

## 2022 Casad Comparative Law Lecture<sup>±</sup>

### Forced Together, Never Sustainable? Post-Conflict Federalism in Bosnia and Herzegovina

*Jens Woelk\**

**Editor's Note:** The following essay is drawn from the Casad Comparative Law Lecture presented in April 2022 by Professor Jens Woelk. The Casad Lecture, held regularly at the University of Kansas School of Law School as a component of the School's International and Comparative Law Program, is named after Robert C. Casad and Sarah Casad in recognition of the special contributions that both of them have made to the Law School over many years, particularly in the area of comparative law. Bob Casad's service on the KU Law faculty starting in 1959 reflected his deep dedication both to academic scholarship and to classroom teaching, so that generations of students and practitioners have benefited from his contributions to civil procedure, particularly from a comparative perspective. In keeping with *Kansas Law Review's* practice when publishing lectures, this article is structured as an essay.

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<sup>±</sup> The Casad Lecture is named in honor of Professor Robert Casad, one of KU Law faculty's brightest stars in the area of comparative law. Professor Casad became a college freshman at age 16, and by the age of 21 he had earned his undergraduate degree and a master's degree from the University of Kansas. He then went on to earn a JD degree from the University of Michigan and an advanced law degree from Harvard. Before Professor and Mrs. Casad moved to Lawrence in 1959, they lived for a short time in Winona, Minnesota where Professor Casad practiced law at the practice of Streater and Murphy. During their long association with KU, Professor and Mrs. Casad worked and lived overseas several times, including forays to Spain, Vienna, London, Japan, Costa Rica, Guatemala, Munich, Augsburg and Frankfurt. In connection with some of those visits abroad, Professor Casad became fluent in Spanish and undertook extensive research and writing in that language – a sign of a true legal comparativist. Among Professor Casad's most well-known scholarly works in English are *Res Judicata in A Nutshell* (1976) and *Jurisdiction in Civil Actions* (1998). Professor Casad took emeritus status at the Law School in 1997; Sarah Casad passed away several years ago.

\* Jens Woelk is a full professor of comparative constitutional law at the University of Trento (Italy), where he holds the Euregio Chair in Law, and he also has an appointment in the interdisciplinary School of International Studies at Trento. After earning his Ph.D. in Law at the University of Regensburg (Germany), Professor Woelk worked at the Eurac Research offices in Bolzano (Italy), where he helped lead the Institute for Comparative Federalism. His research interests revolve around comparative constitutional law, with special emphasis on federalism, regionalism, minority rights, and European Union law. He has most recently focused on the constitutional transformation processes in Southeastern Europe. In the Western Balkans, Woelk has served in several advisory capacities for the EU and the Council of Europe, including his work as Senior International Legal Expert on EU integration matters at the High Judicial Council of Bosnia and Herzegovina. He has written and lectured widely and earned recognition globally for his expertise.

## I. INTRODUCTORY REMARKS

As you see, the title I have chosen for my Casad Lecture includes, at its very center, a question mark: “*forced together, never sustainable?*”. That is, in exploring post-conflict federalism in Bosnia and Herzegovina, I pose this question: Even if the efforts at cooperative governance among the conflicting groups can succeed in *forcing them together*, after a conflict, must we conclude that these arrangements are in fact *never sustainable?*

As I will also explain, I might actually replace the question mark with an exclamation mark—*never sustainable!*—because even an optimist must acknowledge that the situation in Bosnia and Herzegovina remains quite tentative despite the strenuous efforts at bringing conflicting groups together there through federalism. I have been closely involved in those efforts, and I welcome the opportunity to offer my observations in the context of the Casad Comparative Law Lecture.

Much attention focuses now, appropriately enough, on the terrible war in Ukraine. We should not forget that thirty years ago another terrible war started, also in Europe. In April 1992, the Siege of Sarajevo began. For three long years, the city was under siege, and the country was caught in the throes of war. My remarks today focus on the situation that followed that war—that is, the reconstruction of the country, the continuity and strengthening of its institutions, and how this has been, or can be, achieved. It is a story that involves a great deal of constitutional law and influences from other sources, in particular European law on various levels, such as action taken by the Council of Europe, efforts by the European Union (EU), and others.

My assessment today is disheartening. Indeed, the current situation in Bosnia and Herzegovina is one of crisis. This is why I say that the question mark in the title of my lecture is probably a bit optimistic. The crisis is severe enough that both the United States (U.S.) and the EU have applied sanctions to one member of the Presidency of Bosnia and Herzegovina—now the President of *Republika Srpska*, one of the two Entities of the State of Bosnia and Herzegovina—for secessionist behavior and for fomenting secessionist movements.<sup>1</sup>

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1. On January 5, 2022, the U.S. Department of the Treasury sanctioned Milorad Dodik for destabilizing and corrupt activity. *Treasury Sanctions Milorad Dodik and Associated Media Platform for Destabilizing and Corrupt Activity*, U.S. DEP’T OF TREASURY (Jan. 5, 2022), <https://home.treasury.gov/news/press-releases/jy0549> [https://perma.cc/R892-RHNQ]. Other leaders

Understanding the crisis requires an explanation of the complexity of the system and of the Western Balkans region more generally. The former Socialist Federal Republic of Yugoslavia consisted of six Republics—Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia—and two autonomous Provinces—Vojvodina and Kosovo. The situation after the Balkan wars in the 1990’s resulted in all Republics becoming independent countries, including Bosnia and Herzegovina, and Kosovo—although Kosovo is not recognized by Serbia and some other States, including five EU Member States. I should point out that these states (plus Kosovo) are in various stages along the route toward membership in the European Union.<sup>2</sup> Some are candidates and in negotiations; these are Serbia and Montenegro. Some are in an in-between category because they are candidates but have not yet started negotiations toward EU membership; these are Albania and Northern Macedonia.<sup>3</sup> And then there are two that we might consider the “laggards” (officially labelled as “potential candidates”); these include Kosovo (again, not fully recognized as an independent state) and Bosnia and Herzegovina.

What I wish to emphasize in my remarks is a combination of law and geopolitics as applied to one country within this complicated region of the Balkans—namely, the country of Bosnia and Herzegovina. The overarching question is one of post-conflict federalism, and I would frame it as follows: Is federalism a feasible means of stitching together a country after a violent internal armed conflict—and, specifically in the case of Bosnia and Herzegovina, can power-sharing arrangements be constructed to make it possible for different ethnic groups, who had been at war with each other, to live together peaceably?

Let me offer some further details about Bosnia and Herzegovina so we

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and officials were targeted later. For example, on June 6, 2022, the U.S. sanctioned Marinko Cavara, President of the Bosniak-Croat Federation, and Alen Seranic, minister of health and social welfare of the Bosnian Serb Entity, the RS. *U.S. Imposes Sanctions on Bosnian Leaders for ‘Undermining’ Peace Accords*, RADIOFREEEUR. RADIOLIBERTY (June 6, 2022), <https://www.rferl.org/a/bosnia-serbs-us-sanctions/31885875.html> [<https://perma.cc/PQ3W-2JPJ>].

2. For detailed information on the EU enlargement process and the Western Balkans, see *Enhanced EU Engagement with the Western Balkans*, EUR. COMM’N, [https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/enhanced-eu-engagement-western-balkans\\_en](https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/enhanced-eu-engagement-western-balkans_en) [<https://perma.cc/3SME-7JKR>].

