

Imposing constitutional reform? The case for ownership

A discussion paper

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Now that the prospects of an immediate agreement on implementing the Constitutional Court's decision on constituent peoples are receding, the High Representative and the PIC Steering Board need to decide whether to use the High Representative's authority to impose a package of amendments to the Entity constitutions.

Among Bosnian politicians and the Sarajevo-based press, this issue has been presented in terms of the "legacy" of the departing High Representative – his last opportunity to bequeath a multi-ethnic system of government to the Bosnian people. They have dared him to impose far reaching changes, particularly in Republika Srpska, or else leave behind an important job unfinished.

This paper argues that the tough decision is to resist these pressures and refrain from imposition. These are precisely the circumstances in which the concept of ownership should prevail, for the following reasons:

- § The present atmosphere of extreme urgency is entirely artificial. Neither the approaching elections nor the process of Council of Europe accession actually represent a fixed deadline on constitutional reform.
- § The proposals currently on the table range well beyond the specific matters addressed by the Constitutional Court. The Court makes only a limited number of explicit orders for changing the text of the entity constitutions, which have already been accepted. Beyond that, the Court lays down the general principle of the political equality of the three constituent peoples throughout Bosnia. **The concrete implications of this general principle can only be interpreted through a political process.** It is untenable to suggest that respect for the Court's authority requires this political process to be cut short, or replaced by an international decision.
- § The present debate excludes many of the most pressing issues facing the Bosnian state, from rationalisation of the unwieldy governmental structure to developing a sustainable system of public finances. These are the issues which really affect the individual and collective welfare of Bosnia's three constituent peoples. Beginning from these practical problems, rather than the symbolic level, would mobilise real

constituencies for change, ensuring that reforms were both implemented and sustainable.

The serious political dialogue on constitutional development initiated by the High Representative over the past two months has been an important step towards the normalisation of the Bosnian political process. It is this process of dialogue which carries the promise of political change. Cutting short the process now would be a premature admission of failure. The chairmen of the two entity Constitutional Commissions both believe that imposition by the High Representative is unnecessary and unwarranted.¹ Just at the moment when Bosnia is being welcomed into the Council of Europe, imposition of constitutional change would represent a vote of no confidence in the Bosnian body politic.

The process so far

Over recent weeks, the Bosnian press has treated the constitutional dialogue as though it were a brief window of opportunity that must be seized immediately or else lost forever. In fact, it is merely the latest chapter of a story that has been unfolding since the signing of the Dayton Agreement, namely the reconciling of the two entities to their position within a multi-ethnic Bosnian state.

In the first two years after Dayton, both entities passed a number of amendments to their constitutions to make them more compatible with the new state constitution, at the urging of the Venice Commission.² Further issues were raised before the Bosnian Constitutional Court in an action brought by Alija Izetbegovic as chair of the state presidency in February 1998, leading to a series of decisions in 2000.

In January 2001, the High Representative issued a decision creation Constitutional Commissions in both entities, with the dual function of preparing constitutional amendments and, in the meantime, vetting the work of the entity parliaments to guard against discriminatory legislation. In March 2001, an International Taskforce on Constitutional Court Decision Implementation presented a paper on “guidance and options” to the two Commissions, with specific textual proposals which were much more limited than those currently on the table.³

The Federation Constitutional Commission forwarded its first working proposals to the Federation government in July 2001, which were not seriously debated at that stage. It then produced a formal proposal on 2 February 2002, which was followed by an alternative proposal from the Federation government on 27 February. The Croat caucus in the Federation House of Peoples issued its own draft on 18 February. The Republika Srpska Constitutional Commission issued Working Material on

¹ Jakob Finci is chair of the Federation Commission, Miroslav Mikes the chair of the RS Commission. See also: *Blic*, 8 March 2002.

² See European Commission for Democracy Through Law, “Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina”, Strasbourg, 4 September 1996.

³ International Taskforce, “Constitutional court decision implementation: guidance and options”, Sarajevo, 6 March 2001.

constitutional amendments for public debate on 17 January 2002, and presented it to the RS National Assembly on 27 February.

High-level political engagement in the question of constitutional reform began only six weeks ago, when the eight leading political parties met at Mrakovica in Republika Srpska on 25 January. There have been three meetings organised by the political parties themselves, and another six or so meetings mediated by the High Representative.

