

# After Dayton, Dayton? The Evolution of an Unpopular Peace

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**ABSTRACT** Contrary to conventional wisdom, the Dayton Peace Agreement has been surprisingly flexible and institutions in Bosnia and Herzegovina have evolved significantly over the past decade in both implementing the agreement and moving beyond the agreement in key aspects. While much of this evolution has been driven by the Office of the High Representative (OHR), recent years have seen the rise of domestic constituencies which invest in the institutions and the state set up at Dayton. Much of the criticism of the rigidity of the original peace agreement remains valid, but the gradual success of the institutions it set up or legitimized speaks in favour of a gradual evolution of the institutional system, rather than whole-scale changes.

Oh, Land of Kulin, through many centuries  
Unightly we have made without the fear of God.

Cantons there are ten, entities two,  
Three members of the presidency, countless functions.

The High Representative is the highest of them all,  
He does good things for us, thus deserves a verse.

Bosnia, dear mother, Herzegovina,  
Forgive us dear mother for existing,  
You, Land, will be everlasting and we are manure.  
(Zoran Čatić's proposal for the lyrics of the national anthem)<sup>1</sup>

Is the ironic proposal of the Sarajevo radio host, Zoran Čatić, for the national anthem quoted above a sign of Bosnians appropriating the internationally imposed and often sterile institutions and symbols of the joint state? Bosnia has an anthem without lyrics and a flag imposed by the High Representative after it failed to find a majority in the Bosnian parliament. While originally not widely accepted, the flag and the symbols have become part of the everyday life in Bosnia and Herzegovina (Kolstø, 2004,

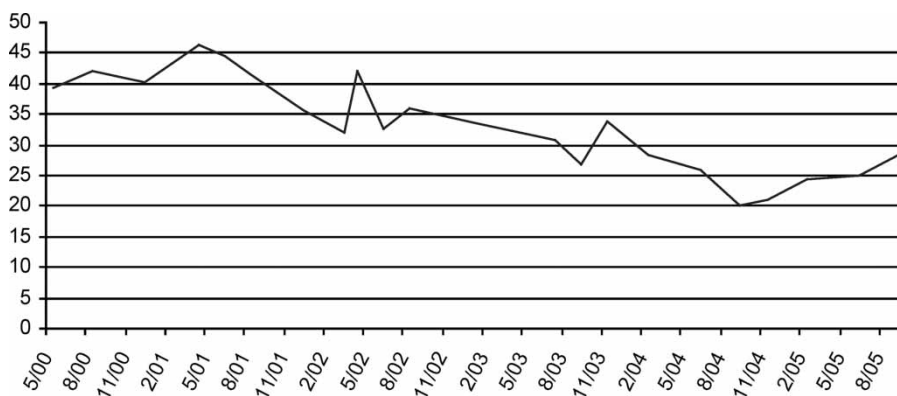
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pp. 185–208). Numerous commentaries since the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), negotiated in late 1995 in Dayton, have noted the artificial and complex nature of the state it (re-)establishes. The validity of these critiques notwithstanding, the question arises whether and how Bosnia and Herzegovina as a state has been living with the institutions and the Dayton ‘system’.<sup>2</sup>

There is little controversy over the fact that the peace agreement has kept the peace for 10 years. Furthermore, there has been a notable decline of ethnically motivated violence since the end of the conflict, thus large-scale attacks against returning refugees, as in the first post-war years, or the violent riots in Banja Luka and Trebinje against the reconstruction of mosques in 2001, appear unlikely today. This development is backed up by changing perceptions among the population. The quarterly UNDP *Early Warning Reports* have measured inter-ethnic relations through surveys since 2000. They indicate that, since then, Bosnian citizens’ fear of a renewal of the conflict in case of a withdrawal of international peacekeepers has decreased from around 40% to less than 30% (see Figure 1). At the same time, support for secession among Croats and Serbs has declined dramatically since 2000. In August 2000 68.6% of those surveyed in the Republika Srpska (RS) identified an independent RS or joining Yugoslavia as the paramount interest of Serbs; in predominantly Croat areas 21.8% consider either an independent Republic Herceg Bosna, or joining Croatia as the paramount Croat interest. By early 2003 a desire for the independence of the RS or joining Serbia and Montenegro had dropped to 43.4%; among Croats the establishment of Herceg-Bosna enjoyed only the support of 3.5%, with no support for joining Croatia (UNDP 2000, p. 31; UNDP, 2003, pp. 45–46).

Despite these apparently positive trends, the key word ‘Dayton’ is suggestive of everything which appears not to be well in Bosnia and Herzegovina: complicated institutions, high unemployment, dependency on external aid and intervention, and the predominance of ethnic politics. Dayton Bosnia and Herzegovina has failed to emerge as a self-sustainable state governed by a reformist political elite. Much of the blame has fallen on the GFAP and in particular the constitution it contains in Annex 4. However, I argue that, while there are numerous flaws in the institutional set-up of the Dayton constitution, much of the blame has been misplaced. First, the institutions are often seen as being



**Figure 1.** Percentages of Bosnians fearing a re-start of the war in case of withdrawal of international peacekeepers. *Source:* UNDP (2000–05)

highly inflexible, nevertheless, the state powers have grown substantially in the past decade and witnessed the establishment of numerous new institutions, disproving the argument of inflexibility (at least partially). Second, the contradictions and ambivalences about the relationship between group and individual rights and between competing claims to self-determination are often viewed as a disadvantage of the peace, but, as I will argue, this has allowed for more evolution than the original signatories had anticipated. On the other hand, many of the weaknesses of Bosnia and Herzegovina cannot be narrowly blamed on 'Dayton' or the institutions it sets up. The importance of ethnic politics and national parties<sup>3</sup> is certainly not solely the result of the state structure, but at least equally the consequence of the war, even if the institutions at the time facilitated the dominance of such parties. The high degree of decentralization has also created obstacles to economic development but, again, high unemployment and low levels of foreign investment are also a consequence of the war and of deep reservations about stability, and they do not stand out in the regional context.