3. As of October 2022, negotiations with Albania and Northern Macedonia have begun and Bosnia and Herzegovina has received proposed candidate status from the European Commission. See, e.g., *Public Address by President von der Leyen in Bosnia and Herzegovina*, EUR. COMM’N (Oct. 28, 2022), [https://ec.europa.eu/commission/presscorner/detail/es/speech\\_22\\_6464](https://ec.europa.eu/commission/presscorner/detail/es/speech_22_6464) [<https://perma.cc/T5QG-2FHK>] (addressing Bosnia and Herzegovina’s proposed candidate status). In December, the European Council will decide whether to grant Bosnia and Herzegovina’s candidate status.

can appreciate the importance of that overarching question. Bosnia and Herzegovina is a relatively small country in terms of demography. It had four million people before the war; now its population has dropped to perhaps 3.5 million after experiencing a huge emigration trend. According to the 1991 census data, of the three largest ethnic groups—referred to in the Constitution as “constituent peoples”—Bosniaks, or Muslims, constitute the largest group (43.5%), Serbs are the second largest group (31.2%), and Croats make up the smallest group (17.4%).<sup>4</sup> This is truly a multi-ethnic composition. And, indeed, there are other “minority” groups, such as Bulgarians, Slovaks, Roma, and others. The 1991 census data—that is, before the war—has been used after the war as an ethnic key. In particular, it has been used as a reference for determining the representation of the groups in the composition of institutions, and for earmarked posts in the public administration.

This ethnic diversity more or less corresponds to religious diversity. After all, many “ethnic” groups or minorities in Eastern and Southeastern Europe are defined by religious affiliation.<sup>5</sup> Although Bosnia and Herzegovina has three official languages (Bosnian, Croatian, and Serbian), they are very similar and mutually intelligible; in fact, they were known as “Serbo-Croatian” in the past.<sup>6</sup>

## II. THE POST-WAR POLITICAL ARRANGEMENTS: ETHNIC FEDERALISM AND POWER SHARING

As the result of the war and the international agreement to end it, the Dayton Peace Accords, Bosnia and Herzegovina has become a federal system. It is a federal “twin state” with only two Entities. The first Entity

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4. See the table in Fran Markowitz, *Census and Sensibilities in Sarajevo*, 49 COMPAR. STUD. IN SOC'Y & HIST. 40, 42 (2007); see also Valery Perry, *The 2013 Census in Bosnia and Herzegovina—A Basic Review*, DEMOCRATIZATION POL'Y COUNCIL (Oct. 2013), <http://www.democratizationpolicy.org/pdf/dpcpolicynotebihnewseries3bihcensus.pdf> [<https://perma.cc/DMF6-UNHA>].

5. This is due to the importance of religion in the Ottoman Empire. Under the “Millet system,” religious groups enjoyed autonomy in certain matters, particularly those matters concerning family law.

6. A major difference is that Serbian uses the Cyrillic alphabet, while Bosnian and Croatian use the Latin one. But in fact, today it is certainly not the linguistic differences creating cleavages in society. For example, 200 academics, researchers, cultural workers, artists, authors, and activists signed the Declaration on the “Common Language,” published in Sarajevo on March 30, 2017. See *Declaration on the Common Language*, LITERATURHAUS EUROPA, <https://www.literaturhauseuropa.eu/en/topics/articles/declaration-on-the-common-language> [<https://perma.cc/SFB4-V9RD>]. However, the declaration immediately provoked harsh political reactions.

is the *Republika Srpska* (“RS”), which has a Serb majority in the population and a unitary organization, meaning there are only municipalities and the government. The second Entity is the Federation of Bosnia and Herzegovina (“FBiH”), a federal system itself consisting of ten Cantons of which some have a majority Muslim population, others are majority Croat, and the rest are mixed in terms of population. The FBiH was created in 1994—one year before the end of war through the U.S.’s intervention in the international Washington Agreement<sup>7</sup>—primarily to end the war between Bosniaks and Croats. In addition, there is the autonomous District of Brcko, established in 1999, as a result of international arbitration by the only constitutional amendment so far.<sup>8</sup> Once directly administered by the international community, Brcko is now an autonomous area because of its strategic position between the two parts of the RS, on one hand, and two FBiH Cantons north of it, and its multi-ethnic nature and population. In practical terms, it functions like a local self-government area, independent from the two Entities and with its own legislature and judiciary.

This is the complicated beginning which we may call a “forced together” federal system.<sup>9</sup> To end the war, the international community pursued a two-part objective: First, the country should stay together as one, and second, no one would be rewarded for ethnic cleansing and other horrors. This was achieved by an international agreement negotiated over two weeks at an Air Force base in Dayton, Ohio.<sup>10</sup> The Dayton Peace Accords forged the country: Bosnia and Herzegovina’s Constitution is part of the Dayton Agreement, as Annex IV.<sup>11</sup> Apart from the international guarantees, the international character of the agreement had the advantage of not needing to resolve the problem of legitimacy by asking the

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7. *Washington Agreement*, U.S. INST. OF PEACE (Mar. 1, 1994), [https://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/washagree\\_03011994.pdf](https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/washagree_03011994.pdf) [<https://perma.cc/6P3B-JPXH>].

8. See Tomas Vail, *The Brčko Arbitration: A Process for Lasting Peace between Non-State Actors*, in *NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS* 313, 313–14 (James Summers & Alex Gough eds., 2018).

9. See Nancy Borneo, *A New Look at Federalism: The Import of Institutions*, 13 J. OF DEMOCRACY 96, 105 (2002) (noting the “federal process requires a ‘sense of partnership,’ and such a sense cannot be imposed”) (footnote omitted).

10. See generally RICHARD HOLBROOKE, *TO END A WAR* (1999) (describing the negotiations at the air base and the making of the Dayton Constitution).

11. *Annex 4: Constitution of Bosnia and Herzegovina*, UNIV. OF MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/icty/dayton/daytonannex4.html> [<https://perma.cc/WSA8-B9MQ>]; see also Bosnia and Herzegovina’s Constitution of 1995 with Amendments Through 2009, CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Bosnia\\_Herzegovina\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en) [<https://perma.cc/6RUC-GZ2N>] (providing the Constitution’s text).

population. Indeed, there has never been a referendum on the Constitution, nor does an official translation of the English text exist in the local languages. Instead, the leaders alone signed the Agreement: The Serb President Milosević, the Croat President Tudjman, plus the President of Bosnia and Herzegovina Izetbegović, representing the three warring parties (note, however, that formally the Bosnian Serbs and Bosnian Croats as secessionist forces have not been involved—they were represented by their kin States). With these signatures they became the three “constituent peoples” of Bosnia and Herzegovina—according to the preamble of the Constitution (“along with ‘Others’ and citizens”).

What are the main elements of the Dayton Constitution? It combines elements from different sources and traditions, creating a unique and complex fusion of Western liberal-democratic principles and pre-existing socialist and Yugoslav, multinational elements. Most important is “ethnic federalism,”<sup>12</sup> which is a characteristic of many former socialist countries like the USSR. Ethnic federalism was present in Yugoslavia itself, where territories were (nominally) self-governed by dominant groups, like Croats in Croatia, Serbs in Serbia, and Montenegrins in Montenegro.<sup>13</sup> Thus, the Serb majority part (the RS) and the Bosniak-Croat part (the FBiH), which already existed at the end of the war, were transformed into sub-national entities of the State. Therefore the “State” is the federal level in BiH; it needs to be distinguished from the “Federation” as one of the Entities. Ethnic federalism did only nominally work in Yugoslavia (supposedly a union of Republics named after their “titular peoples”): Tito and the party exercised strong centralized control. However, it importantly contributed to the country’s dissolution, due to the nationalist movements in its Republics which created centrifugal, secessionist forces when the center became (too) weak in the 1980s following Tito’s death. Also, ethnic federalism is based upon the assumption of a clear population majority in a given territory, a “titular people.” In Bosnia and Herzegovina this was not the case due to the diversity of its population in most of its parts. In fact, the war was about control over territory, and “ethnic cleansing” was used as a means for transforming ethnically diverse areas into homogenous

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12. See generally Sammy Smooha, *The Model of Ethnic Democracy*, in *THE FATE OF ETHNIC DEMOCRACY IN POST-COMMUNIST EUROPE* 5, (Sammy Smooha & Priit Jarve eds., 2005); Ilija G. Vujacic, *The Challenges of Ethnic Federalism: Experiences and Lessons of the Former Yugoslavia*, in *FEDERALISM AND DECENTRALIZATION: PERSPECTIVES FOR THE TRANSFORMATION PROCESS IN EASTERN AND CENTRAL EUROPE* 259 (Jurgen Rose & Johannes Ch. Traut eds. 2001).