The debate has taken place under difficult circumstances, just as the political parties are gearing up for an election campaign. The parties have often appeared to be more concerned with the impact of the debate on their own constituencies, than with achieving workable solutions and genuine compromises. Sefudin Tokic, speaker of the state House of Peoples, has advocated reforms that would “mean the end of the Republika Srpska which was projected by Radovan Karadzic and his SDS”.⁴ Haris Silajdzic has insisted that compromise solutions in Republika Srpska would amount to “rewarding genocide”.⁵ The HDZ has adopted its familiar tactic of warning that the very existence of Croats in Bosnia and Herzegovina is at stake.⁶

The time spent on serious political debate on the Constitutional Court’s decision has therefore been extremely limited. One can of course criticise Bosnia’s political leaders for being slow to begin the debate. However, the High Representative himself has characterised the process which is underway as follows:

“Some will argue that the process of debate on efforts to harmonise the Entity constitutions with the BiH constitution has already dragged on too long – since the summer of 2000. But it should not be forgotten that an entirely new kind of consciousness has had to develop – this is a process more time consuming and complex than simple negotiation. Thinking has had to change. Time has been needed for the potency of extreme nationalism to evaporate; it has had to be replaced by a civic alternative, a political culture within which compromise and consensus are not viewed as weakness. In other words, politics in Bosnia and Herzegovina have had to mature and normalise.”⁷

If one takes these notions seriously, then giving up on the domestic process would clearly be counterproductive to the real objective of transforming the Bosnian political culture.

The question of urgency

The sense of extreme urgency which has gripped Sarajevo in recent weeks is highly artificial, generated more by international institutional imperatives than by the needs of Bosnia and Herzegovina.

⁴ Interview in Dnevni Avaz, 20 February 2002.

⁵ Interview with CNN, 17 March 2002.

⁶ Interview with Ante Jelavic, Jutarnji list, 11 February 2002.

⁷ Wolfgang Petritsch, article published in Oslobodjenje, 11 February 2002.

There are two main reasons why the international community has sought to push the constitutional process to an early conclusion: the process of Council of Europe accession and the elections scheduled for October 2002. Neither of these factors impose strict deadlines on the process, and neither is as important as the goal of securing a genuine domestic agreement on constitutional reform.

Regarding the Council of Europe, Bosnia's post-accession commitments require it to adopt and implement constitutional and legislative amendments to comply with the Court's decision within one year of its accession.⁸ The date of accession is likely to be in May 2002, giving Bosnia another clear twelve months to meet its commitment. It would be perverse, just as Bosnia has been welcomed into the European family of democratic nations, to use Council of Europe accession as a reason to overrule the constitutional process.

Regarding the election, OHR has repeatedly stressed that the constitutional changes must be adopted in March, to allow consequential amendments to the election law to be made in time for the Election Commission to set the process in motion for October elections. However, on closer examination, this is not a fixed deadline.

When the permanent Election Law was adopted in September 2001, it contained gaps concerning the election of the two entity presidents and the Federation House of Peoples, pending implementation of the Constitutional Court decision. Both the Federation president and House of Peoples are indirectly elected. Changes to these institutions could be made right up to the election date, or even afterwards, without disrupting the election. As regards the Republika Srpska president, the Election Law allows the election to proceed under the 1998 PEC Rules and Regulations, if constitutional amendments have not been adopted in time.⁹

There is also concern among international observers that delaying constitutional change until after the October 2002 elections would necessitate new elections, or else delay implementation of the reforms until the next elections in 2006. However, this depends entirely on the reforms which are chosen. New institutions that are not directly elected can be established at any time, and reforms concerning the composition of governments and other executive bodies are not tied to elections.¹⁰

These timing issues are mainly technical concerns. They are not a reason to cut short the domestic constitutional process.

⁸ Text adopted by the Parliamentary Assembly of the Council of Europe, 22 January 2002, condition 15(iv)(a).

⁹ Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina 23/01, 19 September 2001), article 18.12.

¹⁰ Reductions in the size of entity and cantonal parliaments might be more difficult to implement mid-term, but then neither are they required by the Constitutional Court's decision.

What does the Constitutional Court really demand?