It is not my purpose to exculpate the GFAP from all its weaknesses and I by no means deny that Bosnia and Herzegovina has not made as much progress as most of its citizens hoped for. Instead, this article seeks to trace the institutional evolution of the Dayton institutions to determine how and in which direction they have changed. For this purpose, I will examine four aspects: the development of the state institutions, the relationship between power sharing in the entities and at the state level, the functioning of ethnic representation in Bosnia and Herzegovina and, finally, the constitutional debates and what they signify for Bosnia and Herzegovina.

When examining the debates on the GFAP and the institutions which have shaped post-war Bosnia and Herzegovina, some demystification is called for. The state and all its institutions have become synonymous with 'Dayton', as much as reform debates have often focused on 'changing Dayton'. Here I shall limit myself to the institutional aspects of the GFAP rather than other components.

First, a distinction needs to be made between the institutions the peace accord sets up and the ones it implicitly endorses. Much of the criticism of the GFAP has focused less on the institutions it sets up, but rather on its recognition of the institutions which emerged during the war, i.e. the two entities (and in extension cantons) and their claim to ethno-territorial predominance of particular communities. What is wrong with Dayton is often not what it set up, but what it recognized. However, while it acknowledged the existence of the entities, neither the constitution nor the GFAP in general define the nature of the entities beyond their need to live up to the human rights standards set out in the constitution, and to harmonize their laws with those of the state. This omission originally helped ethno-nationalist elites to engage only in cosmetic changes at the entity level, but later also allowed for more substantial changes. Second, the institutional framework needs to be narrowed down to two parts of the peace agreement: the constitution and Annex 6, which establishes a number of Human Rights institutions, including an ombudsman and a human rights chamber (disbanded in the meantime). The GFAP itself is much more than these aspects, ranging from regional security (now hardly relevant) to detailed troop withdrawal plans, all of which received considerably more attention during the negotiations than the most lasting legacies of the peace agreement. Debates on 'Dayton' can be divided into three phases: a) implementing Dayton; b) changing Dayton; and c) moving beyond Dayton. In the first post-war years all attention focused on Dayton

implementation, i.e. the establishment of institutions foreseen in the constitution and the entities' fulfilment of the commitments they made in the GFAP (see ICG, 1999b).

In the second phase the discussions on Dayton have focused on overcoming the shortcomings of its institutional set-up, such as the high degree of territorialization of group rights. These reform debates expressed themselves in the context of the permanent election law, passed in 2001, and the decision of the Constitutional Court from 2000, which declared the ethnic pre-dominance of one or two groups in both entities to be unconstitutional.

In the third phase, beginning in recent years, institutional development has been less centred on formally changing the framework of the peace agreement, and more on allowing for the development of state institutions and the erosion of the entity and cantonal ethno-territorial autonomies, thus moving beyond the original Dayton framework.

### **Institutional Evolution at the Centre**

In the first post-war years the state institutions were largely an empty shell. Some of the institutions of the Republic of Bosnia and Herzegovina (1990–95) which ceased to exist with the signing of Dayton were transferred to the Federation, while others became part of the new state structure, such as the Ministry of Foreign Affairs. Both the Serb Democratic Party (SDS) and the Croat Democratic Community (HDZ) formally participated in the governance at the state level in coalition with Party of Democratic Action (SDA) between 1996 and 2000 and again after 2002. Nevertheless, the state administration was at first a domain of the SDA. The minimal investment in the state by the Croat and Serb nationalist parties coincided with their goal of keeping the state weak and the entities and cantons strong. The constitutional powers of the state were thus largely viewed as a ceiling up to which the state could evolve.

Institutional evolution at the state level took three forms: 1) The existing institutions were strengthened, followed by 2) the establishment of new ministries and 3) creation of a number of specialized agencies and institutions. While much of the initiative for this process was externally induced, the institutions have become 'domesticated' and operate more effectively than the state institutions early on. This is largely explained by the fact that the state began exercising real competences, which increased the incentives for representatives of all communities to partake in the decision-making process. Originally, the weak institutions were further weakened by lack of support structures and complex rules of procedure. Thus the Presidency, for example, lacked an institutional infrastructure and the office of the Serb member was not based in Sarajevo, but rather in Pale, the capital of the Serb Republic at the time (Gligorić, 2002, pp. 56–57).

The Council of Ministers—the term 'government' has long been rejected—similarly was kept weaker than foreseen in the constitution. The first law on the Council of Ministers of 1997 included a very rigid form of parity representation between the three groups. All decisions have to be taken by consensus in government and within the ministries. Here, a minister with her/his two deputy ministers, who have to be from different constituent peoples, had to agree on all decisions. If an agreement was impossible, the Council of Ministers had to decide jointly.<sup>4</sup> Finally, the Council of Ministers is not presided over by one Chair who might emerge as a prime minister, but by two Co-Chairs and a Vice-Chair. The co-chairs rotated every eight months. In addition, for decisions to be taken by the Council of Ministers, four members of the government (of six) and at least one

