



## Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?

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# Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?

VALERY PERRY

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This article considers Bosnia and Herzegovina (BiH)'s constitutional reform path options following the 20-year anniversary of the Dayton Agreement that ended the war. The need for substantive structural and constitutional reform has not gone away, and there is an open question on whether and how Euro-Atlantic integration processes might influence reform outcomes. First, a brief review of constitutional reform efforts to date is presented. Second, arguments for and against constitutional reform in BiH are summarized. Next, some characteristics of federal and confederal systems are introduced to frame discussions on BiH decision-making capabilities, and the role of the state vs lower levels of government. This includes a discussion on the issue of a BiH 'coordination mechanism' to manage EU integration, and whether or not the state might need some sort of supremacy clause. The article closes with some musings on the apparent trajectory of the country. The case of BiH is not *sui generis*, and can contribute to the literature and potentially influence policy-makers interested in the implementation and possible re-negotiation of peace treaties and constitutions – issues relevant to any countries emerging from divisive, violent conflict.

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## Introduction

While there is broad agreement that post-Dayton Bosnia and Herzegovina (BiH) is not functioning, there is not agreement on how to improve the political and governmental situation. Some actors believe that discussions on constitutional reform are by their very nature toxic, and therefore pin their hopes for change on some kind of limited sub-constitutional reforms and a reinvigorated effort at socio-economic development. Others believe that this kind of 'tweaking around the edges' has already been tried for nearly two decades and has proven ineffective; only core structural changes to the country's governing structure can ameliorate the frozen political situation. As of late 2014 and early 2015 it has become clear that the preferred approach of the European Union (EU) and leading BiH politicians is to maintain the status quo to the greatest extent possible; to maintain a semblance of 'stability' while allegedly focusing on the much-needed social and economic progress that has eluded the country for years. However, it would be a mistake to think that the core political questions plaguing the country since the 1990s have been resolved.

This article considers BiH's constitutional reform path options following the 20-year anniversary of the Dayton Agreement that ended the war. The need for substantive structural and constitutional reform has not gone away, and there is an open question on whether and how Euro-Atlantic integration processes

might influence reform outcomes. This article is structured in the following way: first, a brief review of constitutional reform efforts to date is presented. Second, some arguments for and against constitutional reform in BiH are summarized. Next, some characteristics of federal and confederal systems are introduced to frame discussions on BiH decision-making capabilities, and the role of the state vs. lower levels of government. This includes a discussion on the issue of a BiH 'coordination mechanism' to manage EU integration, and whether or not the state might need some sort of supremacy clause. The article closes with some musings on the apparent trajectory of a country in which an oligarchical domestic political elite of formerly warring parties – together with two once hostile and still meddling neighbours, and with Brussels technocrats dangling a vague European perspective – still wield more influence than citizens whose options and voting choices are constrained by the very political structures that resist the reforms needed to make true accountability possible. The case of BiH is not *sui generis*, and can contribute to the literature and potentially influence policy-makers interested in the implementation and possible re-negotiation of peace treaties and constitutions – issues relevant to any countries emerging from divisive, violent conflict.

### BiH Constitutional Reform: A Short History

It has been long and broadly acknowledged that while the Dayton Peace Agreement (DPA) effectively ended the war, it did not as efficiently create a sustainable, irreversible peace or a functioning state.<sup>1</sup> Echoing Woodrow Wilson, Dayton seemed to create 'peace without victory'<sup>2</sup> in the minds of all sides: the Bosniaks and those supporting the structure of the Republic of Bosnia-Herzegovina did not win a unitary state; the Serbs managed to hold on to their Republika Srpska (RS), but within the confines of BiH's unchanged borders; the Croats did not consolidate their own Herceg-Bosna and were instead cobbled together into a wartime alliance turned into a federation entity to be shared with the Bosniaks; those citizens not identifying as one of the three dominant groups were left to fend for themselves.

By ensuring there was something for everyone, the DPA ensured there was something for everyone to resist. The RS would be legitimized as an entity that included the territories ethnically cleansed in 1992 and through the 1995 genocide in Srebrenica; but justice would be sought through the war crimes tribunal at the Hague. Elections would be structured along the newly created and largely ethnically homogenous municipal, cantonal and entity units; but Annex 7 of the DPA would guarantee the right to return to one's pre-war community, and until then internally displaced persons (IDPs) could register to vote in their pre-war communities.<sup>3</sup> The notion that the Croat-majority parts of the Federation might enjoy confederal status with Croatia was quietly ignored; but the entities would have the right to establish 'special parallel relations with neighboring states'.<sup>4</sup> BiH as a state would be held bound to a host of international conventions and promises related to human rights and other commitments; but implementation would be the responsibility of lower levels of government. The rights of

the three constituent peoples, together with citizens and 'Others' would be confirmed; but in practice the rights of the three constituent peoples would be dominant and preferential. The constitution would include provisions for its amendment; but it would not be easy to do so.<sup>5</sup> BiH would consist of three constituent peoples, two entities, one state and no shared vision of the present or future.

The need for constitutional reform had been evident to BiH citizens and international organizations for years.<sup>6</sup> Dayton had no sunset clause, and if there *had* been plans to revisit the constitution within a certain period of time, this fell off the agenda as diplomats (including Richard Holbrooke himself) became preoccupied first with Kosovo, and then following 9/11 with Afghanistan, Pakistan and Iraq. Instead, subtle yet important steps were taken to chip away at some core contradictions and inconsistencies. In a landmark case known as the 'Constituent Peoples Decision', the Bosniak and international judges sitting on the BiH Constitutional Court found that the entity constitutions must be re-written to confirm that all three constituent peoples would be guaranteed equal status and rights throughout the territory of BiH.<sup>7</sup> In March 2005, the European Commission for Democracy through Law (the Venice Commission) issued a report on outstanding constitutional issues in BiH entitled, 'The Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative', pointing out the functionality and human rights problems of the Dayton constitution.<sup>8</sup>

A period of more robust attention to constitution reform followed, aimed at addressing these problems of functionality and human rights, and the challenges were numerous, encompassing the structural and the political. Structural challenges included how to ensure a balance between group and individual rights; how to structure devolution to lower levels of government while ensuring necessary cohesion at higher levels of government; how to maintain mechanisms to prevent any group out-voting while not hobbling the legislative process through endless potential veto procedures;<sup>9</sup> how to ensure sufficient governmental and ministerial functionality to enable EU accession processes, and so on. At the political level, these issues had to be considered against the backdrop of the main political parties and their own agendas – among Serb parties, maintaining the greatest degree of autonomy possible; among Croats, securing more rights to compensate for their lack of a Croat entity; and among Bosniaks interested in stronger state-level jurisdiction and rights protection in general, and to support return. However, there was for a time the sense that reform was possible.

