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Constitutional Reform in Bosnia-Herzegovina: A Few Comments, Reflections and Recommendations

Fifteen years after the signing of the Dayton Agreement that ended the war there is a broad agreement that a substantial constitutional reform is needed in Bosnia-Herzegovina to enable further democratization in the country and its Euro-Atlantic integration, and this is also the central hypothesis of this article. Although it discusses the Butmir (political) process as the broader political context, it focuses on the preconditions, concepts, principles, nature, contents, goals, actors and process of constitutional reform. Reflecting theoretical discourses and concepts (particularly consociationalism, which was used in the drafting of the Dayton Constitution and is involved in the current constitutional debate in Bosnia-Herzegovina), and based on my extensive research in the country and region, the preferred concepts, key strategies and a possible model of the constitutional reforms are elaborated that can contribute to the realization of the main goals. These main goals can be summarized as ensuring peace and stability, promoting democracy and the process of democratization and institution building as well as economic and social development that can contribute to a better life of every individual and distinct community.

Keywords: Bosnia-Herzegovina, Butmir process, consociational democracy, constitutional reform, Dayton constitution, democratization, ethnic relations, institution-building, constituent peoples

Ustavna reforma v Bosni in Hercegovini: Nekaj komentarjev, razmišljanj in priporočil

Temeljna hipoteza tega članka je, da je petnajst let po podpisu daytonskega sporazuma, ki je končal vojno, ustavna reforma v Bosni in Hercegovini nujno potrebna, da bi lahko zagotovili nadaljnjo demokratizacijo in vključevanje države v evro-atlantske integracije. Ob tem ko na kratko predstavlja butmirski (politični) proces kot širši okvir, osrednjo pozornost namenja predpogojem, konceptom, načelom, naravi, vsebini, ciljem, akterjem ter procesom in proceduram ustavne reforme. Ob obravnavanju teoretičnih diskurzov in konceptov, posebej še konsociativizma, na katerem temelji daytonska ustava in ki je zelo prisoten tudi v sedanjih razpravah v Bosni in Hercegovini, in na podlagi mojega obširnega raziskovanja regije in držav v njej, v članku razvijam primerne koncepte in ključne strategije ter možne modele ustavnih reform, ki naj omogočijo uresničitev temeljnih ciljev. Ti cilji so predvsem zagotovitev miru in stabilnosti, promocija demokracije, demokratizacija, krepitev demokratičnih institucij ter ekonomski in socialni razvoj, skratka vse kar lahko prispeva k boljšemu življenju slehernega posameznika in skupnosti.

Ključne besede: Bosna in Hercegovina, butmirski proces, konsociativna demokracija, ustavna reforma, daytonska reforma, demokratizacija, etnični odnosi, razvoj institucij, konstitutivni narodi

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1. Introduction: The broader context

In the context of the ongoing intense discussions about the constitutional reform in Bosnia-Herzegovina, which have not produced the desired results so far, this article is a scholarly reflection on some relevant issues, particularly the successes and failures of the reform. It discusses the broader social, cultural and political contexts of the reform process, as well as some specific issues and solutions. After the refusal of the proposed package of constitutional reform within the “Butmir Process” of dialogue with political leaders that was facilitated by the European Union and the United States, the general opinion is that the political and constitutional reform in Bosnia-Herzegovina is at the beginning of 2010 at a deadlock, although politicians express their determination and commitment to continue with the dialogue and unanimous support for the Euro-Atlantic perspective of their country (see, e.g., Ekonom: east Media Group 2009–2010; OHR 2009–2010). This article presents some ideas and recommendations for the continuation and, hopefully, a successful completion of the constitutional reform(s).

My starting point and central hypothesis are that there is an inherent need to reform the Dayton constitutional arrangements, particularly the Constitution of Bosnia-Herzegovina of 1995 (Annex 4 1995), for a number of reasons, among which I would stress particularly the following:

- ♦ The main, real historic achievement of the Dayton (Peace) Accords (1995) was that they stopped the armed conflict, the actual fighting in Bosnia-Herzegovina. In many ways, this accord was more of a truce than a true peace treaty, regardless of intentions of its creators who hoped that it might have established also the adequate normative framework for the functioning and development of the country in the time of peace. The Accords and the Dayton Constitution, however, have not proved to be adequate solutions. These constitutional arrangements have produced and are still producing several negative results and problems. Among them I would mention that, initially, they recognized the territorial gains of war and ethnic cleansing, they recognized, legitimized and further strengthened the existing, often nationalist political leaderships of constituent peoples and their roles (frequently as their exclusive monopoly) in political, but also in economic life, thereby cementing the existing divisions and balance of power. By establishing a system based on the division of power among the three constituent peoples these constitutional arrangements established these peoples as the only true legitimate basis of the constitutional system and political processes that might be described a specific

type of “ethnocracy” rather than democracy¹ (see, e.g., Mujkić et al. 2008; Žagar 2006/7 (© 2008)).

- ♦ Although the Dayton arrangements included several potentially very productive mechanisms and provisions (such as, e.g., economic cooperation and corporations that should stimulate economic cooperation and integration in the country as provided by Annex 9 (1995) in connection with Article III of the Constitution of Bosnia and Herzegovina), often such provisions were not realized at all or have been realized inadequately. There is a need to create a political and normative framework and mechanisms that would better enable and stimulate economic cooperation and integration regardless of ethnic divisions.
- ♦ Already at the time of the signing as well as later there have been some warnings that the Dayton Accords could be considered insufficient, even inadequate, during a time of peace, particularly when indigenous internal democratic developments should be promoted and stimulated that would require substantial economic, social, political and constitutional reforms in order to be successful. These warnings and criticisms, reflected also in the existing scholarly literature, prove even more true and more adequate fifteen years later – considering all developments that have taken place since (see, e.g., Bebler 2006a, 2006b; Biber 2001/2; Bose 2002; Chandler 2000; Cousens and Cater 2001; Kasapović 2005; Klemenčič and Žagar 2004, 310–323; Marko 2005/6, 207–218; et al. 2008; Petritsch 2001).

