

Leaving Dayton for Brussels: Reviving Bosnia's constitutional reform

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Executive summary

In December 2022, the European Council granted Bosnia and Herzegovina candidate status. Now, to make EU membership a reality, Bosnia needs to address several conditions and implement major reforms.

Bosnia is currently the last in line in terms of preparation for EU accession,¹ and without changing the current governance setup, it will continue to struggle to meet the membership criteria. The allocation of power along ethnic lines, stubborn veto mechanisms, and the continuous presence of the High Representative as the country's highest authority hinder Bosnia's advance on its EU path. It is time to reopen the debate on Bosnia's constitutional reform. The EU should insist on it and accompany the country's efforts.

Bosnia's constitutional reform is not only necessary for the sake of realising the country's EU aspirations. It is also essential if Bosnia is to become a fully functional and democratic state. Almost three decades since the end of the Bosnian war, the country continues to be governed along sectarian lines and is overseen by an internationally appointed authority, the High Representative. Moreover, the ethnic provisions of the constitution discriminate against parts of its citizenry. A new constitution is key to improving institutional functionality, streamlining decision-making, and guaranteeing equality for all citizens – all of which would ultimately allow for the closure of the Office of the High Representative.

Introduction

Since the early 2000s, the need for constitutional reform has been part of the political discussion in Bosnia and Herzegovina (BiH). There have been several attempts to change the constitution, but they have all failed. Negotiations always tried to broker backroom deals between ethnic political leaders, excluding other stakeholders and the broader population from the debate while allowing nationalist leaders to sabotage the process based on their short-term political calculations.

If the EU is to nudge Bosnia to undertake a new and much-needed constitutional reform effort, it should insist on a bottom-up, inclusive approach that allows new voices to contribute to the discussion and new proposals to flourish beyond the positions of party leaders. Civil society should play a leading role in the process and become a key interlocutor for the Union, alongside other stakeholders like lower levels of government, business representatives, experts, academics, and ordinary citizens.

An unworkable constitutional setup

Bosnia's constitutional setup is dysfunctional and discriminatory. Designed during the peace negotiations in Dayton in 1995, it established a complex institutional system with several layers of governance and territorially decentralised competences. In a country of slightly more than 3 million people (the size of cities like Madrid or Berlin), there are 13 parliaments, five presidents, and around 150 ministries.

Dayton allocated power along ethnic lines and granted veto rights to each constituent peoples – i.e. Bosniaks, Serbs, and Croats. The result has been an intricate decision-making system. Nationalist leaders have constantly abused the blocking mechanisms to boycott the normal functioning of the institutions, plunging Bosnia into a permanent state of political stalemate.

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As a result, citizens are paying a high price as fundamental issues affecting the populations' day-to-day life are yet to be addressed. Bosnia is one of the poorest economies in Europe and has the highest unemployment rate.² The lack of prospects has prompted many to leave the country, especially the young and highly-educated people.³

The division of the political system along ethnic lines has also paved the way for corrupt practices. The main nationalist parties – i.e. the Bosniak SDA, Croat HDZ BiH and Serb SNSD – which have held power almost

uninterrupted since the end of the war, have benefitted from the ethnically segregated system, capturing the state to serve their interests and consolidate their control over institutions and public companies.

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Furthermore, the seats of the tripartite Presidency and the Upper House of the Parliament are reserved for Bosniaks, Croats and Serb candidates. This provision negatively infringes on the political rights of about 400,000 Bosnian citizens (12% of the population)⁴ who do not belong to any of the three constituent groups, refuse to identify ethnically, or do not reside in the entity that elects the candidate from their ethnic group, i.e. Serbs in the Federation and Bosniaks and Croats in the Republika Srpska.

In 2009, the European Court of Human Rights (ECtHR) ruled⁵ that this constitutional provision was discriminatory, upholding the complaint of Dervo Sejdić and Jakob Finci – a Roma and a Jew, respectively – and establishing that the Dayton constitution violated the European Convention of Human Rights.

The Sejdić-Finci case set a precedent and, since then, several other ECtHR decisions have followed the same line. In 2014, the Court ruled in favour of Azra Zornić,⁶ a citizen that refused to identify ethnically. In 2016,

the ECtHR upheld the cases of Samir Šlaku,⁷ a Bosnian Albanian, and Ilijaz Pilav,⁸ a Bosniak living in the Republika Srpska. Finally, in 2020, it sided with Svetozar

Pudarić,⁹ a Bosnian Serb from the Federation. However, none of these judgements have been implemented.