representative from each nation had to be present. As this system not only cemented the weakness of the government, but also contravened the Bosnian constitution, the Constitutional Court declared the set-up unconstitutional in a first major decision challenging a system of government in Bosnia and Herzegovina that had gone beyond an already highly ethnified institutional structure (Constitutional Court, 1999). A new law structured the position of the Chair so that it was more like that of a prime minister in other countries. The ministerial positions were also strengthened by abolishing the rotation between the minister and his/her two deputies, who were members of the other two constituent peoples. Thus, the government has become more effective, a development which coincided with the short interregnum of a coalition of moderate parties between 2000 and 2002, which provided for a decisive break and increased the functionality of the government; this process has outlasted the moderate 'Alliance for Change'. The two-chamber parliament has undergone a similar process. Over a three-year period, between 1997 and 1999, the parliament passed only 30 laws, one less than in 2001 alone. The High Representative in fact imposed most important laws and thus acted as the *de facto* arbiter over blockages in the decision-making process caused by the threat of either group invoking a 'vital national interest' veto. Blocked decision making in post-war Bosnia and Herzegovina is, however, less a result of the veto powers, than of the electoral successes of uncompromising national parties, creating a *de facto* stalemate in the chambers of parliament and preventing any substantial decision making, not only on issues directly pertaining to the sensitivities of the national groups, but also in areas where necessary decisions run the risk of reducing the popularity of either of the governing parties.

The increase in state competences has been reflected in the establishment of new ministries. The number of ministries was originally limited to Civil Affairs and Communications; Foreign Trade and Economic Relations; and Foreign Affairs. In 2000 three ministries charged with human rights and refugees, the treasury and European integration were added. In 2002 the Ministry of Justice and Security was established and the Ministry for Civilian Affairs and Communication was divided into two ministries. Establishment of the Ministry of Defence in 2004 increased the number of ministries to 10 from the original three. The establishment of a new ministry, however, was often more symbolic in nature, as some were and continue to be mostly embryonic, with no more than a handful of staff, like the Ministry of Justice and Security for example. As a result, entity-level institutions continue their influence by virtue of size.

In addition to the establishment of new ministries, there has been the proliferation of state-level institutions and agencies. Some of these took over competences which were previously held by the entities or cantons, such as the State Border Service, established in 2000, which assumed control of the borders from the entity and cantonal police forces. Other institutions took on competences which newly arose and had not or had only partially been regulated in the entities, such as the Regulatory Agency for Communication, which supervises the electronic media, allocates frequencies and controls the mobile phone networks.

Since 2003 the evolution of the state level continued in the most sensitive field of security. This included the creation of a state-wide system of identity cards, the dissolution of the entity intelligence agencies and the establishment of a joint command for the armed forces and the abolition of the entity defence structures, including the ministries of defence. The latest reform effort focused on wresting control of the police from the entities, the key resource of power and income of nationalist elites. While the evolution of the

institutional system at state level had by 1999/2000 extended beyond establishing the institutions set up in the constitution, constitutional reform has not been necessary because of the constitutional clause, which stipulates that:

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities. . . or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.<sup>5</sup>

While assigning all residual powers to the entities, the constitution simultaneously does not prevent the state from gaining competences. These might be acquired as a consequence of entity consent or on the vague grounds of sovereignty and independence, which can be broadly interpreted. Even if the state competences could be enhanced without formal entity support, at least minimal acceptance has often been required to wrest competences from the entities. The progressive strengthening of the state has thus hinged on international pressure on the entities to condone the state accumulating institutions and competences.<sup>6</sup> Although weaker than most other federal states, the competences accumulated by the Bosnian state have reached the crucial level where non-participation is no longer in the interest of any community's political elites. In addition, many of the special agencies are not governed by formal power-sharing mechanisms, but are only required to reflect population distribution. Thus, these institutions cannot be rendered ineffective simply through blockage.

### **Balancing Power Sharing in State and Entities**

As highlighted above, most formal and informal power in Bosnia and Herzegovina in the past derived from entities or cantons, i.e. from ethnically relatively homogeneous units, whereas institutions governed by power sharing held little formal power, which was further eroded by complex decision-making procedures.

If one were to exclude the strong international intervention in the system of governance in Bosnia and Herzegovina, the institutional set-up appears at first glance to fulfil the rule book of consociational theory: power sharing at the centre, supplemented with a high degree of decentralization. So why does the recommendation of Arend Lijphart that "a federal system is undoubtedly an excellent way to provide autonomy for these groups [in divided societies]" (2004, p. 104) appear to fail in Bosnia and Herzegovina? While one might be tempted to consider the weakness of the central government in Bosnia and Herzegovina symptomatic for consociational systems failing to offer incentives for cooperation (Horowitz, 2002, p. 20), it is more appropriate to examine Bosnia and Herzegovina's institutional particularities, which might offer some lessons for fine-tuning consociationalism.

The institutional set-up in Bosnia and Herzegovina highlights the problematic link between veto rights and decentralization in power-sharing systems. Power-sharing systems rest on the premise that all communities have to consent to all major decisions in the state. This is institutionally expressed through veto rights and other restrictions on majority voting. The underlying assumption of introducing veto rights is that they

are not often used, but constitute a restraint on the institutional set-up to prevent outvoting of one or several groups in issues affecting those groups' interest (Lijphart, 1977, p. 37). At first glance the Bosnian experience seems to confirm this theory. The generous and far-reaching veto rights have been invoked very rarely (Venice Commission, 2005). The rare usage is, however, not an adequate measure of the positive effect of the consensus-seeking institutional set-up. The threat of the use of veto powers and other requirements for decision making (quora, reserved seats in parliament) pre-empt decisions from being taken which might be vetoed. Bosnia and Herzegovina is a key example of the impact of informal veto. This type of blockage and formal veto rights are unlikely to be used by groups, if there is a joint and equal interest in the functioning of the institutions in question. For this to be the case the institutions must reflect a minimal consensus—both over their existence and their competences—and alternatively decision-making bodies must not be available to replace these institutions. This has been the case in Bosnia and Herzegovina, however, in particular in the first post-conflict years. Ethnically homogeneous territories, the cantons and the RS had greater legitimacy and held both formal and informal powers which exceeded those of the state. Additionally, the vague division of competences between the layers of government and the fiscal dominance of the entities reduced any incentive in terms of commitment to the state. Functioning institutions at the state level could be thus considered to be a threat, rather than a prerequisite for the power of the entities. The consensus-building mechanisms at the state level thus served not to protect 'vital national interests', but to secure the unhindered predominance of the exclusivist ethno-territorial autonomies. The commitment to the joint state has and continues to be *asymmetrical* among different communities. Their stronger attachment to the Bosnian state, the fact that they are the largest ethnic group in the country and that they are settled across most parts of the country, has made Bosniaks identify more with the state than most Serbs or Croats. The key level of governance for most Bosniaks is thus the state, while it is the RS for a majority of Serbs and cantons for most Croats.