Additionally, in my view based on my own long-term extensive field research,² currently the existing constitution is in many segments more of an obstacle to than an adequate aid for the inclusion of Bosnia-Herzegovina into Euro-Atlantic integrations, which seems to be the only realistic option for the optimistic future of the country. Consequently it is not surprising that Bosnia-Herzegovina declared NATO and EU membership their main strategic goals. However, in this context other central goals, one that are particularly relevant for the internal situation, relations and development – such as stability, further democratization, successful economic and social development, etc. – should not be forgotten.

If these goals are to be realistic, in my view, Bosnia-Herzegovina has to ensure the main foundations and preconditions that will determine the economic, social and political conditions and future development of the country and that, therefore, should be listed also among the central strategic goals of the constitutional reform. These foundations and preconditions are the following:

- ♦ Peace and stability as preconditions for successful social, economic and political development, democratization and the adequate functioning of democratic institutions;

- ♦ Clearly defined and precisely formulated common interests that should be considered the key basis for coexistence and cooperation in this diverse country. These common interests – in all spheres of life – need to be constantly discussed, (re)examined, (re)elaborated, developed and (re)enforced, as well as presented and promoted as beneficial to all individuals and communities. This demands permanent democratic and truly inclusive processes that stimulate the participation of all individuals, communities, political and other relevant actors (e.g., civic society), giving them realistic hope that their needs and interests will be met, as well as increasing their awareness of the importance and beneficial impact of common interests and their realization for every individual, community and the county. As such, agreed upon common interests could help bridge gaps and divisions, thereby contributing to the internal cohesion of the country and acting as much needed centripetal forces. One of such common interests, surely, is a successful integration of Bosnia-Herzegovina into Euro-Atlantic integrations; this interest alone is however not a sufficient long-term guarantee for a more successful development of the country and its territorial integrity;
- ♦ Prosperity, or at least the general recognition that only Bosnia-Herzegovina as a whole can ensure a common better future for all its citizens and communities, who realistically would be able to hope for a better life and conditions in the future. To ensure prosperity for its citizens and communities Bosnia-Herzegovina has to be particularly successful in its economic and social development and in developing its human resources, while simultaneously it has to guarantee adequate standards of human rights, including minority rights and democratic social and political development.

The current constitutional, legal and institutional arrangements, as well as the present social, economic and political situation, however, do not guarantee the above mentioned foundations and the inclusion in Euro-Atlantic integrations that is declared to be the central longer-term goal. For this reason substantial and radical economic, political and constitutional reforms are needed. To ensure the successful execution and completion of all these reforms their strategies should focus on, stimulate and pursue, among others:

- ♦ intense and permanent state-, institution- and capacity-building that all require adequate human resource development, as well as the true and full commitment of all people involved to contribute to these processes;
- ♦ continuous legal reforms, including the announced property and ownership reforms that should provide adequate normative frameworks and mechanisms necessary for the continuation of economic and other reforms. Whenever possible, these legal reforms should be agreed upon (ideally by consensus) and

66

should include detailed plans, tasks of both state and public institutions and other actors, as well as a timetable for the execution of these reforms;

- ♦ the promotion and realization of human rights, including minority rights, based upon and respecting the highest standards.

These tasks do not require just the commitment of political leadership and the broad mobilization of the public, but also the active involvement of the international community that – at least in a foreseeable future – will need to provide the necessary economic, developmental, institutional and political assistance. In this context, the international community – as well as Bosnia-Herzegovina – should see the accession to NATO and the EU not only as their ultimate goal, but simultaneously as the means to stimulate, support and direct necessary reforms. For this purpose, NATO and the EU should establish a realistic timetable that would stimulate all countries of the region to speed up their reforms and to do their best to meet the preconditions, criteria and standards that are required for their membership in these Euro-Atlantic integrations. It is particularly important that the EU confirms and shows with its actions that the future EU enlargement in the Western Balkans will continue after the expected accession of Croatia in a relatively near future. Additionally, I would suggest that NATO and the EU reward successful reform attempts and achievements of these countries in specific fields. Consequently, I would suggest that – recognizing and awarding their sincere attempts and results – the EU introduces a visa-free regime also vis-à-vis Albania and Bosnia-Herzegovina as soon as possible. Such a step would ensure the citizens of these countries that successful reforms and the fulfillment of set criteria and standards can bring certain important benefits to individuals. This will increase the popular support for the integration of the respective countries into Euro-Atlantic integrations, as well as their readiness to accept the necessary reforms – regardless of their immediate results that sometimes, in the process, may cause additional hardships to the people in the respective countries. I believe that in stimulating the Euro-Atlantic perspective of countries of the Western Balkans the international community, particularly the EU, should recognize that (as a general approach) a “carrot” proves far more productive than a “stick”.

2. The constitutional reform in Bosnia-Herzegovina: Processes

67

Although the central aim of this text is to discuss the preconditions, concepts, goals and models of constitutional, political and institutional reforms in Bosnia-Herzegovina, it is important to present the process and political and institutional frameworks of these reforms. Fifteen years after the signing of the Dayton Accords there is a broad consensus that – considering the current situation and several problems in the functioning of the Dayton constitutional arrangements and institutions – a profound and substantial constitutional reform is needed in Bosnia-Herzegovina that would establish an adequate normative basis and framework for a successful functioning and future development of the country; this is considered necessary preconditions for a successful integration of Bosnia-Herzegovina into Euro-Atlantic integration processes. However, there is no consensus regarding the contents and extent of constitutional reforms. This lack of consensus was obvious during the recent round of discussions on constitutional changes in October and November 2009 that was based on the so-called Butmir constitutional package, which was hoped to speed up the constitutional reform (see, e.g., *BalkanInsight.com* 2009; Karajkov 2009; Latal 2009; *Radio Slobodna Evropa* 2009–2010; etc.) Should, consequently, this package be considered a failure? Even in its latest revised and watered down version the Butmir constitutional package failed to speed up and intensify the necessary process of constitutional reforms. However, this failure does not reduce the importance of the Butmir process for the future democratic developments of the country. This process – which stimulates a dialogue among main political leaders and offers a democratic framework for a formal and informal interactive exchange of views, thereby enabling discussions, elaboration and coordination of their specific and common needs and interests – needs to be continued and remains an important tool for future constitutional, political and economic reforms. In my view, the Butmir process needs to be intensified and developed, as well as at least occasionally broadened by representatives and leaders of those distinct communities (e.g., minorities) and civic society actors that are now excluded from the process and that can play an active role in the elaboration of possible proposals for constitutional reforms and in building the necessary political and social consensus for those proposals. The involvement of the international community, particularly of the Office of the High Representative and EU Special Representative (OHR) remains important, sometimes essential (see, OHR 2009–2010). Occasionally, the participation of high foreign and international officials and diplomats, as well as political leaders may prove instrumental in stimulating and intensifying the process. For the success of

