

# Breaking the Impasse: Constitutional Reform in Bosnia

**Sofía Sebastián**

**>>** Debates on revising Dayton have featured prominently in Bosnian politics since 2006. The objective is to make the constitution comply with the European Convention on Human Rights, and have a more functional, streamlined constitutional structure for EU accession and international withdrawal. Despite numerous initiatives undertaken by the international community and local authorities, these efforts have not worked, largely due to a lack of political will from local leaders and mismanagement by international actors.

Last October, general elections and ensuing discussions aimed at forming the new government have resulted in further delays to constitutional reform. Frustrated with these delays, the EU has stepped up diplomatic efforts in order to create a sense of urgency. These include a recent round of consultations with party leaders promoted by German Chancellor Angela Merkel in January (in coordination with the EU and in consultation with international actors such as the Venice Commission). While the German initiative has positive intentions, it is unclear how it is being coordinated with international actors on the ground, and what role, if any, the EU should play. In the absence of a cohesive plan, this development is unlikely to gain the necessary support and might offer local politicians yet another opportunity to impede the process.

Drawing lessons from previous efforts, the EU needs to devise a clear reform strategy as part of an enhanced EU presence on the ground. More specifically, the EU should clearly outline a comprehensive roadmap for required constitutional change and draw on international support to back the effort. While the EU has tired of trying to impose political conditions (police reform, for example, stalled the accession process for more than four years), the absence of a defined strategy on this issue is likely to

## HIGHLIGHTS

- Constitutional reform in Bosnia aims to prepare for EU accession and make the constitution comply with the European Convention on Human Rights.
- Despite numerous constitutional reform efforts (including strong external arm-twisting), ethnic groups remain deeply divided over constitutional issues.
- While the EU is growing impatient with Bosnia's stalemate, it has failed effectively to promote the need for constitutional change. Germany's recent initiative on constitutional reform is also likely to stall without well coordinated international action.
- Failure to comply with the European Convention of Human Rights could result in Bosnia's expulsion from the Council of Europe and the EU's refusal to ratify the Association and Stabilisation Agreement.

»»»»» undermine Bosnia's transition to full ownership. Ultimately, the EU will need to demonstrate to both local and international actors that it has the will and capacity to take on a leadership role. The adoption of the much-talked about EU package for Bosnia (likely to provide new details on both the EU presence on the ground and Bosnia's EU accession process) could boost its credibility.

While the world focuses on protests in the Middle East, the current stakes for Bosnia and the Balkan region could similarly not be higher. Failure to implement the necessary changes rapidly will jeopardise Bosnia's future in an integrated Europe.

### **DAYTON'S SHORTFALLS**

The Dayton Peace Agreement, brokered by the US in the midst of a war between three ethnic groups (Serbs, Croats and Bosniaks), marked the beginning of a new era in Bosnia. Dayton established an international monitoring system designed to provide security and institutional guarantees to the different ethnicities. The agreement set up a system in which ethnic differences and group rights were not only maintained, but were explicitly acknowledged and even reinforced (a typical institutional approach towards deeply divided societies emerging from conflict).

After fifteen years, the Dayton Agreement is inadequate as a political framework. Not only have all the ethnic groups been dissatisfied with Dayton at various times, but structurally, the multiple ethnic veto points have served to cripple the political process and all but paralyse the decision making process. The system only functions due to heavy external pressure and the direct intervention of the High Representative (the international envoy that monitors the implementation of Dayton).

Two examples illustrate the constitutional deficiencies inherent in Dayton. Firstly, the group identified as 'others' (national minorities that do not define themselves as Bosniak, Serb or Croat) cannot run for certain public offices, including the Presidency and the House of Peoples. This issue

gained prominence with the 2009 ruling by the European Court of Human Rights (ECHR) stating that the Bosnian constitution violated the European Charter on Human Rights. Subsequent to the ruling, both the Council of Europe and the EU have grown increasingly apprehensive about Bosnia's violations of pre- and post- membership criteria.

Secondly, Bosnia's complex institutional structure prevents the country from progressing more quickly toward EU accession. The lack of key competences at the state level, and the heavy dependency of the state upon the support of the entities are considered problematic by EU officials. The introduction of new legislation and the transfer of certain competences from the entities to state-level institutions *have* served to provide additional credibility. But the result is a complex, dysfunctional structure that lacks cooperative mechanisms amongst and between the different layers of authority.

The multiple veto points also undermine the legislative process and give ethnic groups an opportunity for institutional blockage. One of the most problematic provisions is the entity voting system in the House of Representatives which does not have an effective mechanism to overcome stalemate. Decisions require the approval of at least one-third of the members of each entity giving Serb delegates from the Republika Srpska a powerful tool to obstruct decisions at the state level (and potentially render EU accession unworkable).

