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## Constitutional reform in Bosnia and Herzegovina: preparing for EU accession

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### BACKGROUND

In April, the latest attempt by the EU and US to help overcome the political crisis in Bosnia and Herzegovina failed, with key Bosnian political players rejecting US Deputy Secretary of State James Steinberg's and Spanish Foreign Minister Miguel Ángel Moratinos' efforts, during a visit to Sarajevo, to convince them to sign up to constitutional reforms and a reform agenda after this year's general election.

Over the past year, Bosnia and Herzegovina (henceforth referred to simply as Bosnia) has slipped back into international headlines for all the wrong reasons. Talk of a new war and its potential disintegration has captured global attention, prompting a renewed focus on the country by the US and the EU.

This interest is justified, given both the political crisis in Bosnia and the EU's unclear and wavering strategy towards the country.

New EU foreign policy chief Catherine Ashton's decision to visit Bosnia during her first trip abroad after the US, is encouraging, as are indications that both the EU's foreign policy and enlargement strategy towards Bosnia and the Western Balkans are being reevaluated. This renewed interest in the country, however, runs the risk of leading to engagement for the wrong reasons, compounding the EU's inability to effectively deal with the challenges facing Bosnia.

#### **Should we stay or should we go?**

Bosnia is no closer to the brink of collapse than it has been many times since the end of the war in 1995; a renewed conflict is not on the horizon.

If anything, the hasty and ill-prepared EU-US initiative at the Butmir NATO base next to Sarajevo airport in autumn 2009 contributed to creating the sense of crisis rather than alleviating it.

International mediators had hoped to kick-start constitutional changes and secure a deal on the remaining criteria necessary for the Office of the High Representative in Bosnia and Herzegovina to be closed. While driven by desirable goals, the process was mishandled by the US and the EU.

The initiative was designed to put pressure on the political parties to agree to major concessions, but most walked away from the talks and rejected the internationally proposed reforms when they realised that neither sticks nor carrots were on the table, just a show of engagement.

Following the aborted talks and a few further rounds of technical discussions, the so-called 'Butmir Process' is dead. While the proposed reforms remain on the table, elections in October 2010 and the EU's all-too-brief engagement have all but ended 'Butmir'. It joins the ranks of previous failed reform efforts, from the 'April package' (named after the month in which it was rejected by the Bosnian parliament in 2006) to the 'Prud agreement' (a vague platform for constitutional reforms drafted in a small Bosnian village in 2008).

The latest efforts failed for three reasons: the EU and US were ill-prepared, suggesting 'quick fix' solutions to the parties. Second, international mediators had little to offer in exchange for reform, especially to those parties

which would have lost out as a result. Third, by creating a sense of emergency in Butmir's army barracks, the mediators suggested that extra-institutional and quasi-coercive means might be used to change Bosnia's political structure. The EU and the US lacked the means and determination to back up such a high-risk strategy.

While it would be tempting to blame the failure of Butmir on intransigent nationalist leaders, the international community must shoulder a large

share of the responsibility. The EU, in particular, has taken a contradictory line.

The criteria and conditions for further progress in the Stabilisation and Association Process have changed and remain unclear. The EU has been particularly ambivalent about constitutional reform, supporting (although not wholeheartedly) the first US-led efforts that failed in April 2006 and then subsequently stating that constitutional changes are not a requirement, but are necessary. Even if this might be right, it has sown damaging confusion.

## STATE OF PLAY

Matters have been complicated by the long-expected decision of the European Court of Human Rights (ECHR) in December 2009 which found the Bosnian Constitution in breach of the European Convention on Human Rights, because the presidency and the upper chamber of parliament – the House of People – are only open to Serbs from the Republika Srpska and Bosniaks and Croats from the Federation, thus excluding minorities and members of the dominant nation from the 'wrong' entity.

This decision gave the calls for constitutional change a new sense of urgency. However, while there is broad agreement among Bosnia's political actors that the Constitution needs to be amended, there is more than one way to do this, and all the alternatives are controversial because they go to the heart of the balance of power between the state and the entities and between the different ethnic groups.

The most important change would affect the election of the presidency. A minimalist approach, promoted by the Republika Srpska (RS), would be to remove the ethnic labels but keep the current electoral system. This would formally address the Court's ruling, but would not end the discrimination. Most proposals for more substantial reforms have focused on reducing the presidency's power and introducing indirect elections. The key difficulty here would be in ensuring that those groups previously excluded can be represented, while avoiding the exclusion or over-representation of one of the three dominant groups.