Past constitutional reform efforts gone wrong

In the mid-2000s, there were attempts to reform the constitution, but they all failed. In 2006, all major parties endorsed a reform package to amend the constitution. The decision was triggered by a favourable political momentum, with all parties aware that reforms were needed to advance EU accession and open negotiations.¹⁰ It was also encouraged by the publication of a report by the Venice Commission,¹¹ which underlined that constitutional reform was crucial to address the democratic and efficiency-related shortcomings in the country, as well as indispensable to advancing BiH in the EU integration process. However, after many months of closed-door negotiations, two of the participating parties – Bosniak SBiH, led by Haris Silajdžić, and Croat HDZ 1990, a split from HDZ BiH – eventually jumped off the boat, and the so-called April Package fell short of meeting the required two-thirds parliamentary majority.

The failure to pass the April Package and the outcome of the general elections six months later made the initial prospects for consensus disappear and triggered an escalation of nationalistic narratives that has continued to monopolise the political debate ever since.

Bosnian Serb leader Milorad Dodik, who until then was seen as a moderate politician, abandoned his reformist profile and adopted an increasingly complex secessionist line. Furthermore, in 2006, Željko Komšić was elected as the Croat member of the Presidency. Komšić ran as the candidate of the SDP, a multiethnic party, and won the elections against the Croat nationalist HDZ BiH candidate. HDZ BiH, who won the Croat Presidency seat in all three previous elections, refused to consider Komšić as a legitimate representative of the Croat people, turning the matter of 'legitimate representation' into the cornerstone of an increasingly sectarian political agenda.

In the following years, two new attempts to revitalise the reform process – Prud and Butmir – were launched, but neither succeeded. The efforts focused on facilitating backroom deals between the main political parties and nationalist leaders based on the assumption that the population would subsequently endorse the ensuing agreements. This flawed premise allowed leaders to sabotage the process based on their short-term political calculations and encouraged nationalist leaders to pursue their sectarian goals.

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During that period, the EU refused to take the lead in trying to build Bosnia's post-war statehood, limiting itself to backing US efforts to strengthen the state's institutions. It was not until the ECtHR Sejdić-Finci ruling in 2009 that the EU finally stepped in and tried to push for constitutional reform by including it as a condition for the entry into force of BiH's Stabilisation and Association Agreement (SAA). Then, in 2014, amid a series of widespread protests against the deteriorating socio-economic situation in the country, the EU changed tactics. Constitutional change ceased to be a priority, and the focus shifted towards implementing socio-economic reforms.

An obstinate political debacle

The European Commission issued its opinion on Bosnia and Herzegovina's application for EU membership in 2019.¹² It concluded that the country had not yet fulfilled several of the obligations under the SAA, such as the establishment of a national programme for the adoption of the EU *acquis*. The document also highlighted disputes on the distribution of competences and the inability to

effectively coordinate the country's 14 governments which hampered BiH's capacity to align and implement EU law.

In the same opinion, the Commission set 14 key priorities for Bosnia to meet before it could start the screening process. These covered *inter alia* the areas of democracy, the rule of law, fundamental rights, and public

administration reform. The fourth priority specifically asked for the improvement of the institutional and constitutional framework to address, among others, the ECtHR Sejdić-Finci ruling, eliminate veto rights in decision-making, and ensure legal certainty on the distribution of competences across levels of government.

Bosnia is still far from meeting the criteria. In its 2022 report on BiH,¹³ the Commission concluded that the country had not progressed in improving its constitutional framework. In the same year, the main Bosnian political parties – except for HDZ BiH – met in Brussels with the President of the European Council Charles Michel and the EU High Representative for Foreign Affairs and Security Policy Josep Borrell to agree on a set of principles to ensure a functional Bosnia that advances on the European path.¹⁴ Parties committed to undertaking reforms that safeguard Bosnia's democratic behaviour. They also pledged to implement the necessary electoral and constitutional changes that would allow BiH to comply with the judgements of the different courts within six months from the formation of the governments. However, to date, no real action has been taken to put these public agreements into practice.