EU officials have suggested that the implementation of European standards will require a more efficient law enactment system and that Bosnia also operate with a single voice on EU related matters. Adoption of the 'EU clause' has been portrayed as an essential reform to provide the requisite constitutional authority on EU matters and to ensure a system of coordination mechanisms between the different layers of authority. Serb parties, however, have remained reluctant and regard these changes as a pretext to undermine the status of the Serb-dominated Republika Srpska (RS). The EU has not stood firmly on this issue and has not set a clear policy around the EU clause.

---

## FAILURE AND COLLAPSE

Constitutional reform has become one of the most contentious and protracted post-war debates, with three major failed initiatives. The first attempt (the 'April Package') was cloaked in secrecy and spearheaded by the US delegation with the marginal support of the EU. This was the most comprehensive effort and, of the three attempts, came closest to succeeding. Its ultimate demise triggered a disruptive electoral campaign in 2006, and led to considerable setbacks in terms of the EU reform process and political, social and economic stability.

Two other significant attempts at constitutional reform were launched in 2008 and 2009 respectively.

## Constitutional reform has become one of the most contentious and protracted post-war debates

The 'Prud Process', was instigated at the local level by leaders of the three main ethnic-based parties; namely SNSD leader Milorad Dodik, HDZ leader Dragan Covic, and SDA leader Sulejman Tihic. This effort was primarily aimed at complying with the remaining criteria for the closure of the Office of the High Representative (OHR) and addressing constitutional issues. Unfortunately, this initiative developed largely outside of the public domain and therefore excluded many of the key stakeholders. Although some common ground was identified (including an agreement to create new administrative units), the process quickly disintegrated into finger pointing and accusations of 'selling out'.

The 'Butmir Process', launched in 2009, was the last international effort aimed at addressing constitutional change prior to the general elections in October 2010. Despite the united front presented by the EU and the US, underlying divisions, unrealistic time constraints, the overlap of issues and a 'take-it-or-leave-it' approach led to its failure in an environment rife with nationalist rhetoric and diminishing international credibility.

Following Butmir's collapse in December 2009, a local initiative emerged in the form of a Parliamentary Working Group aimed at addressing the ruling of the European Court of Human Rights. Despite external pressure from the Council of Europe (and hesitant efforts by the Spanish EU presidency to broker a political compromise), no progress was made before the 2010 elections.

## THE STALEMATE

Ethnic groups remain deeply divided over the future form and status of the state. Bosniaks believe that the current state is dysfunctional (owing to the multiple veto mechanisms), and demand a stronger government with additional state competences. Serbs, however, are fierce defenders of the status quo and advocate a weak state, as this provides them with powerful territorial and group autonomy rights. They are firmly opposed to engaging in the EU accession process at the expense of their territorial and political autonomy. The Croats are perceived as the most difficult group to accommodate given the need to diminish veto points and to avoid further state fragmentation. Constrained by internal power struggles, they tend to waver between radicalism (including demanding a third entity for Croats, which both Bosniaks and international officials consider unviable) and moderation.

Parties are also divided over the scope and pace of the reform process. While all groups agree on the need to address the ECHR ruling, they are deeply divided over the approach. Serb leader Milorad Dodik has advocated a simple change to the wording of the constitution so that elected officials would not be required to belong to any particular ethnic group, leaving the door open for further changes in a second phase of constitutional reform.

Bosniaks distrust Serb motives and believe this approach is a strategy to avoid more meaningful constitutional change extending beyond the requirements of the ECHR ruling. This issue has been divisive within the international community. While the EU appears to be in favour of introducing limited (and staged) constitutional changes as a



»»»»» means of unblocking the stalemate, the US fears a scenario in which the parties stop short of a second round of constitutional reform. This could potentially lead to state failure following international withdrawal.

Ultimately, party leaders have used constitutional reform to advance their own political agendas by presenting themselves as the genuine guardians of their respective ethnicities. Especially during election cycles, this development has served to heighten the level of nationalist rhetoric. This is particularly significant in the context of pervasive ethnic distrust and a lack of institutional incentives for cross-ethnic cooperation. Intra-ethnic dynamics have also challenged the capacity of political leaders to reach across the ethnic divide given the potential for accusations of ‘selling out’.

The manner in which the April package and the Butmir process played out were indicative of political manoeuvring by actors seeking to unseat incumbent parties. The Croat offshoot party HDZ 1900, for example, was created in 2006, only days after constitutional changes had been agreed upon by HDZ and other ruling parties. The newly formed HDZ 1990 framed its electoral campaign directly in opposition to HDZ’s position on constitutional reform, and made significant inroads into HDZ’s electoral base.

### **BREAKING THE IMPASSE**

In the absence of local level political will, the EU and US should take a leadership role in pushing party leaders to address constitutional change (the US is perceived as the only actor capable of brokering consensus amongst the parties). The credibility of both the EU and US has suffered over the past few years, and they will need to find ways to restore their credibility and halt the cycle of division and indecisiveness. Both actors will need to reconsider their approach to key challenges on the ground. They must engage with the new constellation of local and international forces, evaluate potential risks and opportunities and craft a revised strategy for constitutional reform more attune to Bosnia’s transition to domestic ownership.