The so-called April Package unfolded in 2005–06 among American diplomats and advisers with the leadership of eight ruling parties, resulting in a package of (in hindsight) potentially transformative reforms that was ultimately accepted by the SNSD (*Savez Nezavisnih Socijaldemokrata*), but rejected by parties including *Stranka za BiH* and HDZ (*Hrvatska Demokratska Zajednica*) 1990, failing to be adopted in the Parliamentary Assembly by only two votes.<sup>10</sup> The political environment deteriorated due to the dynamics of the failure of the package of reform, and the impact of the general election campaign in 2006.<sup>11</sup> Two top-down efforts at constitutional reform followed, each failing, and each with

lower expectations than the last. The first was the ‘Prud Process’ (November 2008–January 2009).<sup>12</sup> This was followed by the ‘Butmir Process’ as US and EU negotiators sought to salvage some elements from the April Package.<sup>13</sup> As failure followed failure, the party positions were increasingly less about the details of reforms aimed at enhancing functionality or ensuring human rights protections, and more about existential and conflicting views of the nature of the state.

While domestic politics clashed, another external driver for constitutional reform emerged. The December 2009 judgment by the European Court of Human Rights (ECtHR) in the *Case of Sejdić and Finci vs. Bosnia and Herzegovina*<sup>14</sup> strengthened the human rights arguments for reform, as the Court found that limiting participation in elections for the Presidency and House of Peoples to just BiH’s three constituent peoples constituted unjustified discrimination.<sup>15</sup> Initially this decision was seen as a potential driver for reform; however high expectations were first diluted, and then ultimately dropped. From 2009 until the present day, the BiH political leadership has been both unable and unwilling to make the constitutional changes needed to remedy this situation, as the various solutions – even the least sweeping – lay bare the still un-reconciled interests and agendas of the three main political groups.

After some years of apparent progress in state-strengthening,<sup>16</sup> the political environment began to disintegrate. This decline started with the post-April Package war of words between Milorad Dodik and Haris Silajdžić in 2006, but then interestingly descended in parallel with BiH’s purported ‘progress’ towards EU integration. While each new High Representative brought their own style to the job, the shift from the aggressive state-building of Paddy Ashdown was followed by the openly articulated ‘hands-off’ approach of Christian Schwartz-Schilling and subsequent High Representatives. Some argued this was necessary and constructive in ensuring local ownership, while others suggested it created a ‘rules free environment’.<sup>17</sup> In fact, with the exception of attempted tinkering and endless lip service to the Sejdić-Finci decision, the goal of substantial constitutional reform had already disappeared from the international and domestic agendas by 2011; the EU’s much-heralded 2014 new ‘initiative’ for BiH formally ‘resequenced’ the priority of even this minimal Sejdić-Finci element until some time in the unknown future.<sup>18</sup>

### Is Constitutional Reform Really Necessary?

In spite of the noted long-acknowledged belief that BiH needs *some* constitutional revision,<sup>19</sup> increasingly there is debate on whether this is in fact still the case. Can BiH in fact move forward with the EU integration process with the current constitution? Can it consolidate as a normal, thriving, functional state with the current constitutional structure? These are important questions, and one’s position on the matter has become a sort of ideological litmus test between those who think that Dayton’s deficiencies require specific remedies, and those who believe that everything can be remedied by the EU integration process. Some of the key issues relevant to each of these two camps are summarized below.

*Yes – Constitutional Reform Is Needed*

At one time the ‘yes, constitutional reform is needed’ voices were numerous. But they have become weaker and some have gone over to the other side. Is this a recognition that their initial opinion was mistaken? Was stated belief in the need for reform shallow in the first place? Does it reflect a new set of political/environmental realities? Or does it reflect a policy based on hope more than on the demonstrated facts on the ground over the past two decades?

In its 2005 opinion, the Venice Commission noted the following in regards to BiH’s Dayton structure: ‘[w]ith such a weak state Bosnia and Herzegovina will not be able to make much progress on the way towards European integration’.<sup>20</sup> Going beyond issues of functionality and human rights protection, it also pointed out the weak legitimacy of the constitution: ‘[the constitution] was drafted and adopted without involving the citizens of BiH and without applying procedures which could have provided democratic legitimacy’.<sup>21</sup> Others have pointed out the often contradictory statements regarding reform coming from other international community actors; the EU, the Council of Europe and the Office of the High Representative (OHR) have made various statements at times advocating for reform, and at other times suggesting that the status quo is sustainable for the long term.<sup>22</sup>

In addition, over the years, a number of domestic and international NGOs have seemingly embraced the need for constitutional reform, though it is often unclear whether this is based on actual conviction or donor interest. The Foreign Policy Initiative (FPI), a Sarajevo-based NGO, released a report in 2007 entitled ‘Governance Structures in BiH: Capacity, Ownership, EU Integration, Functioning State’, in which, among other things, it recommended substantial reforms along the lines of the April Package, and including an EU Supremacy Clause.<sup>23</sup> The Swiss Development Cooperation Office in BiH (SDC) supported a multi-year project entitled ‘Contribution to Constitutional Reform’ (CCR) for several years, engaging many prominent domestic NGOs such as the Human Rights Center of the University of Sarajevo (HRC), ACIPS,<sup>24</sup> the Institute for Social Science Research at the University of Sarajevo Faculty of Political Science, Zasto ne?, the Association of Democratic Initiatives (ADI) and the entity associations of cities and municipalities. At one time the project had an inspirational vision:

Constitutional changes are the result of wide compromise, representing the interest of the entire citizenry of BiH, achieved through democratic process led by authorities in conjunction with civil society organizations, the media and the broader public. Strong emphasis is given to the state and nation building in BiH.<sup>25</sup>

(After implementing multiple phases of the project to date the Swiss are considering how to structure further engagement, and how to address the issue of the constitution itself less directly.) Two of the Swiss implementing partners, ACIPS and the Law Institute, developed packages of reform proposals, again largely in line with the Venice Commission and April Package guidelines.

USAID and the National Endowment for Democracy supported another effort implemented by Forum Gradjana Tuzle (FGT, or Forum of Citizens of Tuzla), which also resulted in a proposal for constitutional reform. In all of these proposals (and there are more), the authors consistently note the dysfunction of the current system and the need for functional reforms. BiH academics have argued that reforms are needed to end the ‘ethnopolis’ and create a more genuinely democratic environment.<sup>26</sup> However, there has not been consistent or aggressive advocacy or constituency building in support of substantial reform, and none of the noted proposals gained any broad civic interest or traction.<sup>27</sup>

Those advocates supporting constitutional reform have different positions on whether reform should be minimalist or maximalist, and evolutionary or revolutionary. The civil society efforts noted above proposed packages of reform largely in line with the April Package, keeping the broad structure of Dayton, but making a combination of substantive changes (e.g. adding a BiH Supreme Court) as well as lesser tweaks. A set of reforms developed by an informal network of women’s NGOs proposed a package as well, though it is less coherent in terms of its political approach to reform.<sup>28</sup> The group Coalition 143 advocates for more substantial governance reform, to strengthen municipalities and eliminate the need for the middle layer of cantons and entities.<sup>29</sup> Green Council and its supporters advocate for sector-specific constitutional reform, seeking a state-level Ministry of Agriculture.<sup>30</sup>

On the political side, in 2015 one of the only political groups consistently talking about constitutional reform is the Croats,<sup>31</sup> led by Dragan Cović, and supported by a vocal block of Croatian MEPs in Brussels. After the 2014 general elections and after agreeing on priorities with the SDA (*Stranka Demokratske Akcije*), Cović noted that these developments would build trust among coalition partners, which could eventually result in a positive atmosphere for constitutional change talks next year.<sup>32</sup> This talk is squarely focused on constitutional reform – cloaked in the language of federalism – that would among other changes result in some sort of Croat electoral unit or similar mechanism to ensure that only ‘real’ Croats vote for the Croat representative on the Presidency, and that non-Croats in the Federation cannot strategically exert electoral influence on Croat representation.<sup>33</sup> Creation of such a unit – whether by gerrymandering, coloured ballots, weighted votes or a ‘one day electoral unit’ would fall shy of a third entity, but together with other initiatives such as the ‘coordination mechanism’ (see later) and the demands that public broadcasting be organized by ethnicity rather than according to entity, would certainly again move in that general direction, and point towards a potentially more confederal order.