If the presidency members are elected by the entities without ethnic pre-fixes, Croats are likely to be unrepresented, and if a fourth member is added to the current three to represent 'others' (i.e. minorities), there is a danger of this position being abused by nationalist parties running token minority representatives for the seat. Replacing the presidency with a single president (with two or more vice-presidents) would be the best solution, but is one to which Croat and Serb parties will be reluctant to agree.

### Institutions rather than constitutions

Although changes are needed to some aspects of the state structure to facilitate EU accession, constitutional reform has become a fetish.

Decisions can be taken through the current Constitution, as long as there is political will to proceed with EU integration, and even a reformed constitutional structure will need to include vetoes and quorums which would allow one of the 'constituent people' or entities to block many decisions. Otherwise, neither the Croat nor Serb parties will agree to such changes.

By focusing on constitutional reform, cause and symptom are confused: the cumbersome political structure is not to blame for the delays in EU integration and the slow pace of reforms; the political disputes between the different political parties are. Constitutional reform can at best reduce the number of veto points, opening the door to the creation of political spaces which are not completely dominated by ethnic politics. But this would take several electoral cycles to achieve after the Constitution has been amended.

So what kind of constitutional amendments are possible and what can they achieve? As any changes require the consent of a parliamentary majority of all three constituent peoples – Bosniaks, Croats and Serbs – reform without a broad consensus is impossible. Nor is it desirable: in divided societies from South Tyrol to Northern Ireland or Belgium, constitutions are intentionally difficult to change to avoid one group imposing its will on others. Narrow coalitions also tend to make it easier for 'spoilers' to wreak havoc by sabotaging the entire political system.

Amending the Constitution must be a consensual and inclusive process, no matter how odious some of the parties involved might be. This, by definition, rules out any maximalist changes, such as the proposal for a civic constitution of a more

centralised Bosnia floated by the opposition Social Democratic Party.

Realistic constitutional change can thus accomplish one of two goals: a) enshrine the current *status quo* in the Constitution and incorporate the ECHR ruling; or b) make a few additional changes drawing on the failed 2006 effort.

The former would be more likely to win the support of Serb parties and foster greater commitment to the institutional system. It might also help to overcome some of the current paralysis borne out of continuous challenges to the country's structure, primarily from Bosniak parties seeking to weaken the Republika Srpska and parties from the RS seeking to claw back competences for the entity at a price. The second option would facilitate the administration of the country in some respects, but might be harder to agree on, as the RS has few incentives to move much beyond its insistence on maintaining the *status quo*.

Most important, however, is the fact that – beyond addressing the breach of European human rights' standards – no *constitutional* change is, strictly speaking, necessary for Bosnia to move towards further EU integration, and should not become a condition for doing so. Bosnia will need clear *institutional*

arrangements which will allow it to determine a single position in key policy areas and implement EU legislation. These can take many forms, from state-level ministries and agencies to inter-entity coordination bodies.

There can be no doubt that although political elites pay lip service to EU accession, no major political actor is willing to agree to cede powers for the sake of EU accession alone. Furthermore, decisions on which level of government negotiates with the EU, and where standards are set and implemented, are not technical but profoundly political. Thus, EU accession cannot de-politicise Bosnian arguments over where power lies. At best, it can create incentives for institutional reform and help to defuse some of these controversies in the long term.

The EU's record so far has not been good: the failed police reform demonstrates that when the locus of power becomes more important than the substance of reform and when the requirements lack credibility, the Union is bound to fail. Consequently, effective EU engagement needs to focus not on one particular institutional set-up, but rather on clearly identifying what different institutional set-ups can (and cannot) engage with the EU during the accession process and once Bosnia becomes a Member State.

## PROSPECTS

Constitutional reform before the general election is highly unlikely, as any changes have to be approved before elections are called. The election law requires the vote to be held on the first Saturday in October and it must be called 170 days (or 5½ months) ahead of time.

This is not inherently problematic. The ECHR ruling does not require constitutional changes before mid-2011. Not only are the elections a brake on reform, as little legislative progress can be expected this year, but ethno-nationalist rhetoric also flourishes during electoral campaigns – not a good climate in which to discuss controversial constitutional changes.