13. The degree of autonomy these territories exercised was little, as the Socialist Party guaranteed overall control and dominance.

ones, justifying and legitimating, in turn, the control over them by one group.

To counteract this homogeneity assumption and the dominance of one group, the Dayton Constitution adds considerable complexity with power-sharing arrangements. These are based upon Arend Lijphard's model of organizing divided societies with the following main elements: Group autonomy, their proportional representation in the institutions, a grand coalition government where all groups decide together issues of common interest, and veto rights as ultimate guarantee when it comes to the vital national interests of the group.<sup>14</sup> The three constituent peoples are put at the center of those power-sharing agreements, and according to Lijphard's assumption, although the groups are separated, cooperation will occur at an elite level. An important landmark case of the Constitutional Court—known as the “constituent peoples” case<sup>15</sup>—interpreted the Constitution (through its preamble) in a way that applied those power-sharing guarantees at all levels of government, for all constituent peoples. This was necessary to avoid discrimination against those members of a constituent people who were in fact minorities in a given territory. Further, the case was essential to implement the right of refugees and internally displaced persons (IDPs) to return home—a right guaranteed in Annex 7 of the Dayton Peace Accord<sup>16</sup>—particularly for those returning to areas with a different dominant group and who risked facing discrimination. The effective possibility of return thus meant not to accept ethnically cleansed areas as permanent, but to restore, at least in part, the country's pre-war diversity. While ethnic cleansing worked to some extent, today the population remains considerably diverse, and many areas do not have a clear majority. However, the 2013 census also confirmed the two Entities today have a clear ethnic structure, with 92.11% of all Bosnian Serbs living in the RS, and 91.39% of Bosnian Croats and 88.23% of Bosniaks living in the FBiH.<sup>17</sup>

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14. See generally Arend Lijphard, *Constitutional Design for Divided Societies*, 15 J. OF DEMOCRACY 96 (2004).

15. Eur. Comm'n for Democracy Through L. (Venice Comm'n), CDL(2000) 81, *Constitutional Court of Bosnia and Herzegovina: Case U 5/98, Partial Decision III, Issue of “Constituent People,”* (Oct. 3, 2000), [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2000\)081-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2000)081-e) [<https://perma.cc/9HNK-A9E2>].

16. *Annex 7: Agreement on Refugees and Displaced Persons*, UNIV. OF MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/icty/dayton/daytonannex7.html#:~:text=All%20refugees%20and%20displaced%20persons,cannot%20be%20restored%20to%20them> [<https://perma.cc/X7JJ-GUM8>].

17. According to the results of the 2013 census, Bosniaks make up 50.11% of the population, Serbs 30.78%, and Croats 15.43%, plus 2.73% “others.” Rodolfo Toè, *Census Reveals Bosnia's*

The result is a quasi-confederal setting: The compromise at the end of the war was a State without many, or even strong, institutions of its own. Power remained with the two Entities controlled by the dominant groups—Serbs in the RS, Bosniaks and Croats in the FBiH. Further, the territory has been divided 51% (FBiH) vs. 49% (RS), while the population ratio is roughly two-thirds (FBiH) versus one-third (RS). Because of this, these dominant groups and also the two Entities often behave as antagonists. Rather than cooperating and moving forward together, the outcome was a sort of Cold War inside the country, according to a permanent ceasefire logic. The complexity of an institutional system that includes fourteen governments—one State, two Entities, ten Cantons, and the Brcko District—in a country of not even four million people creates fragmentation, dysfunction, and a resulting “institutional overkill.”<sup>18</sup>

The basic outline of the Dayton Constitution follows the structure of the U.S. Constitution, even in the numbering of the articles and in the institutional setting.<sup>19</sup> There is a presidential system rather than a parliamentary one, and legislative powers are exercised through a bicameral system consisting of the House of Representatives and the House of Peoples.<sup>20</sup> However, the House of Peoples does not represent territorial Entities, but the constituent peoples.<sup>21</sup> There are elements recalling Yugoslav traditions, such as the collective Presidency and the principle of representation of all peoples, but Western constitutional values are blended in: Instead of a Bosnian Bill of Rights, article 2 declares the applicability of thirteen international and European human rights catalogues as well as their priority “over all other law.”<sup>22</sup> Thus, an important third dimension, individual rights and non-discrimination, adds to the combination of ethnic federalism and power sharing (group representation). Of course, the three dimensions and the resulting

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*Changed Demography*, BALKAN INSIGHT (June 30, 2016, 2:19 PM), <https://balkaninsight.com/2016/06/30/new-demographic-picture-of-bosnia-finally-revealed-06-30-2016/> [<https://perma.cc/8DWR-SVHR>]. However, census data from 1991 is to be applied until the full implementation of the Annex 7, which guarantees the return of refugees and IDPs to their homes.

18. Jens Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 109, 132 (Michael Burgess & G. Alan Tarr eds., 2012) (“The term ‘institutional overkill’ is used by Joseph Marko, Bosnia and Herzegovina: Multi-Ethnic or Multi-National? European Commission for Democracy through Law (ed.), *Societies in Conflict: Science and the Technique of Democracy*, no. 29 (Strasbourg, Council of Europe Publishing, 2000), 92-118.”)

19. See *Annex 4: Constitution of Bosnia and Herzegovina*, *supra* note 11.

20. *Id.*

21. *Id.*

22. See *id.*



principles do not harmonize, but rather create tension as their objectives contradict each other. Those tensions and conflicts needed to be resolved in the evolution of the system.

### III. CONSTITUTIONAL TRANSITION VIA INTERNATIONAL RECONSTRUCTION?

In the constitutional transition of Bosnia and Herzegovina, we can distinguish three different phases. At the outset, the idea was to practically freeze the situation as it was on the ground, guaranteeing the continuity of the State with a minimum set of institutions at state level. But this was not an effective approach because of the ceasefire logic and the lack of will to cooperate between the elites—contrary to the main assumption of Arend Lijphard’s model of power sharing. In fact, the institutional framework had been immediately occupied by ethno-nationalist parties: For controlling the resources they established a pervasive patronage system resulting in effective “state capture” and consolidated into systems characterized as “stabilitocracy.”<sup>23</sup>

Over time the constitutional system has evolved, mainly through corrections imposed by the international community. In fact, there is a Peace Implementation Council formed by fifty-five states engaged in the supervision of the implementation of the Dayton Peace Agreement.<sup>24</sup> Moreover, in Sarajevo, the ambassadors of the most active States regularly meet.<sup>25</sup> A High Representative of the international community, foreseen as a moderator of the implementation process (Annex 10), has also become a key actor.<sup>26</sup> In 1997, at the peace conference in Bonn, the High Representative was invested with extraordinary powers (“Bonn powers”).<sup>27</sup> He may overcome political obstruction of the implementation process by imposing legislation, substituting the Bosnian authorities, or

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23. FLORIAN BIEBER, *THE RISE OF AUTHORITARIANISM IN THE WESTERN BALKANS* 98–105, 109–10 (2020).

24. *Peace Implementation Council*, OFF. OF THE HIGH REPRESENTATIVE, <http://www.ohr.int/international-community-in-bih/peace-implementation-council/> [<https://perma.cc/Z5M7-QQTX>].