### **Power Sharing and the Decline of the Entities**

The entity constitutional reforms negotiated by political parties in Bosnia and Herzegovina and later imposed by the OHR in 2002, triggered by a key Constitutional Court decision of 2000, largely sought to address the challenge of asymmetric commitment to the state and ethnopolitical exclusivity of the entities. By endowing the three 'constituent people' at all levels with rights to representation and veto at the entity and cantonal level, the logic of power sharing has cascaded to all levels of government, down to municipalities. The reforms were imposed by the OHR at the entity level; at the cantonal and municipal level the political elites largely undertook the legal changes autonomously. While there has been broad recognition that this proliferation of power-sharing has rendered Bosnia and Herzegovina more, rather than less, complex, the implicit goal of the reform has been to correct the asymmetries in the commitment to the different levels of government by the three 'constituent peoples'. Bosniak MPs, with less commitment to the RS can veto decisions (or threaten a veto) just as Serb MPs from the RS have been able to block decision making at the state level. This institutional 'arms race' has thus secured representation and veto rights down to cantons and municipalities.<sup>7</sup> This trajectory of reforms following the decision of the Constitutional Court in 2000 has taken a different direction than was probably originally intended by members of the Court. In the Constituent

People's Case the Court evaluated if and how the constitutions of the entities (and in extensions the cantonal constitutions) broke the state constitution by privileging, implicitly or explicitly, one or more communities over others. Unsurprisingly, both entities—conceived as ethno-territorial autonomies—had favoured the respective dominant community in terms of representation in the public administration, in parliament and government, as well as in the symbolic sphere. The Court criticized both discrimination in practice, as had been the case in the RS, which in terms of institutional set-up was mostly ethnically neutral, and formal discrimination, as in the Federation, which formally granted Bosniaks and Croats a greater degree of representation and veto rights than serbs and minorities. In addition, the Court also challenged the extreme 'ethnification' of the institutional system. Drawing on a comparison with Belgium, the court noted that the Federation had more rigid mechanisms of assigning ethnicity to office holders. Thus, unlike in Belgium, where "every citizen can stand as a candidate" therefore leaving it to "the subjective choice. . . whether to take the oath in French or in Flemish and thereby to 'represent' a specific language group. . . the Constitution of the Federation of BiH provide for *a priori* ethnically defined Bosniac and Croat delegates, caucuses and veto powers for them"<sup>8</sup>. Implicitly, the court thus criticized the overall structuring principle of the state or, in the words of the Bosnian legal scholar Nedžad Duvnjak it noted that "the constitution of BiH is not in accordance with itself" (2004, p. 160). The reforms imposed by the OHR in 2002, however, structured the system of the entities on the model of the state, thus increasing the degree of ethnic representation in the political system, rather than reducing it as suggested by the Court.

The court decision is also relevant as it identified another contradiction. The GFAP implicitly recognized the principle of ethno-territorial autonomy as the 'building block' of the state, but at the same time introduced the principle of human rights and equality, which ran counter to the ethno-territorial autonomies. This tension had structured the post-Dayton reality since 1996 but the Constitutional Court formally decided to privilege individual rights over group-based autonomies. Again, the Court decision would have been impossible, had the Dayton constitution formally defined the entities as the autonomous unit of one or two constituent peoples.

### **Does the Ethnic Key Fit?**

Much of the institutional development since Dayton does not constitute an abrogation from the institutional legacy of Bosnia and Herzegovina. The concept of reserved seats in assemblies and public administration dates from the Ottoman period and was thoroughly institutionalized during the Austro-Hungarian rule. Similarly, while Bosnia and Herzegovina was part of the Socialist Yugoslavia (SFRJ), the ethnic key became a guiding principle for the allocation of positions in the League of Communists and the republican institutions. Arguably the introduction of cascading power-sharing systems since 2002 in the entities, cantons and municipalities has not only eroded the formal territorialization of ethnicity but also linked the institutional set-up to its historical predecessors (Abazović, 2002). In addition to formal differences, the current ethnic key differs in its function from the Yugoslav ethnic key.

The socialist system of ethnic representation was grounded in ensuring representation of communities within the framework of the one-party state and furthermore to control nationalism. As nationalism was considered to be one of the main threats to the political system, the ethnic key helped to confront accusations of national bias of party and

republican institutions and meant that nationalism by one nation was criticized largely by a member of the same nation within the political system. As such, the socialist system did not represent different national elites, but rather one Bosnian, Yugoslav and Socialist elite which 'happened' to belong to different communities, but whose primary allegiance was with the state and the League of Communists (Andjelic, 2003, pp. 39–40).