In order to avoid the cycle of instability defined by previous initiatives, the EU and US must learn from, and build upon, past failures. Some important areas for consideration include:

- 1)** Avoid ‘take-it-or-leave-it’ initiatives triggered by artificial deadlines. Instead, utilise a more restrained approach by actively and effectively influencing the process via local leaders, domestic institutions and major stakeholders, including members of the civil society.
- 2)** Demonstrate international unity and avoid public discrepancies. While the presence of numerous actors can improve leverage, dissention generates confusion and a lack of accountability. The EU’s promotion of a limited reform package in relation to previous reform initiatives, for example, could alienate US support and create opposition from local actors. Divisions between the US and the EU (mainly in reference to the scope of the reform) must be clarified prior to engaging with local actors.
- 3)** Clearly define the required criteria for EU accession. Whereas EU officials have been vocal in their demand for constitutional change, they have not been clear about the specific requirements. The EU’s emphasis on ‘domestic ownership’ has ultimately proven weightier than the need for Bosnia to be treated as a unique case with respect to the accession process.

The EU needs to determine whether constitutional change is a critical facet of the agenda and agree on the nature and scope of constitutional and institutional reforms necessary for accession. In this manner, compliance with the ECHR ruling and implementation of constitutional and/or institutional changes necessary for EU accession would be required conditions. Further constitutional reform would then depend upon there being a real desire for change.

- 4)** Enhance the credibility of the EU and reinforce a sense of local ownership and responsibility. With the exception of visa liberalisation, the EU’s political carrots and sticks have failed to forge consensus between local actors. EU threats to freeze the
-

ratification process of the Stabilization and Association Agreement (a precursor to accession) until Bosnia makes tangible progress in implementing the ECHR ruling have been met with scepticism. Party leaders continue to subordinate EU reforms to more parochial interests, and it is paramount that the EU adopts a more forceful, 'hands on' approach in the face of political obstructionism.

The provision of clear EU incentives and disincentives as part of a strengthened presence on the ground is critical. Constitutional change should feature as an integral part of the EU package for Bosnia being discussed in Brussels. A fast-track process for EU candidacy would provide Bosnia with important economic incentives. The EU needs to demonstrate a willingness to pursue punitive actions in the face of persistent violations of international standards on human rights and Bosnia's failure to comply with the requirements for EU integration. Ultimately, the EU will need to decide on the form of EU assistance, and reconcile the political tools at its disposal in the context of a strengthened presence on the ground

**5)** Carefully consider the implications of intertwining reforms with Bosnia's transition to comprehensive domestic ownership, as this is likely to raise ethnic tensions and strengthen radical positions. Bosniaks, for example, fear that the state will no longer be viable following the departure of the High Representative and in the absence of substantial constitutional reform. Serbs, however, fear that constitutional changes (beyond the base-level requirements to comply with the ECHR ruling) are intended to undermine their political survival in a post-OHR era. Both the EU and the US will need to define a framework for a post-OHR Bosnia based upon the provision of critical guarantees, not only with respect to Bosnia's territorial integrity but also in relation to the status and autonomy of RS.

**6)** Engage (formally or informally) additional international actors such as Russia and Turkey. The active involvement of these nations could prove beneficial in light of their growing prominence on

the ground. The EU should also seek the assistance of neighbouring countries such as Croatia and Serbia; while making it clear that support for nationalist platforms will undermine the prospects for EU integration.

The EU needs to be aware that open-ended frameworks lacking specific objectives are unlikely to deliver tangible results in an environment where political leaders are accustomed to finger pointing and skirting blame. Tentative initiatives will not command the requisite credibility, and another failed effort could have disastrous consequences in terms of the broader EU-led reform process. The inability to forge and demonstrate consensus could serve to further damage the EU's legitimacy and undermine the authority of the new Bosnian leadership at a critical juncture.

The alternative to promoting constitutional reform in Bosnia would be to de-emphasise this issue and adopt a more subtle approach. However, this option could turn impractical as constitutional changes need to be addressed before the new election cycle in 2012.

The stakes for Bosnia could not be higher: failure to comply with the ECHR could result in its expulsion from the Council of Europe and the EU refusing to ratify the Association and Stabilisation Agreement (the pre-stage for membership application). Bosnian authorities are faced with the very real prospect of becoming a political backwater in the context of a Balkan region that is rapidly moving towards an integrated Europe. Alternatively leaders could put aside their ethnic differences in the interest of strengthening their position vis-à-vis the EU and help to define a path for political stability and economic growth. Bosnia is clearly at a crossroads and the implications are significant. The future of Bosnia hangs in the balance.

*Sofia Sebastián is research associate at FRIDE*

**e-mail: [fride@fride.org](mailto:fride@fride.org)  
www.[fride.org](http://fride.org)**