68

economic development and reforms the involvement of relevant personalities from the economy and representatives of companies and institutions that may be interested in investing in Bosnia-Herzegovina or otherwise participate in its economic and social development would also be welcome. However, I would argue that it is impossible to develop and elaborate adequate proposals and draft constitutional, legal, political and economic reforms without the direct participation of individual experts and scholars, as well as research institutions from Bosnia-Herzegovina and abroad. They should be involved directly and should be given the chance to present their views and alternative solutions, initially to those who participate in the Butmir process, and later also to the general and interested public in the country and abroad. This can be considered important also for the building of the political and social consensus that is necessary for the adoption and successful realization of reforms.

With respect to the current Butmir constitutional package, my criticism differs from the most frequently presented views that criticize the inability to reach the necessary political consensus, often considering this proposal too ambitious. My criticism is exactly the opposite. I consider this package “too little, too late”. It included only those proposals and provisions that seemed to be agreed upon by the main political leaders in Bosnia-Herzegovina and that were considered the minimal common denominators. However, the drafters of the current Butmir package failed to recognize that public statements of these political leaders are frequently just lip service. Meant to please the public and particularly representatives of the international community and institutions, and used to hide their actual goals and true interests. Following such a minimalist approach, this package failed to provide the necessary broader and long term visions and goals, as well as short-, medium- and long-term strategies for constitutional, political, social and economic reforms that are necessary for the future successful development of the country. These visions, goals and strategies should be used as the widest bases for a broader consensus and tools for the mobilization of the public, which would provide the necessary widespread popular support. For those purposes, the reform proposals need to be comprehensive and elaborated well, and when required profound and radical.

Analyzing individual proposals in the Butmir constitutional package and following the current discussions in Bosnia-Herzegovina, my general impression is that the facilitators, drafters and politicians have not learned much from past lessons. These experiences show many problems, failures and mistakes that constitution drafters and conflict managers made in the past in different parts of the world. The key lesson should have been that the importation and direct transplantation of both simple and complex solutions to other environments

usually could not work well in these new situations. Before considering their application in other environments, solutions and models that seem to be working well in specific environments should first be closely analyzed in those environments to determine all their results and consequences, both positive and negative, in the short term but also in the longer term: this can only be done properly if all, or at least most, of the relevant characteristics, specifics and processes are known and taken into account. When this is done special attention should be paid to the possible effects and consequences of such solutions in other specific environments in which they may be applied. These kinds of critical analysis should study and compare all potential benefits and problems, as well as their social impacts and consequences – also in the longer term. I agree that these solutions that are intended to be transplanted into other environments may prove adequate and effective there if they are adequately adjusted to specificities, particular needs and interests in these new environments and if the necessary public support and social and political mobilization are ensured. If these conditions are not met they are likely to fail, possibly worsening the existing problems and creating new ones in the respective societies where they are applied.

In any case, an attempt at constitutional reform in Bosnia-Herzegovina can only be successful if it manages to generate and mobilize the support of the main political leaders and parties at all levels, based on their expressed and unconditional consensus (ideally based on agreed upon common interests, but when these are not sufficient possibly stimulated also by internal and external pressure), as well as the support of the public in all parts of the country. The necessary mobilization of the public requires concerted efforts and activities of all relevant politicians, political parties and institutions at all levels, federal units, cantons and local government, international institutions and the international community, public services and particularly the educational system, media, civic society and its actors. Considering the current situation and reality in Bosnia-Herzegovina it seems likely that in the near future the international institutions and community will continue to be important, if not key, factors for the initiation and generation of these kinds of concerted efforts and actions, which hopefully will result in a broad coalition for constitutional reforms.

70 3. The constitutional reform in Bosnia-Herzegovina: Concepts

As mentioned, the main and most important goal of the international community in the time of the preparation of the Dayton Accords was to stop the war and armed conflict in Bosnia-Herzegovina. The international community and particularly the USA tried their best to achieve this aim, and this policy included the necessary international pressure. At that point and in comparison with the urgent need to stop the war, everything else – including the Dayton Constitution and post-war developments – seemed to be of a secondary importance.

Nevertheless, the constitution drafters tried their best to lay down the adequate constitutional foundations for a democratic development of the state after the war. Their suggested solutions and the final draft, however, were built on their perceptions of Bosnia-Herzegovina – its history and contemporary historic reality in the 1990s. Their perceptions, like the perceptions of the international public, were – at least to a large extent, if not exclusively – built on the (sometimes uniformed and simplified, often over-simplified) reports, perceptions and comments of the international media, among which electronic media were the most influential. Obviously, in the process of drafting the constitution they did not pay much attention to the rich historic legacies and experiences in Bosnia-Herzegovina, particularly to the culture, the positive experiences and the arrangements of tolerance, relatively peaceful coexistence and cooperation in the past centuries, as well as to solutions and arrangements used in the period of the post-WW II Yugoslav federation (see, e.g., Klemenčič and Žagar 2004, particularly 99–286). The absence of an adequate analysis of positive and negative historic experiences, of the results and problems of various past arrangements and institutions may be considered one of the main deficiencies of the drafting process and the final result. My research on the drafting process and Dayton peace conference and conversations with some of the persons involved in this process lead me to the conclusion that – at least at the time of the conference, but often also at the time of our conversations – the key political personalities and their advisors, as well as the very constitution drafters, did not know much about Bosnia-Herzegovina, its history, traditions and realities and/or that they did not understand them well. I came to the same conclusion talking to several international officials in Bosnia-Herzegovina whom I have met in the past fifteen years. Their perceptions and views were based on stereotypes spread by the media in the time of war in the 1990s. Consequently, conditioned also with their current experiences of Bosnia-Herzegovina as a divided society, they often still believe that this country has traditionally and for centuries been