The ethnic key in post-war Bosnia and Herzegovina has been fundamentally different in function. First, the inclusion of power-sharing provisions sought to prevent exclusion of one group and its members from different levels of governance (first state, later entity and lower levels). Second, the ethnic key has been a tool of 'affirmative action' in Bosnia and Herzegovina. Not only are all three groups represented on the basis of parity in a number of institutions, favouring the less numerous Croat community, but the ethnic key remains linked to the refugee return process. Since 2002 the governments and the public administration of the entities and all lower levels of government are required to apply an ethnic key linked to the previous census.<sup>9</sup> As the last census was conducted in 1991, the numerical requirements for Croats and Bosniaks to be represented in the RS, or Serbs in the Federation, are considerably higher than the real number of the communities living there. The goal has been to facilitate the return process by *de facto* creating employment opportunities and to prevent legitimization of ethnic cleansing. This goal has, however, been in fundamental contradiction to the self-understanding of the entities and the lower levels of governance as exclusive domains of the dominant post-war communities. Thus the ethnic key in large parts of Bosnia and Herzegovina lacks the consensus of the communities. In combination with the multiplication of power-sharing institutions, this has brought with it an increased danger of abuse. Such abuse could be viewed as the appropriation of imposed power-sharing systems by ethnic parties. Not without precedent, national parties have used the category of either minorities or 'Others' since 1990 to increase their dominance. In Mostar, for example, the main line of confrontation since 1993 has been between Croats and Bosniaks. As the territorial line of control ran through the city at the end of the conflict, the division survived the peace. Here, in the six municipalities of the city, seats were reserved for all three communities (including Serbs) largely on the basis of the pre-war population distribution. As neither the dominant HDZ nor the SDA were willing to have their dominance in 'their' part of the city challenged, both parties developed a practice of including Serbs on their list of candidates who would be voted for mostly by Bosniaks and Croats, respectively voting for their national parties. The Serb candidates thus represented the views of the respective other national group. More recently, with similar requirements introduced in other municipalities and cantons, the two largest communities possess alternative 'identities' which allow for a switch of political convenience. Thus a number of positions reserved for 'Others', i.e. non-dominant groups in the RS, were occupied by self-declared Montenegrins. Similarly, in the Sarajevo city council, 16 seats are reserved for Bosniaks, five for Serbs, four for Croats and three seats for 'Others', to reflect the distribution of the population before the war. In recent council elections by the city assembly, the three 'Others' were self-declared Muslims from the dominant Bosniak parties (Maričić, 2005, pp. 12–15).

On the other hand, the flexibility of identity at the level of reserved offices stands in contrast to the willingness to accept self-identification elsewhere. Thus there have been cases in the past when candidates for the public administration were categorized not according to self-description, but by names and other criteria (Mulić-Bušatlija, 2002, pp. 32–33; Pečanin, 2002, p. 65).

The option of abuse lies in the very nature of an institutional system which represents persons on the basis of criteria as individual and subjective as identity. Much literature on minority rights emphasizes the need for self-identification and for recognizing the subjective nature of national identity. 'Objective' criteria risk classifying people against their will and are thus hardly appropriate from the point of view of individual human rights. Self-identification on the other hand bears the risk of abuse. Bosnia and Herzegovina is by no means the exception: the use of minority self-government in Hungary, for example, by ethnic entrepreneurs whose connection to the respective group is questionable, is widely documented, as is the case of the head of the Romanian coal miners' union, who was elected to Romanian parliament as the candidate of the Macedonian minority without any tangible links to that anyway minuscule community (Alionescu, 2004, p. 69). Instances of abuse do not necessarily discredit the system of ethnicity-based representation *per se*; on the contrary it could be argued that limited abuse is a reflection of the self-identification ingrained in the system. However, the cases of abuse raise two questions about the appropriation of the institutional set-up by the dominant political parties.

First, the institutional fit of the national parties did not restrain the nationalist political parties from laying claim to seats assigned to minorities or other communities. Believing that political parties would exercise self-restraint and only compete for positions clearly 'assigned' to the community, the parties' claims to represent, would be naïve. In particular the linkage of territorial claims to ethnicity has enhanced the incentive of the national parties to consolidate territorial control through seats assigned to other communities. On the flip side, not all national parties have always competed in both entities. In particular, the SDS has not run in the Federation since the end of the war. This indicates a clear territorial linkage to the understanding of group representation. As the proliferation of power-sharing mechanisms since 2002 to entities, cantons and municipalities has sought to undermine exclusive ethnic control, abuse has to be viewed from the perspective of preventing this intentional erosion of territorial control.

Second, the proliferation of power sharing to the sub-state level has increased the opportunities for abuse. In particular, seats reserved for the ubiquitous 'Others' are at risk of becoming an aspect of struggle for the control of power and territory between the three constituent peoples, as minorities lack a strong public voice and the majority, mimicking minorities, as in Sarajevo, has greater ease in securing seats set aside for 'Others'. As there are no firm legal mechanisms to prevent abuse and as the supervisory role of the international community is receding, there is a risk that the 'ethnic key' in municipalities, cantons and entities might not often benefit those for whom the mechanism is intended.

### **Constitutional Debates**

A number of independent intellectuals and NGO representatives concluded at a workshop in 2000 that, while the Dayton Constitution is "not immutable, or some sort of 'holy writ' . . . *now is not the time to change it*" (hCA, 2000, p. 73). Similarly international organizations and the dominant political parties had refrained from holding a constitutional debate. Within five years, by 2005, the environment had changed and a constitutional debate emerged among the main political parties and in the larger political discussions.

The ability to amend and transform the immediate post-war constitution is thus a key question in determining whether the Dayton constitution provides for an institutional arrangement that could become viable independently of international intervention and

whether reform is possible in a domestically driven process. Furthermore, the constitutional debates are relevant in ascertaining the flexibility of the current political system and of post-conflict consociational arrangements more generally. The Dayton system has been much criticized for its rigidity and over-emphasis on ethnicity. If, however, the system provides for enough room to amend and change it to reduce some of these aspects, this indicates at least sufficient flexibility to allow for institutional evolution. In terms of the larger debate on consociational arrangements, the ability of even most rigid consociational system to change—such as Bosnia and Herzegovina today—would redeem some of the weaknesses of consociationalism, most notably the rigid enforcement of group identity.