While the Croats consistently raise this issue, Dodik, speaking on behalf of the RS/Serbs, notes his support for Cović’s efforts, as long as the RS is not touched or affected in any way. He also speaks of the need to go back to what he would consider the ‘original spirit’ of Dayton, before reforms such as the constituent peoples decision, state justice sector reform and other changes began to strengthen the state. Dodik often uses the language of confederalism to describe his vision of BiH as he thinks it should be; one of the clearest examples of this is the document published by Dodik’s cabinet in 2014, ‘Dayton Structure of Bosnia and

Herzegovina and the Legal Position of Republika Srpska'.<sup>34</sup> The Bosniaks have been rather quiet on the issue in comparison, perhaps reflecting either a sense that there is no longer external support for a stronger state, or an acceptance that it is better for the Bosniaks to carve out the best deals they can in the current framework. No major political party is talking about constitutional reform that would create a more civic order, grounded less on ethno-national factors and more in accountability and participation.

### *No – Constitutional Reform Is Not Needed*

An alternative school of thought says that no, constitutional reform is not needed, either ever, or certainly not right now. This perspective is grounded in the belief that other than the needed Sejdić-Finci remedy, the constitution is good enough, providing a suitable framework for a functioning country if only there was political will to compromise and work together. It is better to work within the current system rather than to open up a Pandora's Box of unknown demands and problems. A state-level Court of BiH has been established, and even a Ministry of Defence was set up without changing the constitution, so clearly substantive changes *can* be made without touching this delicate legal document.<sup>35</sup> The priority should instead be on practical changes aimed at getting the country farther along the EU integration process.<sup>36</sup> The delicate nature of the Dayton power-sharing agreement should remain sacrosanct; the International Crisis Group (ICG) has gone so far as to state that its previous support for the 2002 Constituent Peoples' decision was mistaken.<sup>37</sup>

This has increasingly been the refrain of many of the international actors in BiH. The EU has almost gone out of its way to note publically that BiH can get into the EU without constitutional reform,<sup>38</sup> and has not openly spoken of the constitutional changes other countries have had to make as they prepared for their own accession.<sup>39</sup> The new EU initiative on BiH is premised on this belief. In fact, to speak of constitutional reform is to be branded as a BiH political Luddite, looking backwards to Dayton rather than forward towards Brussels.

### **You Say Federal, I Say Confederal ... Let's Call the Whole Thing Off ...**

So, where does BiH stand on this matter in 2015, at this 20-year watermark of post-war existence? There are some signs of possible directions. The discussion that follows will briefly review some aspects of federal and confederal governance structures, as this distinction is increasingly at the core of discussions on the nature of the BiH state, its two entities and its three constituent peoples.

Both federal and confederal systems represent governmental systems in which governing powers are substantially devolved to lower levels units of government (often referred to as 'states'), generally, but not solely, with some layer(s) of government serving as intermediate layer(s) between the lowest levels (municipalities or communes) and the state. The difference between a federation and a confederation is based on the balance between the state and these lower layers. In a federation, sovereignty is shared, the central authority of a federal state is the federal government, and powers of the central authority are determined by the

constitution but often may include competencies in the diplomatic, military, legal and economic spheres. In a confederation, sovereignty is held by the lower-level units of government; the federal/state authority is a weak body formed by the lower-level units and without its own force or governing sovereignty; and the federal government answers to the lower-level units and has very weak competencies, perhaps limited to matters of joint foreign policy and defence. Membership in both confederations and federations is voluntary; however leaving a confederation is often much simpler than leaving a federation, as most federal states do not allow secession.<sup>40</sup>

The USA, India, Canada, Germany and other countries are often noted as examples of federal models. It is difficult to find examples of confederal states today; the USA and Switzerland both started out as confederations, but then evolved into federations. Alfred Stepan proposed understanding various types of federalism: 'coming together' federalism, as seen in the cases of the USA, Switzerland and Germany, in which states freely associate under a large federal umbrella, and 'holding together federalism', as formerly unitary (or more unitary) federal states increasingly devolve (Belgium, Spain, India).<sup>41</sup>

There is a debate on the merits of multi-national or pluri-national federations. Horowitz and Snyder point out the divisive and corrosive impact of federalism in multinational societies, arguing for governance systems that promote more integrative and civic policies and politics. Roeder argues that the increased granting of autonomy in federal arrangements – particularly 'holding together' federations – hastens the risk of partition and secession:

Roeder presents the view that provisions for autonomy typically *fail* to manage tension effectively between rival ethnic communities. Taking the argument further, Roeder contends that autonomy arrangements actually *enhance the likelihood that countries will experience interethnic tensions and dissolve along communal lines*.<sup>42</sup>

More and more generous offers of autonomy do not satisfy minority ethnic groups, who 'will instead use control over their own regional governments to cement national identities, to press a secessionist agenda, to capture institutional weapons, and to weaken the common-state government in order to demand greater power and an independent state'.<sup>43</sup> McGarry and O'Leary challenge these critics of pluri-national federalism, focusing on conditions that make pluri-national federations (such as Switzerland, India and Canada) successful, emphasising to a large extent on the need for consensus politics and elite bargaining.<sup>44</sup>

Whether coming together or holding together, the voluntary nature of federation is often seen as key. For this reason, Keil views BiH as unique as an example of federalism *imposed* on a country through the Dayton Peace Agreement. This creates a difficult situation, as it is the voluntary character of federations that make them work.<sup>45</sup> BiH's federal structure emerged from the war in the 1990s, in spite of starkly different visions of the nature of the state among the three formerly warring parties and the lack of any civic legitimacy in the system (e.g. via a referendum).<sup>46</sup> The challenge is compounded by the lack of a tradition of

democratic politics and low social trust; characteristics which poorly equip the country for effective consensus politics or constructive elite bargaining.

### The Impact of the new 'EU Initiative' on BiH's Constitutional Reality

Since the announcement of the new EU initiative for BiH in autumn 2014, and the adoption of this initiative by the BiH political establishment through their agreement on a vague written commitment to reform required to unfreeze the Stabilization and Association Agreement (SAA), the big question is how the country can successfully and efficiently negotiate the long and arduous EU accession and reform process that has proved challenging to even better functioning states. Two concepts will be briefly introduced here: the concept of an EU Supremacy Clause, and the notion of a coordination mechanism for BiH to facilitate its EU negotiations. The extent to which they are inter-related begins to reveal differing perspectives on the nature of BiH as a federal or confederal state.

