that was justified to end a war may not be justified more than a decade after; also, because there are power sharing systems with lesser impact on individual human rights or freedoms.²¹ Nowadays, 25 years after the end of the conflict, the logic needs to be changed putting fundamental rights of all citizens first, asking which specific arrangements are needed to guarantee the groups. In a multinational system, the civic principle needs corrections in favour of the safeguard of the specific characteristics of groups. But individual rights are the rule and the safeguard of group characteristics the exception which needs to be justified specifically. Here adjustment is needed.

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 sub-national level according to historical, economic and geographic criteria in order to favour decentralized 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. 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 realistic or feasible. A reform of the Federation may offer considerable chances for improvement, by reducing the number of Cantons, at least, and transforming them into an efficient intermediate level of territorial governance with economic and planning functions. Although discussed extensively in the past, such proposals have been regularly rejected.²² In any case, cooperation between territorial bodies at all levels of government is key for more efficient territorial governance and needs to be strengthened; it also offers potential for the so-called "Croat question".²³

Thus, the current relations between territorial government, constituent peoples and individual citizens need to be corrected. Territorial and civic elements need to be strengthened and group rights to be linked to areas of

21 As the 2002 amendments of the Entity Constitutions demonstrate, which ended the exclusion of "Others". Although these amendments were, in the end, imposed by the High Representative, they were based upon an agreement by the dominant political actors.

22 For instance, in a proposal by the European Stability Initiative (ESI). 2004. *Making Federalism Work – A Radical Proposal for Practical Reform*, dated 8 January 2004. Available at [http://www.esiweb.org/index.php?lang=en&id=156&document_ID=48].

23 A Bosnian Croat-dominated "Third Entity" would not resolve the representation of Bosnian Croats, as a considerable number of Bosnian Croats live in Central Bosnia and would therefore remain outside such an entity. Rather would ethno-federal structures be further entrenched. Alternative ways through cooperation are explored in Soeren Keil and Jens Woelk, 'The Territorial Dimension of the Croat Question in Bosnia and Herzegovina' in: Woelkner, Sabine and Ademovic, Nedim (Eds.), *The Constitutional, Legal and Factual Position of the Croat Constituent People*, Konrad Adenauer Foundation BiH and European Academy Bosnia: Sarajevo, 2014, 27-46.

specific collective interests. Some adjustments to the current federal setting are also necessary, if federalism in Bosnia and Herzegovina shall effectively work like a system and guarantee all three purposes common to federal systems: the integrative function (“self rule and shared rule”),²⁴ the “vertical” separation and limitation of power as well as more participation for citizens. The basis of any federal compact will be a multinational constitutional order in which diversity is the rule, but not to the detriment of individual rights and freedoms.²⁵

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 and interaction. Throughout its history, Bosnia and Herzegovina has always been a recognizable territorial unit, but also part of wider systems. Constitutional provisions on the (possible) transfer of sovereignty rights to international and European organizations are common in most States. The adoption of such an integration clause would confirm the readiness and willingness of Bosnia’s institutional actors and citizens to give the accession process (and later EU membership) a secure constitutional basis. It should also contain technical issues, such as 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.

Thus, the substance is clear and the April Package (2006), on which broad political agreement had been achieved at the time, may still provide a useful starting point for debate. It even contained an integration clause,²⁶ already.

how to get there and by which means? citizen involvement and a staged process

Constitutional reform has to take place in the institutions and through the procedures for constitutional amendment. However, any open process for change needs to include civil society in order to guarantee information and participation of citizens thus providing the basis for sustainability. There are many ways of involving civil society and citizens: an open process rather than negotiations between party leaders behind closed doors promises further support and substantial contributions to the objective of finding a common denominator. Sustainable reforms need time, but a beginning has to be made in order to end the phase of transition.

²⁴ Daniel J. Elazar, *Exploring Federalism*, University of Alabama Press, Tuscaloosa, 1987, p. 5.

²⁵ Joseph Marko, *Autonomie und Integration*. Rechtsinstitute des Nationalitätenrechts, Böhlau, Wien 1995. Regarding the situation in BiH, the ICG, *Bosnia’s Future*, 2014, concluded: “A new design is needed: a normal federation, territorially defined, without a special role for constituent peoples, but responsive to the interests of its three communities and the rights of all citizens.”

²⁶ Art. III 6 c of the “April Package” proposal.

A staged, differentiated process may help to build up momentum for constitutional reform: its elements should be discussed on different levels, with different actors and in different fora. Deliberative processes and participatory democracy for preparing constitutional amendments are currently practised in more and more countries.²⁷ 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 useful 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 on the issues at stake which are different from those of the political actors represented in the institutions.

The European Union and the Council of Europe (and other actors of the International Community) 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, currently the EU imposes tasks on BiH that the country cannot fulfill. Fundamental for any reform is coordination with and support by the US; there may be a window of opportunity in 2021, if the new US administration is willing to engage in constitutional reform.

out of the maze. constitutional change is necessary

On 25 October 2020 in Chile a national plebiscite was held on the question whether to draft a new Constitution (substituting the one from the Pinochet dictatorship) and how to do so. 25 years after Dayton, Bosnians need to rebuild their political structure from the bottom up, too. There may be no consensus on where or how to start, but the country needs to correct its political system based on constituent peoples and their rights. Of course, the ideal can neither be the “melting pot” (increasingly questioned as a model even in the USA), nor can it be France's liberal-agnostic model where only abstract ‘citizens’ are legally recognized. Multinational diversity needs to be reflected in a multinational State, in addition to the civic principle. But there is no blueprint ready. Belgium does not work as a model as its basic assumption of homogenous, mono-linguistic populations in the sub-national territories does not fit (even in

²⁷ Recent important examples are in particular Iceland, Ireland and Chile. As a common feature, a broad participation phase with assemblies of randomly selected citizens assisted by experts has prepared the way for the formal amendment process which was based upon the indications and guidelines elaborated by citizens in a more informal, but transparent context. See, among others, Cristina Fraenkel-Haeberle / Sabine Kropp / Francesco Palermo / Karl-Peter Sommermann, *Citizen Participation in Multi-level Democracies*, Brill, Leiden – Boston 2015, and Paulus Blokker, *Constitutional Reform in Europe and Recourse to the People*, in: *Participatory Constitutional Change. The People as Amenders of the Constitution*, Routledge, London - New York, 2016, pp. 31-51.

Belgium there are important exceptions from that principle: bilingual Brussels, the municipalities with linguistic minorities, the German speaking community, ...). For a sustainable multinational Bosnia and Herzegovina, it is important to turn around the current logic of the Dayton system based upon the ethnic principle. Individual rights, functioning institutions, efficient services and solidarity are the glue for a sustainable State. This means finding a setting which balances citizens' rights and group interests and uses decentralization and federalism as means for creating more democratic participation, not less, and accountability in order to create a positive dynamic for all citizens and groups.

However, the whole region is involved. By contrast with Belgium, Switzerland, South Tyrol and other examples, Bosnia's neighbours still actively interfere with its internal affairs, most often for their own interests. Good neighbours always make an important difference. If Bosnia and Herzegovina shall have a chance of finding the right balances between territory, ethnicity, group interests and individual rights, the influence of its neighbours needs to be limited and instead used constructively for supporting the process. This is what happened in the case of Austria and Italy regarding South Tyrol or of Ireland and the UK with regard to Northern Ireland; in both cases cross-border relations have been an important element, which has been innovatively and constructively used for resolving the respective conflict. The European Union and the US, both involved directly in the latter case, should keep this in mind and act accordingly, by offering attractive incentives.

In this way, constitutional reform could actually mark the end of transition and the transformation from a system imposed upon Bosnia by the IC and its neighbours in Dayton to a sustainable system. Thus, the choice is between the guarantee of further consolidation of the status quo (with a great risk of deterioration of the apparent stability) and the attempt of reforming the system. In the end, it is the choice expressed by Joe Biden: "more divided..., or to reform and to unite". ■■■

UNTIL MY RULING IS ENFORCED, CERBERUS – THE THREE-HEADED DOG OF GREEK MYTH – WILL OCCUPY THE BH PRESIDENCY

Sladjan Tomić, interview with Azra Zornić*



"Hercules and Cerberus LACMA", Wikimedia Commons

* This text has been written in cooperation with the Citizens for Constitutional Change and the Helsinki Citizens' Assembly Banja Luka. Originally, it was published in the *Buka* magazine and is available at <https://www.6yka.com/novosti/azra-zornic-dok-se-ne-provede-moja-presuda-u-predsjednistvu-bih-sjedice-kerber-troglavi-pas-iz-grckog-mita>

Azra Zornić, BH citizen and Sarajevan, does not identify as Croat, Serb or Bosniak. For this reason, she was prevented from standing as a candidate for the House of Peoples and the BH Presidency

BH electoral law does not recognise the identity of a BH citizen, so Azra Zornić turned to the European Court of Human Rights. On 15 July 2014, the Court ruled against Bosnia and Herzegovina, affirming that the Zornić case involved a violation of Article 14 of the Convention (prohibiting discrimination), in conjunction with Article 3 of Protocol No. 1 (the right to free elections) of the European Convention on Human Rights.