The evolution of the debates and critiques of the Dayton constitution since 1995 has been indicative of its legitimacy. In the first post-war years critics of the constitutional set-up—ranging from civil society activists who opposed the emphasis on ethnicity and territorial fragmentation to nationalists and secessionist parties who sought to dismember Bosnia and Herzegovina—outnumbered its supporters. Critics of the ethnic principle, including a number of Bosnian lawyers, often challenged the procedural legitimacy of the Dayton constitution and identified the pre-Dayton constitution as being more appropriate for the country (Šarčević, 1997, pp. 120–132). On the other hand, constitutional lawyers and the political elite in the Serb entity saw the RS as a state and Bosnia and Herzegovina as a mere union of states (Kunić, 1997, pp. 1–5). The fact that the constitution did not assign a label to the state to describe its system of government could be considered an example of what Cass Sunstein has appropriately termed “incompletely theorized agreements”, where fundamental disagreements would otherwise prevent a social consensus. Such agreements are thus able to reduce “the political cost of enduring disagreements” (2001, p. 60).

The emerging debates on the constitution could be considered progress from the lack of consensus over the state as such in the first post-conflict years. The question remains whether the debates on constitutional change signal a shift in perception of the state, allowing a greater degree of (re)definition of the state and its institutions.<sup>10</sup>

There are two key approaches to constitutional change in Bosnia and Herzegovina. The first seeks an abandonment of the Dayton constitution and replacement of it with a new constitutional system entailing a different institutional and territorial organization. The second approach advocates reforms of the existing system, whether they be limited to increasing the efficiency of institutions or eliminating the most pertinent inequalities. The first approach has been generally advocated by Bosniak parties and intellectuals. The Bosniak national parties, the SDA in particular, oscillated between a state defined in ethnic terms, i.e. the status quo, and the call for revising the GFAP to reverse the recognition of the RS, as a symbol of war crimes. Furthermore, a state defined in less ethnic terms is bound to benefit the largest community. Thus, the Party for Bosnia-Herzegovina of former prime minister Haris Silajdžić was the first mainstream party campaigning on a complete revision of the GFAP in 2000 with the electoral slogan ‘Bosnia without Entities’. A similar call for abandoning the entities has come from the Social Democratic Party (SDP), which elaborated a number of concrete amendments which would transform the state.<sup>11</sup> In the wake of the victory of national parties in the 2002 general elections, two additional proposals have emerged from civil society. The return to power of the national parties appeared to confirm the inability of Dayton Bosnia and Herzegovina to break with the nearly uninterrupted rule of the nationalist parties. The

proposals called for the creation of a ‘third republic’ or a ‘Federal Republic’, signifying abandoning Dayton and moving towards a more clearly defined nature of the state. The proposal for the third republic was voiced by leading intellectuals, primarily from Sarajevo, who argue that “Dayton Bosnia and Herzegovina is untenable and unsustainable” and a new constitution is required to secure human rights and to refocus on citizens (Zahtev, 2003). Similarly another group of mainly Sarajevo intellectuals from different communities, including Jakob Finci, the director of the Civil Service Agency at state level and a leader of Sarajevo’s Jewish community, and Ljubomir Berberović, whose Serb Civic Council has been a key initiator of the constituent peoples’ case at the Constitutional Court, called for a ‘Federal Republic of Bosnia and Herzegovina’ organized along regional lines, not following ethnic divisions, and for a strengthening of state competences. While Finci emphasizes that the reforms “would not even require the abolition of the Entities or cantons, since time and economic circumstances would demonstrate that all these levels of government are uneconomic and would be too expensive” (2004, p. 63), his model, like that of the third republic, would fundamentally transform the existing state.

This overall approach of abandoning the political system established at Dayton rests in part on a fundamental challenge to the legitimacy of the peace accord. More relevant here, however, is whether a system other than power sharing is appropriate for a deeply divided system such as Bosnia. While Arend Lijphart’s claim that “consociational democracy is not only the optimal form of democracy for deeply divided societies but also, for most deeply divided societies, the only feasible solution,” (2002, p. 37) could be challenged as reducing all institutional approaches of managing diversity to consociationalism, there can be little doubt that ethnically blind systems are unlikely to be provided for democratic governance.

The abandonment of group-specific protections bears a high risk and is likely not to transform Bosnia and Herzegovina from a rigid consociational democracy into a liberal democracy, but rather to turn it into an ethnic democracy (Smooha, 2005, pp. 12–13; 20–23). There is little doubt that the post-war institutional arrangement has given extraordinary precedence to ethnicity over other forms of political identification and orientation. Nevertheless, there is little reason to believe that most Bosnian citizens would jump at the chance to define their political preferences in non-ethnic terms, even if these institutional constraints were abolished.<sup>12</sup> A procedural democracy would favour the respective majorities, i.e. Bosniaks at the state level and any of the three groups at the local or regional level, depending on which competences these hold. Although the first elections in 1990 were held in extraordinary circumstances, it should be borne in mind that, without ethno-territorial autonomies and with cross-ethnic voting rules, nationalist parties won a resounding victory. There is little reason to believe that elections in a ‘third republic’ would not be contested along ethnic lines, at least for the foreseeable future. As long as this is the case, an ethnically blind constitutional and institutional structure is likely to be both discriminatory in its practices and potentially more centrifugal, as communities who have only a limited commitment to the state, i.e. Serbs and Croats, are unlikely to accept the dominance by Bosniaks that formal democracy might imply. The other direction of proposals for constitutional revisions has focused on ethno-territorial solutions, in particular those originating from the HDZ, suggesting the creation of three entities, i.e. the transformation of the Federation into separate Bosniak and Croat units of self-government. For example, in 2001 the defence minister of the Federation (later indicted for war crimes by the International Criminal Tribunal for the former Yugoslavia–ICTY)