25. *Id.*

26. *Annex 10: Agreement on Civilian Implementation of the Peace Settlement*, UNIV. OF MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/icty/dayton/daytonannex10.html> [<https://perma.cc/S3UJ-BUKL>].

27. *See generally Decisions of the High Representative*, OFF. OF THE HIGH REPRESENTATIVE, <http://www.ohr.int/decisions-of-the-high-representative/> [<https://perma.cc/QXF8-4LAZ>]; *see also* Tim Banning, *The ‘Bonn Powers’ of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, 6 GOETTINGEN J. INT’L L. 259, 289 (2014).

removing obstructionist officials from office.<sup>28</sup> These coercive powers have been used extensively in the first decade after the conflict, for example, by introducing neutral license plates, new identification cards, and even the flag of the country.

Another Bosnian actor, the Constitutional Court of Bosnia and Herzegovina, has been key in the transformative process. Due to the initial weakness at the State level, it was the only judicial institution at State level foreseen in the Constitution.<sup>29</sup> Like the U.S. Supreme Court, it is composed of nine judges, with a composition reflecting the country's diversity, as well as its federal structure: Two judges are nominated by the RS parliament, four are nominated by the FBiH parliament—resulting in equal representation of the three constituent peoples (two Serbs, two Bosniaks and two Croats). In addition, there are three foreign judges nominated by the President of the European Court of Human Rights (so called “international judges”), as a sign of international guarantee.<sup>30</sup>

After the controversial decision in the “constituent peoples” case, the international community became more active in guaranteeing the Dayton Peace Agreement's implementation, and the High Representative began using its extraordinary powers to change the country. For example, in 2002, the two Entity Constitutions were changed by international decree,<sup>31</sup> and to strengthen the State institutions, several new ministries and institutions were added at State level.<sup>32</sup> With hindsight, we might say that the first decade after the war, until 2005, was a kind of “reconstruction period,” with a reform agenda driven by the international community—

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28. Banning, *supra* note 27, at 266–69.

29. Later, further institutions have been added by Transfer Agreements (article III.5 Constitution). The two Entities agreed upon transferring parts of their powers in the judicial sector to the State and on that base a State Court and a State Prosecutor Office have been created (for war crimes and serious economic crimes), as well as the High Judicial and Prosecutorial Council responsible for the autonomous administration of the judiciary (including recruitment and disciplinary procedures) as part of their constitutional guarantee of independence. See *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, COUNCIL OF EUR. 8 (June 18, 2012), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)014-c#page=8](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-c#page=8) [<https://perma.cc/BJ9L-VZRW>].

30. See *Organization*, CONST. CT. BOSNIA & HERZEGOVINA, <https://www.ustavnisud.ba/en/organization> [<https://perma.cc/NW3Z-B5ZL>].

31. See *Process of Constitutional Change in Bosnia and Herzegovina's Entities is Completed*, OFF. OF THE HIGH REPRESENTATIVE, <http://www.ohr.int/process-of-constitutional-change-in-bosnia-and-herzegovinas-entities-is-completed/?print=pdf> [<https://perma.cc/5M4R-7KEK>] (summarizing High Representative Wolfgang Petritsch's actions in 2002).

32. See generally Soeren Keil & Jens Woelk, *In Search of Functionality and Acceptance: The Distribution of Competence in Bosnia and Herzegovina*, in *FEDERAL POWER-SHARING IN EUROPE* 119 (Ferdinand Karlhofer & Günther Pallaver eds., 2017).

things happened because they were imposed from the outside. And they happened because the international community was effectively present in substantive numbers and with force, with NATO military personnel (SFOR), an International Police Task Force (IPTF), and international judges in different courts in Bosnia and Herzegovina.<sup>33</sup>

Following increasing public and academic criticism,<sup>34</sup> this sort of international “semi-protectorate” spurred an opinion by the “Venice Commission” of the Council of Europe, a very authoritative advisory body on constitutional issues. Although the opinion is from 2005,<sup>35</sup> it still stands as probably the most informative and analytical document on Bosnia and Herzegovina’s constitutional situation—which is telling regarding the (lack of) dynamics, until today.<sup>36</sup> The opinion assessed the constitutional system as neither rational, nor efficient, nor sustainable. Among the reasons, it observed a striking weakness of the State level. While the House of Peoples is functioning as a second chamber with equal powers, it is vested, in addition, with veto powers in favor of the protection of one group.<sup>37</sup> The Venice Commission considered a necessary definition—and limitation—of the “vital interest” veto for constituent peoples, as the latter

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33. The NATO-led Stabilization Force (SFOR) in Bosnia and Herzegovina was operational from January 1996 to December 2004. The Stabilization Force, which replaced SFOR, had slightly more than 36,000 combat, engineer, and support troops located in Bosnia proper and in Croatia. The members of SFOR were drawn from the militaries of thirty-seven NATO and other nations around the world. The number of troops in June 2004 was still about 7,000. Mark Hope, *SFOR Transition to Multi-national Taskforces*, SFOR INFORMER ONLINE (June 2004), <https://www.nato.int/sfor/indexinf/171/p16a/t02p16a.htm> [<https://perma.cc/J5QC-RN8X>]. From January 2005 SFOR has been substituted by the EU-led “Operation Althea” with an EUFOR contingent. *Operation ALTHEA*, EUR. UNION FORCE IN BIH, <https://www.euforbih.org/> [<https://perma.cc/HLM9-QJHL>]. In addition, an International Police Task Force (IPTF) was overseeing local police, and foreign judges and public prosecutors were serving in the Bosnian judiciary from 2003 to 2009; the last ones served until 2011. Javier Marcos, *The UN International Police Task Force*, SFOR INFORMER ONLINE (Jan. 8, 1997), <https://www.nato.int/sfor/partners/iptf/iptf.htm> [<https://perma.cc/SA7S-8LR2>].

34. E.g., Gerald Knaus & Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, 14 J. OF DEMOCRACY 60, 61–63 (2003).

35. Eur. Comm’n for Democracy Through L. (Venice Comm’n), CDL-AD (2005) 004, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, at 1 (Mar. 11, 2005), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e) [<https://perma.cc/7SX7-QRE7>].

36. The lack of dynamics due to the lack of political will is the main observation in the European Commission’s annual reports on the situation in Bosnia and Herzegovina (and other Western Balkan countries). See *Strategy and Reports: EU Enlargement Package 2021*, EUR. COMM’N, [https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports\\_en](https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en) [<https://perma.cc/GJN3-X9WJ>].

37. But for a valid decision, at least one third of the deputies/delegates of each Entity needs to approve it in each House. In practice, this “entity veto” (quorum) has effectively blocked more bills than the “vital interest” veto. See BOSNIA AND HERZEGOVINA CONST. art. IV, § 3.

can basically declare anything as running counter to a “vital national interest,” thus justifying a veto in the legislative process.<sup>38</sup> And the Venice Commission held that the separation between territorial structure and ethnicity is far from clear, as the two often overlap in a confusing way. For example, the RS, the Entity with a Bosnian Serb majority governed by majority of Serb parties, is not the Entity of Serbs only, because there are also citizens of the other two constituent peoples (as well as those belonging to different groups and minorities who do not want to declare their affiliation). And after the “constituent peoples” case of the Constitutional Court BiH, this is even more important and has been expressed in the Entity Constitutions.<sup>39</sup> However, in a political system based upon ethnic representation and political parties, control over territory is exercised by the (ethnic) majority, leading to the identification of a territorial Entity with its dominant group. This is true also for the collective Presidency of the State, reserved by the Constitution to a Bosniak, a Croat, and a Serb; while the former are directly elected in the FBiH, the latter is directly elected in RS, again mixing ethnic and territorial elements (and excluding citizens from office who are “others” and do not want to declare or are residing in the “wrong” Entity). Finally, the Office of the High Representative is strongly criticized for being in contrast with a democratic system, as “an unelected foreigner” is making fundamental decisions.<sup>40</sup> As the use of the Bonn powers had become so frequent, the Venice Commission considered it high time to remind the High Representative of their extraordinary, temporary, character.

