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OVERCOMING THE WAR IN THE HEADS:
RENEWING BOSNIA'S CONSTITUTIONAL DEBATE

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Overcoming the War in the Heads: Renewing Bosnia's Constitutional Debate

Executive summary

The only realistic way out of Bosnia's current constitutional impasse is for the three constituent peoples and their representatives to leave behind their respective myths – their "war-time thinking" – and to agree on a few straightforward propositions. The Serbs need to accept that the Republika Srpska cannot persist under its current name and the political philosophy of its founders. The Bosniaks need to overcome their current cult of political innocence and victimization and develop innovative concepts of decentralization and protection of those who are not a plurality. The Croats need to reach out to people with similar ideas from other ethnicities. And the civic-minded Bosnians need to abandon their disdain for the political process and fully engage with it instead.

Only on such a basis will an open and honest debate about a new constitution for Bosnia be possible. Should the constitutional amendments that failed a vote in parliament in late April be tabled again, the principle of entity voting in the House of Representatives needs to go.

In all this, the international community – the European Union and the United States above all – needs to re-engage in a process of constitutional debate that needs to be more inclusive and legitimate than the recent attempt. One possible way to do this would be to support the work of a constituent assembly.

Constitutional travails

On April 26, the parliament of Bosnia and Herzegovina (Bosnia) failed to pass a set of constitutional amendments that had been under discussion for almost an entire year. The draft amendments were neither comprehensive nor particularly far-reaching but still failed, by just two votes, to reach the required two-thirds majority in the House of Representatives.

This marked the likely end of the first coherent attempt to revise the current constitution since it entered into force in 1995, and perhaps also the defeat of this entire approach to constitutional reform: in painstaking deliberations, international mediators from the United States Institute of Peace and the U.S. State Department had secured the agreement of six parties – but it wasn't enough to get the draft passed.

What now? Is there a way out of the apparent constitutional impasse?

The short answer is yes, but not before the next election. The failed amendments were designed and promoted so they could enter into force by 1 May, five months before Bosnia's next general election, as required under the recently updated Electoral Law. This would have allowed the new government to be formed in accordance with the proposed changes. It is now clear that the new government will be formed, and quite possibly function for its entire four-year mandate, according to the current constitution, which was part of the 1995 Dayton peace agreement. As such, the "Dayton constitution" represented a compromise between the parties to the conflict; it has ever since served to secure advantages to ethnically-defined political parties and to perpetuate ethnic divisions in the country.

Even after 11 years of living in peace and enjoying the political arbitration, moderation, and advice of some of the most powerful governments and multilateral institutions in the world, the local political stakeholders seem to have decided that the incentives for moving beyond the current constitution are insufficient. Indeed, the war-time thinking enshrined in the constitution still prevails in Bosnia, casting a serious shadow on all achievements believed to have been made in the post-war state-building of this country.

Instead of aiming to *suppress* it, which seems to have been the approach of most internationally-led reform initiatives thus far, the time has come to *address* the war-time thinking in Bosnia. At a time when the international community is drawing down its presence in Bosnia, it needs to gather the courage and resources to skillfully facilitate a responsible debate among local political elites on all their fears and assist them in finding constitutional solutions that mitigate those fears and secure the foundation of a self-sustainable state supported by all citizens and peoples living there.

This policy brief aims to offer a general blueprint for such a mission. It first examines the latest proposal on constitutional changes, the reasons for its failure, and short-term remedies. It then addresses the long-term challenges of creating a new constitution that would again satisfy all relevant political forces in the country, as did the Dayton charter, but this time in an environment of peace and an orientation toward Euro-Atlantic integration.

The U.S.-led constitutional initiative

In international circles, state-building in Bosnia is frequently described as a "U.S.-led" operation. Indeed, American officials have for the most time held all key international positions in Bosnia except that of the High Representative, which was reserved for officials from European nations: the commander of NATO troops has always been a U.S. general and both the Principal Deputy High Representative and the head of the OSCE mission have always been U.S. diplomats. The U.S. ambassador is the most powerful of the many ambassadors in Bosnia, especially in the Peace Implementation Council, the body that appoints the High Representative and oversees his work. Almost no major reform in Bosnia has happened without the decisive engagement of the United States, simply because Americans understood better than most other international actors that a push has always been necessary for any milestone to be reached, and they were ready to provide it. In sensitive reforms that implied a shift in the balance of power established by the war, the war-time positions held by the different sides would face off and produce deadlock. To break it, a persuasion

from the United States - sometimes friendly, sometimes less so – has in the past been the most successful method. Even in the accomplishments assigned to the Office of the High Representative (OHR), it was frequently the U.S. administration that exerted pressure behind the scenes.