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At the state level, parties continue to systematically use their powers to challenge the functioning of the state and boycott decision-making processes. In the Federation, the 2014-elected government worked with a technical mandate for the entire 2018-2022 period due to the parties' inability to agree on forming a new executive. Moreover, last year, HDZ BiH refused to allocate the necessary funding for the organisation of the 2022 elections if the demands regarding modifying the electoral law would not be met.¹⁵

Despite the urgency for reform, the highly polarised domestic environment is not favourable for consensus. Ethnic issues continue to be the cornerstone of the political discussion,¹⁶ and nationalist parties have opposing views on the country's future.

Milorad Dodik continues to pull the strings, and his threat to break away from Bosnia and Herzegovina keeps escalating, threatening the country's integrity. In 2021, he announced the withdrawal from the army, the judiciary, and the tax administration – three institutions transferred to the state level after Dayton. While the scenario of Bosnia falling apart in the present context is unlikely, Dodik uses that threat to extract concessions from the international community.¹⁷

Furthermore, the rapprochement between Milorad Dodik and Russian President Vladimir Putin has intensified over the past year. In January 2023, during the unconstitutional celebration of the Day of Republika Srpska, Dodik awarded Putin with the Order of the Republika Srpska, the highest decoration of the entity. The Serb leader has also strengthened ties with Hungarian Prime Minister Viktor Orbán, who supported him ahead of the October 2022 elections.¹⁸ In 2021, Orbán provided Republika Srpska with 100 million euros in financial assistance and warned that it would block any EU attempt to sanction Milorad Dodik as a response to his secessionist threats.¹⁹

For its part, HDZ BiH leader Dragan Čović continues to insist on the narrative of legitimate representativity, intensifying calls for changes to the electoral law in line with the interests of his party but implementing the ECtHR rulings. The party even pleaded for the creation of a third Croat-dominated entity; efforts were eventually supported also by Croatian President Zoran Milanović.²⁰

While pretending to be opponents in public, the main nationalist parties benefit from the current sectarian system and hence have little incentive for reform. Over the years, the SDA, HDZ BiH and SNSD captured the state, abusing their positions of power and consolidating the political control of the judiciary, the civil service and public enterprises.²¹ Meanwhile, civic-oriented political parties, like the SDP and Naša Stranka, struggle to navigate a sectarian setup that is not designed for multi-ethnic options.

At the same time, however, cross-party compromise will be necessary for any reform package to pass since any constitutional change requires the support of a two-thirds majority in each ethnic group of the state and entity parliaments.

Thirty years after the war, the ultimate authority in the country continues to be a foreign official not elected by Bosnian citizens. Initially conceived to oversee the implementation of the civilian aspects of Dayton, the High Representative can also amend or impose legislation and can remove public officials from office with the so-called Bonn Powers.

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Last year, the allocation of funding for the general election was authorised by the High Representative given HDZ BiH's obstruction of the process.²² Minutes after the polls closed on election day, High Representative

Christian Schmitt acted again to amend the election law and the constitution of the BiH Federation. These decisions aimed to unlock the political paralysis, enhance functionality and facilitate the formation of governments.

Yet, they also damage democracy, cement the idea that Bosnia needs foreign intervention to function and undermine the agency of Bosnian citizens and politicians to shape the future of their country.

Civil society: Driver of change?

Despite sectarianism and the capture of the state by nationalist political elites, several examples of grass-root initiatives across the country show that there is room for optimism and that society wants and can contribute to moving BiH forward.

In fact, last year, representatives from political parties, non-governmental organisations, the academic community, and appellants before the European Court of Human Rights committed to actively implementing the necessary reforms to advance towards EU and NATO membership. The declaration received the support of over 60,000 citizens.²³

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For example, the BiH Pride March is organised by activists from all over the country in a de-centralised way to fight for recognition, visibility, and equal rights for the LGBTI population in Bosnia.²⁴ The organising committee meets throughout the year in different cities and, unlike most pride marches, it adopts the name of the country instead of that of the city where it takes place.

Also, at the political level, there are a few civic-oriented and reformist options, as well as positive examples of multi-ethnic cooperation. For the first time since 1996, two of the three elected members of the Presidency come from multi-ethnic and civic-oriented parties. In Sarajevo, the reformist coalition that took office in late 2018 revalidated its mandate after the 2022 vote. In the

area of Majevisa (Northeastern Bosnia), which was the backdrop of intense fighting during the nineties, the mayors of five municipalities located in the Federation and the Republika Srpska managed to overcome past legacies and work together for economic growth, regional development, tourism, and environmental protection.