a divided society, torn apart by ethnic hatred, hostilities and violence. Often, our conversation showed that they knew nothing about traditions and a high level of tolerance, peaceful coexistence and cooperation that had existed in this environment in the past. Consequently, following the contemporary approaches and fashion in designing new systems in divided societies, particularly approaches to constitution drafting in South Africa and the first evaluations of the new constitutional system (see, e.g., Lijphart 1994, 221–231), the drafters of the Dayton Constitution chose to use the theoretical concept of consociationalism, with which they were familiar from public discussions, from their education and from popular and scholarly literature (particularly the theory and works of Arend Lijphart, as well as the scholarly debate that they stimulated) (see, e.g., Lijphart 1968, 1977, 1985a, 1985b, 1990, etc.; see also: Daalder (ed.) 1987; Lustick 1979; McGarry and O’Leary (eds.) 1993; McGarry and O’Leary 1993, 1–40; D. McRae (ed.) 1974; Steiner 1991; Steiner and Dorff 1985; van Schendelen 1984a, 19–55; van Schendelen 1984b, 143–163). They took the theoretical concept of consociationalism as the foundation upon which they designed a new constitutional system and institutional structure for Bosnia-Herzegovina. Consequently, the Dayton Constitution introduced a specific model of consociational democracy and federalism based upon and dominated by the principle of equality of three constituent peoples taking as its point of departure the situation, divisions and balance of power in the territory at the moment when the fighting had been stopped.

No doubt the perception of the constitution drafters was that the concept of consociationalism and a theoretical model of consociational democracy were the most appropriate, if not perfect solutions for Bosnia-Herzegovina and its divided society after the violent, cruel and tragic armed conflict, a civil war usually described as an ethnic war. According to Arend Lijphart (2000, 2002), the existence of grand coalition, autonomy, proportionality, and mutual veto are four main elements of consociational democracy, which can be described as power-sharing democracy. In plural societies, particularly in internally diverse, multiethnic and divided societies, such consociational arrangements may prove more suitable and effective than some other arrangements, such as majoritarian and consensus democracy, unitary and federal arrangements, different executive and party dimensions; at the same time, their various combinations are also possible (see, e.g., Lijphart 1995, 1999). However, the main questions are: whether and to which extent the above-mentioned four necessary elements of consociational democracy actually existed in Bosnia-Herzegovina at the time of the introduction of the Dayton Constitution; regardless of their existence at the time of the Dayton Accords, have those elements been established later; has the introduction of arrangements of consociational democracy strengthened élites

and consequently cemented the divisions and exclusion in Bosnia-Herzegovina?

I agree with Arend Lijphart and Jürg Steiner that consociational theory and arrangements may be useful tools for enabling stability in plural, diverse and culturally segmented environments and societal contexts, particularly when they are combined with proportional representation, federalism and/or various forms of decentralization (see, e.g., Lijphart 2002, 2008; Steiner 2002, 104–120). This is particularly true in divided societies, in environments that experience or have experienced long-term protracted and emotionally charged conflict that is culturally, religiously or ethnically based (see, e.g., Taylor (ed.) 2009). However, a necessary condition for a successful functioning of the consociational concepts and arrangements is the existence of distinct communities and their stable élites that are prepared to negotiate and bargain, cooperate, deliberate and search for consensus based on their common interests and a cost-benefit analysis, while they should be willing to share power in – preferably democratic – political processes and decision making. Although these concepts contrast traditional competitive concepts and models of democracy, particularly individualistic majoritarian democracy, in specific circumstances they may be complementary, intertwined and used in different combinations. Answering the questions listed above, I would argue that the Dayton Constitution established and introduced the formal and institutional framework of consociational democracy in Bosnia-Herzegovina that should have contributed to democratization in the post-war period, more precisely to the consolidation and development of democracy in this country. The introduction of the concept of constituent peoples – Bosniaks, Croats and Serbs – as distinct collective entities, the constitutional guarantees of their equality based on the principles of equality and proportionality in all state institutions and all spheres of life, as well as complex federal arrangements (the state comprised of the Federation of Bosnia-Herzegovina and the Serb Republic (Republika Srpska) and complicated multi-level territorial organization seemed logical solutions aimed at providing peace, stability, democratization and the necessary cohesion in this divided society immediately after the war. However, the presumption, or indeed the belief, that the existing ethnic élites of the constituent peoples, regardless of their roles in pre-war and war-time developments and their nationalistic background, would be the adequate bases and actors of consociational arrangements and processes, could be considered at least problematic if not incorrect. Frequently these ethnic élites and their political leaders, often proponents or at least prisoners of their respective nationalisms, have proved unable or unwilling to engage and participate in a democratic political process that requires continuous negotiations, bargaining, cooperation and deliberation by all participating actors that need to search, determine, elaborate and develop common interests as the necessary basis for stability and

democracy, the future successful political, social and economic development of the country and well-being of all its citizens. Considering experiences of post-war development, the Dayton arrangements as well as international influences obviously failed to transform these ethnic élites into more democratic and inclusive and less nationalistic ones or to replace them with new democratic and inclusive political élites that would – ideally – be able to reach beyond ethnic divisions.

As in other countries of the region of the Western Balkans, regardless of all proclamations of democracy, democratic principles and human rights in Bosnia-Herzegovina, ethnicity and *ethnos* continue to dominate civic and political life, and this can be considered a problem. However, this does not mean that *demos* in democracies should exclude *ethnos* or that in a democratic setting these two are irreconcilable. Quite to the contrary, my position is that democratic systems and institutional models should not ignore ethnic diversity as one of the most important dimensions of social diversity that influence the emergence and elaboration of specific interests in democratic political processes. True democracy should not only recognize and respect ethnic and all other existing diversities formally, but should also:

- ♦ establish mechanisms and institutions that would address them adequately,
- ♦ enable the preservation and development of diversity and specific identities based upon them, should members of the distinct communities so desire, and
- ♦ enable and guarantee the voluntary, free and equal full integration of distinct communities, as collective entities, and persons belonging to them as individuals, into their respective societies based upon the principles of equality and democratic participation, by guaranteeing and providing the highest standards of human rights, including the rights of minorities, as well as the conditions, procedures and adequate institutions for their inclusion, participation and the exercise of adequate influence.