In its assessment, the Court established, among other things, that “the present case is identical to the earlier case of Sejdić and Finci, as Ms Zornić has also been prevented from standing for election to the House of Peoples on account of her ethnic origin, and concluded that the continued inability of petitioners to run in elections has no objective and reasonable justification, which makes the relevant constitutional provisions discriminatory,” according to the www.fcjp.ba/ website.

In an interview for the *Buka* Magazine, Azra Zornić talks about her motives to submit her petition, her frustration with systematic discrimination, and her vision of a Bosnia and Herzegovina with a single president and equal rights for all its citizens.

BUKA: You are one of several citizens of BH who sued their country to the Court in Strasbourg for being denied the right to stand in elections. A couple of days ago, BH enforced the Strasbourg Court’s judgment in the Baralija v. BH case; did you believe that this could happen, as many rulings are waiting to be carried out?

Zornić: The Dayton Peace Agreement was drafted and signed solely to stop the bloodshed, and ought to have been temporary, and by no means a document that would cement the divisions and effects of the war.

Even such a grotesque, imposed Constitution did not recognise the category of ‘constituent peoples’. This category was an invention of the Constitutional Court of Bosnia and Herzegovina, which included it into the grotesque Constitution, thus in fact cementing ethnic cleansing and bloodshed in BH. At the same time, it allowed ethnonationalist parties to rule the region unchallenged, as long as the Constitution contains this invented term, constituent peoples.

I'm not sure whether BH fully implemented the ruling in the Baralija case. True, ethnonationalist parties made a political deal to finally hold the elections in Mostar, but, again, in a way that will ensure that Mostar is divided into the Croat, the Bosniak, and now perhaps even the Serb part. On the other hand, everything has been arranged so as to preclude any possibility that opposition parties might gain power in these elections. Indeed, the example of Mostar gives the most plausible illustration of the state of affairs in Bosnia and Herzegovina. In this situation, the CDU BH is the most radical party, which, aided and abetted by the CDU from neighbouring Croatia, constantly seeks not only to introduce a third entity, but to ensure that only the CDU's Croats have both active and passive voting rights. Parties from the RS entity do the same; with the impermissible support of Serbia, and on no legal grounds, they deny all the Serbs living in the Federation of BH entity both their active and passive rights to vote in any way, or be elected to bodies and positions that the political agreement has apportioned to Serbs. On the other hand, with the exception of the Sarajevo canton, the most populous in BH, which has remained multi-ethnic, in other cantons, and especially within the RS entity, ethnonationalist divisions hold sway, constantly being reinforced by direct support from Serbia and Croatia. This is direct meddling by foreign states in the internal political and legal system of BH. Unfortunately, in this unhappy reality of ours, the international community, like BH, is divided into those who proclaim their support for the multi-ethnic, civic Bosnia and Herzegovina, while doing nothing to contribute to democratisation and the rule of law; and those states that publicly and openly support the ethnonationalist divisions in BH; the third category being those states that have no interest at all in the situation in BH, which simply passively watch the Balkan Sodom and Gomorrah.

With the exception of the Sarajevo canton, which remained multi-ethnic, and where the largest number of citizens of BH live, in other cantons, and especially within the RS entity, ethnonationalist divisions hold sway, constantly being reinforced by direct support from Serbia and Croatia. The international community, like BH, is divided into those who proclaim their support for the multi-ethnic, civic Bosnia and Herzegovina, while doing nothing to contribute to democratisation and the rule of law; and those states that publicly and openly support the ethno-nationalist divisions in BH; the third category being those states that have no interest at all in the situation in BH, which simply passively watch the Balkan Sodom and Gomorrah.

BUKA: It is disheartening that the majority of citizens acquiesce to voting as part of an ethnic group. What has inspired you, why are you doing all this?

My passive rights as a citizen of BH were not the reason, but the motive for me to petition the Court of Human Rights in Strasbourg. I have no personal political ambitions, in terms of running or holding any kind of office at any level in Bosnia and Herzegovina. My sole ambition, that is, motive that has driven me to continue my legal fight, is a multi-ethnic, civic state with a functioning legal system, a single president elected in democratic elections throughout the BH territory, and two levels of government – the state level and the municipal level. Only a legally and economically stable BH can survive and offer its citizens a good future, free of fear of our neighbours' great-state ambitions to partition, that is annex parts of BH.

BUKA: How do you feel as a person who has been denied a fundamental right, the right to stand in elections? Do you sometimes feel humiliated because the state, that is, the system discriminates against you?

Like all BH citizens, I feel discriminated and disenfranchised in all aspects of my life, even though I was born in this city (Sarajevo) and have lived in it all my life, like my father and my grandfather before me. Some other people from certain other cities have moved into Sarajevo, got their hands on the levers of government, and have been doing everything to keep things that way in order to further their personal interests, at the detriment of all the citizens of BH.

BUKA: According to the ruling, your case is identical to the Sejdić and Finci case. Does it give you hope that one of the conditions for BH to gain candidacy is that it enforce the Sejdić and Finci judgment?

The Sejdić and Finci case is not identical to my case, as the verdict, that is the Sejdić and Finci case pertains to the rights of national minorities. Citizens of BH are not a national minority. Both legally and essentially, the question of active and passive voting rights, as well as any other rights of the citizens of BH, can be settled by changing a single sentence in the BH Constitution. It is the sentence stating that BH is the country of all its citizens, and the words that should be erased are, "its constituent peoples – the Serbs, Croats, Bosniaks and others".

BUKA: Can you even imagine someone who is not Serb, Bosniak or Croat sitting in the House of Peoples?

Until my ruling is enforced in its entirety, Cerberus – the three-headed dog of Greek myth – will occupy both the House of Peoples and the BH Presidency. The three heads are the Serb, the Croat and the Bosniak. The same goes for the House of Peoples.

Even such a grotesque, imposed Constitution did not recognise the category of 'constituent peoples'. This category was an invention of the Constitutional Court of Bosnia and Herzegovina, which included it into the grotesque Constitution, thus in fact cementing ethnic cleansing and bloodshed in BH. At the same time, it allowed ethno-nationalist parties to rule the region unchallenged, as long as the Constitution contains this invented term, constituent peoples.

BUKA: It's unbelievable that you're not allowed to run for office as a citizen, but you can identify as Croat, Bosniak or Serb in order to do so. The system forces you into ethno-national pens. Did you ever consider "aligning" yourself?

Of course I am frustrated by the fact that the system forces me into ethno-national pens. This was the basic motive and the reason for my appeal to the European Court of Human Rights.

BUKA: The case of Pudić v. BH takes issue with the fact that a Federation Serb cannot run for the BH Presidency, while only a Serb can run in the Republic of Srpska. What do you think, how much awareness there is in Europe of the discriminatory nature of the BH Constitution and electoral law, and why have there been no stronger messages to the BH, save for the Court's?

Unfortunately, Svetozar Pudić did not live to hear his verdict from Strasbourg. He left too early, but was honoured with the civic dignity which characterised his life and which he deserved. This city and its citizens will remember him as a great man, a sincere patriot and true comrade. Europe is very well acquainted with the discriminatory Constitution and electoral law in BH, but Europe itself is divided and at odds on the issue. The conclusions of the Peace International Council testify to this. If Europe were on the same page, the High Representative would be authorised to intervene both when it comes to the Law on Elections and the Constitution. His powers issue from the powers vested in the PIC.

BUKA: Do you believe politicians when they say they would be glad to have a Constitution and laws that do not discriminate against anybody?

All politicians in BH claim to be in favour of implementing my ruling, or are at least not explicitly against, but the ruling elite is doing everything to stop it from happening. On the contrary, whenever an election draws close, they try their best to radicalise the relations between peoples in order to ensure they do well in the elections.

BUKA: How much of the responsibility for such discriminations that arise from the Constitution falls on the shoulders of the international community?

The international community bears a great deal of the responsibility for the situation in Bosnia and Herzegovina, from Dayton onwards. My view is that, since they had decided to meddle in BH's internal affairs, by forcing politicians to sign the Dayton and Washington agreements, then they should have gone all the way and helped BH to become a legally, economically, socially and politically well-organised and stable state. Failing that, they should not have meddled at all, they should have left us to bring everything to a close. With its partial meddling and solutions, the international community has only made the situation in BH worse. ■■■

“A STATE FOUNDED UPON THE PRINCIPLE OF CIVIL SOCIETY IS PEACE-LOVING AND HUMANE BY NATURE”

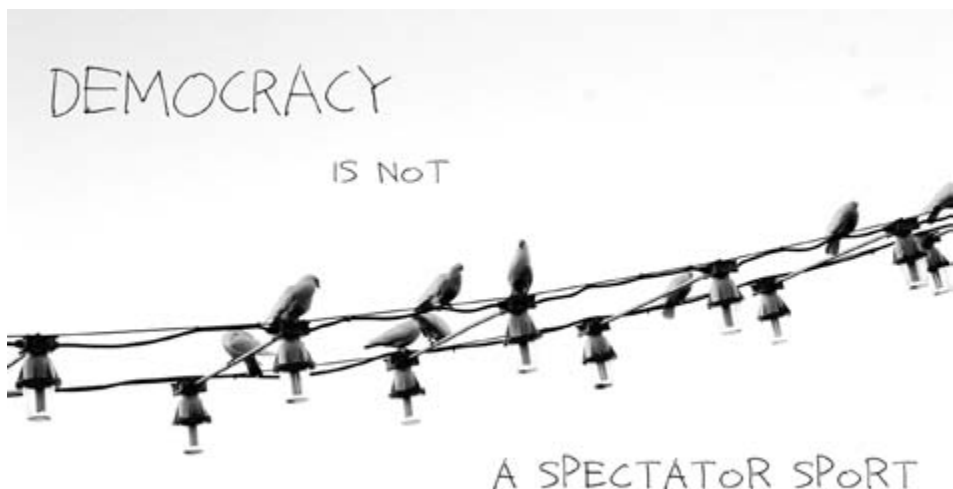
a plea for participatory rights for all the
citizens of Bosnia and Herzegovina

Ellen Ueberschär, in cooperation with Nina Locher

In Václav Havel’s Summer Meditations, written in August 1991, where he pondered the revolution and the new Czechoslovakian state, the decisive role was played by the experiences of the civil society that has campaigned for change.