In the four parts of its decision on case U5/98, the Constitutional Court considered a series of specific challenges to provisions of the two entity constitutions alleged to be incompatible with the state constitution.

For Republika Srpska, the Court ordered the removal from the preamble of all references to sovereignty, self-determination, independence and the determination of the Bosnian Serb people "to link their State with other States of the Serb people". It insisted that the entity must not describe itself as the "State of the Serb people", and ruled against a number of other specific provisions, including certain references to "social property" which it deemed incompatible with the constitutional protection of the free market. For the Federation, the Court ordered that Bosniacs and Croats may not be designated as the sole constituent peoples, and struck out a reference to diplomatic missions.

These specific orders of the Court have all been accepted by the Constitutional Commissions and the main political parties.

As part of its reasoning, the Court declared that the reference to three "constituent peoples" in the preamble of the Bosnian constitution, a concept that remained undefined in the text, establishes a principle of collective political equality of the three peoples throughout the territory. The Court declared that this principle:

"prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation." ¹¹

It insisted that the internal structure of the Bosnian state cannot serve as a constitutional pretext for upholding the effects of ethnic cleansing.¹² The Court further stated that, in the Federation, it is unconstitutional to reserve legislative, executive or judicial posts exclusively for Bosniacs and Croats.

The current debate has ranged far beyond the specific orders of the Court, to address the implications of these general principles on the different levels of government in the two entities. The judgment gives no real guidance on these questions. The Court offers no opinion on whether political equality requires the use of ethnic vetoes at different levels of government, whether there should be a House of Peoples in Republika Srpska, whether there should be proportional representation in different public institutions, or whether the special regime cantons in the Federation should be preserved.

The Court left it entirely to the political process to determine which elements of the existing constitutional systems are inconsistent with the general principle of political

¹¹ Partial Decision No. U5/98-II, para. 60.

¹² *Ibid.*

equality. It also left it to politicians to determine what new institutional arrangements, if any, are appropriate.

In 1955, when the United States Supreme Court declared that racial segregation in American public schools was unconstitutional, it enjoined the responsible authorities to proceed with integration with “deliberate speed”. As one analyst has written:

“This was an act not merely of great moral (and presumably legal) significance, but of political wisdom. The law is now known. That is as far as a Court or a moralist can go. But it will be an act of political cowardice if the Federal executive cannot now constantly nudge the unreconstructed time-servers to implement the law. Time by itself solves nothing; but time is needed to attempt anything politically.”¹³

In Bosnia, the public debate and the political process set in train by the Court’s decision encompass the entire spectrum of constitutional development – a vastly complex subject requiring many difficult political judgements. Nowhere does the Court demand that all of these issues be resolved within a fixed deadline.

Changing Bosnian realities

In its judgement, the Court attributed great significance to figures on minority return and participation in public life, which it took as evidence of the discriminatory effect of elements of the two entity constitutions. The population figures cited by the Court were UNHCR estimates from 1997, while the minority return figures and ethnic composition of judges, prosecutors and policemen were from January 1999. At the time, these figures certainly demonstrated the intransigence of the entity governments towards ethnic reintegration.¹⁴

However, as table 1 shows, the situation has changed dramatically since then. Laws on the return of property were passed in both entities in 1998, and implementation began in earnest in 2000. By 31 January 2002, 66,552 families (51 percent of all claimants) had recovered their property in the Federation, and 36,901 (32 percent) had repossessed in Republika Srpska.¹⁵ The rate of implementation continues to increase. The number of registered minority returns to Republika Srpska has leapt from the 10,000 cited by the Court to more than 91,000 in January 2002, while the number of Serb returnees in the Federation has jumped from 19,000 to 87,000.¹⁶ Given the inadequacies of the registration process, the real figures are probably much higher.

Regarding recruitment of minority police officers, UNMIBH began to achieve the first major breakthroughs in the summer of 2001. There are now 307 non-Serb

¹³ Bernard Crick, *In Defence of Politics*, London, 5th ed., 2000, p. 156.

¹⁴ At that time, Momcilo Krajisnik was Serb member of the Bosnian, Biljana Plavsic was president of Republika Srpska and Slobodan Milosevic ruled Serbia. Today, all three face trials for war crimes in The Hague.