#### *An EU Supremacy Clause*

An EU Supremacy Clause in BiH would not concern the legal supremacy of EU law over domestic law (as that is not in doubt) but would provide a political formula to push through accession reforms and facilitate a strong EU Coordination Mechanism. This fairly legalistic concept is introduced briefly below, in general and *vis-à-vis* BiH; a full exploration of this complex issue is beyond the scope of this article.<sup>47</sup>

At its core the EU accession process is a big, negotiated treaty. The Vienna Convention on the Law of Treaties 1969 (VCLT) applies to treaties concluded between states.<sup>48</sup> Most EU agreements with third states (including the BiH SAA) are mixed international agreements, concluded and signed by the EU and its member states on the one hand, and by a third state on the other hand; as such, these agreements fall within the scope of the VCLT.<sup>49</sup> In the case of BiH, any EU Treaty is binding upon both the RS and the Federation, then including the cantons and municipalities. The supremacy of EU law doctrine asserts that EU law supersedes the domestic law of a member state when EU law conflicts with the member state's domestic law.<sup>50</sup> Supremacy of EU law reinforces the authority of the EU as a legal and judicial authority with jurisdiction over its member states in areas where the EU has competency.<sup>51</sup> Some EU member states have preferred to give precedence expressly to EU law in their own constitutions, acknowledging the autonomous nature of the EU legal order, such as Austria,<sup>52</sup> Belgium<sup>53</sup> and Estonia,<sup>54</sup> each in their own way.

The BiH State Constitution guarantees the legal unity of BiH by establishing the supremacy of the State Constitution over inconsistent provisions of law, including the Entity Constitutions of the RS and the Federation.<sup>55</sup> The State Constitution also specifically provides that '[e]ach Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina'.<sup>56</sup> Article III(3)(a) of the State Constitution may complicate BiH's implementation of international obligations made through treaties in respect of functions or powers

delegated to entities rather than state institutions.<sup>57</sup> For areas not within the competence of the state, the BiH Constitution only provides that the Presidency ‘may decide to facilitate inter-Entity coordination on matters’.<sup>58</sup> However, this authority is limited, because it operates only in the absence of an entity objection.<sup>59</sup> The weak formulation of the term ‘may’ and the entity veto risks non-cooperation on the part of an entity with respect to EU law concerning those elements that entities may argue fall within their competence. As BiH moves towards EU accession, the SAA treaty will require the conformity and harmonization of BiH state and entity domestic laws with the 35 Chapters of the EU *acquis* and EU law generally.<sup>60</sup> According to the treaty, BiH is also required to ‘define, in agreement with the European Commission, the detailed arrangements for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken’.<sup>61</sup> This leads to a discussion on the notion of a coordination mechanism.

### *Coordinating EU Accession Negotiations*

BiH’s need to be able to conduct negotiations practically for EU membership has been appreciated for years. Every candidate country needs to ensure they have this capacity: in Croatia, the Ministry of Foreign and European Affairs eventually replaced the Ministry of European Integration;<sup>62</sup> Montenegro has a Ministry of Foreign Affairs and European Integration;<sup>63</sup> Serbia established the European Integration Office (SEIO) on 14 March 2004;<sup>64</sup> Macedonia has a Secretariat for European Integration as a separate expert body of the government, under the authority of the deputy prime minister of the government in charge of European Affairs;<sup>65</sup> Kosovo has a Ministry of European Integration.<sup>66</sup>

Moves to ensure the unwieldy BiH would have *some* body responsible for this work began after BiH’s signing of the Stability Pact for South-Eastern Europe in Cologne in June 1999,<sup>67</sup> and on 22 June 2000 the BiH Ministry of European Integration was established by a decision of the House of Representatives of the Parliamentary Assembly of BiH.<sup>68</sup> However, this Ministry was short-lived, as following the formation of a state government by the non-nationalist coalition the Alliance for Change in January 2001, a new approach emerged.<sup>69</sup> On 3 December 2002 the Law on the Council of Ministers (CoM) of BiH replaced the Ministry of European Integration with the Directorate for European Integration (DEI). This reform of the CoM was imposed by the Office of the High Representative (OHR), to ensure the DEI fell under the competences of Council of Ministers Chairman Adnan Terzić (SDA).<sup>70</sup> Indeed, Terzić stated in his 23 December 2002 address to the House of Representatives that his ‘aim is that BiH steps forward in European integration’.<sup>71</sup> The Chairman of the CoM had become, as High Representative Paddy Ashdown put it, ‘Bosnia’s de facto prime minister’.<sup>72</sup> His appointment to the head of the CoM was considered a good sign for the European integration of BiH, and more trust was put in his (ultimately short-lived) individual capacity than in potentially lasting institutions.

In June 2003 BiH was declared to be a ‘potential candidate country for EU accession’ at the Thessaloniki European Council.<sup>73</sup> On 25 November 2005 BiH’s SAA negotiations opened in Sarajevo,<sup>74</sup> with BiH signing the Agreement on 16 June 2008,<sup>75</sup> and ratifying it in 2010. As is by now well known, in 2011

the EU tied BiH's submission of a membership application to three criteria: the adoption of a law on the census; a law on state aid; and implementing a Sejdić-Finci remedy to address the 2009 ECtHR decision. The SAA then remained 'frozen' for years, as the parties were unable to agree on this reform. In autumn 2014 the EU changed its policy on BiH on this issue, allowing BiH to move forward with an application without implementing the Sejdić-Finci reform, but instead making a written commitment to a basket of reforms at some time in the future.<sup>76</sup> The vague written commitment was agreed in March 2015, and the SAA 'unfrozen' in June 2015.<sup>77</sup>

Now that there is the theoretical possibility of progress on the EU path, there is continuing apparent confusion over *how* integration processes will be negotiated, managed and implemented. One would think that the DEI, within the Council of Ministers, would play this role, and coordinate (at the state level and between the state and the entities) and supervise the activities of the BiH authorities regarding European integration, and advise the CoM. This provision is clear in article 23 of the Law on the Council of Ministers:

The Directorate for EU Integration shall perform in particular the tasks and duties relating to the coordination of activities of the authorities in BiH, supervision of the implementation of decisions taken by responsible institutions of BiH concerning all relevant activities required for European integration.<sup>78</sup>

However, over time the DEI has become an expert advisory body rather than an executive body. It was not always this way.