The recent initiative to amend the Dayton constitution marked a shift of sorts from that pattern. It was launched on the occasion of the tenth anniversary of the Dayton agreement -- at a time when international engagement in Bosnian affairs had already shifted a strategy of “push” to a strategy of “pull.” This new strategy reflects an international community that is increasingly reluctant to use its powers in Bosnia to achieve its goals, building instead on the prospect of Euro-Atlantic integration. There are obvious challenges inherent in that approach: non-compliance of one side will trigger consequences for all others as well, and the tangible benefits of Euro-Atlantic integration are slow to materialize.

Nonetheless, the U.S. initiative was a test for this “pull strategy,” though elements of “push” were also part of the mix. The point of departure was to find the lowest common denominator of the political parties with regards to strengthening the state level to make it more responsive to the demands of good governance and Euro-Atlantic integration. Although most of the participants were quite skeptical about the project, it resulted in a consensus on some serious improvements in state-level institutions. The final proposal also incorporated previous changes that had come about not through formal constitutional revisions but creative interpretations of the Dayton agreement; these had resulted in shifts of power from the entity to the state level in the area of defense, intelligence, and taxation. In most aspects, this proposal would have improved the current situation.

Yet, from the day one it was obvious that the parties treated the whole process as a power game. Parties from Republika Srpska (RS) entered the negotiations under condition that Bosnia’s division into entities would not be on the table, nor would the “entity voting system” in the House of Representatives be discussed – even though these two aspects of Bosnia’s post-war set-up had been identified by most independent observers as among Dayton’s key deficiencies. It is this voting system, the insistence on it and its political implications, which is to blame for the failure of the constitutional initiative, not a handful of individual representatives who voted against the proposal.

The entity voting system consists of decision-making procedures in Bosnia’s state-level parliament whereby all decisions need to be taken by a majority that includes one-third of the delegates from each entity. According to many expert opinions, most notably those issued by the Venice Commission, this protection against majority rule by the largest ethnic group is redundant since all decisions need to be approved by the upper chamber of parliament, which can block any decision that threatens the national interest of one people.

Parties from RS insisted on keeping this system for purely political purposes – this mechanism has ensured that nothing can be done in Bosnia without the explicit approval from the RS. Perhaps more importantly, preserving this mechanism also provides a key argument for the preservation of Bosnia’s entity-based organization in all future phases of constitutional reform.

An important feature of the protection provided by entity voting in the House of Representatives is that there is no remedy to overcome blockage. This was particularly significant in the context of another proposal contained in the latest amendments, which would have introduced a procedure for electing the Bosnian presidency, which would subsequently appoint the prime minister. Preserving entity voting would have meant that the RS would have been in a position to indefinitely block the formation of a state-level government.

This is a decisive difference to disputes involving national interests in the House of People, where the issue is eventually referred to the Constitutional Court, whose decisions are binding. Of its nine

judges, two are from each of the three constituent peoples, while three are foreigners. This makes it impossible to predict whether a specific issue will indeed be ruled as involving the national interest of a particular people, and it certainly does not allow much room for abusing the right to invoke the national interest protection clause. For political purposes, then, the entity voting system is a much more powerful instrument.

It is also a powerful instrument to ward off any attempts in a second phase of constitutional reform, a possibility announced before the conclusion of the first phase, to tackle the entity set-up. Any second phase would under these circumstances have had to accept the entity structure as a given.

This system of voting has been particularly unfair to the smallest constituent people, the Croats, who would indeed be in an unequal position with the two other peoples and would never be able to realize any of the benefits the model provides to the other two peoples. Others, who do not identify with any of the three constituent peoples, would be in a similar situation.

The lesson from this constitutional episode is thus straightforward: a key reason for its failure was the unanimous insistence by all RS parties on entity voting. Should the international community have the appetite for another effort at constitutional change, it will need to address this issue more thoroughly and resolutely since it is nothing but a demonstration of war-time thinking from the RS. If the present proposal is to be more successful in parliament – and it is likely that future reform initiatives will take it as their point of departure – the entity voting clause must be dropped. The parties from RS need to be persuaded that protection mechanisms need to be equal for all, and that in today's new, peaceful environment the House of Peoples provides such protection for any genuine issue of national interest. U.S. representatives in Bosnia, together with their EU partners in this country, are best positioned to present the necessary arguments and assurances on this.

A new constitution for Bosnia

But even if these changes had been adopted, they would by themselves not be sufficient for Bosnia to proceed as a self-sustainable state after the end of robust international engagement. As mentioned above, the U.S. initiative represented an attempt to *amend* the Dayton constitution. But the Dayton constitution – and this is the conclusion of most serious analyses of its text and implementation – cannot serve as a foundation for an efficient state of Bosnia. Bosnia needs a *new* constitution if it is to survive the end of the international “push phase.”

What are the most realistic prospects for Bosnia in a situation when the international community is withdrawing from its state-building tasks?