A relevant problem in the democratic development of Bosnia-Herzegovina since its independence is that in the political system established by the Dayton Constitution the ethnic principle became the dominant principle in all spheres of life – including politics³ (see, e.g., Žagar 2007/8 (© 2010)). Stressing the principle of the recognition and equality of “constituent peoples” that I consider relevant, legitimate and even urgent in this diverse multi-national environment, the current constitutional system of Bosnia-Herzegovina is in a way an exclusive and discriminatory system that establishes the ethnic criterion as the key precondition for the election to certain key public offices. This means, for example, that an individual has to belong to one of the “constituent peoples”

to be able to run for the office of the member of the presidency of Bosnia-Herzegovina. Anybody who does not declare him or herself a member of one of “constituent peoples” is automatically excluded, which applies also to persons belonging to the various minorities that live in the country. I believe that such a system contradicts the principle that no one should be forced to declare his or her ethnic affiliation to exercise equal rights within a democratic political system. Analyzing arrangements of this kind, particularly from the perspective of a possible violation of the principle of equality of all individuals, we could speak of constitutionally established ethnic exclusivity that by establishing the criterion of the belonging to “constituent peoples” in a multiethnic and multireligious environment, where several minorities live traditionally, may result in the exclusion of persons belonging to these minorities, as well as in the exclusion and/or marginalization of these minorities as distinct collective entities. In extreme cases, such arrangements could be used as a system and policy of enforced assimilation that is involuntary imposed on persons belonging to minorities who want to participate equally in political life and processes⁴ (see, e.g., Mujkić et al. 2008, 10–11).

Consequently, I believe that in Bosnia-Herzegovina solutions of this kind should be developed and introduced in the planned constitutional reform that will provide for the adequate combination of ethnic and civic principles, thereby enabling de-ethnicization of politics while still providing for the equality of constituent peoples and the adequate protection of minorities⁵ (see, e.g., Gordon et al. 2008, 24; Mujkić et al. 2008, 3–5, 10–11). In other words one could say that the current ethnocracy should be transformed into a true pluralist democracy, in which civic principles and the role of every citizen should be strengthened – while simultaneously the position and equality of the constituent nations and persons belonging to them as well as the highest standards of human rights, including the protection and rights of minorities and persons belonging to them, should be guaranteed and ensured.

4. Instead of a conclusion: The strategies, goals and contents of constitutional reforms – with some recommendations

Following the discussion of contexts, processes and concepts, this section addresses the strategies, goals and contents of constitutional reforms and tries to elaborate some recommendations that, in my view, could intensify and improve

the process, mobilize the necessary public support and contribute to the better quality and improved contents of constitutional amendments.

One of reasons for the very limited success of the past and current rounds of constitutional reforms in Bosnia-Herzegovina can be found in their strategies or – better – in the lack thereof. To be successful, these strategies should clearly and coherently define the foundations, principles, and at least the general directions and goals of planned constitutional reforms as well as ways and means to realize them, particularly activities to promote the necessary mobilization and participation of the public. Their key contents should be also the definition of all relevant actors and their roles, which have to be elaborated precisely in individual phases of the reform process. Considering the complexity of the situation and structure of the population in Bosnia-Herzegovina it is important that all relevant actors who can contribute to the success of constitutional reforms are involved and can participate in the process. These relevant actors include the following individuals and groups:

- ♦ State actors within the state with clearly determined and planned actions and tasks in individual phases:
 - ♦ Political institutions, particularly from the legislative and executive branches of government, but also judicial institutions, and key office holders at all levels (state, federal units – the Federation of Bosnia-Herzegovina and the Serb Republic, cantons and regions, local government);
 - ♦ State and public institutions, particularly the public administration, as well as state and public officials, particularly those employed in the public administration and in fields of education and public information;
- ♦ Non-state actors within the state:
 - ♦ Political parties, their membership and particularly their leaders, as well as independent politicians that can all have important impact on public discourses, political mobilization of the population and all dimensions of political processes – both within democratic political institutions and informally;
 - ♦ Social and political movements, including new social movements, which can co-shape politics and civic society. Considering recent tragic historic developments in the Balkans, one should be especially aware of the potentially destructive roles of nationalist movements, politics and forces;
 - ♦ Trade unions and various professional interest organizations that can

influence and mobilize the public and public discussions and may have an impact on political socialization, political processes and decision-making, particularly through collective bargaining and various (neo) corporate arrangements;

- ♦ Civic society with all its segments and actors:
 - ♦ Non-governmental organizations and various associations of citizens that, through activities in various fields, can contribute to the improvement of social inclusion and integration, education and training, social and political participation, access to information, intercultural and interethnic communication and cooperation, awareness raising, trust building, etc., that are all-important for the internal cohesion of a diverse society and for successful diversity management;
 - ♦ Non-state economic actors, private and public companies and enterprises, whose participation is important for providing economic and social stability and economic development of the country and may be instrumental in determining strategic directions and goals of the future development;
 - ♦ Media, and in particular the recently-developed electronic media, that should provide free and adequate information, promote interethnic understanding, tolerance and equal cooperation, participate in and promote education and training, including civic education, etc. Considering the social, educational and political importance, responsibility and impact of mass media in diverse societies, as well as their role in successful diversity management, it is not surprising that sometimes they are described as the “fourth branch of government” in democracies;
 - ♦ Research institutions and researchers, particularly in law, social sciences and humanities who – with their expertise, research and knowledge – can contribute to discussions and to the improvement of quality of proposed solutions and arrangements included into constitutional amendments; etc.