At the time, Havel was the president of the new republic, and a passionate advocate of the “principle of civil society”, as he called it: “This [civic] principle”, he writes, “is sometimes presented as opposed to the principle of national affiliation, as if it ignored or suppressed the stratum of our home represented by our nationality. [...] the principle of civil society represents the best way for individuals to realize themselves, to fulfil their identity in all the circles of their

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home, to enjoy everything that belongs to their natural world, not just some aspects of it."

With respect to Bosnia and Herzegovina, if we replace the word national with the word "ethnic", we are already at the centre of what Václav Havel meant and what has impeded civil society in the Balkan countries, especially the most fragile state – Bosnia and Herzegovina.

Unlike other countries that were under Communist rule until 1989/90, the countries that emerged from Yugoslavia did not turn into democratic polities in peaceful revolutionary processes, but were caught up in bloody ethnopolitical conflicts. The consequences are still heavily felt today.

Theorists of democracy like Robert A. Dahl have defined democracy as realised when there are free and fair elections. Dahl believes that the definition also has to include the citizens of a democratic state enjoying freedoms of assembly and expression of opinion, as well as the freedom to request information and transparency. The citizens enjoying both active and passive voting rights – being able to vote and to be elected – also determine the character of democracy.

In essence, the Havelist "civic principle" means that the basis of a functioning state is not merely the nation or the ethnicity, but the human person as a whole; citizens in their life's relations – the legacy of a peaceful revolution, which was not heeded in Bosnia.

After many rulings in European courts, and many requests by EU bodies, awareness of Havel's principle has only begun to grow recently. Back then, however, 25 years ago, when the agreement and the constitution were created, its meaning was too new and out of sight of the great theorists of democracy, whose theories provided the foundation for these documents.

Today, 25 years after the Dayton Peace Agreement ended the war in Bosnia and Herzegovina on 14 December 1995, citizens still do not enjoy important democratic rights in terms of Dahl's definition of democracy, because their

As long as only territory and ethnic affiliation count, Bosnia and Herzegovina will not be able to achieve democratisation without help from outside, or turn itself into a community worth living in – 25 years on, that much is clear. Civic engagement is more than just the franchise and civil society engagement. Popular democratic participation also means allowing co-determination at the regional and local levels, in the entities, cantons and municipalities of Bosnia and Herzegovina, whilst paying attention especially to the rights of women, as well as minorities. The first prerequisite for ending the 25-year structural discrimination against people who are without a place in the ethnic three-way division is to enshrine the civic principle in the Dayton Constitution.

precondition – the civic principle – has not been fulfilled. To this day it is still not the case that all citizens, without exception, can equally participate in politics.

It is not a matter of a lack of respect in the Bosnian Constitution for human and fundamental rights, or that participation in the political process, exercise of one's active and passive voting rights, are merely an element of a broader outrage. No, this form of discrimination reaches the core of the problem, which is that whether human rights are respected or not respected is ethnopolitically determined.

Annex 4 of the Dayton Agreement codifies ethnic nationalism at the constitutional level: two entities, the Federation of Bosnia and Herzegovina (BH) and the Republic of Srpska, along with the Brčko District, constitute the basis upon which citizens of the three “constituent peoples”, of Muslim-Bosniak, Bosnian-Croatian and Bosnian-Serb affiliation run for elections.

As a result, there are 400,000 people, around 12% of the population of BH, who, because of their religion, ethnic affiliation, place of residence or simply refusal or inability to ethnically define themselves, cannot run as candidates for certain public offices. For instance, this affects the seventeen “ethnic groups” officially categorised as “other”, such as Jews, Roma and Sinti. This in a land where the two ethnic groups have had a historic, formative influence, both in the country and abroad. It also affects those Bosniaks who live in the Republic of Srpska, as well as Serb Bosnians living in the Federation. As Václav Havel would say, “the strata of affiliation to (one's own) origin” are denied and suppressed.

The one-dimensional construction of the state on an ethnopolitical principle achieves neither justice nor peace. Havel: “A state [...] founded upon the principle of civil society, which respects the human person and their life in its full breadth and multilayeredness is essentially peace-loving and humane.”

There is an international consensus that the Constitution of BH is dysfunctional. The institutions have not been designed with a state of equal citizens in mind, but merely to apportion power among ethnic groups. It might be historically understandable that in 1995, the provisions of the Constitution were more intensely concerned with ending ethnic conflict as soon as possible, which is reasonable in the aftermath of a traumatic event such as Srebrenica. However, the price of ethnopolitical stipulations, as well as the absence of political will to change them, have ever since prevented the construction of a state centred on the welfare of all its citizens.

A constitutional reform to suppress the ethnic in favour of the rights of individual citizens is urgently needed. The Venice Commission has for long insisted on amendments. The European Court of Human Rights has ruled in five cases that the legal stipulations directly discriminate against citizens if they

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prevent them from running for office. The ruling in a sixth case is pending. The first case, and probably the best known, was the Sejdić-Finci ruling of 2009 – both the plaintiffs, the Bosnian Roma Dervo Sejdić and the Bosnian Jew Jakob Finci, are still denied the right to stand in elections. In addition, the franchise discrimination is entirely at odds with the remaining constitutional provisions, which comprehensively prohibit discrimination in various spheres. From 2009, a constitutional reform has been mandatory, yet nothing changed.

As long as only territory and ethnic affiliation count, Bosnia and Herzegovina will not be able to achieve democratisation without help from outside, or turn itself into a community worth living in – 25 years on, that much is clear. Civic engagement is more than just the franchise and civil society engagement. Popular democratic participation also means allowing co-determination at the regional and local levels, in the entities, cantons and municipalities of Bosnia and Herzegovina, whilst paying attention especially to the rights of women, as well as minorities. The first prerequisite for ending the 25-year structural discrimination against people who are without a place in the ethnic three-way division is to enshrine the civic principle in the Dayton Constitution.

Bosnia and Herzegovina's future lies in Europe. It was therefore right for the state to submit a formal application to join the European Union in 2016. The country must now open the way for the adoption of European laws and regulations in accordance with the Acquis. This will entail a comprehensive constitutional reform as required by the European Commission in order to bring it into line with the European Convention on Human Rights. While the European Convention on Human Rights will mark its 70th anniversary this year, the Bosnian Constitution is still at odds with the European notion of human rights, 25 years after its inception. This cannot remain so – above all for the good of the country's citizens!

Because in the European Union, the principle that applies is precisely finding agreement among different ethnies and nations, for which Bosnia and Herzegovina lacks the political will. In the European Union, there are discussions around consensus on certain key issues, but they are discussed! Without the political will to compromise, no community can prosper. Let us imagine for a moment that Bosnia and Herzegovina is already an EU member – this would

mean that it does not only speak in its own voice, but that it would also be part of cross-border compromise-seeking with Western Balkan countries – Croatia already a member, and Montenegro, Albania, North Macedonia and Serbia are on the way. Creating a willingness to compromise within the Bosnian society across ethnic boundaries is an essential step in the development of a European identity and Bosnia and Herzegovina’s cohesion on a European basis.

In the sense proposed by Václav Havel, citizens must be placed in the centre of political development, as only then will this be a state that enters the international arena in a peace-loving and humane way.

Citizens are ready for this: this was on display in 2014, when all the ethnies were caught up in the protests against the corrupt and dysfunctional government policy, as well as the Pride that was able to take place in Sarajevo in 2019, and which demanded much greater democratic participation than that promised solely by the focus on the LGBTI community. Those active in civil society have for long been conquering social spaces, but they need support. Culture and education need strengthening, both in schools and public institutions, in the media and in the citizens’ everyday lives.