Yet, data shows that citizens are dissatisfied with their domestic institutions and leaders. Most of the population does not trust public institutions such as the parliament (69%), the government (71%), local authorities (72%), political parties (83%), or the judiciary (67%).²⁵ Numbers in Bosnia are even higher than the regional average.

Moreover, while citizens tend to see EU accession with pragmatism and are increasingly sceptical of the prospects of their country joining the Union, most of the population continues to be in favour of EU membership and thinks that joining the Union would be positive for Bosnia.²⁶

In 2022, the EU and the US re-launched negotiations with political parties to reform the electoral law ahead of the general elections. In parallel, the Office of the High Representative (OHR) organised a four-day citizens forum with 57 randomly elected people to bring them into the discussions.

But negotiations with the political elites failed again. Parties continue to be stuck in their immobile and inflexible standpoints, and the EU did not have any incentives to offer that would make leaders sacrifice their positions to find a compromise.

However, citizens managed to put forward some alternative proposals.²⁷ They suggested, for instance, adding a Presidency member to represent those citizens who do not belong to any of the three constituent groups, the so-called 'others'. Citizens also proposed electing the members of the Presidency indirectly, transferring parts of the Presidency's executive power to the Council of Ministers or abolishing the House of Peoples.

Thus, there is potential for civil society, together with reformist political actors, to play a constructive and more active role in the process of reforming Bosnia's institutional system based on European democratic standards. Their input will be crucial for the demands and needs of citizens to be included in the debate and for the blockade caused by the mainstream parties to be overcome.

The way forward

To break the vicious cycle, the EU should push Bosnia to revive the debate about constitutional reform, but it should draw on past lessons learned and demand that negotiations on this subject no longer take place behind closed doors and among nationalist leaders only. This approach, which assumes that the population will jump on board at the end, has repeatedly failed. It is essential to move away from an ethnically framed narrative and the idea that political leaders, who have long benefitted from the current system and have no interest in changing it, hold the solution to Bosnia's governance crisis.

The EU should push Bosnia to revive the debate about constitutional reform, but it should draw on past lessons learned and demand that negotiations on this subject no longer take place behind closed doors and among nationalist leaders only.

Brussels also needs to enhance its direct communication with citizens. It should find better ways to explain to the population the requirements for membership, the reforms that need to be implemented, why, and by whom, as well as how people can contribute to their country's integration effort.

Long-lasting change can only be achieved through broad-based consensus on a reform package reached at the grass-root level first and then used to push leaders towards compromise. In this sense, the EU should insist on a bottom-up, inclusive approach that allows new voices to contribute to the discussion and new proposals to flourish beyond the positions of party leaders.

The population should participate in the debate through, for instance, citizens' assemblies. Civil society must play a leading role in the constitutional reform process and become a key interlocutor for the EU, alongside other stakeholders like lower levels of governments, reformist political actors, businesses, experts, academics, and ordinary citizens. These actors know best the reality in the country and have the best capacity to mobilise the population, monitor progress and hold leaders accountable.

Currently, the lack of credibility of the EU in the region diminishes the Union's capacity to use its leverage effectively, and the absence of a realistic EU future for

Bosnia reduces the effectiveness of the conditionality mechanisms. Hence, Brussels should now offer BiH a more realistic path towards EU membership to incentivise political leaders to sacrifice their positions and reach a compromise on a reform package. Doing so would also encourage citizens to play an active role in the process and push for positive transformation.

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For the EU to be credible and effective, it must stop member states from acting as spoilers, instrumentalising the enlargement process to push for their domestic political agenda or solve bilateral disputes.

Almost twenty-five years have passed since the peace treaty was signed in Bosnia. The Dayton Agreement put an end to the war but established an institutional setup that is still trapping BiH in a permanent state of dysfunctionality. The new geopolitical momentum has made the urgency for Brussels to deliver on enlargement ever more salient. The EU should seize the recently granted candidate status to Bosnia as a chance to break the impasse and foster the discussion about the reform of Bosnia's constitution based on European democratic standards. This time, this effort should be based on a bottom-up approach, moving away from ethno-sectarianism and placing citizens at the centre of the discussion.