Consequently, in 2006, the U.S. brokered an attempt to profoundly change the Constitution through the domestic institutions in order to close the period of international reconstruction: the so-called “April Package” which failed to be adopted by only two votes!<sup>41</sup> In terms of substance, the April Package had addressed most of the criticism expressed by the Venice Commission trying to overcome rigid ethnicization and dysfunctionalities.

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38. *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, *supra* note 35, at 9.

39. Since the (imposed) constitutional amendments of the two Entity Constitutions in 2002, the House of Peoples in the Federation is composed of seventeen delegates from each constituent people, as well as by seven “others,” while in the RS each constituent people is represented by eight delegates to which four delegates representing “others” are added.

40. *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, *supra* note 35, at 21.

41. Joseph Marko, *Constitutional Reform in Bosnia and Herzegovina 2005-2006*, 5 EUR. Y.B. OF MINORITY ISSUES 207, 213 (2005/6). See generally R. Bruce Hitchner, *From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina*, 30 FLETCHER F. OF WORLD AFFS. 125 (2006).

In this context, it is interesting that by contrast with the U.S. Constitution, the Dayton Constitution can be easily amended: A majority in the Parliamentary Assembly is sufficient, plus a two thirds majority in the House of Representatives.<sup>42</sup> This might be an indicator of the intention to consider the Dayton Constitution a transitional constitutional basis; however, there is no sunset clause or anything similar which would require change. And the political will to change is lacking, as the power cartel of ethno-nationalist parties is fine with the status quo. In fact, after the failure of the April Package, for fifteen years constitutional reform has been a taboo; efforts were instead directed towards technical reforms.

#### IV. A NEW CHALLENGE: RE-BALANCING INDIVIDUAL RIGHTS WITH ETHNIC FEDERALISM

In December 2009, the European Court of Human Rights (“ECtHR”) added further complexity to the constitutional questions addressing the tensions between the underlying, contrasting principles. Some guarantees for the constituent peoples in the Dayton Constitution were found to be in contrast with individual rights guaranteed by the European Convention on Human Rights. Two citizens, Mr. Dervo Sejdić and Mr. Jakob Finci, complained that they had been discriminated against by the Constitution, as they were barred from standing for election as a Member of the Presidency or the House of Peoples because they were neither Bosniak, nor Croat, nor Serb. After rejection of their complaint by the Constitutional Court BiH as not admissible, these two citizens, a Roma and a Jew, filed an appeal to the Court in Strasbourg.<sup>43</sup> The Court decided in their favor, stating that all citizens must have a right to stand for election. This was in line with the Venice Commission’s previous assessment. Despite numerous academic conferences and frequent political negotiations, the judgment has not been implemented as of today. In fact, any implementation would require constitutional reform, thus opening Pandora’s box, at least from the perspective of those—the power cartel of ethno-nationalist political parties—who want above all else to maintain the status quo and their dominant position.

Four similar cases followed along the same lines: Azra Zornić refused to declare her affiliation, insisting on her rights as a citizen of the country, including the right to stand for election to the Presidency and the House of

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42. *Bosnia and Herzegovina’s Constitution of 1995 with Amendments through 2009*, *supra* note 11, at 14.

43. *Sejdić v. Bosnia & Herzegovina*, 2009-VI Eur. Ct. H.R. 273.

Peoples.<sup>44</sup> In a similar case, a Bosnian citizen of Albanian ethnicity, Mr. Šlaku, was denied the same possibility.<sup>45</sup> For the ECtHR, “[t]he impossibility for some citizens to stand for election to the Presidency and the [House] of Peoples, just because they do not belong to one of the majority ethnic groups constitutes a discriminatory treatment, without objective and reasonable justification, and as such [is] contrary to art. 14 and art. 1 of Prot. 12 of the ECHR.”<sup>46</sup> The Court confirmed that total exclusion cannot be justified and arrived at the same result with regard to Mr. Pilav and Mr. Pudarić after they complained about their exclusion based on their residency: As a Bosniak and a resident of the RS, Mr. Pilav was generally excluded from running for the Presidency of Bosnia and Herzegovina;<sup>47</sup> it was the opposite situation, but the same result, in the case of Mr. Pudarić, a Serb living in the Federation.<sup>48</sup> None of these decisions have been implemented so far.

These cases raise important questions about the relationship between power-sharing arrangements and rights. According to the Court, what has been justified or justifiable at the end of the war (in order to end it), might not be justified in the same way twenty-five years after the war: “Time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities of citizens.”<sup>49</sup>

This inevitably leads to questions about the relationship between individual rights and the group dimension, or even collective rights. The difference in the general discourse regarding collective rights in Europe and in the U.S. is well known. In Europe, the recognition of groups may include the attribution of rights for these groups (exercised by their representatives), for example, the veto rights in the Parliamentary

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44. *Zornić v. Bosnia & Herzegovina*, App. No. 3681/06, ¶ 3 (July 15, 2014), <https://hudoc.echr.coe.int/fre?i=001-145566> [<https://perma.cc/5SFA-X69M>].

45. *Šlaku v. Bosnia & Herzegovina*, App. No. 56666/12, ¶ 3 (May 26, 2016), <https://hudoc.echr.coe.int/fre?i=001-163056> [<https://perma.cc/H58F-LPC2>].

46. *Šlaku v. Bosnia and Herzegovina*, No. 56666/12, ECtHR (Fifth Section), 26 May 2016, BICOCA L. & PLURALISM, (May 26, 2016), <https://www.lawpluralism.unimib.it/en/oggetti/460-slaku-v-bosnia-and-herzegovina-no-56666-12-e-ct-hr-fifth-section-26-may-2016> [<https://perma.cc/L66X-PZPN>].

47. *Pilav v. Bosnia & Herzegovina*, App. No. 41939/07, ¶ 11 (June 9, 2016), <https://hudoc.echr.coe.int/fre?i=001-163437> [<https://perma.cc/R7J4-8FTY>].

48. *Pudarić v. Bosnia & Herzegovina*, No. 55799/18, ¶ 7 (Dec., 8, 2020), <https://hudoc.echr.coe.int/fre?i=001-206357> [<https://perma.cc/NB23-63FC>].

49. *Zornić*, App. No. 3681/06, at ¶ 43.

Assembly of Bosnia and Herzegovina. Another problem is whether you can undo a political, negotiated agreement, the Dayton Peace Agreement, by a judicial decision.<sup>50</sup> But while there is “no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to BiH,” the absolute limit for the European Court is that these mechanisms “do not automatically lead to the total exclusion of representatives of the other communities.”<sup>51</sup> Thus, collective rights, if recognized, must not totally exclude or overrule individual rights. And the Dayton Constitution is clearly linked via direct reference to the European Convention on Human Rights protecting individual rights (and not considering group rights itself). Therefore, the implementation of the ECtHR judgments would require major constitutional change. The current balance needs to shift in favor of individual rights of persons, to the detriment of the guarantees for groups (i.e., “constituent peoples”), and this runs counter to the interests of the ethno-nationalist parties which agree upon the preservation of the status quo, as otherwise their preferences differ considerably.