After 25 years of Dayton, it is finally time to grant citizens sovereignty and cooperation without exception. This will prepare the way towards a European future. ■■■

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BOSNIA AND HERZEGOVINA IN THE JAWS OF OMINOUS ALLIANCES – TWENTY- FIVE YEARS AFTER THE DAYTON AGREEMENT

Husnija Kamberović*

Twenty-five years after the signing of the Dayton Agreement, Bosnia and Herzegovina once again finds itself at the beginning. The Agreement that brought peace, offered hope and presaged a European future for Bosnia and Herzegovina, also bequeathed fears, the seeds of possible new misunderstandings and mechanisms that would obstruct its European path. Serbian and Croatian ambitions towards Bosnia and Herzegovina did not cease, and these greater-state projects together with a dysfunctional state apparatus and corrupt political elites, have threatened to bring down peace in the entire region. Alliances that have lately been hinted at by the president of the Alliance of Independent Social Democrats (AISD) and the Serb member of the Presidency of Bosnia and Herzegovina, Milorad Dodik, and the president of the Croatian Democratic Union BH party, Dragan Čović, with the aid of Serbian and Croatian leaders, are not only dangerous to Bosnia and Herzegovina, but represent a real threat to peace in the Balkans. Under the guise of protecting “vital national interests” and demands for a return to the “original Dayton”, much deeper interests lurk, not quite as simple to recognise. In the past, such agreements (the Cvetković-Maček agreement of 1939, the Karadorđevo accord of 1991 and the Graz accord of 1992) have always brought

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evil. The moment Serbia stops playing the role of protector of all the Serbs on the Balkans, and Croatia abandons its ambition to improve upon its geographical outline, it will become possible that the political elite in Bosnia and Herzegovina may begin to build a unified politics, as historical experience has shown that only united responses by the political elites in Bosnia and Herzegovina have offered peaceful ways out. Insisting on exclusively ethnic representation in Bosnia and Herzegovina does not present good odds for success.

In the General Framework Agreement for Peace in Bosnia and Herzegovina, co-signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia as "Parties" in Dayton on 21 November 1995, many issues concerning the future of Bosnia and Herzegovina have been defined across the 11 annexes. It is usually forgotten that the Dayton Agreement not only defined the status and determined the new inner administrative structure of Bosnia and Herzegovina, but also determined its European orientation. The internal structure of Bosnia and Herzegovina established by the Dayton Agreement is entirely ahistorical; it has no historical foundation, but is the result of the war and the processes that took place in the broader region of south-east Europe during the late 20th century, and as such represents a historical fact. Many scholars have claimed that the Agreement, especially its Annex 4, which is the Constitution of Bosnia and Herzegovina, has been designed as a temporary, rather than permanent, solution. However, we can testify to the very complicated nature of the mechanisms of its change. From a perspective 25 years on from signing the agreement, we can see that there has not been much progress in the sphere of European integration, but that the peace established then has been preserved. In addition, the situation in Bosnia and Herzegovina and its surroundings has been complicated most by the policies pursued by the

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Republic of Serbia and the Republic of Croatia.

Addressing the Bosnian-Herzegovinan Serbs in his renowned “Sarajevo Speech” in late 1970, Marko Nikezić, the leader of the Serbian liberals, said that they should develop their identity and affirm themselves in that republic, and that Serbia cannot identify with the interests of all the Serbs in Yugoslavia: “The time of the identification of the Republic of Serbia with Yugoslavia has passed; on the one hand, it has led to a neglect of the real interests of the Republic [of Serbia], and, on the other, could only be experienced by the other nations of Yugoslavia as a pursuit of hegemony.” A long time since this speech by a Serbian leader, Croatian President Stjepan Mesić said “Bosnia and Herzegovina is your homeland, Sarajevo is your capital, create your policies together with the other two peoples,” sending a message to Croats in Bosnia and Herzegovina. In contrast to these two statements, which reflect Serbia’s and Croatia’s respect for Bosnia and Herzegovina, historically we have often been witness, as we are today, not only to statements, but to active behaviour that shows that its two neighbours would rather view Bosnia and Herzegovina as a buffer zone than a true and equal neighbour.

During the 20th century, the attitudes amongst the political elites of Serbia and Croatia towards Bosnia and Herzegovina developed each at their own pace, and the end results

always depended on the ability of the political elites of Bosnia and Herzegovina to impose themselves as an equal partner. Three rules can be noted here:

First, during periods when the political elite of BH was weak and divided on the fundamental questions of sovereignty and integrity of Bosnia and Herzegovina, influences originating from Serbia and Croatia had tragic consequences for Bosnia and Herzegovina. During periods when the BH elite was self-assured and showed political unity, Serbian and Croatian influences on processes within Bosnia and Herzegovina waned and ended in fiasco.

Second, when political elites in BH acted exclusively as protectors of ethnic or religious interests, they lacked the strength to defend the sovereignty and integrity of BH. When they transcended ethnic and religious frameworks, they had the strength to successfully stand up to the negative and paternalist influences from the neighbourhood and to build Bosnian-Herzegovinan statehood and society as a whole.

Third, when leaders of ethnic parties in Bosnia and Herzegovina made separate treaties, these treaties always led to ethnic suffering, even though they had been justified as saving imperilled national interests.

Let us demonstrate this using some concrete examples.

Between the two world wars, Bosnia and Herzegovina and Yugoslavia survived constant crises. The crises were not the results of conflicts between national ideologies, nor did the political disputes always reflect national identities, but an unwillingness on the part of political elites to reach compromise. That is, the crises were the result of concrete decisions made by the political elites after 1918, as Dejan Đokić proved several years ago in his book, *The Unreachable Compromise [Nedostižni kompromis]*. The unreachable compromise in Yugoslavia could not be replaced by the partial Serbian-Croatian Agreement of 1939 at the expense of Bosnia and Herzegovina, even though this had seemed like a good solution for Yugoslavia at the time. Nevertheless, as it transpired, the Agreement brought no benefits, as the Kingdom of Yugoslavia was easily toppled in 1941, and the Banate of Croatia, as part of Yugoslavia, only managed to survive for a little over a year. Political elites in Bosnia and Herzegovina were not united: the Serb political elite, divided between its loyalty to BH and to Yugoslavia, failed to find a compromise with the others, constantly opening up new lines of conflict; the Muslim political elite stated its loyalty to Yugoslavia in order to preserve the territorial integrity of BH. While this put it at constant loggerheads with part of the Serb political elite in BH, it also made compromises and made political alliances with Serbian political elites, for which reason the Croatian political elite accused it that such wavering might mean it will be to blame “if Bosnia is ever divided”. The Croatian political elite in Croatia formally advocated the view that people in BH are free to decide on the

status of Bosnia and Herzegovina, but decided to create the Banate of Croatia, incorporating parts of BH where Catholic Croats were the majority population, as soon as opportunity arose in 1939. The explanation put forward by Maček: “We [Catholic Croats] shan’t be forever slaves because of you [Muslims]”. This agreement, settled in 1939 between Serb and Croat political elites, meant the further division of Bosnia and Herzegovina, while at the same time showing up the failure of Yugoslavian integration, formalising the definitive separation of the Serbs and the Croats into two distinct nations. Such a treaty was only possible due to the fact that after 1935, the entry into the Yugoslavian Radical Community weakened the Muslim political elite, since it, gathered around Mehmed Spaho, relinquished the prospect of an independent political party in order to achieve autonomy for the Islamic religious community, which thus reduced its room for manoeuvre and ability to influence further debates around the organisation of the Yugoslavian state.

In the absence of internal consensus, political elites were unable to preserve the integrity of Bosnia and Herzegovina between the two world wars. However, when the socialist elite achieved such a consensus, Bosnia and Herzegovina did function as an integral unit, from 1945 until the late 1980s. It is illusory to assume that the policies towards Bosnia that the Serbian and Croatian political elites constructed over that period shared the foundations on which such policies were built, and expressed in 1970, by Marko Nikezić. Although formally equal, Bosnia and Herzegovina made a lot of effort to make that equality a reality – something it was able to do only once it had built its internal unity. In the late 1960s and early 1970s, the Bosnian-Herzegovinan elite was united in its efforts to put a stop to influences from Croatia, and cast aside Croatian “paternalist claims” on Bosnia and Herzegovina. In 1977, in a conversation with Branko Mikulić, Edvard Kardelj warned his interlocutor that many people in Yugoslavia, especially in Serbia and Croatia, were scheming against Bosnia. However, in the end Kardelj added, “You in Bosnia and Herzegovina are united, you don’t let anyone split you up, so gossiping is less dangerous.” When the first campaign against Bosnia and Herzegovina began in Serbia in the 1980s, Nikola Stojanović, an ethnic Serb, had very harsh words against the Serbian leadership, threatening that he would rally the Bosnian-Herzegovinan media to campaign against the Serb leadership, which had a positive effect. This success was based on the unity of the Bosnian-Herzegovinan political elite regardless of ethnic affiliation.