- ♦ Citizens as individuals who, based on their political rights, either individually or organized in, e.g., political parties, movements, pressure groups, etc., are entitled to participate in democratic political processes directly, e.g., in general free elections and other forms of direct democracy, such as referenda, and indirectly through different forms of indirect democratic political representation by the elected individual representatives (e.g., MPs and other elected public officials) and/or

democratic institutions. For a successful completion of constitutional reforms a broad popular support, ideally by consensus and mobilization, are very welcome and important, because they give democratic legitimacy to the proposed and adopted constitutional arrangements.

77

The above list of actors could be considered an ideal matrix and a check list for broad democratic political participation in political processes in democratic societies in general. Ideally, all these actors should be included in democratic political processes, particularly in decision making in key cases, when a consensus or – at least – the broadest public support is desired to establish their legitimacy. Adequate democratic legitimacy seems to be an even more important and sensitive issue in new democracies, particularly in those countries that are considered divided societies, where the inclusion and participation of all relevant distinct communities may be an additional requirement for the legitimacy of key decisions. On the other hand, however, our observations and research show that actually in past decades in many countries popular participation in democratic political processes has been and still is decreasing, sometimes to the extent that already may call into question the very democratic legitimacy of the respective political systems or, at least, particular decisions. These issues are very relevant also for democratization in Bosnia-Herzegovina and for the success and legitimacy of its constitutional reforms. However, in the case of Bosnia-Herzegovina and its constitutional reform there is a need to discuss and determine also the role of the international community and different international actors that have to be included and can contribute to the successful completion of the process. These international actors are:

- ♦ International institutions and offices in Bosnia-Herzegovina, particularly the OHR with its direct role in the politics of Bosnia-Herzegovina, including the Butmir process;
- ♦ International organizations and integrated units, particularly those that have their offices or representatives in Bosnia-Herzegovina and can provide political, technical and expert assistance and support in the process of constitutional reforms. Especially interesting is in this context the role of the EU, which – through different mechanisms, particularly by insisting on Copenhagen criteria and through mechanism of conditionalities – can have an impact on politics in Bosnia-Herzegovina;
- ♦ Foreign states (particularly through their embassies and diplomats in Bosnia-Herzegovina) that may act individually or in concert with other states, promoting the coordinated views of the international community. Bilateral and multilateral international cooperation and programs can assist internal democratic processes and developments and contribute particularly to the

stimulation and promotion of tolerance, to the improvement and intensification of interethnic and international communication and cooperation that are necessary for successful constitutional, political and economic reforms. Although we know that in their international cooperation and foreign policies states follow above all their own national interests, it is desired that they succeed in coordinating their policies and programs, as well as in undertaking concerted cooperative activities;

- ♦ Foreign and international non-governmental organizations through their direct involvement, projects and programs that may contribute to the improvement of interethnic relations, building interethnic communication and cooperation, empowerment of civic society, as well as to diversity management, prevention, management and/or resolution of crises and conflicts, etc. However, considering their limited resources and influence, one should be aware of their actual capabilities and impact on social and political processes – also with regard to their contributions to the development of civic society and to self-sustainability of their projects and activities in Bosnia-Herzegovina (particularly when foreign funding dries out).

The success of the constitutional reforms and the ensuring of the necessary public mobilization and participation demand that the general directions, strategies, basic principles, longer- and shorter-term goals as well as the ways to realize them, possibly with alternative solutions and scenarios, are clearly defined, presented and promoted. As presented in the introduction, the key preconditions, foundations and directions of the constitutional reform in Bosnia-Herzegovina should be: peace and stability as preconditions for successful development; clearly defined and formulated common interests that should provide the necessary basis for the internal cohesion of this diverse society, among which the integration into Euro-Atlantic integrations is consensually considered the most important common interest of the country; and, as well, prospects for increased prosperity and better life of every individual and the population of the country.

The creation of a prospect of a better life and increased prosperity of the people is also the best strategy for the mobilization of the population – individual citizens – for a broad support of the proposed constitutional reforms. This kind of popular support needs to exist in all parts of the country, ideally across ethnic and other divisions. Past and current experiences show, however, that the success of the constitutional reform to a large extent depends on the support of the key political leaders, usually perceived as the political leaders of the respective constituent peoples, particularly on their will to participate in the process and actually contribute to the adoption of constitutional amendments. Although publicly they welcome the proposals for constitutional reforms, particularly to

please the international community and public, their actual support for certain proposals and arrangements could be in doubt, especially when such solutions may reduce or even endanger their political influence and monopoly in their own environment and within their respective constituent peoples; this is the main reason that they favor arrangements that contribute to strengthening their constituent units and their influence within these units. Consequently, I suggest that the mobilization of the support at the local and cantonal levels, particularly the support of legal and regional institutions and officials – thereby generating a direct and additional pressure on the key political leaders – could be the best strategy for the success of the constitutional reforms. The international community and certain political forces who want to reach across ethnic divisions would be the most likely promoters of this kind of strategy that may, moreover, become attractive also to others, particularly if brings certain advantages and practical rewards to the local and regional communities and people who live there (e.g., in form of improvements in infrastructure, ensured and more favorable funding for cooperative projects that reach across ethnic lines and contribute to the integration, etc.).

The first step in the development of the global strategy of constitutional reforms in Bosnia-Herzegovina is the determination of general principles and goals of this reform, thereby establishing the necessary basis and framework for the development of segmental strategies, the planning of the reform process and activities, as well as for the elaboration of concrete proposals and drafts of constitutional amendments. On the one hand, there seems to be broad support, almost a consensus, regarding some general principles and goals. For example, almost everybody in Bosnia-Herzegovina agrees that:

- ♦ the country needs successful development in all spheres that would bring better life and prospects for the people – all individuals and distinct communities;
- ♦ the process of democratization – based on democratic principles, such as human rights, the broadest popular democratic participation, and equality – should continue and intensify and should contribute to the improvement and higher standards in the field of human rights, including the rights of minorities; these are necessary developments needed to meet the Copenhagen criteria and other requirements for the inclusion of Bosnia-Herzegovina into Euro-Atlantic structures, particularly its future EU membership defined as the central long-term goal of the country;
- ♦ future development and democratization demand constant and intense state-, institution- and capacity-building that all require the development of adequate human resources;
- ♦ the adequate normative framework needs to be established; this requires

continuous and intense legal reforms as well as the necessary changes to the present constitution;

- ♦ there remains much room for the improvement of human rights, including minority rights, which – following the highest international and national standards – should be the basis and yardstick of all decisions, reforms and activities, etc.