¹⁵ Inter-Agency Property Law Implementation Statistics, 31 January 2002.

¹⁶ UNHCR, Returns summary to Bosnia and Herzegovina from 01/01/96 to 31/01/02: www.unhcr.ba.

officers in Republika Srpska, and 633 Serbs and ‘Others’ in the Federation, while the Brcko District police force is fully integrated. The Republika Srpska police academy has 562 non-Serb cadets who have graduated or are currently in training, while in the Federation there are 516 Serb cadets.¹⁷ A Serb has been appointed chief of police in Drvar, and a Bosniac as deputy police chief in Srebrenica. While the overall percentage of minority officers is still too low, for the first time there is a real momentum to the process.

Table 1: Progress in minority return since the Constitutional Court decision

Registered minority returns	Figures cited by the Court	January 2002 figures
<i>Republika Srpska</i>		
Bosniaks	9,212	84,814
Croats	751	6,420
RS total	9,963	91,234
<i>Federation</i>		
Serbs	19,247	87,495
Total	29,210	178,729

Source: UNHCR, Returns summary to Bosnia and Herzegovina from 01/01/96 to 31/01/02: www.unhcr.ba

This process of reversing ethnic separatism has radically transformed Bosnia’s reality. There are now mosques in Prijedor, Bosniac businessmen in Doboje, a strong Serb community in Drvar and hundreds of Bosniac children attending schools in Stolac.

At this most practical level, the implementation of the Court’s decision is already well advanced. The Court’s finding of “a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Federation of BiH in order to prevent so-called minority returns either through direct participation in violent incidents or by not fulfilling their obligation to protect people against harassment”¹⁸ simply no longer applies. In Republika Srpska, the shift in attitude came later and still lags behind, but the changing reality in the field over the past two years suggests that it will follow a similar path.

This most practical dimension of transforming Bosnia and Herzegovina through ethnic reintegration should remain the primary focus of agencies charged with implementing the peace agreement. It is this changing social reality that opens up the possibility of meaningful and lasting constitutional reform. Time is now working for the process of constitutional development, not against it.

¹⁷ Figures as of 13 March 2002, provided to ESI by UNMiBH.

¹⁸ Constitutional Court, Partial Decision No. U5/98-II, para. 138.

Other pressures for constitutional change

What is most striking of all about the current debate is that there is so little conviction among international observers that the proposals currently on the table will succeed in transforming Bosnian political life. Are the interests of the Bosnian people really advanced by constitutions which further entrench ethnicity as the basis of representation? Will their quality of life be improved by extending mutual vetoes across every level of government? Does changing the ethnic composition of the Republika Srpska government really guarantee that the interests of Bosniac and Croat returnee communities will be better defended? The link between the emotionally charged, symbolic questions currently dominating the debate and the welfare of ordinary citizens is far from self-evident.

In many respects, the current debate is reminiscent of constitutional developments in the old Yugoslavia. There, socialist elites constantly responded to pressures for political and economic reform by creating ever-more complex constitutional arrangements. The need for consensus decision-making between diverse regional and national groupings made the political system increasingly unworkable, and it proved totally ill-equipped to respond to the economic crises of the 1980s.

Post-Dayton Bosnia and Herzegovina exhibits many of the same features: excessive decentralisation, a proliferation of weak institutions, complex decision-making procedures prone to deadlock, weak fiscal federalism and intergovernmental relations, and incentives for politicians to build purely ethnic constituencies. There is every risk that, in the name of political equality, these problems will be exacerbated by the constitutional reforms now on the table.

In a mirror image of constitutional debates from the former Yugoslavia, once again also the most pressing problems facing the Bosnian state in the coming years are conspicuously absent from this debate. All levels of government in Bosnia will face severe budgetary challenges in the near future. Bosnia's foreign debt-servicing obligations will leap from US\$75 million in 2001 to more than US\$110 million in 2003, putting enormous strain on the entity budgets. According to the World Bank, even under the most optimistic economic projections and with continued foreign aid, Bosnia will not gain access to commercial credit until 2006:

"Unfortunately, due to transitory setbacks and loss of momentum in the reform agenda, the opportunity to achieve creditworthiness before foreign aid flows began to decline has been missed. According to our projections, under the assumption of a full reform scenario with strong output and donor response, the country will require some \$2.3 billion from donors during the next five years. While about half of this requirement could be financed through committed and expected assistance from official creditors, financing sources for the other half remains to be identified."¹⁹

¹⁹ World Bank, "Bosnia and Herzegovina: Creditworthiness Review", 5 September 2001, p. 31.