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- ¹ European Stability Initiative (2023), "[Scoreboard - The true state of accession - What the Commission assessments reveal](#)", p.5.
- ² *Trading Economics*, "[Unemployment Rate | Europe](#)" (accessed June 2023).
- ³ The United Nations Population Fund (UNFPA) (2021), "[Survey on Youth Emigration in Bosnia and Herzegovina](#)", Bosnia and Herzegovina, p.9.
- ⁴ *Human Rights Watch*, "[Bosnia and Herzegovina: Ethnic Discrimination a Key Barrier](#)" (accessed June 2023)
- ⁵ European Court of Human Rights (2009), "[CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA](#)", Strasbourg.
- ⁶ European Court of Human Rights (2014), "[CASE OF ZORNIĆ v. BOSNIA AND HERZEGOVINA](#)", Strasbourg.
- ⁷ European Court of Human Rights (2016), "[CASE OF ŠLAKU v. BOSNIA AND HERZEGOVINA](#)", Strasbourg.
- ⁸ European Court of Human Rights (2016), "[CASE OF PILAV v. BOSNIA AND HERZEGOVINA](#)", Strasbourg.
- ⁹ European Court of Human Rights (2020), "[CASE OF PUDARIĆ v. BOSNIA AND HERZEGOVINA](#)", Strasbourg.
- ¹⁰ Hays, Don; Crosby, Jason (2006), "[From Dayton to Brussels: Constitutional Preparations for Bosnia's EU Accession](#)", Washington: United States Institute of Peace (USIP), pp. 4-5.
- ¹¹ Council of Europe (2005), "[Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative](#)", Venice.
- ¹² European Commission (2019), "[Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union](#)", 52019DC0261, Brussels.
- ¹³ European Commission (2022), "[Bosnia and Herzegovina 2022 Report](#)", 52022SC0336, Brussels.
- ¹⁴ European Council (2022), "[Political agreement on principles for ensuring a functional Bosnia and Herzegovina that advances on the European path](#)", Brussels.
- ¹⁵ Kurtic, Azem, "[Bosnia's Election Commission Borrows Money to Hold Polls](#)", *Balkan Insight*, 6 June 2022.
- ¹⁶ Manipunacija, "[SNSD i SDA Prvaci u Ispraznom Nacionalizmu – Naša Stranka s Najviše Ideja o Životnim Temama!](#)" (accessed June 2023).
- ¹⁷ Ruge, Majda, "[Time to Act on Bosnia's Existential Threat](#)", *Foreign Policy*, 3 November 2021.
- ¹⁸ Kurtic, Azem, "[Hungary's Orban Champions Bosnian Serb Chief Ahead of Elections](#)", *Balkan Insight*, 29 September 2022.
- ¹⁹ Inotai, Edit, "[Orban: Hungary Gives €100 Million Support to Bosnian Serbs](#)", *Balkan Insight*, 21 December 2021.
- ²⁰ *N1*, "[Croatia's President: BiH Croats are prepared for establishment of third entity](#)", 5 May 2022.
- ²¹ Ruge, Majda (2020), "[Hostage state: How to free Bosnia from Dayton's paralyzing grip](#)", Berlin: European Council on Foreign Relations (ECFR), p.9.
- ²² Kurtic, Azem, "[Bosnia's International Overseer Orders State to Fund Elections](#)", *Balkan Insight*, 7 June 2022.
- ²³ *Deklaracija BiH*, "[Declaration on Constitutional and Other Reforms of Bosnia and Herzegovina on its Path to the European Union and NATO](#)" (accessed June 2023).
- ²⁴ *BiH Pride March*, "[About the BiH Pride March](#)" (accessed June 2023).
- ²⁵ *Balkan Barometer*, "[Database - Balkan Public Barometer](#)" (accessed June 2023).
- ²⁶ *BiEPAG*, "[Public Opinion Poll in the Western Balkans on the EU Integration](#)" (accessed June 2023).
- ²⁷ Delegation of the European Union to Bosnia and Herzegovina European Union Special Representative in Bosnia and Herzegovina (2022), "[BiH Citizens' Assembly presents its recommendations on constitutional and electoral reform to the BiH Parliament](#)", Sarajevo.

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