When this unity was undermined, the cloud of an ominous alliance reappeared over Bosnia and Herzegovina. The ideas from the agreement between the Serbian and Croatian political elites, which first saw life in 1939, with the creation of the Banate of Croatia, regained strength, while the Banate of Croatia became the ideal subscribed to by the Croatian nationalist political

elite in the 1990s. On the other hand, ideas about Bosnia and Herzegovina as the core of the Serb national territory gained new impetus. During 1991, negotiations were in progress between Franjo Tuđman and Slobodan Milošević to solve the Yugoslavian crisis, with one of the options on the table being the division of Bosnia and Herzegovina. It is evident today that the talks were also directed against Izetbegović, but also against Marković¹. The Karadžević talks, whose substance the media speculated about, were clearly much more than the usual friendly chat between two presidents. In his diary, Dušan Bilandžić wrote: “Tuđman explained to me that on 25 March 1991, an agreement in principle was reached with Milošević in Karadžević, about the division of Bosnia and Herzegovina.” Expert committees were also established, to give the idea of division tangible form. The backdrop was the conviction that the Yugoslavian crisis can be resolved by an agreement between the Serbs and the Croats, and a division of Bosnia and Herzegovina. Expert committee meetings yielded no results, but left behind a bitterness that the “spirit of Karadžević”, the agreement on the division of Bosnia and Herzegovina, had been settled, and that the war that was fought afterwards was a sort of “arranged war”. It is difficult to accept the thesis about an “agreed war”, just as it is difficult to refute the testimonies stating that a division of Bosnia and Herzegovina truly had been agreed in Karadžević. Although it would seem that the Karadžević agreement had not been set down in the form a written, binding document, and although testimonies about it came mostly from Tuđman’s subsequent political opponents (but then-allies), which is why it had been filed under the category of political myths, that is, an “imagined superstructure, a twisted or unobjective, unreliable, contentious explanation of the reality,” today the belief holds sway that an agreement in principle on the division of Bosnia and Herzegovina truly had been reached in Karadžević, but had never been fully operationalised. The meeting was not secret, but what transpired there remained largely a secret. There was certainly talk about Bosnia and Herzegovina, but no written binding document about its division remained. Closest to the truth would be the belief that it was discussed then, as were a number of other options.

However, it is nevertheless key here that Tuđman and Milošević undoubtedly did discuss Bosnia and Herzegovina in Karadžević. Just before the Karadžević meeting, Alija Izetbegović stated in a letter addressed to Tuđman that he was “in possession of certain information” that Milošević would offer Tuđman “certain partial solutions, which would partly be realised at the expense of Muslims and of BH,” asking Tuđman to refuse this, as it would “lead to the chaos that certain forces were desiring.” These discussions probably did involve the proposal to split up Bosnia and Herzegovina as a means of achieving a final solution to the Serb-Croat question, and subsequent expert committees undoubtedly worked

1 then the prime minister of the Yugoslav government (editor’s note)

The policies pursued in Bosnia and Herzegovina over the past 30 years or so, with the support of the international community, promoted ethno-political tendencies; they are now slowly coming home to roost, threatening the survival of Bosnia and Herzegovina. To support the principle of representation exclusively along ethnic lines and reduce everything to agreements between “national leaders”, however legitimate it may seem, is so very dangerous, as every agreement constructed on such principles will only lead to the drawing of new boundaries. After all the negative experiences, both ahead of World War II and before the wars of the 1990s, the convictions among some Balkan leaders today that a final solution and permanent peace might be achieved by drawing new borders – where the weakest always fare the worst – are dangerous, as any new demarcation would be accompanied by new waves of ethnic persecution.

on its partition as one of the models for the resolution of the Yugoslavian crisis. However, such arrangements were not only not fit to bring about any kind of “final solution”, instead, they led to a terrible war, in which everybody suffered, especially Croatia and Bosnia and Herzegovina. Early ‘90s agreements between Serbia and Croatia at the expense of Bosnia and Herzegovina could benefit neither side. Such alliances have always bade ill.

Subsequently, ethnic elites in Bosnia and Herzegovina itself began to creep into this “ill-doing”. At the outset of the 1992 war against Bosnia and Herzegovina, on 6 May 1992, an agreement was reached in Graz (again, not in writing) between Mate Boban, the leader of Herzeg-Bosnia, the Croat community’s para-state, and Radovan Karadžić, the leader of the Serb Democratic Party in BH, today a convicted war criminal. This agreement showed that it was internal support for such outside interventions against Bosnia and Herzegovina that allowed them to succeed. The Graz agreement “outlined the territorial ambitions that reached far beyond the areas populated by Serbs and Croats”. A few days after the agreement, on 12 May 1992, the Assembly of the Republic of Srpska adopted its Six Strategic Goals, which augured the great misfortune and evil that were to befall Bosnia and Herzegovina.

However, it seems that there is never enough evil in the Balkans. The recent statement by Milorad Dodik, that Serbs and Croats will “design a joint statement about the options for the functioning of BH,” and that, if the statement is not accepted, “the only solution is to dissolve the country,” has invoked precisely that evil. It is dangerous because it hints at the creation of “an alliance of nations” and partial agreements between the two, presenting the third with an ultimatum – only now, the hint was very open. But Dodik’s statement is not only dangerous for the reason that ultimatums never end well on the Balkans, but also because it implies national unity around a single cause, which is

in turn defined by a single national party (in this case, the SNSD [Alliance of Independent Social Democrats, Dodik's party] and the CDU-BH). The policies pursued in Bosnia and Herzegovina over the past 30 years or so, with the support of the international community, promoted ethno-political tendencies; they are now slowly coming home to roost, threatening the survival of Bosnia and Herzegovina. To support the principle of representation exclusively along ethnic lines and reduce everything to agreements between "national leaders", however legitimate it may seem, is so very dangerous, as every agreement constructed on such principles will only lead to the drawing of new boundaries. After all the negative experiences, both ahead of World War II and before the wars of the 1990s, the convictions among some Balkan leaders today that a final solution and permanent peace might be achieved by drawing new borders – where the weakest always fare the worst – are dangerous, as any new demarcation would be accompanied by new waves of ethnic persecution. The assurances we often hear from the Serbian president Aleksandar Vučić about respecting the sovereignty of BH do not seem plausible when viewed in the context of his close relations with Milorad Dodik, who uses any opportunity to stress his desire for the unification of the Republic of Srpska with Serbia (which continues to arm itself). On the other hand, while Croatian policies towards BH likewise formally respect its sovereignty, their exclusive insistence on a partial policy, focussed on support for the demands of the Croatian Democratic Union in BH, leaves little space for developing a policy of mutual respect. Statements such as "the Croats' life and future being with the Bosniaks" are correct, but they must abandon these frameworks of dualism (Serbs and Croats, Croats and Bosniaks) and return to the principle that in Bosnia and Herzegovina, "the life and future of the Croats and the Serbs are with the Bosniaks".

And finally, the views on Bosnia and Herzegovina that can be heard among the ranks of the strongest Bosniak ethnic party, as well as part of the left-leaning intellectual circles, now seem almost totally unrealistic. Europe and the world offer no solutions, and since at this moment, Bosnia and Herzegovina is certainly the weakest state in the Balkans, since its internal structure has been shattered, its connective tissue is receding, ethnic elites dominate the political scene, and the call of the nation state has crossed the borders of the today's states, it seems necessary to step forward with some realistic suggestions, so that this direct involvement by Serbia and Croatia in the question of Bosnia and Herzegovina, and Europe's inertia, does not have permanent negative consequences for the Balkan countries. Ideas about new demarcations do loom in the background of all these discussions. In this setting, the discussions organised recently in Zagreb and Belgrade with "national leaders" from Bosnia and Herzegovina were like a biopsy that can only further ravage the ailing tissue of Bosnia and Herzegovina. 30 years after Karadžević and all the experiences of war, we ought to accept the fact that the existing state borders are immutable; it is also important however

to understand that internal relations are subject to various dynamics, and that they can be changed. All the while clearly and consistently developing a loyalty to the state. Failing this, the alliances that loom behind these negotiations bode ill and threaten that 25 years after the signing of the Dayton Agreement, Bosnia and Herzegovina may return to the beginning. ■■■

TO WHOM, IN FACT, DOES THE CONSTITUTION OF BIH BELONG?

Željka Umičević



After only three serious attempts of negotiations on amending Constitution¹, it was evident that the Constitution is exclusively discussed by political elites, that is the presidents of leading political parties with the mediation of international community. Negotiations were non-transparent, outside official institutions, far away from the eyes

*Sarajevo, Women's protest march on March 8th, 2020
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¹ The first serious approach towards changes in BiH happened after report of the Venice Commission from 2005 whereby problems were presented in constitutional-legislative framework of BiH. After this report, international community initiated negotiations with political leaders in BiH on amendments of the Constitution known as "April Package" (2006), "Butmir Agreement" (2009) and "Prud Agreement" (2008). April Package entered parliamentary procedure but was not adopted while Butmir Package and Prud Agreement never became part of the discussion in Parliament of BiH.

* Helsinki Citizens' Assembly, Banja Luka

of the public. The proposals of the constitutional reform did not reflect attitudes of wider public and interested groups but were exclusively attitudes of governing political parties and their interests.

Although the Resolution 1325 stresses importance of including women in all phases of peace processes – from the peace negotiations to society reinforcement, women were not part of negotiations led from 2006 to 2009 and none of the three recommended packages of constitutional amendments included discussions on the gender equality becoming a constitutional principle.

Dissatisfied with this approach of local leaders and international representatives, who against all set of different declarations, resolutions and regulations of EU as well as local laws which obliged all parties to respect gender equality, constantly ignored and excluded women from negotiation processes, representatives of NGOs in October 2009 submitted protest letter to initiators of Butmir negotiations². The letter was sent to addresses of Carl Bildt, former Minister of Interior Affairs of Sweden, James Stanberg, former Deputy of State Secretary of USA and Valentin Inzko, High Representative in BiH. In the letter they requested from all included to stop with the practice of discrimination against women, to include women in negotiation processes so that they could enrich negotiations with a different perspective and “direct them towards needs and interests of ordinary citizens of this country who cannot live from the ‘principle of constituency’”. The letter was only responded by James Stanberg.