Furthermore, the formation of governments in Bosnia is painfully slow due to the need to form coalitions between parties with diametrically opposed platforms. It is therefore unlikely a new government will be in place before early 2011, at the state and entity level.

Also, while elections can potentially change the political dynamics in a country, the international community has consistently overestimated their power to 'change the game'. Ever since the first elections after the war in 1996, there have been hopes that more moderate and cooperative parties would come to power, but more often than not, the

opposite has been true – or, as was the case in the 2006 elections, the 'moderates' turned out to be more uncompromising than the established nationalist parties.

Reliable opinion polls are notoriously hard to come by in Bosnia given the divided nature of party politics, but radical change seems improbable.

In the RS, Milorad Dodik and his Alliance of Independent Social Democrats are unlikely to retain the overwhelming dominance they have enjoyed since 2006. However, no other party is likely to overtake Mr Dodik's party, which might thus continue to dominate RS politics in the coming four years unless a broad coalition of opposition parties can challenge it. Political opponents will gain not from challenging Mr Dodik on his nationalist rhetoric and uncompromising defence of the Serb entity, but rather from his authoritarian streak and his alleged financial wrongdoings.

In the Federation, the picture is more complex and less predictable, not least due to the new 'Union for a Better Future' of Fahrudin Radončić, owner of the influential media group *Avaz*. A 'Bosniak Berlusconi', he could become a king-maker in the next Federation

and even state government. Recent attacks by Mr Radončić on the editor-in-chief of the Federation news programme – arguing that there is no place for non-Muslims as editors in public broadcasting – suggests that he is willing to use Bosniak nationalism just as Mr Dodik has used Serb nationalism: to consolidate his power.

At the same time, the moderate Social-Democrats are likely to make a political comeback, splitting the Bosniak vote. After October, a weaker Mr Dodik might govern Bosnia together with new partners from the Federation. While this outcome might end the vicious cycle of confrontation between Mr Silajčić and Mr Dodik, it will not transform the underlying political conflicts that have shaped Bosnian politics for more than a decade.

Amending the Constitution will be marginally easier after October, but is likely to be pushed back to make way for other, more pressing reforms. This is both good and bad news. On the upside, focusing on other policy issues could help to avoid getting bogged down in the most controversial aspect of Bosnian politics. The downside is that even the constitutional changes based on the ECHR ruling might re-appear only as the next electoral cycle looms – when it is too late, once more, for a constitutional debate.

### How to engage with Bosnia?

The policy consequences for the EU are clear: immediately after a new government is formed, it will need to take a soft but strategic approach towards Bosnia.

This strategy needs to move away from the assumption that Bosnia is a potential EU Member State just like any other country, but also avoid rash reactions which play into the hands of those who either hope or fear that outsiders will seek to impose solutions to Bosnia's problems. It should focus on outlining clear options for the organisation of Bosnia's institutions to prepare for eventual EU membership. These options should draw on different models among current EU Member States, especially those organised as federal states (especially Belgium and Germany), rather than on proposing any particular organisational structure for Bosnia itself.

A complimentary EU effort to encourage constitutional reform can help Bosnia overcome some of the egregious flaws in its Constitution. This engagement should be built on the following negotiating principles:

- a) constitutional amendments should only be introduced through the formal institutional process, not pushed through *ad hoc* meetings, to reduce the risk of spoiling tactics if only party leaders are included;
- b) the goal of constitutional reforms should not be state-building by stealth, but addressing the Constitution's shortcomings in terms of human rights and facilitating EU accession, to reestablish the Union's credibility as a mediator in the reform process;
- c) the EU should steer the process by providing advice and guidance, offering a clear menu of options to prepare Bosnia's institutional structure not only for accession negotiations but also for membership; and
- d) reforms should be built on the premise that Bosnia is a fully-functional decentralised country, which includes the Serb Republic as one of its federal units and a state government which can represent Bosnia in the EU.

While it would be easy to draw up a long wish list of the desirable constitutional changes, the main goal must be an agreement which moves the existential debates on how, why and whether Bosnia should exist into the background.

With such a soft, but strategic approach, the EU can help to overcome the political crisis which has plagued Bosnia in recent years. However, it will not produce immediate results and Bosnia will continue to require the Union's patience and long-term engagement.

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*The issues raised in this paper are discussed in the EPC's Balkans Forum.*

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