In fact, looking at the position of the main parties representing the constituent peoples, the following contrasting objectives regarding the constitutional system can be identified<sup>52</sup>:

Full implementation of an ethnic federation, especially through the creation of a third Entity. This is, above all, the preference of the Croats in Bosnia and Herzegovina who lament discrimination as the smallest group while not having an Entity in which they form the dominant group (there are three Cantons in the Federation in which Croats are the majority of the population).<sup>53</sup>

Creation of a “civic state” through the abolition of the Entities and the introduction of regions along historical and economic lines is favored by the Bosniak parties as the Bosniaks are the majority population in the country.<sup>54</sup>

A return to the “original Dayton” is the more recent slogan of Bosnian Serb parties. This shall reverse the trend of strengthening State institutions and aims at establishing a confederate system with the main powers held

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50. See generally Christopher McCrudden & Brendan O’Leary, *Courts and Consociations: Human Rights versus Power-Sharing*, 36 HUM. RTS. Q. 962 (2013).

51. *Sejdić*, 2009-VI Eur. Ct. H.R. at ¶ 48.

52. Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* 144, 149 (2013).

53. *Id.* at 144–46.

54. *Id.* at 146–49.

by the Entities.<sup>55</sup>

The (incremental) reform of the current system to overcome its main obstacles—without a solution to the “ethnic federalism” versus “civic state” conflict—seems to be the international community’s preferred solution.<sup>56</sup>

However, although the status quo might seem the preferable solution in a situation where divergent views are so strong, some tensions between contrasting principles inevitably need to be resolved by adjusting current balances for the sake of compatibility with European values. Also, the general context may change and require adaptation, as it is now dramatically shown by Russia’s invasion of Ukraine and its role in the Western Balkans. Change and adaptation are therefore unavoidable, but they also raise the question of a constitutional blueprint for the sustainable organization of the State and its institutions. In fact, “[t]he ongoing fundamental disagreement about the nature of the state is at the heart of Bosnia’s paralysis.”<sup>57</sup>

#### V. “FROM DAYTON TO BRUSSELS”<sup>58</sup>: EU MEMBERSHIP AS A SHARED AND OVERARCHING GOAL?

For the past fifteen years, there has been the expectation (or rather hope?) that the prospect of EU membership would be sufficiently attractive for triggering change domestically, despite the huge differences in perspectives, objectives, and interests. The (pre-)accession process of EU membership guarantees conformity with the impressive body of EU law, so that the candidate country will be able, at the moment of accession to the EU, to fully implement its obligations as a member. In fact, the EU has become the most important player in Bosnia and Herzegovina, trying to trigger reforms, setting benchmarks, and providing technical as well as financial assistance.<sup>59</sup> As a “potential candidate” (like Kosovo), Bosnia

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55. *Id.* at 149–51.

56. *Id.* at 153.

57. Marie-Joëlle Zahar, *When the Total is Less than the Sum of the Parts: The Lessons from Bosnia and Herzegovina*, F. OF FED’NS 20 (2019), [http://www.forumfed.org/wp-content/uploads/2019/03/OPS\\_26\\_BosniaHerzegovina.pdf](http://www.forumfed.org/wp-content/uploads/2019/03/OPS_26_BosniaHerzegovina.pdf) [<https://perma.cc/DBW5-BYXS>].

58. Sofia Sebastian, *Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina* 7 (Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE), Working Paper No. 46, 2007).

59. For an overview and key documents relating to the EU’s relationship with Bosnia and Herzegovina, see *Bosnia and Herzegovina*, EUR. COMM’N, [https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina\\_en](https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina_en) [<https://perma.cc/5NBA-RB9A>].



and Herzegovina needs to prepare for the opening of accession negotiations through reforms in many sectors. However, according to the European Commission's own assessment of the situation, there is not much progress to report (even the so-called "progress reports" are now simply called, in a more sober manner, "annual reports"). This assessment was again certified in May 2019, when the European Commission published its opinion on Bosnia and Herzegovina's application for EU membership (a kind of feasibility study), according to which: "Bosnia and Herzegovina is overall at an early stage regarding its level of preparedness . . . ."<sup>60</sup> This is a diplomatic euphemism and means that there is practically nothing, or not much, in terms of progress or reforms. It is the result of the ceasefire logic which not even European accession as a medium- or long-term objective can overcome.

The problems listed in the European Commission's opinion are nearly the same as those already identified fifteen years ago by the Venice Commission. These include values, the effective implementation of the rule of law, democracy, human rights, and in particular the implementation of the judgments of the ECtHR.<sup>61</sup> The Office of the High Representative should close before the country becomes a member of the EU.<sup>62</sup> Another important focus in the opinion is functionality issues: Due to territorial fragmentation, a coordination mechanism is needed for guaranteeing integration and coordination in the (future) implementation of EU law.<sup>63</sup> According to the European Commission, ethnic veto powers must not be construed as final and unchecked powers, as this would mean uncertainty in the implementation of EU Law and Bosnia and Herzegovina's membership obligations.<sup>64</sup> The same risk is addressed regarding the certainty of competencies and those State institutions transferred or created by agreement with the Entities (i.e., those not directly foreseen in the Constitution), which needs to be guaranteed.<sup>65</sup> The European Commission's opinion therefore officially clarifies that EU accession will not take place without changes to the Dayton Constitution. Constitutional reform is back on the agenda after more than a decade of silence.

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60. *Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union*, at 14, COM (2019) 261 final (May 29, 2019).

61. *Id.* at 14–16.

62. *Id.* at 7.

63. *Id.* at 8, 14–15.

64. *Id.* at 7, 15.

65. *Id.* at 14.

## VI. INSTEAD OF AN OPPORTUNITY FOR REFORM, A DUAL CRISIS

The year 2021 was widely seen as an opportunity for comprehensive reform in Bosnia and Herzegovina, as neither national nor municipal elections were scheduled.<sup>66</sup> However, it proved to be one of the most turbulent years since the end of the war in 1995, with severe political crises challenging the very existence of the state.<sup>67</sup> The impetus for the current crisis was a much-discussed external intervention that touched the delicate balances of the status quo and *divide et impera*. The outgoing High Representative, Valentin Inzko, used his Bonn Powers in the last days of his term, in July 2021, to push through amendments to the state penal code by international decree, which in the future will criminalize the denial of genocide and the glorification of war criminals.<sup>68</sup> This is a red rag for some in Bosnia and Herzegovina, in part because of the inadequate dealing with the past. The law was aimed primarily at the Bosnian Serb elites, who in recent years had not only denied the horrors of the Bosnian conflict in the 1990s, but also openly celebrated convicted war criminals such as Ratko Mladic, the former leader of the Bosnian Serb military.

Corresponding reactions were strong, especially in the RS, ranging from delegitimization of the High Representative, attempts to question state authority, and preparations for possible secession starting with a call to boycott state institutions. In particular, the RS unilaterally took steps to shift responsibilities from the state level back to the entity level (regarding the areas of judiciary, defense, and indirect taxation) because of the alleged unconstitutionality of the original transfer of responsibilities to the state—that is, without amendments to the state constitution.<sup>69</sup> Moreover, the RS National Assembly adopted a declaration instructing the RS government

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66. See, e.g., R. Bruce Hitchner, *The Time for Electoral Reform in Bosnia and Herzegovina is Now*, BALKAN INSIGHT (Oct. 27, 2021, 7:36 AM), <https://balkaninsight.com/2021/10/27/the-time-for-electoral-reform-in-bosnia-and-herzegovina-is-now/> [<https://perma.cc/95GG-WE67>]. See generally Daniel S. Hamilton, *Fixing Dayton: A New Deal for Bosnia and Herzegovina*, WILSON CTR. (Nov. 2020), <https://www.wilsoncenter.org/publication/fixing-dayton-new-deal-bosnia-and-herzegovina> [<https://perma.cc/QJN2-ZBTN>] (arguing the need to address the Dayton Peace Agreement's deficiencies including voting).

67. Marko Prelec & Ashish Pradhan, *Grappling with Bosnia's Dual Crises*, INT'L CRISIS GRP. (Nov. 9, 2021), [www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/grappling-bosnias-dual-crises](http://www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/grappling-bosnias-dual-crises) [<https://perma.cc/AM8M-UBYB>].