The ever-changing environment of international politics makes prediction difficult, but in the foreseeable future there appear to be three realistic options for the future of Bosnia:

1. A dissolution into three separate, homogeneous ethnic states. In a first phase these would most likely be three ethnic entities within Bosnia, which would later on evolve into separate states of which some may opt to join neighboring states.
2. The creation of a unified state of dominant peoples and likely assimilation of others. In a first phase this would most likely mean a two-level organization of Bosnia, with central and municipal authorities as the only authorities, and without true protection of the national identities of smaller peoples.
3. A genuine acceptance that Bosnia is a state of three equal peoples and equal citizens whose representatives, as serious and responsible leaders, pledge to create the foundations for a self-sustainable and hopefully prosperous state supported by all citizens and peoples living there.

It is widely believed that first two options have been abandoned. Neither of them could be achieved without a return to violence of unpredictable extent. Neither of the two guarantees peace or a prosperous future for Bosnia, and no responsible leader would seriously consider them.

The third option is not romantic political dreaming, but a practical political solution that is actually within reach. What it needs to achieve is an open and honest debate among political elites who understand the new environment in Bosnia and Europe as a whole.

Such a debate would need to address some issues that are difficult for each of the main groups, primarily the leaders of the three constituent peoples but also the leaders of a silent group of citizens who are not satisfied with ethnic politics. Since these are truly difficult issues, the international community needs to facilitate this debate.

Here are some difficult starting points that the different political elites need to consider and accept:

Serb political elite:

The RS cannot persist under its current name and the political philosophy of its founders.

The Constitutional Court of Bosnia has already ruled against its mono-ethnic symbols, as well as against the practice of naming different cities with single ethnic prefixes. Reasoning from these earlier decisions, the Court is – in all likelihood – going to rule against the name of that entity as discriminatory to the other two constituent people living there. An application for the Court to consider this issue has already been submitted.

The founders of RS designed it as an exclusive, mono-ethnic entity. Almost all of them have meanwhile been indicted by the United Nations war crimes tribunal in The Hague – not in a conspiracy of non-Serbs but a reflection of the opinion of the civilized world represented in the United Nations. The RS has changed significantly from its early days, but it is still not fully recognized inside RS that it will always be just another part of Bosnia in all politically relevant aspects. It can therefore simply not continue to be the exclusive preserve of one ethnic group only.

Bosniak political elite:

The cult of political innocence and victimization will not pay off: if it is to survive as a multi-ethnic society, Bosnia needs new, innovative concepts of decentralization and protection of those who are not a plurality. The leadership in Sarajevo needs to understand that something is fundamentally wrong with the political concepts they put forward if these concepts are consistently met with unanimous rejection from both Croat and Serb political parties in Bosnia. The Bosniak leadership needs to be aware at all times of the negative experience from former Yugoslavia, where the largest people failed to recognize the political sensitivities of smaller peoples.

Croat political elite:

Reaching out to people with similar ideas from other ethnicities is the only way forward. As the smallest of the constituent peoples, the Croats are in the best position to design constitutional models that guarantee full and equal rights for all. Yet, Croat parties cannot move their agenda forward if they stay focused only on their ethnic concerns, especially if they are interpreted in the narrowest possible fashion. To resolve a specific issue of special concern to Croats it sometimes helps to be open and work with others on larger issues. Major Croat and Bosniak parties, for example, have similar ideas on the future constitutional framework but have not yet formulated it as a powerful, joint political initiative.

Civic political elite:

Nothing can be gained in politics by staying outside the political arena. It is believed that a large segment, perhaps even a plurality of citizens, want a dramatic shift in Bosnian politics. Yet, as long as they stay silent and despise the political process as it is, other political forces will decide on their behalf and the identity of the individual is not going to gain primacy over ethnic affiliations.

With these premises accepted by the four major stakeholders' groups, a substantive debate on future constitutional reform would be possible. But that will only be possible if the U.S. government and the EU agree on a joint approach, which should also involve the Council of Europe and the Venice Commission, and if all segments of Bosnian society, not just the main parties, are involved. The forthcoming decision by the Constitutional Court, which will put the fate of RS center-stage, might open a window of opportunity in this respect.

That debate needs to be free from the burdens imposed by recent history and the current organization of Bosnia, and should result in a completely new constitutional text for a self-sustainable, fully sovereign state of Bosnia. All other options are bleak.

Conclusion

Any substantive constitutional debate needs to address the war-time thinking that is still holding Bosnia back in its quest for Euro-Atlantic integration. The international community is indispensable in that process since only it can provide the arguments and assurances that are trusted by all domestic actors. Its facilitation of the process will have to include its full engagement in outlining possible options and in the skillful preparation of a debate that is to be conducted by local representatives, perhaps in a full-blown constituent assembly. It is a comprehensive and demanding task that needs to be taken up if Europe and the wider world want to avoid a failed state in its midst.

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