argued that “countrywide pluralism will follow only after three smaller, multi-ethnic citizen federal units are established. Denying institutional identity to any of the three [groups] will only keep BiH a perpetual protectorate” (Prce, 2001, p. 143). With the failure of the self-government project of Bosnian Croats in 2001 and the criminal prosecution of much of the HDZ leadership at the time for involvement in organized crime, money laundering and corruption, the political project of separate Croat self-government failed. However, since the Croats are a numerical minority at the state and the Federation level, some Croat intellectuals, politicians and catholic functionaries regularly voice their concern of being marginalized in the state and renew the call for Croat self-government. In particular in late 2005, amid the emerging constitutional debate among the political elite, leading Croat politicians from the HDZ reiterated the idea of a third entity.

The establishment of a Croat entity would follow the logic of the original Dayton arrangement and establish symmetry in the Bosnian institutional arrangement, absent in the Dayton Peace Agreement. This had a been a consequence of the fact that the Federation, established one year before the GFAP was signed, was preserved to simplify the peace negotiations. Nevertheless, the creation of a third entity would stand in contradiction to the trajectory of constitutional and institutional evolution in post-war Bosnia and Herzegovina. As mentioned earlier, the institutional development since 1999 has moved away from the ethno-territorial units and towards joint decision making at the state level. The establishment of a Croat entity, even if one were to ignore the ambivalent relationship of some of its proponents to secession, would thus re-legitimize the RS and weaken the joint state by reducing incentives for Croat political parties to participate in joint institutions, as has been the case for Serb parties, as outlined earlier.

A second stream of constitutional reform debates has until recently been largely internationally driven and focused to a greater extent on reforming the existing constitution. Much of this discussion has been conducted outside Bosnia and Herzegovina and often with insufficient input from Bosnians. In fact, debates on the problems of institutions and intervention in Bosnia and Herzegovina have often been as much detached from Bosnian reality as the problems they sought to resolve (Belloni, 2003). The unusual nature of governance in Bosnia and Herzegovina has meant that there have in fact been two parallel debates on reform, within the international community and policy circles and among politicians and intellectuals within Bosnia and Herzegovina. Besides diffusing reform debates, the existence of parallel discussions suggests a full or *de facto* protectorate, where institutional design and its reform are dictated by parallel international and domestic policy considerations.

Interestingly, the domestic and international debates on constitutional reform have not been drawing from academic debates on institutional design in multi-ethnic states. Although the original Dayton system is an extreme textbook example of consociationalism, there is little evidence that the drafters drew from consociational theory rather than combining Yugoslav heritage with demands of ethno-nationalist political elites. In the international reform debates of the late 1990s, focusing on electoral reform, rather than constitutional change, Donald Horowitz was consulted by the High Representative along with two other external experts.<sup>13</sup> His recommendation to introduce alternative voting in Bosnia and Herzegovina was also adopted by the International Crisis Group (1999a), but had little practical impact on the reform of the electoral system, as it was used only in one case which was arguably not appropriate for this type of system and was abandoned in the permanent election law of 2001. Neither international officials

nor moderate political parties recognized the potential benefits of this electoral system at the time.

Since 2004 constitutional debates in Bosnia and internationally have begun to converge and have focused on reform, rather than on a larger change of the system. This development is chiefly rooted in the fact that any other form of constitutional reform would not be able to secure support from domestic political actors, and that the international imposition of a new constitutional order had been ruled out by both Wolfgang Petritsch and Paddy Ashdown during their time as High Representatives. The first substantial domestic reform debates coincided with the tenth anniversary of the Dayton Peace Accords and an opinion of the Venice Commission of the Council of Europe, which clearly spoke in favour of constitutional reforms and outlined concrete suggestions for changing the constitution.<sup>14</sup> In particular, it emphasized the need for a stronger central state to reflect the nature of other federal states in Europe. Such a reinforcement of the state should in the eyes of the commission include a comprehensive transfer of responsibilities, executive agencies and financial resources from the entities to the state, and a domestic process to assure that the process takes place transparently. Unlike earlier reform initiatives, the report of the Venice Commission enumerates concrete suggestions for amending the Dayton constitution. In particular, the suggestions include:

1. the need to define the veto rights on the basis of vital national interests;
2. abolishing the consent of entities;
3. abolishing the House of Peoples and transferring the vital national interest veto to the House of Representatives;
4. a single president elected by parliament to replace the Presidency;
5. transfer of some powers from the Presidency to the council of ministers (Venice Commission, 2005).

All the reforms are based on the premise of streamlining the state structure and preventing blockages, while recognizing that national identities matter in the political system. In addition, the report suggests transferring the legislative powers of the cantons to the Federation, if not abolishing them altogether; abolishing the House of Peoples in the Federation and at the state level and reducing other complicated allocations of offices enshrined in the constitution.

Most of the proposals essentially preserve the consociational nature of the constitutional arrangement for Bosnia, such as the definition of veto rights. Others in fact strengthen the power-sharing dimension, e.g. strengthening the government and reducing the competences of the Presidency and introducing an indirectly elected president. The only aspect which could be considered a weakening of the consociational arrangement is the position of a single president to replace the three-member Presidency. As most consociational systems have not adopted the awkward institution of a multi-member Presidency, such a change would not run against consociationalism *per se*.