In the six years since Dayton, Bosnia's economic growth has been directly linked to the amount of foreign aid received, and is therefore likely to slow considerably.²⁰ As aid from the European Union CARDS programme drops from 105 million euros in 2001 to 44 million euros in 2004, Bosnia's financial flows might turn negative.

At the same time, Bosnia must face the long-deferred spectre of economic transition. According to projections prepared by one of Bosnia's bilateral donors, the transformation of moribund public companies will produce 50,000 additional unemployed by 2005 in the best-case scenario, or 76,000 in the low-case scenario, a load far beyond the present capacity of Bosnia's feeble social welfare systems.

Recent opinion polls show that the Bosnian public is overwhelmingly preoccupied with the question of economic security. In a survey carried out by the National Democratic Institute in February 2002, 60 percent of respondents rated employment as one of the two most important issues determining their vote, followed by corruption in government (31 percent), emigration of youth and the adequacy of social services. Only 13 percent of voters rated "national interests" in their top two concerns.²¹

In the coming months, the World Bank will release the results of a major review of Bosnia's public finances. It is likely to paint a picture of a structure of government which is increasingly unstable, unable to build its revenue base, sustain its institutions or meet its social obligations. There are already signs of unhealthy revenue competition within the Federation, as the entity makes decisions that reduce cantonal budgets, which in turn are forced to starve the municipalities of funds.

These factors – a fiscally unsustainable structure of governance, the changing priorities of Bosnian citizens and the continued need for external (in particular European) support beyond the reconstruction phase – will be the engine that drives real constitutional change in Bosnia. It will be up to Bosnia's political class, opinion makers and civil society to find the compromises that will enable the political system to weather the coming storm. 'Quick-fix' solutions imposed from above will not achieve this.

Municipal, cantonal and entity officials are forced every day to confront the inadequacies of Bosnia's governmental structure, and are more open than ever before to considering new solutions. Over the coming year, proposals for constitutional change which address these practical problems and offer a real perspective for improving the lives of ordinary people are likely to stand a growing chance of success.

²⁰ *Ibid.*, p. 5.

²¹ National Democratic Institute for International Affairs, "A survey of voter attitudes in B&H: summary report", 28 February 2002.

Conclusion

If the High Representative imposes constitutional change of the kind that is now contemplated, the likelihood is that the international mission in Bosnia will be fully engaged for the next year in reforming the high political structures, perhaps in the face of widespread opposition. This will consume an enormous amount of international political capital, diverting it from the more pressing issues. At the same time, it will muddy the waters for the vital process of overhauling Bosnia's system of government.

Although the High Representative and the Steering Board have repeatedly stressed the importance of a political agreement, the possibility of imposition has hung over the present talks from the outset. As a result, politicians have had little incentive to compromise, preferring to keep open the option of opposing a High Representative imposition.²² All parties have attempted to force the High Representative's hand. As the Bosniac member of the state presidency, Beriz Belkic, stated:

“Although the High Representative announces that he is not ready to do anything and that he leaves it to the domestic officials to make constitutional changes, I believe that, in the end, he will have to intervene in some way, that he should not look for a compromise between a good and bad solution, but to impose the solutions that contain criteria of known European standards.”²³

If the parties hope for a better result from the High Representative than they can achieve in direct negotiations, then negotiations are bound to fail.

For all these reasons, we consider that, if an agreement on constitutional reform is not reached in the current round of talks, the right choice is to take a step back and leave the issue to another day. An imposition by the High Representative is not going to transform Bosnian political life. It is far more important to develop Bosnia's capacity to transform itself over time.

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²² Even Ivanic's PDP, the party in Republika Srpska closest to the international community, announced: "Solutions imposed on the PDP will not create an obligation to implement them, nor will the PDP have any responsibility for the consequences such solutions might cause": PDP press statement, 28 February 2002.

²³ Interview in *Vecernji list*, 28 February 2002.