This was the beginning of the idea on networking women across BiH and uniting them in the search for solutions which further on would be incorporated into the Constitution. This idea was fundamental for launching the Initiative “Women Citizens for Constitutional Reform” back in 2013. This was and still is the only women’s initiative where 36 non-governmental organizations and individuals from across Bosnia and Herzegovina efficiently conduct activities in relation to constitutional reform in BiH. The attitude of all members of the Initiative is that reform of the Constitution of BiH must reflect consensus and include all interested parties in discussing issues which will define future framework of common life and that this process should include both men and women equally.

The title of the Initiative itself points to existence of women citizens and women in BiH who can equally participate in launching initiatives and finding solutions of political problems, and whose attitudes should be considered when making decisions especially those which impact lives of ordinary citizens. The name of the Initiative also points to the fact that the Constitution of BiH is

2 Protest letter was the result of regional round table held in October from 21 to 23, 2009 in Banja Luka organized by Foundation United Women and Helsinki Citizens’ Assembly Banja Luka. The round table gathered more than 30 representatives of women’s non-government organizations from BiH, Serbia, Monte Negro, Croatia and North Macedonia.

written exclusively in male gender (president, delegate, deputy, judge...) and that women are invisible in the Constitution's text³.

In the Constitution woman does not even exist as citizen because this document discriminates citizens by giving advantage to collective over citizen's rights which European Court for Human Rights also confirmed in case of Azra Zornić.

Having in mind discriminatory nature of the Constitution of BiH, the Initiative „Women Citizens for Constitutional Reform“ defined five key priorities for future activities and a set of gender sensitive amendments⁴, being aware that in current political context adopting completely new Constitution (which would have been the best solution) is not possible. Priorities and amendments are included in the document of the Initiative under the title “Platform of Women's Priorities for Constitutional Reform with Amendments to the Constitution of BiH from Gender Perspective”.⁵

The special emphasis in the Platform is on the usage of gender sensitive language in the Constitution of BiH and introducing affirmative measures in order to achieve gender and sex equality. In addition to these two priorities, the Initiative also advocates for extension of the existing catalogue of rights with provisions related to unique health, social and family welfare, greater judicial and legal protection of human rights and freedoms and introducing principle of direct democracy which would be implemented within the process of constitutional reform.

In addition, the Initiative also advocates for implementation of the Recommendations of CEDAW Committee (General Recommendation 33 and Conclusive Recommendation in the fourth and fifth (2013) and sixth report (2019) for BiH) which requests from the state to incorporate definition of gender equality between men and women and to prohibit direct and indirect discrimination of women in public and private sphere because BiH is one of the rare European states which does not have gender equality as constitutional principle⁶.

3 “Visibility of women in language is very important because the language reflects gender relations in society. Using gender sensitive language shows aspiration of the society to increase degree of equality between men and women through language”. See: “Guide through Constitution from W(omen) to A(mandments)”, 2017 https://gradjankezaustavnepromjene.files.wordpress.com/2017/09/vodic-z_a.pdf

4 Set of gender sensitive amendments was created based on the research “Constitution and Gender: Analysis of the Possibility of Gender-Sensitive Reform of the Constitution of BiH”

5 https://womencitizensforconstitutionalreform.files.wordpress.com/2016/02/platform-of-women_s-priorities-for-constitutional-reform-and-amendments-to-the-constitution-of-bosnia-herzegovina-from-a-gender-perspective.pdf

6 Report of civil society organizations on implementation of the concluding observations and recommendations of CEDAW committee for Bosnia and Herzegovina 2013-2017, <https://hcabl.org/wp-content/uploads/2016/11/CEDAW-ENG-web.pdf>

Alongside with advocacy activities directed at decision makers, the Initiative is also working on informing citizens on constitutional problematics and is trying to demystify the term constitutional reform itself, because by using this term for so many years with an intonation which is exclusively negative and war-mongering, political elites managed to create resistance and fear just by mentioning these words. In this way they impacted a general attitude that real constitutional changes are impossible and that initiating this process would not bring any good for the citizens.

By adopting the set of gender sensitive amendments that the Initiative recommends, women will also become more visible in the Constitution through language; the grammar gender⁷ will be respected and measures of affirmative actions will induce and encourage all state, entity, cantonal and local governing institutions to implement these measures, execute inclusive politics and work on accomplishing real and full gender equality in society.

One of the problems which directly impact lives of citizens in BiH and whose real cause is in the Constitution of BiH is lack of equal health, social and family welfare. Due to the non-compliance of the laws between all levels and different approach in this field, there is a visible discrimination of citizens in BiH regarding exercising these rights. For almost 25 years, degree of exercising rights such as maternity benefit and right to medically assisted fertilization differs between entities or between cantons. Therefore, the state allows discrimination between women and permits entities/cantons to unilaterally determine, within the available budget, how much woman/woman in labour “is worth” in her entity/canton i.e. how women will exercise their right. Members of the Initiative advocate for extension and precise definitions of certain terms in the Catalogue of Rights in the Constitution; they do not recommend transferring jurisdictions but leaving space for entities to find appropriate model of implementing this constitutional right which would guarantee equal rights for all citizens at the territory of BiH but also equal specific rights for all women.

The Platform of Women's Priorities recommends that the Constitution also introduce the principle of direct democracy by adding two tools of direct democracy – referendum and citizen's initiative, which would allow

⁷ Official languages in BiH, Serb, Bosnian and Croat are gendered, meaning they have female, male and neuter gender and have rule of congruence – grammatical rule on concord of gender, number and cases of adjectives and nouns or gender and number of nouns and verbs in sentence. Therefore, the female grammar gender in B/H/S languages exists. However, in practice, laws, manuals and even the Constitution of BiH itself only male gender is (too) often used as generic for all three genders, although the Law on Gender Equality (Amendments to the Law on Gender Equality in BiH, Official Gazette 102/09, December 29, 2009) states that “Discrimination in language exists when only one grammar gender is used as generic term”.

direct participation of citizens in making important decisions for BiH. At the moment, the Constitution does not provide citizens with the possibility of direct participation in creating policies, and this will enable them to express their political will and attitude in relation to important issues for determining direction of state's development.

Along with the mentioned insufficiencies in the Constitution which generally impact all citizens of BiH, members of national minorities (so called Others) and those who declare their affiliation only as citizens (without wish or need to belong to any of the constituent peoples or nationalities) are doubly discriminated because the Constitution guarantees exercise of all rights and freedoms only to constituent peoples. European Court for Human Rights in Strasbourg determined that with such Constitution BiH violates the European Convention on Human Rights and Fundamental Freedoms and delivered four verdicts⁸ which order reform of the Constitution and electoral legislation and abolishment of disputable discriminatory provisions. If BiH wants to be a functional state, capable of integration into European Union and other Euro-Atlantic organizations, it will have to guarantee individual rights for all its citizens in all fields which are one of the priorities the Initiative "Women Citizens for Constitutional Reform" stands for.

Since 2013, by advocating for the mentioned priorities considering constitutional reform, the Initiative was supported by the Commission for Gender Equality of the House of Representatives of the Parliamentary Assembly BiH (convocation 2014-2018)⁹, by the Agency for Gender Equality¹⁰, by representatives of the government at the state and entity levels we had meetings with, as well as by the international community. Most of them agree that the constitutional reform is necessary, especially from the gender perspective. This is further confirmed by the fact that the Resolution on Women's Rights in the Western Balkans¹¹ literally incorporated the recommendations which BH

8 Verdicts of the European Court for Human Rights in cases: "Sejdić-Finci against Bosnia and Herzegovina" (2009), "Zornić against Bosnia and Herzegovina" (2014), "Pilav against Bosnia and Herzegovina" (2016), "Šlaku against BiH" (2016). Currently in the procedure before the same court is the case "Pudarić against Bosnia and Herzegovina", which is also related to constitutional discrimination.

9 Commission for Gender Equality of the House of Representatives of the Parliamentary Assembly of BiH in 2013 supported gender amendments from the Platform of Women's Priorities (the usage of gender-sensitive language, introducing affirmative measures and defining gender equality as a constitutional virtue) and forwarded it to the Council of Ministers and Collegium of the House of Representatives which, as they responded to the letter of the Initiative, 'get noted'. To the present day, gender amendments of the Initiative were not put on the agenda of the Parliamentary Assembly of BiH.

10 In 2007, the Agency for Gender Equality of BiH recommended a set of amendments to the Constitution of BiH including among others those related to gender responsible language and affirmative measures. In 2016, in cooperation with the Initiative, this institution organized a joint conference where the importance of incorporating gender perspective into the Constitution was stressed and explained how this impacts the position of women.

11 https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/FEMM/DV/2019/01-23/1163876ENDraftmotionforresolutionWomensrightinWesternBalkans_EN.pdf

Considering that the Constitution of BiH is part of the peace agreement, created and adopted without participation of citizens of Bosnia and Herzegovina and without implementing procedures that would provide it with democratic legitimacy, the Constitution was never understood as a document which belongs to citizens, as a tool which citizens could improve and which can be used to create and develop social and political processes. For 25 years the Constitution of BiH was completely alienated from those whose lives, freedoms and rights it regulates.