The role of the DEI was affirmatively noted in the BiH 2005 Progress Report of the European Commission (EC): '[t]he DEI, which is under the direct responsibility of the Chairman of the Council of Ministers, has improved co-ordination with, and the involvement of State and Entity ministries through regular meetings with the EU Integration Coordinators of these ministries'<sup>79</sup> It was noted as well in 2006:

The Directorate for European Integration (DEI) has played an important role within the Council of Ministers and has further promoted the European integration objective. It has maintained its efforts towards improving co-ordination with, and the involvement of, State and Entity ministries through regular meetings with the EU Integration Coordinators of these ministries. The DEI has developed an Action Plan to address the European Partnership priorities and a Strategy for European Integration, which have been adopted by the Council of Ministers. It has also remained Bosnia and Herzegovina's focal point for assistance programming.<sup>80</sup>

The role of the DEI was ultimately scuppered, however, by the general anti-state policies of Dodik, the pro-Croat policies of Čović and the blowback from the failed April Package and subsequent political consequences. In addition, the police reform experience that culminated in a 2007 compromise disappointing to many further began to illustrate the cracks in the reform environment, both among BiH parties but also within the EU and international community.<sup>81</sup>

Rather than recognizing the DEI's role, BiH and EU attention has instead shifted to the need for a new and different 'coordination mechanism' to guide and manage BiH's EU reform efforts. While the term 'coordination mechanism' is now ubiquitous, it was not always so. In the 2008 EC Progress Report for BiH, the phrase was not used.<sup>82</sup> The 2009 Progress Report noted: '[o]verall, there is a need for a stronger coordination mechanism between the State level and the Entities for the acquis approximation process in the field of agriculture and rural development'.<sup>83</sup> The 2010 Progress Report notes the need for some coordination mechanism but in a very limited context, in regard to the proposed procurement law, education, and fight against drugs in BiH.<sup>84</sup>

The 2011 EC Progress Report notes, '[t]he EU accession process requires political will and functional institutions at all levels with an effective coordination mechanism on EU matters'.<sup>85</sup> The 2012 report sent a similar message:

The need for an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws remains to be addressed as a matter of priority, so that the country can speak with one voice on EU matters and make an effective use of the EU's pre-accession assistance.<sup>86</sup>

Similarly, the notion of the need for a coordination mechanism only began to enter the domestic press in 2012, as seen, for example, through reporting on a June 2012 meeting with former Commissioner Fuele in which Fuele – speaking for the EU – himself began to propagate the notion that this is necessary: '[w]hat needs to be done is for politicians to understand why a coordination mechanism is required', Fuele said, '[w]hat kinds of issues it needs to process and coordinate on, and then [...] they will need to find an agreement amongst themselves [on that]'.<sup>87</sup> The EU began to discuss establishing an 'EU Coordination Mechanism' in BiH to coordinate BiH state and entity obligations with respect to EU accession issues.<sup>88</sup> BiH was supposed to implement this mechanism by 31 October 2012.<sup>89</sup> However, it failed to do so.<sup>90</sup> A summary of the high-level dialogue from October 2013 further shows how the EU itself internalized this new language, this time linking the lack of a coordination mechanism to Instrument for Pre-Accession (IPA) funding: '[d]espite some progress on the coordination mechanism at today's meeting, the final solution has not yet been reached. Until an effective coordination mechanism on EU matters is in place, the IPA 2 (2014–2020) programming exercise cannot be launched'.<sup>91</sup>

The shift in rhetoric in 2011 heralded an EU policy shift related to two signal events that year. One was the 2011 'standoff' between the RS and Brussels in which Dodik's threats of a secession referendum succeeded in opening up discussion on state-level justice sector issues, a move viewed by many as EU capitulation to RS blackmail.<sup>92</sup> The second milestone that year was related to the IPA funds controversy, in which IPA fund allocation decisions made by the appropriate Council of Minister bodies were after the fact rejected by Banja Luka, and, at the last minute, the EU allowed new, entity-driven priorities in spite of the extra-institutional and irregular decision-making process.<sup>93</sup> In hindsight, it is clear that these capitulations marked the beginning of the end of efforts to

strengthen BiH as a state, and ushered in a new process of negotiating subtle means of political-ethnic internal partition, a form of either enhanced federalism or even a move to confederalism depending on how far it might ultimately go. It demonstrated the downgrading of state-level bodies with (albeit limited) decision-making abilities in favour of entity or even 'peoples'-based decision-making.

It is very interesting to see some very recent developments on this issue, though as of this writing a specific solution has not been publically announced. The intra-Serb party power struggle has reflected this issue, as Serb member of the BiH Presidency Mladen Ivanić Partije demokratskog progresna noted that the state government *should* be able to play a role in the coordination mechanism in those instances when lower levels of government are unable to agree. Ivanić said, 'there should be a simpler mechanism [for the coordination of EU projects] so when there is no consensus, the final decision can be made by the chairman of the Council of Ministers and his deputies, or by the presidency'.<sup>94</sup> (There is a certain lack of clarity and consistency in referring to coordination of 'EU projects' or the broader EU process; it is unclear whether this is intentional constructive ambiguity.) Dodik immediately reacted, noting that such a state role would be unacceptable and contrary to BiH's decentralized constitutional structure, with RS Prime Minister Cvijanović noting that the BiH government has no authority to adjudicate on issues that the entities themselves cannot decide. In early June 2015, the Council of Ministers adopted a decision on the appointment of a team that will draft the plan for the coordination mechanism, including representatives from the Office of the Chairman of the Council of Ministers, the Ministry of Finance and the Treasury, the Ministry of Foreign Trade and Economic Relations and the Directorate for European Integration, as well as representatives from the two entities, Brčko district and the cantons.<sup>95</sup>

This composition of the team is to be expected. Čović has consistently sought to ensure that any coordination mechanism is not limited to the entities, but then also ensures cantonal agreement, and, presumably, cantonal-level veto power. Would this mean that tiny canton 2 (Posavina) or Canton 5 (Gorazde) would have decision-making and veto rights at every stage of every EU relevant decision? Or, would some sort of mechanism be arranged to have a single voice speaking for Bosniak and Croat cantons/cantonal interests en masse?<sup>96</sup> The latter again brings one back to Federation structural questions, and the direct political influence of the Croats as a group at the state level through some avenue other than the Federation.<sup>97</sup> Should decisions be made by consensus, or by some super-majority, and should there be the equivalent of national or entity vetoes? Would such a system be workable? This debate continues: should BiH have some sort of mechanism (even a sort of formalized supremacy clause) that will allow BiH as a state to, as needed, and as a last resort, serve as a referee in cases of lower-level policy agreement stalemate, or would this confer unacceptable competencies to the state? Should the Federation be restructured in some way to provide more guaranteed ethno-territorial privileges to the Croats, and, in turn, the Bosniaks, perhaps more closely mirroring the decision-making structures in the RS? The question of who is in charge of negotiations with the EU is fundamental, as it highlights the issue of the nature of the BiH polity. If the entities are allowed a

substantial or principal role in the negotiations, including veto rights, this would move BiH much closer to a confederal-like system, as it would imply (some would say confirm) that sovereignty lies with the entities, and/or the constituent peoples. While it is necessary that entity-representatives are involved in both the negotiations and associated reform implementation, if there is true interest in confirming the sovereignty of BiH and avoiding the undermining of the state, then the driving force in charge of the country's EU integration should be a state-level institution.