On the other hand, it can be very difficult to reach consensus on some principles and concepts, as well as on some concrete proposals and solutions, particularly when they clash with specific interests (possibly, a monopoly) of the current élites in Bosnia-Herzegovina; these are usually defined along ethnic lines. In my view, however, certain concepts and segmental reforms are necessary if Bosnia-Herzegovina is to achieve its main strategic goals, particularly the accession to the EU; for example, the revision and development of the concepts and models of democracy that will replace or at least complement the currently applied consociational arrangements, which are built almost exclusively on the principle of equality of the constituent nations; substantial institutional reforms that will improve the functioning of the state and its institutions; redistribution of powers and competences; legal and ownership reforms; etc. Consequently, the global strategy of constitutional reforms in Bosnia-Herzegovina has to address these issues and, at least, should provide for an ongoing inclusive democratic political process, possibly the continuation of the Butmir process that will stimulate and enable continuous inclusive democratic discussions and deliberation on these issues. In this context, the strategy should determine the ultimate deadlines for the adoption and execution of specific segmental reforms. If this proves impossible initially, the strategy will need to be later revised in a way that may require continuous concerted efforts and the cooperation of all the actors that support such reforms and can agree on their contents. Broad cooperation of this kind, possibly a more permanent and inclusive coalition open to all internal actors, would be instrumental also in the detection, elaboration and continuous reinforcement of common interests in all fields that would contribute to and increase the necessary internal cohesion of the state. The main roles of international actors should be to stimulate, promote and support the reform process, as well as the efforts and activities of internal actors, particularly by various assistance programs, by the promotion of the highest international standards of human rights and pre-accession criteria and requirements, and by assistance in introducing *acquis* and common EU standards.

My recommendation regarding democratic principles and concepts and the necessary institutional reform would be that it is necessary to address those issues and evaluate possible options, which should enable the selection of the best

alternatives. Considering the experiences and particularly detected deficiencies of the current consociational constitutional principles and arrangements, I would suggest a substantial revision of the existing concept that I determine as “ethnocracy” by the introduction of democratic concepts and arrangements that would strengthen “civic” principles and the participation of citizens and improve the protection and integration of the various minorities, particularly the ethnic ones, and persons belonging to them. The current social and ethnic reality of Bosnia-Herzegovina requires that the principles of equality and proportional representation of the constituent peoples continue to be applied as basic organizational principles upon which democratic institutions and processes are built. However, these principles and arrangements need to be complemented by the arrangements that enable and guarantee the inclusion and participation of individual citizens regardless of their ethnic background as well as the adequate protection, integration and participation of various minorities. A reform of this kind would require more than just a cosmetic improvement to the existing institutions and arrangements. Consequently, constitutional amendments would have to introduce political and institutional reforms and arrangements that would, e.g.:

- ♦ introduce a new basic organizational principle that would replace or at least complement “ethnicity”, more precisely the belonging to the constituent peoples in their federal units, as the only exclusive criterion for the full participation of citizens and ethnic communities in democratic politics; this applies particularly to elected offices at the state level. In the institutions where the “ethnic principle” should be preserved, such as the parliament and, at least to a certain extent, government, the principle of reciprocity should also be preserved. This principle, however, needs to be complemented by the constitutional guarantee of adequate minority representation. Following the principles of equality and nondiscrimination, the election to other institutions and offices should be equally accessible to all citizens regardless of their ethnic and other background;
- ♦ reform current federal arrangements, preferably also by the introduction of regionalism, in a way that would require and stimulate permanent cooperation and concerted activities of the state and federal units, as well as cantonal, regional and local government. These federal arrangements should provide for adequate procedures, mechanisms and institutions that would enable their coordination and cooperation, as well as permanent accommodation to changing circumstances and situations that may require also redistributions of competences and powers;
- ♦ introduce a bicameral (or even tri-cameral) structure of the parliament that would reflect the federal structure and ethnic reality of the country, while

simultaneously ensuring effective work and decision making. In the bicameral parliament one chamber would house the representation of federal units, possibly also of cantons/regions, while the other chamber would be a typical citizens' representation – possibly elected in the whole territory of the state, applying the safeguards that would guarantee adequate proportional representation of all distinct communities. Considering the ethnic and political reality of Bosnia-Herzegovina, it seems necessary to preserve the principle of reciprocity of the representation of the constituent peoples in both chambers; this has however to be complemented by mechanisms that would ensure the adequate participation and inclusion of distinct minorities and persons belonging to them, as well as individuals who do not wish to express their ethnic affiliation. Adequate “ethnic” proportionality and inclusion of citizens who do not express their ethnic affiliation should be ensured also in institutions and offices in both federal units and at lower levels;

- ♦ reform the office of the head of state by reducing the ethnically exclusive criterion of belonging to the constituent peoples: if the state presidency is preserved it could be expanded by an additional member that would represent minorities and those who do not express their ethnic affiliation. However, if the presidency is replaced by an individual president of the state, running for this office should be open to all citizens, regardless of their ethnic background, who meet the general criteria;
- ♦ clearly determine and regulate competences and powers of state institutions and, possibly, increase their competences and powers, in order to enable more effective functioning of the state in the fields that would be agreed upon;
- ♦ preserve when possible the use of the principles of proportionality also in the executive and judicial branches of government at all levels; here, however, there must be a guarantee also of adequate representation and the inclusion of minorities and citizens who do not express their ethnic affiliation; etc.