68. Réjeanne Lacroix, *Bosnia and Herzegovina: Same Problems, New Decade*, FUND FOR PEACE (Dec. 20, 2021), <https://fundforpeace.org/2021/12/20/bosnia-and-herzegovina-same-problems-new-decade/> [<https://perma.cc/CSL8-8KKX>].

69. Una Haidari, *Secession Threats and Nationalist Strife Shock Bosnia as EU Offers Limited Response*, POLITICO (Jan. 18, 2022, 4:00 AM), <https://www.politico.eu/article/secession-threat-bosnia-milorad-dodik-eu-limited-options/> [<https://perma.cc/V4XL-H6Z8>].

to draft a new text for the RS Constitution.<sup>70</sup> These concrete steps and the harsh rhetoric of Milorad Dodik, the leading Bosnian Serb politician and a member of the three-member BiH State Presidency, were widely interpreted as preparations for RS secession.<sup>71</sup>

In the shadow of this development, the Bosnian Croat party (HDZ) continues to try, with strong support from Croatia, to push through comprehensive electoral reform that would expand and legally guarantee HDZ's de facto control over the three Cantons that have a Croat majority in the FBiH. For a long time, Croat elites have complained that there is neither a third Entity nor specific rules for a Croat constituency. The peg is an unimplemented 2016 Constitutional Court ruling,<sup>72</sup> that would make electoral reform necessary. However, on July 6, 2017, in a second decision the Constitutional Court annulled the unconstitutional provisions in the Electoral Code due to the non-implementation by the Parliamentary Assembly,<sup>73</sup> whereupon the Election Commission determined a distribution key. Thus, there is no acute need for reform to allow the elections, at least from a legal point of view.<sup>74</sup> The current arrangement has been criticized for some time, with the HDZ denying that all Croat representatives in the institutions are “true” Croats as some incumbents—including the Croat member of the tripartite State Presidency, Željko Komšić—receive votes not only from Croat voters but also from Bosniaks. The concept of “legitimate representation” on the other hand, shall ensure that Croat representatives in the institutions are determined (only) by Croat voters or the ethnic party representing Croats (i.e., the HDZ), at least in the majority Croat areas. This controversy is important because the delegates of the ethnic groups in the House of Peoples have veto power and can block bills violating a “vital national interest.” Thus, control over the election of representatives to the House of Peoples means not only control over the exercise of this veto power, but also control over filling important offices in Parliament or in the institutions nominated by Parliament (since these are proportionately held by the three constituent peoples). A change of the electoral law has therefore long been a political

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70. *Id.*

71. *Id.*

72. Constitutional Court of Bosnia and Herzegovina, Case No. U-23/14, Dec. 1, 2016.

73. The Constitutional Court adopted a ruling on non-enforcement which repealed these provisions. Constitutional Court of Bosnia and Herzegovina, Case No. U-3/17, Jul. 6, 2017.

74. This is the conclusion of Joseph Marko. Joseph Marko, *Is Ethnic Gerrymandering a Solution for the Constitutional Impasse?*, VERFASSUNGSBLOG (Aug. 23, 2022), <https://verfassungsblog.de/is-ethnic-gerrymandering-a-solution-for-the-constitutional-impasse/> [<https://perma.cc/3CW6-S5EC>].

demand of the Croat party HDZ, which thereby wants to enhance the status of Bosnian Croats and control Croat-dominated parts of the territory.<sup>75</sup> In its efforts, the HDZ is actively supported by Croatia.

Tensions have recently intensified because of threats to boycott the elections scheduled for October 2, 2022. If the elections were not held, it would highlight the seriousness of the state crisis and be interpreted as a loss of legitimacy for the State institutions. Such events could be reason for Milorad Dodik to declare the independence of the RS. Under pressure from the EU and the U.S., the political elites therefore conducted negotiations on constitutional and electoral law reforms throughout 2022. But they did so to no avail. The efforts pursued mainly by the Americans, the British, and the EU Delegation were unsuccessful. Despite the participation of special envoys Matthew Palmer (U.S.) and Angelina Eichhorst (EU), no consensus was reached.<sup>76</sup>

In parallel with those negotiations, a Citizens Assembly was launched by the EU Delegation in 2021 as an innovative model of deliberative democracy. The recommendations of the fifty-seven randomly selected citizens on elections and constitutional reform differ significantly from the proposals of the international community and political parties.<sup>77</sup> They include the elimination of discrimination in the BiH Constitution and Electoral Code to allow all citizens to vote and be elected to all offices at all levels, and measures to strengthen women's participation. For the Presidency BiH, indirect election of four members is suggested from among the members of the House of Representatives of the BiH Parliamentary Assembly; each member shall serve as President for one year. Surprisingly, also the abolition of the House of Peoples is recommended, with veto rights to be exercised by ad hoc caucuses in the House of Representatives. Although Parliament received these recommendations, they were never discussed. The abolition of the House of Peoples is truly innovative; other recommendations are in line with the conclusions of the Venice Commission's 2005 analysis or the 2006 April Package.

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75. By contrast, the HDZ is much less committed to Bosnian Croats who live in real, de facto minority position in other Cantons or in the RS.

76. Jasmin Mujanovic, *Bosnia's HDZ Doesn't Want Election Reform but Gerrymandering*, BALKAN INSIGHT (Feb. 2, 2022, 1:12 PM), <https://balkaninsight.com/2022/02/02/bosnias-hdz-doesnt-want-election-reform-but-gerrymandering/> [<https://perma.cc/JMY2-HF9Q>].

77. *See BiH Citizens' Assembly Presents its Recommendations on Constitutional and Electoral Reform to the BiH Parliament*, DELEGATION OF THE EUR. UNION TO BOSNIA & HERZEGOVINA & EUR. UNION SPECIAL REPRESENTATIVE IN BOSNIA & HERZEGOVINA (Mar. 17, 2022), <https://europa.ba/?p=74565> [<https://perma.cc/UQT6-3KZ8>].

It remains to be seen whether these proposals will be taken up and, if so, by whom. It seems that even the EU delegation that promoted this experiment in participatory democracy was too preoccupied with secret negotiations with the elites to really believe in the innovative power of the recommendations or even to use them as leverage against the politicians. In view of the interesting and innovative recommendations, the question therefore arises as to whether this unusual method—in the context of the Western Balkans—could not be put to better use. Criticism of the lack of involvement of civil society in the reform dialogue has long been a constant; forms of deliberative democracy could open up new perspectives here.

The international situation further aggravated the situation in Bosnia and Herzegovina, both because of the Russian invasion of Ukraine and its repercussions, and because of increasing “enlargement fatigue” in the face of the blocking of the start of EU accession negotiations with Albania and Northern Macedonia (while granting candidate status to Ukraine and Moldova). For Bosnia and Herzegovina, this does not only mean—as in previous years—no progress,<sup>78</sup> but also a step back.

The crisis also requires action by the guarantor institutions. The new High Representative, Christian Schmidt, also resorted to his Bonn powers in April 2022 to prevent an escalation of the crisis and blocked some RS laws.<sup>79</sup> In May, the Constitutional Court proclaimed declarations by the RS National Assembly to withdraw powers in the judicial sphere unconstitutional; in July, it did so again, this time regarding an RS law on medical care.<sup>80</sup> In early July 2022, the High Representative used

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78. For key findings and the full report, see *Key Findings of the 2021 Report on Bosnia and Herzegovina*, EUR. COMM’N (Oct. 29, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_5277](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5277) [<https://perma.cc/HF3P-22JE>].