The answers to these questions will shape the implementation of not only BiH's accession path, but the continued evolution of the country domestically as well. If the entities are ultimately in charge of the coordination mechanism, with no role for any state-level engagement in either issues of substance or as a last-resort, safety valve, decision-maker of last resort, then this would suggest the move towards a confederation, and further undermine the already weak state. This would in turn likely impact and further roll-back efforts in other state sectors, such as the judiciary, police, public broadcasting and so on.<sup>98</sup> In this case, if sub-state bodies become the ultimate arbiters of BiH's EU negotiations, then it is very unlikely that Čović would accept a lesser role for the cantons, insisting either on inclusion of the cantons or a cantonal coordination body in the negotiations on a par with the entities, or necessitating a cumbersome Federation-level 'pre-coordination mechanism mechanism' to ensure cantonal participation and agreement before final agreement between the entities. Such a development would take BiH a step closer to a confederal model of governance in which ethno-territorial representation and rights would be more firmly entrenched. Would this represent a step backwards in terms of more accountable governance within a civic compact? And what would this mean for citizens who happen to be on 'the wrong side' or some internal administrative boundary line?

### Concluding Comments

These discussions and debates have continued to unfold through 2015. BiH may very well be more or less confederal after these reforms play out. Would this be a return to the 'original intent of Dayton'? Were the constituent peoples decision, Sejdić-Finci (and Zornić and Pilav) and other state-strengthening reforms and legal initiatives errant blips from a long-gone era of peace implementation, to be replaced by the pragmatism of EU accession? These are important questions, and it will be troubling if important issues such as the nature of the state, the nature of one's citizenship within the state vs. one of its component parts<sup>99</sup> and the relationships between and among the state and its entities and peoples are decided by a handful of politicians together with technocrats, without broader public engagement or awareness. Many agendas are playing out, but what is not clear is whether any of them are playing out on behalf of the citizens of this country, and in their interest.

Since the 2014 elections, the focus of BiH leaders and the EU has been on the so-called 'reform agenda'. Numerous action plans and strategies are being developed on issues ranging from the justice sector to the coordination mechanism to

Sejdić-Finci implementation. The discussions so far have been limited to party leaders and their partners, excluding democratically elected institutions and civic debate. The goal appears to be agreement among the elites to demonstrate sufficient credible effort to allow BiH to assume candidacy status by 2017; any effort to 'sell' the plans to citizens or secure legislative approval will occur after political agreement has been secured. The extent to which these reforms will be implementable, will be embraced by citizens or will create the genuine reform needed in the country after years of stagnation is unclear.

The EU agenda, as shaped by the interests of its most influential member states, is grounded in its interest in supporting the status quo in order to sustain the current 'stability' therein. This is founded on a number of false assumptions. First, some would question whether the situation is indeed stable. The 2014 protests led to a brief yet palpable sense of hope among those who seek fundamental change, and fear among those who fear the Pandora's Box that unbridled civic demands could unleash. However, the elite-driven ethno-national stability enshrined in the Dayton constitution, and manifest in a government system based on fear and patronage rather than governance and accountability, has proven itself to be not only stable, but resilient.

The EU, for its part, continues both to consider BiH as a special case while assuming that the same top-down accession process template that worked for Poland and Malta will work in BiH. Willingness to adhere to strict conditionality in a current EU member state (e.g. Greece) stands in stark contrast to apparently generous flexibility towards a potential candidate such as BiH in terms of interpretation of conditions and their fulfilment. While to date a potential bottom-up citizens' constituency has been seemingly incapable of articulating a strategic political vision and practicable governing alternative, the potential top-down influence of the EU has been squandered by a Brussels-centred bureaucracy beholden to elite-level relationships and an internalized essentialist interpretation of BiH's past and present maladies.<sup>100</sup> The extent to which the coordination mechanism will represent yet another effort to bypass institutions in favour of negotiating with party leaders – and the impact of such an approach on citizens' views of democracy in BiH and the EU – remains to be seen. Further in question is the potential impact of an EU accession process that could fundamentally restructure the state, while maintaining enough of the Dayton order to render labelling reforms as constitutionally unnecessary. An ultimate irony is that the integrative EU process could potentially push BiH towards the very confederal arrangements resisted since Yugoslavia began to disintegrate.

Reflection on BiH's post-war constitution will certainly be front and centre during the many events to be held marking this anniversary. Two broad questions could help to shape a constructive debate on Dayton's legacy for BiH, and other divided, post-war societies. First, there is a real need to better understand ways that the power-sharing/power-allocation agreements needed to end a war can be later reformed and improved to strengthen the peace. While elite bargains are needed to secure signatures on a peace plan, it may not be realistic or desirable to wed the citizens of a country to those terms in perpetuity, or to sacrifice basic

democratic tenets such as accountability rather than risk rocking the political boat.

Second, policy-makers and experts who are involved in negotiating peace plans and constitutions in other parts of the world would do well to understand the implications and consequences that well-meaning compromises agreed at the negotiating table can have down the road in terms of democratic functionality and human rights. BiH offers many such examples of the perhaps unintended Dayton strait-jacket: the constitutional incentives that hinder the cultivation of a cadre of citizens declaring themselves to be citizens rather than constituent peoples; the impact on the rule of law of lacking a Supreme Court empowered to serve as a supreme judicial authority; the practical impact of a system that allows for the systematic ethnic fragmentation of education and so on. A greater understanding of the links between the drivers of a violent conflict and resistance to reform in the post-war environment could help to contribute to new negotiation strategies aimed at lessening the long-term impact of ethnic entrepreneurs and spoilers, and increasing the involvement of the people who suffer most in war, and could benefit the most from peace.

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#### NOTES

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2. Paul T. McCartney, "'Peace without Victory": The Promise and Constraints of Third-Party Mediation in Civil Wars', in Joseph R. Rudolph, Jr and William J. Lahneman (eds), *From Mediation to Nation Building: Third Parties and the Management of Communal Conflict*, Lanham, MD: Lexington Books, 2013, pp.19–32.
3. Gerard Toal and Carl T. Dahlman, *Bosnia Remade: Ethnic Cleansing and Its Reversal*, Oxford: Oxford University Press, 2011.
4. Constitution of Bosnia and Herzegovina, art.III2(a). This right has been enjoyed most formally and institutionally by the RS/Serbs in terms of their relations with Serbia. Following the death of Franjo Tudjman, Croatia began to pull back from direct and structured relations with BiH's Croats/Herceg-Bosna structures, but now as an EU member is increasingly exercising influence through those channels. The Bosniaks have not sought to utilize this article to establish relations