The subsequent constitutional debate in Bosnia and Herzegovina, coordinated by the US Institute of Peace and supported by most international actors including the EU, highlights the importance of the report by the Venice Commission. Its significance is threefold: First, it is the first document that links European integration and institutional reform explicitly, rendering opposition to some measure of constitutional reform more difficult. Second, the Venice Commission has remained within the framework of the existing institutional

context, thus not abandoning the entity model and recognizes the need for group-based political representation. Finally, the report links the powers of the High Representative to the issue of constitutional reform. While Bosniak parties have been advocating both continued intervention of the OHR and constitutional changes, Croat and Serb political elites called for diminishing the Bonn powers (i.e. the power to dismiss officials) but mostly oppose constitutional reforms. Thus, the report follows the arguments which consider the powers of the OHR incompatible with the rule of law, but outlines the need for constitutional reforms to allow for such a transition.

In 2005 a series of meetings among the political elites from both entities has highlighted the willingness within Bosnia and Herzegovina to reform the constitution, even if such a transformation is as unlikely to be fundamental as it is to happen at all without external pressure from the USA and the EU. Thus, after years of declarations about the need for constitutional reform, the year of the tenth anniversary of the GFAP saw the beginning of a real debate on constitutional reform. The constitutional reform debates at the same time highlight the particular nature of governance in Bosnia and Herzegovina. The key impetus for change originates outside Bosnia Herzegovina, i.e. with the Venice Commission and key international actors, and is justified by the goal of European integration of the country. The reform debates thus point to the continued role of international actors as formal and informal arbiters and standard setters of the consociational system.

## **Conclusions**

In an exchange between Biljana Plavšić, president of the RS, and US Secretary of State Madeline Albright in 1998, Plavšić reportedly rejected additional competences for the state as these were not contained in the constitution, upon which Albright called for a strengthening of the state in the ‘spirit of Dayton’, prompting Plavšić to rebut: “But we do not want to implement the ‘spirit of Dayton’ but ‘Dayton’”.<sup>15</sup> Today, the ‘spirit of Dayton’ has won over ‘Dayton’. The institutional development of post-war Bosnia and Herzegovina has been significant. The entities lost their *formal* ethno-national dominance, the state controls the armed forces, and increasingly resembles other ‘normal’ federal states.

The contradictions and ambivalences in the GFAP allowed for this development. The substantive changes to the institutions, largely externally driven, have been accepted to the degree that they serve as the basis of discussing further and more formal constitutional reforms. The functional strengthening of the state is more broadly accepted than the proliferation of power sharing to lower levels of government.<sup>16</sup> Much of the change remains insufficiently legislated and the changes do fall into the category of the aforementioned “incompletely theorized agreements”, where modifications to the existing set-up receive support or at least silent acceptance by all communities for different reasons. If the strengthening of the state was pursued with the stated goal of abolishing or entirely hollowing out the entities, the process would have failed early on. As the debates on constitutional changes highlight, for a long time there has been no agreement on the structure of the state or indeed on the need for reform, reflecting the fact that the peace agreement, the state it establishes and the evolution of its institutions are all possible because their trajectory and goals are not always made explicit.

These dynamics in the Bosnia and Herzegovina case suggest a need to examine the evolutionary process of consociational arrangements in general. Power-sharing systems

having become the default arrangement for divided post-conflict societies, established in states with weak legitimacy and a fragile consensus. These arrangements, as highlighted in Bosnia, have to contain a high degree of detailed group protections in the political system, as cooperation and inclusion is often not based on a broad political consensus. At the same, flexibility and ‘creative ambiguity’ is necessary to allow for an informal evolution to take place to reflect changing inter-group relations and developing relations between communities and state institutions.

## Notes

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1. The host of the Sarajevo student radio, Zoran Čatić, sang the following proposal for the wordless national anthem on 25 November 2004: “*Zemljo Kulinova, kroz stoljeća mnoga/Nakaradnu stvorismo te bez straha od Boga/Kantona je deset, entiteta dva/Tri su člana Predsjedništva, bezbroj funkcija/Visoki predstavnik je najviši od svih/Dobro nam ga čini svima, pa zasluži stih/Bosno mila mati, Hercegovino./Oprosti nam mila mati sto postojimo/Ti ćeš zemljo vječna biti a mi gnojivo.*”
2. For more on the Dayton system, see Bieber (2005).
3. I describe parties which appeal to one community as national parties, which includes the Socialdemocratic Party in Bosnia and Herzegovina, whereas nationalist parties endorse an explicit exclusivist–nationalist programme. In practice the border between these categories is often fluid. For a more detailed discussion on this, see Bieber (2005, pp. 103–107).
4. Zakon o Vijeću ministara, Arts 17, 48, 1997.
5. Constitution of Bosnia-Herzegovina, Art. III 5a, 1995.
6. As the same parties are in power at the state level as in the entities, the key power relationship in strengthening the state level structure is between international organizations and some of the nationalist political parties, rather than between state and entities.
7. For more on this, see Bieber (2004, pp. 74–87).
8. Constitutional Court, Case No. U 5/98-III, 30.6-1.7.2000, para. 120.
9. This rule (or similar requirements) was introduced earlier for the police forces.
10. For a discussion of the constitutional debate, see Balić & Izmirlija (2004, pp. 49–63) and Jukić (2004, pp. 68–70).
11. Although the proposal favours reform on the basis of the existing constitution, the extent of the proposed changes has to be considered as a fundamental departure from the Dayton institutional framework.
12. According to UNDP data, less than a third (9/2005: 27.5%) of Bosnian citizens believe that only ethnic parties can protect the interest of the ethnic groups, while at the same time no single party receives significant electoral support outside its core ethnic support base (UNDP, 2005, p. 78).
13. Personal Communication with Donald Horowitz, 22 October 2002, on file with the author.
14. Some earlier debates were triggered by a proposal of the European Stability Initiative (ESI, 2004a; 2004b).
15. Reported in Pečanin (2002, p. 60).
16. The extensive international efforts required to pressure the RS to agree to police reforms and to link the place to the state level demonstrates the limits of strengthening the state.

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