79. *Chief UN Envoy in Bosnia Asserts Power in Suspending Serb Entity’s Property Law*, RADIOFREEEUR. RADIOLIBERTY (Apr. 13, 2022), <https://www.rferl.org/a/bosnia-schmidt-republika-srpska-property-law/31800888.html> [<https://perma.cc/377G-4RKX>]; *Statement by the High Representative Regarding the RS Law on Immovable Property Used for the Functioning of Public Authority*, OFF. OF THE HIGH REPRESENTATIVE (Apr. 7, 2021), <http://www.ohr.int/statement-by-the-high-representative-regarding-the-rs-law-on-immovable-property-used-for-the-functioning-of-public-authority/> [<https://perma.cc/F675-6BCC>].

80. Mustafa Talha Öztürk, *Bosnian Court Rules Major Decisions Made by Republika Srpska Lawmakers Null and Void*, ANADOLU AGENCY (June 28, 2022), <https://www.aa.com.tr/en/europe/bosnian-court-rules-major-decisions-made-by-republika-srpska-lawmakers-null-and-void/2624714> [<https://perma.cc/62CC-NT4P>]; see also Azem Kurtic, *Bosnian Court Suspends Serb Entity’s Law on Medicines*, BALKAN INSIGHT (July 6, 2022, 2:42 PM), <https://balkaninsight.com/2022/07/06/bosnian-court-suspends-serb-entitys-law-on-medicines/> [<https://perma.cc/5TKR-LTBN>].

international decrees to secure both funding for the elections and changes to the electoral law.<sup>81</sup> He described the latter as a “transparency package” intended to contribute to a fairer and more open electoral process. Fears of a more substantial international decree, which would have changed the electoral law, only a few weeks before the election date, led to demonstrations in Sarajevo. According to a draft which had been leaked to the press, the proposal would have focused on the implementation of the *Ljubic* case in favor of HDZ demands—without addressing the implementation of the ECtHR judgments.<sup>82</sup> This was widely criticized.

However, on the evening of the October 2 elections, High Representative Christian Schmidt imposed those changes to the Election Law of Bosnia and Herzegovina and added twenty-one amendments to the Constitution of the FBiH.<sup>83</sup> The measures were declared a “Functionality Package” for “ensuring timely implementation of the results of the October 2022 elections” and for setting “the stage for further electoral and constitutional reform.”<sup>84</sup> The measures focus on the FBiH House of Peoples, its composition, and the processes of forming it.<sup>85</sup> According to the High Representative, the measures “only relate[] to the post-election establishment of indirectly elected bodies” and shall “[i]mplement the Constitutional Court decision in the *Ljubić* case by improving the proportionality of representation of constituent peoples from each canton in the Federation House of Peoples” to avoid “severe overrepresentation . . . in cantons with very small populations of each people.”<sup>86</sup> The measures also amend the procedures for the election of the

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81. The original source can be found on the Office of the High Representative’s website. *Decision Enacting the Law on Amendments to the Law on Financing of the Institutions of Bosnia and Herzegovina*, OFF. OF THE HIGH REPRESENTATIVE (June 7, 2022), <http://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-law-on-financing-of-the-institutions-of-bosnia-and-herzegovina/> [https://perma.cc/5DU5-SQ8J]; see also *Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina*, OFF. OF THE HIGH REPRESENTATIVE (July 27, 2022), <http://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-election-law-of-bosnia-and-herzegovina-7/> [https://perma.cc/MV95-89VA].

82. *Bosnia and Herzegovina’s Hot Summer*, INT’L CRISIS GRP. (Sept. 26, 2022), <https://www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/b95-bosnia-and-herzegovinas-hot-summer> [https://perma.cc/5LC9-EJ2P].

83. *Measures to Improve Federation Functionality*, OFF. OF THE HIGH REPRESENTATIVE (Oct. 2, 2022), <http://www.ohr.int/measures-to-improve-federation-functionality/> [https://perma.cc/UYN5-GXSR].

84. *Id.*

85. *Id.*

86. *Id.* (emphasis omitted). Specifically, with the measure’s increase of each constituent people’s caucus from seventeen to twenty-three seats, each canton will continue to have at least one representative for each constituent people (contrary to the plans leaked earlier in the summer). *Id.*

President and Vice President of the FBiH and for the selection of judges of the Supreme Court and the Constitutional Court of the FBiH, guaranteeing their swift election through lowering majority thresholds after fixed deadlines have passed.<sup>87</sup> Significantly, the measures limit the list of issues for the vital national interest veto in the House of Peoples.<sup>88</sup> The intervention by the High Representative does not address the implementation of the *Sejdić* and *Finci*-case law (considered to be *ultra vires*). Thus, the measures do not allow for structural change; rather, they cement the current system hoping to contain (or to appease) the political forces behind the dual crisis. As the measures are controversial in terms of substance as well of timing, they risk compromising the High Representative's position as a moderator and facilitator.

#### VII. CONCLUSION: NEVER SUSTAINABLE?

To move things forward in Bosnia and Herzegovina, international pressure from the outside is (still) needed. However, the method of cooperation and negotiation with party elites has not worked so far. It is also questionable how much trust can be created with backroom deals. And can these guarantee a democratic, pluralistic environment? But how can you possibly build up alternatives from the inside? Deliberative democracy is an interesting method which directly involves randomly selected citizens. The results of the work of citizens assemblies may be used to confront the politicians, the ethno-nationalist power cartel, with different and innovative options. So far, this has been tried as an experiment sponsored and organized mainly by the EU. But it does not feed into the institutional channels or procedures. Any constitutional reform needs to be approved by Parliament and therefore, a link is needed for making politicians listen and discuss these recommendations by citizens. As a second Dayton with a "big bang" approach does not appear feasible in the current situation, reforms will have to occur gradually, in an incremental process which would build up trust with each milestone reached. This process should be accompanied by a general de-ethnicization, in particular in the media and in the educational system (the

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Moreover, the number of seats of "Others" has been increased from seven to eleven, allowing for their representation from all ten cantons. *Id.*

87. *Id.*

88. *Id.*

reality too often is “two schools under one roof”).<sup>89</sup>

This is the elephant in the room in a country where there is separation at all levels. Where there is no discussion about fundamental values and about the purpose of the State, which makes it practically impossible to find a common vision of the State. The current institutional framework reinforces separation through the institutional setting, which always emphasizes ethnicity and ethnic affiliation. This is where the power cartel of the ethno-nationalist parties can thrive and consolidate their power through State capture. The “perpetuating uncertainty about the country’s political and economic future,” created by the ethno-nationalist leaders in a continuous series of crises, and the “primacy given by Dayton to ethnic categories, to the detriment of voters as citizens, lies at the root of this paralysis”<sup>90</sup> from which Bosnia and Herzegovina is unlikely to find its way out on its own.

In spring, the timing of the two methods for change was wrong and counterproductive, as the Citizens Assembly and the negotiations with party leaders took place at roughly the same time. Everybody was interested in the negotiations, in particular the media, and what citizens had to say did not receive much attention. This was not even much sponsored, as the EU did not want to compromise the negotiations with party leaders until those had failed. The recent use of the Bonn powers by the High Representative is an alarm bell and raises serious doubts regarding the sustainability of the whole system, due to the challenges from many sides which even question the status quo.

We all know that even bad constitutions can work, if you want to make them work; but if you do not, they will certainly fail. While the case of Bosnia and Herzegovina is another case which clearly shows the limits of sustainable intervention from the outside, the challenging question remains how to create a sustainable system for a State which has been forced together after a conflict. One generation after the war, the international community’s responsibility certainly remains, but the goal of a sustainable Bosnia and Herzegovina cannot be reached without the citizens.

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89. See “Two Schools Under One Roof” – The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina, ORG. FOR SEC. & CO-OPERATION IN EUR. 7 (Nov. 2018), <https://www.osce.org/mission-to-bosnia-and-herzegovina/404990> [<https://perma.cc/MZP5-FWNE>].

90. Zahar, *supra* note 57, at 21.