NGOs submitted to the recommender of the resolution Biljana Borzan and whose 18th point states: *“Encourages the Government of Bosnia and Herzegovina to use gender-sensitive language, incorporate a clear definition of gender equality and prohibit direct and indirect discrimination in the Constitution, as part of the constitutional review process”.*

Although requests to initiate a process of constitutional reform were coming from Brussels through annual resolutions and reports on improvement of BiH as well as through verdicts of the European Court for Human Rights in Strasbourg, the government did not take these requests seriously. This is proved by the fact that the Sejdić-Finci verdict has not been implemented since 2009 and that from 2015 until the end of the term of the previous convocation of the Parliament of BiH in 2018 the working group which should set deadlines for exercising activities of the Action Plan for implementing verdicts “Zornić against Bosnia and Herzegovina” and “Sejdić and Finci against Bosnia and Herzegovina” has not been formed.

In addition, although there are different initiatives and proposals of the constitutional solutions coming from political parties and non-governmental organizations, they never entered parliamentary procedure, which speaks for itself on how much the governing elites are not ready to seriously work on the process of constitutional reform because they would have to give up on their positions and power which current constitution enables them.

Alongside with advocacy activities directed at decision makers, the Initiative is also working on informing citizens on constitutional problematics and is trying to demystify the term ‘constitutional reform’ itself, because by using this term for so many years with an intonation which is exclusively negative and war-mongering, political elites managed to create resistance and fear just by mentioning these words. In this way they impacted a general attitude that real constitutional changes are impossible and that initiating this process would not bring any good for the citizens.

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What was supposed to be just the beginning necessary for proper functioning of the state in peace and material which will be upgraded in accordance with the development of the society and international relations, became a tool whose content and interpretation is manipulated by political elites. The Constitution is not perceived as the document which can be a foundation for the beginning of a real civic discourse and which responds to basic interests, requests and needs of citizens. Unfortunately, this document only serves as a hindrance to the progress of the state towards EU Integrations. Without a real political will for changes, by arbitrary interpretation of constitutional provisions with the aim to maintain the non-functional state and status quo which works only in favour and exclusively protects the governing parties, citizens remain prisoners of such Constitution.

However, even in such a seemingly hopeless situation concerning reform of the constitution, members of the Initiative are opposed to the steady narrative and wish not to accept that in a state which is in principle democratic citizens cannot exercise all their rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, that lives of all of us who live here are determined by several political leaders and that the largest marginalized majority in BiH – women – are pushed aside, are unequal and discriminated. Only a Constitution which is seen as a space for improving relations between men and women, which provides all with equal rights, serves for people and is about people, and not exclusively about constituent nations, can define BiH as a really democratic state.

On the occasion of the 25th anniversary of the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Women Citizens' Initiative for Constitutional Reform issues this*



appeal

The signing of the Dayton Peace Agreement in 1995 marked the end of the armed conflict and, which is equally important, defined the form, organization and functioning of the state of Bosnia and Herzegovina. *'Recognizing the need for a comprehensive settlement to bring an end to the tragic conflict in the region'*, this peace agreement marked the beginning of negative peace in Bosnia and Herzegovina. Although the military task was to end the armed conflict through the establishment of military security, this task was also an important condition for the successful implementation of the civil aspects of the peace process, which is the guarantor of lasting peace in the country.

Today, 25 years later, we can see how dysfunctional is the system determined by the Constitution of BiH, i.e. by Annex 4 of the Dayton Agreement. This unprecedented constitutional act froze the conflict and cemented the foundations for ethnic divisions, a captured country, and a framework for separatist demands. While the state is being maintained by uniting separate ethnic groups, any civil claim is marginalized, completely ignored or rejected. Every discussion about constitutional reform is reduced to constituent peoples, to parities and entities, although the needs of citizens are much greater than the right to ethnic affiliation. Our country is a country of ethnic groups rather than citizens.

Today, 25 years later, we, the citizens, see and feel every day that this situation is not and will not bring any progress or prosperity – on the contrary. The shameless discrimination of Others in the electoral process, enshrined in the Constitution, last year marked 10 years of non-implementation of the first decision of the European Court of Human Rights (Sejdić-Finci v. BiH), followed by other decisions. The fact that all the decisions are being ignored by authorities in Bosnia and Herzegovina speak of the unwillingness of those in power to recognize the rights and freedoms of those who are not or do not want to belong to some of the constituent peoples. Promoting the actively advocated principles of ethnic voting will seriously jeopardize the active and passive rights of

* Coordinating organisation: Helsinki Citizens' Assembly Banja Luka www.hcabl.org

Others thus **making them non-citizens and pushing the country deeper into ethnic enclaves.**

Today, 25 years later, individual, human and civil rights can no longer be on hold simply because ethnonationalist politicization conditions or stops any attempt at progressive constitutional reform. Political agreements and debates on the future of BiH, led by nationalist and extreme politicians and parties, are held in private, taking no civil demands into consideration. All this seriously **deepens divisions and pushes Bosnia and Herzegovina further away from the prospect of joining the European Union.**

We hereby appeal to you to use your influence and do the following:

1. Insist on stopping attacks on BiH as an integral state.

Separatist tendencies are strengthening, posing the threat of new wars and inciting hatred. Bosnia and Herzegovina is a country of all its citizens who deserve to live without the burden of the past and be free from the fear of new conflicts. The Western Balkans is a vulnerable region and these tendencies may encourage further instability. We must not allow manipulations by nationalist parties within and towards BiH.

2 Encourage the preservation of democratic principles, with the international community as a key player.

Negotiations on the Dayton Peace Agreement, implementation, interpretation and amendments to the Constitution are in the hands of the nationalist parties in power. The change from within is firmly enclosed by a wall of personal and nationalist interests. Therefore, in its struggle for democracy, civil society must also receive support from outside, using the processes that should put the country on a firm democratic footing. This is a moment for a serious reminder of this, including solutions that will enable the stabilization of the state and the development of civil society.

3 Support civil initiatives to amend the Constitution and enable citizens to establish 'ownership' of the Constitution for the first time.

The BiH Constitution, as part of the peace agreement, did ensure the integrity of the state but failed to achieve social cohesion. This is an out-

of-necessity Constitution; it was the result of international negotiations rather than the consent of the sovereign people. Therefore, the existence of well-founded and legitimate demands of citizens for constitutional reform must be acknowledged and implemented. To note, the citizens of Bosnia and Herzegovina are those who were given the Constitution at their disposal after it entered into force. Requests and advocacy, among others, by our Initiative, for the implementation of decisions taken by the European Court of Human Rights have been present in Bosnia and Herzegovina for years. There is also our Initiative's demand for the presence, identification and recognition of women within the Constitution not only as individuals but also groups aiming to achieve an equal treatment in exercising their rights (and receive guarantee for it). It is necessary to support civil demands to provide the state that citizens want, and not the kind that retrograde and harmful policies create for us.

Our appeal is a reflection of our long-standing struggle for equality in society, for the state and the Constitution. After 25 years, the Dayton Agreement and the BiH Constitution have remained unchanged, and their various interpretations in accordance with nationalist interests have been undermining democratic rights for years thus pushing the country deeper into hopelessness and further away from the EU. Therefore, we appeal that you also take into account the citizens in considering the social and political position and challenges in Bosnia and Herzegovina. We are not silent in our demands; however, due to the constant 'noise' of nationalism and hate speech, civil demands are not heard enough or are silenced.

'Women Citizens for Constitutional Reform' is an initiative that advocates for the Constitution of Bosnia and Herzegovina which will ensure greater protection of human rights and freedoms, with a special focus on the gender perspective. The Initiative was formed by activists and organizations from the whole of BiH, who want to encourage all citizens to use their knowledge, energy, and willingness to interact and contribute to meeting the goals of the Initiative. The initiative brings together 35 civil society organizations and activists who work continuously on understanding the concepts of gender, peace, freedom and human rights.

More information at:

<https://womencitizensforconstitutionalreform.wordpress.com> ■■

25 YEARS OF DAYTON: DEMOCRATIC CIVIL SOCIETY MUST BE OUR STRONGEST PARTNER

Manuel Sarrazin*

What most impressed me in Bosnia and Herzegovina was the engagement of the democratic civil society. These are people who, in the face of every kind of resistance, tirelessly champion democracy and the rule of law, reconciliation and justice, our European values. For instance, Štefica Galić, an impressive Bosnian Croat journalist and human rights activist. During the Bosnian war, Ms. Galić and her husband saved many Bosnian's lives. Today, she is still shedding light on war crimes. She publishes facts in a region where war criminals are still celebrated as heroes, and all too infrequently condemned as perpetrators of crimes. Ms. Galić is convinced that critical thinking and questioning can be the path to a peaceful coexistence in Bosnia and Herzegovina.

Or take Sabiha Husić, the director of Medica Zenica, a women's rights organisation. She and her impressive team have been helping victims who have survived sexual wartime violence for more than 25 years. In defiance of attacks and rejection, she has fought for their recognition in society and to assure that they are given financial support. Ms. Husić is convinced that there can be no peace and justice without confronting traumas and war crimes. Or Irma Baralija, vice president of the Naša

The highly complex state organisation, with multiple levels of government, was supposed to safeguard the interests of the three "constitutive peoples". In effect, it introduced a veto option that has paralysed politics to this day – and with it the country's future.