- more formally, with, say, Turkey, as there is no definition of what is meant by ‘neighboring’ states.
5. Article X: ‘[t]his Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.’
  6. For a thorough review, see Valery Perry, ‘Constitutional Reform Processes in Bosnia and Herzegovina: Top–Down Failure, Bottom–Up Potential, Continued Stalemate’, in Soeren Keil and Valery Perry (eds), *Statebuilding and Democratization in Bosnia and Herzegovina*, London: Ashgate, 2015, pp.1–15; Sofia Sebastian, ‘Breaking the Impasse: Constitutional Reform in Bosnia’, FRIDE Policy Brief No.68, March 2011 (at: [www.fride.org/download/PB\\_69\\_Bosnia\\_Eng.pdf](http://www.fride.org/download/PB_69_Bosnia_Eng.pdf)).
  7. *Case U 5/98 Partial Decision III* 1(A), 1(B), Constitutional Court of Bosnia and Herzegovina, 1 July 2000. The Republika Srpska (RS) constitution recognized only Serbs as its constituent people, and the Federation (FBiH) constitution recognized only Bosniaks and Croats, while the BiH constitution acknowledges BiH’s three constituent peoples. The Croat and Serb judges expressed substantial reservations. International Crisis Group, ‘Implementing Equality: The ‘Constituent Peoples’ Decision in Bosnia and Herzegovina’, ICG Balkans Report No.128 n.10, 16 Apr. 2002 (at: [reliefweb.int/sites/reliefweb.int/files/resources/6C1D3A9D91E-C29EC85256B9D00640396-icg-bos-16apr.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/6C1D3A9D91E-C29EC85256B9D00640396-icg-bos-16apr.pdf)).
  8. European Commission for Democracy through Law (Venice Commission), ‘The Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative’, CDL-AD (2005) 004 2, 11 Mar. 2005 (at: [www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf)).
  9. While a vital national interest veto is common to countries with consociational systems of government, BiH in addition has a so-called entity veto which further complicates state-level legislation development and adoption. See Birgit Bahtić-Kunrath, ‘Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process’, *Nationalities Papers*, Vol.39, No.6, 2011, pp.899–923.
  10. The SNSD, led by Milorad Dodik, has been the main Serb political party in BiH since 2006. The HDZ BiH has been the primary Croat party in BiH since the war; it split into two factions (HDZ BiH and HDZ 1990) during the April Package process. *Stranka za BiH* is a Bosniak party that was led by Haris Silajdzic, who strongly advocated for a stronger BiH at the state level, including through the slogan ‘BiH without Entities’. While other parties such as the Bosniak SDA (*Stranka Demokratske Akcije*) were closely involved in these talks, the support of the SNSD, and the loss of April Package support from Silajdzic and the split HDZ (HDZ 1990 representatives voted against the Package), shaped the dynamics. See Sofia Sebastian, *Post-War Statebuilding and Constitutional Reform: Beyond Dayton in Bosnia*, Palgrave, 2014; Sofia Sebastian, ‘Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina’, FRIDE WORKING PAPER 46, Nov. 2007.
  11. Dan Bilefsky, ‘Tensions Rise in Fragile Bosnia as Country’s Serbs Threaten to Seek Independence’, *New York Times*, 27 Feb. 2009; for a review of the escalating political rhetoric in BiH in recent years see Vlado Azinović, Kurt Bassuener and Bodo Weber, ‘Assessing the Potential for Renewed Ethnic Violence in Bosnia and Herzegovina: A Security Risk Analysis’, Report, Sarajevo: Atlantic Initiative and Democratization Policy Council, 2011; Robert Belloni, ‘Dayton Is Dead! Long Live Dayton!’, *Nationalism and Ethnic Politics*, Vol.15, No.3–4, pp.355–75.
  12. This resulted merely in a restatement of principles for reform, though it did prompt the first amendment to the BiH constitution – the incorporation of the Brčko District under the jurisdiction of BiH state institutions and the Constitutional Court. See Council of Europe Parliamentary Assembly, ‘The Functioning of Democratic Institutions in Bosnia and Herzegovina’, 3.1, Doc.12112, 11 Jan. 2010 (at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12112.htm>).
  13. International Crisis Group, ‘Bosnia’s Dual Crisis’, Europe Briefing No.57, pp.7–8, 12 Nov. 2009 (at: [www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b057-bosnias-dual-crisis.aspx](http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b057-bosnias-dual-crisis.aspx)).
  14. The case challenged the inability of representatives of the Jewish and Roma communities (or any other non-constituent peoples) seeking election to BiH’s Presidency and House of Peoples – each of which is limited to BiH’s three constituent peoples. In July 2015 the ECtHR decided in the *Zornić* case, finding that Azra Zornić was denied rights by being unable to stand for certain offices due to her unwillingness to declare as anything other than as a citizen of BiH. A decision in the *Pilav* case, which considers whether Ilijas Pilav’s inability to stand for the Serb position on the Presidency without declaring himself as a Serb is an infringement of his rights, is pending.

15. *Case of Sejdić and Finci v. Bosnia and Herzegovina*, European Court of Human Rights, Judgment 9, 22 Dec. 2009 (at: [cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860268&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649](http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860268&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649)).
16. It deserves note that the period of robust state-strengthening coincided with the period of time in which there was substantial return of refugees and internally displaced persons. See Toal and Dahlman (n.3 above); Roberto Belloni, 'Peacebuilding at the Local Level: Refugee Return to Prijedor', *International Peacekeeping*, Vol.12, No.3, 2005, pp.434–47.
17. Azinović et al. (see n.11 above), pp.7–18.
18. See Elvira M. JUKIĆ, 'UK, Germany Launch Joint Initiative on Bosnia', *BIRN*, 5 Nov. 2014 (at: [www.balkaninsight.com/en/article/uk-germany-propose-bosnia-s-renewed-eu-perspective](http://www.balkaninsight.com/en/article/uk-germany-propose-bosnia-s-renewed-eu-perspective)). See also EU FAC Conclusions, 'Press Release – 3361st Council Meeting, Foreign Affairs, Brussels, December 15, 2014' (at: [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/146293.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/146293.pdf)).
19. Venice Commission (see n.8 above).
20. *Ibid.*, point 26.
21. *Ibid.*, point 6.
22. Oscar Fernandez, Valery Perry and Kurt Bassuener, 'Making the Market on Constitutional Reform in the Wake of the EU Initiative', Democratization Policy Council Policy Brief, Mar. 2015 (at: [www.democratizationpolicy.org/uimages/DPC%20Policy%20Brief%20-%20CR%20after%20the%20new%20EU%20initiative.pdf](http://www.democratizationpolicy.org/uimages/DPC%20Policy%20Brief%20-%20CR%20after%20the%20new%20EU%20initiative.pdf)).
23. Foreign Policy Initiative BH, About Us (at: [www.vpi.ba/eng/about\\_us.html](http://www.vpi.ba/eng/about_us.html)).
24. Association Alumni of the Center for Interdisciplinary Postgraduate Studies (at: [www.acips.ba](http://www.acips.ba)).
25. Swiss Cooperation Office in Bosnia and Herzegovina, 'Contribution to Constitutional Reform Project, Phase III: Final Report', 3 (2010). Bosnia and Herzegovina: SCO.
26. Asim Mujkić, *We, the Citizens of Ethnopolis*, Sarajevo: Constellations, 2008.
27. For more on the dynamics of these civic efforts, see Perry (n.6 above).
28. The reform proposal is available at: [tpo.ba/inicijativa/dokumenti/P%20Ust%20proCol%20Final%20Web%20.pdf](http://tpo.ba/inicijativa/dokumenti/P%20Ust%20proCol%20Final%20Web%20.pdf). A previous gender sensitive reform effort, limited to gender issues, was prepared in 2008 with the support of UNIFEM.
29. See [www.k143.org](http://www.k143.org).
30. See [www.green-council.org](http://www.green-council.org).
31. The Croat People's Assembly adopted a declaration prioritizing constitutional reform to assure that the rights of the Croat people in BiH are protected (at: [hnsbih.org/deklaracija-6-zasjedanja-hns-a/](http://hnsbih.org/deklaracija-6-zasjedanja-hns-a/)); 'The President of HDZ BiH, Dragan Cović stated that a Declaration will be adopted in the session of the Croatian National Assembly, which will define key directions for the Croatian policy in BiH and which suggests a federal arrangement for BiH' (at: [www.republikarspska.net/2015/02/covic-hrvati-ce-traziti-federalizaciju-bih/](http://www.republikarspska.net/2015/02/covic-hrvati-ce-traziti-federalizaciju-bih/)).
32. *Nezavisne novine* – 19 Mar. 2015 (at: [www.nezavisne.com/novosti/bih/Covic-Sa-SDA-dogovorena-tri-prioriteta-295051.html](http://www.nezavisne.com/novosti/bih/Covic-Sa-SDA-dogovorena-tri-prioriteta-295051.html)).
33. In 2006 and again in 2010, Željko Komšić of the SDP (Social Democratic Party), identifying as a Croat, but not from a Croat-oriented party, won the seat on the three-member BiH Presidency reserved for Croats, likely with the support of non-Croat voters in the Federation. This demonstrated the quirk of a Federation organized as a single electoral unit, in which residents could choose whether to vote for the Bosniak or Croat candidate. See John Hulseley, 'Party Politics in Bosnia and Herzegovina', in Soeren Keil and Valery Perry (eds), *Statebuilding and Democratization in Bosnia and Herzegovina*, Farnham and Burlington: Ashgate, 2015, pp.41–60.
34. The arguments in this document include an explanation of why the RS is fundamentally different from the Federation, and notes that there are only two options for BiH: (1) constitutionally reconstructing the Federation to create a Croat territorial unit, thereby creating the conditions for a confederal state with shared competencies as outlined in Dayton; and (2) dissolution of BiH into three territorial units, even if the Croat territorial issue is not solved. Dodik echoed the message of BiH as a confederation or 'union of three countries' in October and November 2014. See 'Dodik: Spremni za konfederaciju', b92.net portal, 9 Oct. 2014 (at: [www.b92.net/info/vesti/index.php?yyyy=2014&mm=10&dd=09&nav\\_id=909461](http://www.b92.net/info/vesti/index.php?yyyy=2014&mm=10&dd=09&nav_id=909461)); 'BiH: Ili konfederacija ili unija ili razlaz', Vesti-online portal, 4 Nov. 2014 (at: [www.vesti-online.com/Vesti/Ex-YU/446151/BiH-Ili-konfederacija-ili-unija-ili-razlaz](http://www.vesti-online.com/Vesti/Ex-YU/446151/BiH-Ili-konfederacija-ili-unija-ili-razlaz)).
35. In November 2013, in a document entitled 'Dejtonska struktura Bosne i Hercegovine i pravni položaj Republike Srpske', the status of defence reform was challenged on the basis that according to the BiH constitution, the country still had two armies.