Arguments presented so far confirm the central hypothesis that there is a need to reform the Dayton constitutional arrangements and that this reform should, at least in some segments, be substantial and profound; it should however, be based on the broadest possible consensus of all relevant internal actors and carried out in a way that would ensure equality and the adequate participation of the constituent peoples, as well as the protection, inclusion and participation of various minorities on the one hand, and enable the inclusion and participation of all citizens regardless of their ethnic origin on the other hand. Although there is a general agreement in Bosnia-Herzegovina that the main goals of the constitutional reform are NATO membership and the EU accession of the country, it should be stressed that the reform is above all needed for internal reasons and to meet the interests of the citizens, who expect that with the successful constitutional,

political and economic reforms their lives, standard and future prospects would improve. Consequently, citizens should believe in the local ownership of these reforms; this can generate the necessary broad public mobilization and support for the reforms, thereby ensuring their democratic legitimacy. In this context NATO and EU membership should not be considered only important goals, but also tools that can speed up the reform process, the realization of the main goals of reforms, including democratization and improvements in the field of human rights, and the successful development of the country.

Although constitutional and other reforms are above all internal affairs of Bosnia-Herzegovina and depend on the participation of all relevant internal actors, the roles and importance of the international community and international actors should not be underestimated. The successful completion of constitutional and other reforms is a vital interest of the international community. Successful reforms will not only enable better functioning of the state, speed up its accession to the EU, and contribute to a better life of citizens of Bosnia-Herzegovina, but will also create conditions that would allow for the “phasing out” of the OHR and other forms of direct involvement of the international community into internal affairs of Bosnia-Herzegovina. However, in the process – before the main goals of the NATO and EU membership will become reality – the international community, individual states and international organizations should recognize and adequately award also the progress, segmental and small-scale results that bring improvements and fulfillment of prescribed criteria and standards, particularly the Copenhagen criteria. Such gestures could be, e.g., the introduction of a visa free regime with the EU, inclusion in certain international and EU programs, etc.

In this context, setting precise pre-accession criteria, *acquis* and standards should be considered a form of assistance of the international community and actors to all of its internal actors, and particularly to the state in the reform process. Permanent evaluation of the fulfillment of criteria and standards by the European Commission as well as the determination of deadlines for specific tasks can be also useful stimuli of the reforms. However, I think that Bosnia-Herzegovina still needs the assistance and involvement of the international community and all international actors willing to participate in the following fields and tasks:

- ♦ improvement of the current functioning of institutions, institution- and capacity-building, as well as the elaboration of the reform strategies and specific segmental reforms;
- ♦ inclusion of all relevant actors, particularly civic society, into the reform process and human resources development;
- ♦ state-building process that requires strengthening of those levels of government

84

that are underdeveloped, particularly at the local and regional level;

- ♦ implementation of the current constitutional provisions, arrangements and mechanisms, including, e.g., corporations that have not been realized, but could be potentially useful for a successful development of the state and for the success of reforms;
- ♦ development of evaluation criteria and deadlines for the reforms, which are particularly important in a step-by-step approach that can bring partial results; etc.

I would conclude that with the success of the constitutional and other reforms in Bosnia-Herzegovina everybody (individual citizens and all other internal actors, including local communities, cantons, federal units and the state of Bosnia-Herzegovina, as well as the international community and all international actors) can win and benefit. This approach should replace traditional attitudes and perceptions in Bosnia-Herzegovina in the past decade and a half that everybody and every community has been and is “a loser”. Potent tools in this context can be common interests agreed by all relevant communities and the majority of the population that can become cohesive forces and may help in bridging divisions and gaps that exist in the country. In the realization of this inclusive approach, however, the existence of nationalist ethnic élites – that are interdependent and, consequently compatible with their specific interests, and afraid that inclusive common approaches may reduce or even eliminate their monopoly in their respective environments – may be a problem that will require additional assistance and possibly even the intervention of the international community.

Notes

¹ In other words, it established a specific model for the political participation of the main ethnic communities, the constituent peoples that dominate the whole system, while it failed to provide adequate solutions for the democratic participation of individual citizens, as well as for other distinct (ethnic and other) communities, particularly various minorities.

² During my research on social processes, transformations and transitions, democratization, civic education, diversity management, ethnic relations, conflicts and reconciliation in the Balkans in the past two decades I have made than two hundred trips to the region and visited all of its countries. I combine diverse qualitative and quantitative approaches and methods. In addition to studying and interpreting the scholarly literature and research reports, documents, official and other materials, media news, reports and comments, I have conducted several hundred interviews in all countries of the region (more than two hundred in Bosnia-Herzegovina) with scholars, politicians, public officials, journalists, civic society activists and public opinion leaders from those countries, particularly those who were in different capacities involved in relevant processes and fields, as well as with numerous “internationals”, particularly representatives of foreign countries, international governmental and nongovernmental organizations, scholars and journalists. These interviews and conversations provide very interesting insights, as well as various views and evaluations of those processes, their concepts, nature and contents, outcomes and impacts in the respective societies that complement and often contradict views, approaches and evaluations presented by the media and scholarly literature.

³ The dominance of ethnic principles – as organizational principles and dominant criteria in decision making in a given society – over civic principles and concepts of liberal democracy may be particularly problematic and dangerous in environments where the dominant ethnic, racial and religious communities introduce a system of government and politics that exclude or discriminate against others based on their different ethnic, racial and religious characteristics (e.g., the system of apartheid in South Africa and the situation of non-Arians in Nazi Germany, to name the two most extreme and universally known cases). Although this dominance in the system established by the Dayton arrangements is less extreme it can still be considered problematic and a limitation on traditional democratic principles.

⁴ From the perspective of the principles of equality and freedom of expression of ethnic belonging, we should mention also a problem of the status and situation of members of a certain “constituent people” who live in an entity that “belongs” to other “constituent people or peoples” and is, consequently, “dominated” by it or them.

⁵ Ethnicization of politics describes ethnically based, determined and directed politics and policies, which are in their nature often nationalistic, and this may simply be called ethno-politics. Extreme forms of the ethnicization of politics are different forms of ethnic entrepreneurship. Those practices can be described as the shameless misuse of ethnicity for political and economic ends. They include the reproduction and strengthening of ethnic and cultural differences that help increase and better define ethnic borders and divisions in different ethnically diverse environments. Strategies involving the constant invention, reproduction and strengthening of ethnic and cultural differences and rifts, which nationalists apply in many environments, reinforce perceptions of divided societies and of ethnicity and culture(s) as key factors and territorial and non-territorial delineators of these rifts and divisions.

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