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Stranka [Our Party] party. In 2018, Ms. Baralija filed a complaint before the European Court of Human Rights. In her home town of Mostar, which has since 1993 been de facto a divided city, no local elections have been held since 2008 – to the rejoicing of the two nationalist parties that have for years been allowed to practically run amok. In 2019, the Court agreed with her, adjudging that the citizens of Mostar have the human right to hold elections. However, the drafting and the substance of the new electoral law have lagged far behind the demand in the complaint. The two dominant parties made an old-fashioned deal to their own benefit, and to the exclusion of the civil society and the smaller parties. Ms. Baralija is convinced that a state in which all citizens enjoy equal rights, regardless of their ethnic affiliation, is urgently needed.

Bosnia and Herzegovina needs more togetherness and less rivalry

In my view, Štefica Galić, Sabiha Husić and Irma Baralija are beacons of hope in the realisation of a European Bosnia and Herzegovina. They champion togetherness rather than rivalry, reconciliation rather than hate, clarifying rather than denial, equal rights rather than ethnic discrimination. They frequently pay a high price for their engagement, for even 25 years after the Dayton Peace Agreement, people like Štefica, Sabiha or Irma are still in the minority. They struggle daily to be heard and recognised, for social and political success for the sake of a better future for their country. The international community, as well as EU representatives, have all too often supported them only formally, if at all. They could never rely on state support. Even 25 years after the end of the war, people make political decisions mostly under the influence of fear, segregation,

Protest walk, women in Mostar, March 8th, 2020, CC-BY-SA 2.0



ethnic nationalism, and their own, as well as party-political profiteering. And more than that: the most senior politicians still pursue the same goals as they did during the war: to demolish the multinational and multi-religious Bosnian society – and the creation of supposedly ethnically clean areas.

Dayton has brought peace and an ungovernable state

25 years after the Dayton Accords, there is near-total consensus around two insights: First: At the time, “Dayton” did end the war. However, today we know that the absence of war will not mean peace for a long time. Second: “Dayton” made Bosnia and Herzegovina an ungovernable and dysfunctional state. Why? The peace plan contains the current constitution of Bosnia and Herzegovina as one of its annexes, dividing the country into two entities; the Orthodox Serb dominated Republic of Srpska, and the Federation of BH, with a majority Bosniak Muslim and Croat Catholic population. The multi-ethnic Brčko District enjoys special status. The highly complex state organisation, with multiple levels of government, was supposed to safeguard the interests of the three “constitutive peoples”. In effect, it introduced a veto option that has paralysed politics to this day – and with it the country’s future. In its latest, October 2020 report on the state of the rule of law, the European Commission describes the situation thus: “Obstructions to judicial reforms from political actors and from within the judiciary and the poor functioning of the judiciary undermine citizens’ enjoyment of rights and the fight against corruption and organised crime.”¹ The country has shown no progress on the issue of freedom of expression of one’s opinion either. And what is the situation regarding measures concerning key priorities (democracy, the rule of law, fundamental rights and public administration reform) cited in the rule of law report (“the Priebe report”)? Likewise: not found.

To this day, there are still provisions in the Dayton Peace Agreement that are contrary to international law. Thus, members of minorities, for instance Roma and Jews, can neither run for the State Presidency nor for a seat in the House of Peoples, the representative body of the Parliamentary Assembly. The Constitution only allows Bosniaks, Croats and Serbs to stand as candidates. In December 2009, the European Court of Human Rights (in the Sejdić-Finci ruling) determined that the Bosnian constitution is in breach of the European Convention on Human Rights, which prohibits discrimination on the basis of association with a national minority. Since then, nothing has happened. 11 years after the ruling, citizens still do not equally enjoy their right to stand in elections.

1 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf

The ruling ethnic nationalism suffuses nearly all spheres of life in Bosnia and Herzegovina. The old prejudice about the enemy are primarily cemented through the ethnically segregated education system and party-affiliated media. Nationalist parties champion the notion that pluralist societies put ethnic identities at risk. And the coerced affiliation goes further: for instance, without membership in the party affiliated to one's ethnic group, it is next to impossible to find a job in the civil service.

ethno-nationalism – the greatest obstacle to a common future

The ruling ethnic nationalism suffuses nearly all spheres of life in Bosnia and Herzegovina. The old prejudice about the enemy are primarily cemented through the ethnically segregated education system and party-affiliated media. Nationalist parties champion the notion that pluralist societies put ethnic identities at risk. And the coerced affiliation goes further: for instance, without membership in the party affiliated to one's ethnic group, it is next to impossible to find a job in the civil service, which leads to more than just ethnic fragmentation in public administration. Along with the dysfunction, bad governance and corruption, it also leads to young people in particular no longer seeing their future in Bosnia and Herzegovina, leaving in their tens of thousands for Europe every year. The country risks losing an entire generation.

The most recent example of the continued cementing of ethnic nationalism is the Mostar electoral law, adopted with the mediation of the international community, including the EU. In June 2020, following a successful action before the human rights court, a new electoral law was adopted, which finally, more than 12 years on, opened the path for local elections in Mostar. However: only the two largest parties, the Bosniak SDA and the Croat CDU negotiated to define the new law; both the remaining nine parties and the representatives of the democratic civil society were excluded. The result: an ethno-territorial shattering of the city. Three electoral districts on the Croat-dominated right bank of the Neretva, and three on the Bosniak-dominated left bank. Gerrymandering the Bosnian way, as *Der Standard* correspondent Adelheid Wölfl called it. Human and civil rights activists are rightly very disappointed. The policy-makers should have been called to account for not holding elections, rather than being allowed to decide about the new electoral legislation among themselves, says Irma Baralija. Her petition was supposed to give the right impulses for a state of equal citizens – regardless of ethnic affiliation – but this goal is always thwarted, from inside as well as out.

why everyone must be equal before the law

The legal principle of equality before the law is not just an arbitrary norm that needs to be adapted to the European *acquis communautaire* (the EU body of law), like so many others. The principle of equal treatment is key to understanding a society as a civil society. It grounds the legitimacy of authority in the fact that citizens have the final say. They must equally participate in the formation of political will and in the decision-making process, and courts and governments must treat them equally if a society aims to achieve equality of realisation of life chances among its citizens. The basic understanding of democracy is based on the principle of equality. Without a legitimate embodiment of this principle, no democratic culture can develop in the political reality.

And for this reason, equal treatment and non-discrimination represent the basic elements of the European constitutional law and European agreements. They are powerful and overriding arguments in deliberating on legally protected interests and fundamental rights in European law and before the courts in Strasbourg and Luxembourg. There will only be a path to Europe for Bosnia and Herzegovina once it clearly codifies the principle of equality in its constitution and its laws, as well as in the heads of the decision-makers.

Bosnia and Herzegovina – a hopeless case?

No. Such thoughts are prohibited to a confident European. Bosnia and Herzegovina, as well as the entire region, are part of the European family. The future of these countries lies in Europe – even if there is still a long way to go. The EU was and will be a promise of peace – a promise that will only become reality once peace, democracy and human rights are permanently ensured.

However, it is also clear that with the majority of the current political decision-makers, no state with a future will be possible. Milorad Dodik, the Bosnian-Serb member of the three-member state presidency does not merely not recognise the state he is supposed to represent, he also denies the Srebrenica genocide and wants to unite the Republic of Srpska and Serbia. The Croat nationalist Dragan Čović is also trying to carve a special entity out of the Bosnian-Croat-dominated canton and attach it to Croatia. Dodik and Čović enjoy the political support of the Serbian and Croatian governments respectively. Both are unacceptable, both for a current European Union member and for a country that wishes to become one. Revisionism, genocide denial and glorifying war criminals have nothing to do with European values.

My hopes lie in a vibrant civil society, as well as individual political forces that have worked for a better future for the country, and which wish to see the end of the governing dysfunctionally, widespread ethnic nationalism, as well as corruption and kleptocracy.

democratic civil society must be our most important partner

In 2016, Bosnia and Herzegovina applied to join the European Union. Article 2 of the Treaty on European Union states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” These values do not apply only in the European Union. They are universal. They are our command and our mission. The EU and all its member states should thus more strongly support people such as Štefica Galić, Sabiha Husić and Irma Baralija, people who live these values.

The EU enlargement process has a huge potential to much more forcefully and actively support the democratic civil society in Bosnia and Herzegovina and to build a common strategic cooperation with it. We must use this potential! EU financial support must not disappear in a corrupt system, it must reach the places where it can help people build a better future. Civil society representatives must be more involved in all kinds of negotiations, and their interests respected in their realisation. There must be no more purely party-led deals in the future, as happened in Mostar. The EU must more forcefully express its formative will. Democratic civil society and the political actors championing a European Bosnia and Herzegovina must become our closest partners.

Bosnia and Herzegovina will need a revised “Dayton”, a constitutional reform. The provisions that are in breach of international rights must urgently be amended. Ethnic discrimination of all kinds must come to an end. The new constitution must create a legal framework for a society characterised by pluralism, non-discrimination, tolerance, equality before the law and justice. This goal cannot be achieved overnight, and it will not be achieved easily. The nationalists will continue to attempt to divide the country and further embed ethnic nationalism. We, the EU, must also counter such attempts. With political will, much can be not only initiated, but also realised. Let's get working. We are fighting for a European Bosnia and Herzegovina, founded upon equal rights for all. ■■■