36. 'Lost in the Bosnian Labyrinth', *European Stability Initiative*, 7 Oct. 2013 (at: [www.esiweb.org/pdf/esi\\_document\\_id\\_143.pdf](http://www.esiweb.org/pdf/esi_document_id_143.pdf)). The European Stability Initiative (ESI) has aggressively lobbied in European capitals using talking points that deny constitutional reform is needed.
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42. Matthew Hoddie, 'Introduction: Segments States in the Developing World', *Ethnopolitics*, Vol.13, No.1, 2014, p.2, emphases added. Donald L. Horowitz, *Ethnic Groups in Conflict*, Berkeley: University of California Press, 2000. Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*. New York: W.W. Norton & Company, 2000. Philip G. Roeder, 'Secessionism, Institutions, and Change', *Ethnopolitics*, Vol.13, No.1, 2014, pp.86-104.
43. *Ibid.*
44. John McGarry and Brendan O'Leary, 'Must Pluri-National Federation Fail?', *Ethnopolitics*, Vol.8, No.1, 2009, pp.5–25.
45. Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina*, Surrey: Ashgate, 2013.
46. Venice Commission, point 6 (see n.8 above).
47. The author would like to thank Aarif Abraham and members of the Public International Law and Policy Group (PILPG) team for their past research on this issue. Any errors in this summary are the author's alone.
48. Vienna Convention Law on Treaties, art.1 (1969) (at: [treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01p.pdf](http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf)).
49. *Ibid.*
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96. In 2014 then Chairman of the Council of Ministers Vjekoslav Bevanda proposed a decision to amend the 'Decision on the Establishment of Working Groups for EU Integration', to introduce representatives of certain cantons (Posavina, West Herzegovina, Herzegovina-Neretva and Canton 10; all of which have substantial Croat populations). SDP Ministers in the CoM did not adopt this decision, explaining it was another way of introducing a third entity in BiH. Bevanda then blamed the SDP for the country failing to have a coordination mechanism. 'Bevandin ured pokušava uvesti treći entitet u mehanizam koordinacije', *Depo* portal, 21 Mar. 2014 (at: [depo.ba/clanak/110021/bevandin-ured-pokusava-vesti-treci-entitet-u-mehanizam-koordinacije](http://depo.ba/clanak/110021/bevandin-ured-pokusava-vesti-treci-entitet-u-mehanizam-koordinacije)); 'Vjekoslav Bevanda: Bošnjačke stranke ne dopuštaju da Hrvati dobiju samo ono što im pripada', *hrsvijet.net* portal, 25 Mar. 2014 (at: [www.hrsvijet.net/index.php/arhiva-clanaka-hrsvijetnet/137-arhiva-stari-hrsvijet-net-1/31788-vjekoslav-bevanda-bonjake-stranke-nedoputaju-dahrvati-dobiju-samo-ono-to-im-pripada](http://www.hrsvijet.net/index.php/arhiva-clanaka-hrsvijetnet/137-arhiva-stari-hrsvijet-net-1/31788-vjekoslav-bevanda-bonjake-stranke-nedoputaju-dahrvati-dobiju-samo-ono-to-im-pripada)).
97. These talking points have made their way to civil society. In fact, one of the only open discussions on this matter in BiH, organized by the *Vanjskopolitička Inicijativa BH* (Foreign Policy Initiative BiH; VPI) with financial support from the UK Embassy, was titled, 'Principles of an Efficient Coordination Mechanism in the EU Integration Process', tacitly accepting the notion that the existing DEI and Council of Ministers will be replaced by something consisting of the RS, and some other presumably ethno-national structures to be hammered out within the Federation. The title speaks volumes, eliminating from the discussion any links that might relate a coordination mechanism to the RS, or to Brčko District for that matter. It focuses primarily on coordination between the cantons, the Federation and the state, skirting the fact that this discussion is inherently political, and inextricably related to the Federation constitutional structure, and its position within the BiH constitutional structure. However, the VPI considers that the issue of a coordination mechanism is in fact *not* a constitutional question, arguing that the Federation as it is has the constitutional basis for an effective coordination mechanism to resolve issues and cooperate with the EU – again, if there is sufficient political will. See *Vanjskopolitička Inicijativa BH*, 'Principles of an Efficient Coordination Mechanism in the EU Integration Process', Mar. 2015 (at: [www.vpi.ba](http://www.vpi.ba)).
98. The author would like to thank Soeren Keil for this observation.
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