



Statehood – Between Fragility and Consolidation

A Gridlocked State

Bosnia and Herzegovina between
EU Aspirations and Politically Induced Paralysis

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Bosnia and Herzegovina was essentially given its constitution from the outside in 1995. As part of the Dayton Peace Agreement, its main aim was to keep the peace by dividing power along ethnic lines – at the expense of efficiency. The state functions to the extent that its political elites want it to. The recent years and months, however, have been marked by blockade and increasing ethno-national egoism.

A Fragile State in Europe?

The German Federal Ministry for Economic Cooperation and Development (BMZ) defines fragile states as those “in which the government is unwilling or unable to fulfil fundamental state functions in the areas of security, rule of law, and basic social services”. State institutions are weak or at risk of collapse, and the population suffers from abject poverty, violence, corruption, and political despotism. Moreover, fragile states are often affected by violent conflicts and thus represent a regional and international security risk.¹

Bosnia and Herzegovina (BiH) is a state with a troubled past and a challenging present and future. As with various other countries in the region, people’s daily lives are characterised by political and economic instability, and developments regarding the rule of law and the fight against corruption and organised crime continue to be fraught with difficulties. Nevertheless, although BiH displays characteristics of a fragile state in certain aspects, it does not fall into the fragile state category as a whole. In addition to corruption and deficits in the rule of law, state institutions are inefficient; yet, we cannot speak of an erosion of state power, rampant insecurity, political arbitrariness, or excessive poverty. Bosnia and Herzegovina, which is on NATO’s doorstep, is also not affected by any violent conflict and therefore does not pose an international security risk. The causes of the Bosnian state’s dysfunctionality, especially at national level, lie primarily in the political unwillingness of the ruling elites to build a fully functioning state.

Structural Factors of Instability

Following the conclusion of the Dayton Peace Agreement in 1995, Bosnia and Herzegovina experienced a long period of stability and relative progress. With the assistance of the international community, new institutions were created and existing ones reformed and modernised. The country finally officially applied for EU membership in 2016. By this time, it had become evident that BiH could make progress even within the highly complex constitutional construction in place since the 1995 Dayton Agreement. The prerequisite for this has always been the existence of a basic consensus among the local political actors. This basic consensus among the leading political forces on the path to be taken for BiH’s continued development has increasingly eroded over recent years. In the autumn of 2021, this led to the most serious political crisis since conclusion of the treaty, which has further intensified this year.²

The political crisis also has ramifications on the general functioning of state institutions and the rule of law in BiH, since structural weaknesses in the Bosnian state’s legal and institutional spheres are interrelated with the political factor. These structural weaknesses often enable political elites to paralyse the state and its institutions legally, and usually without serious consequences. This article aims to highlight these weaknesses in order to help identify possible solutions. These shortcomings are primarily divided into three areas: the constitutional framework, the inefficient state institutions, and the tame or even dysfunctional rule of law.

Annex IV to the peace treaty, which was drafted in the US city of Dayton, Ohio, and signed by the warring parties in Paris on 14 December 1995 (Dayton Agreement), contains the “Constitution” of BiH. Constitution is in quotation marks, because it does not correspond to an ideal constitution in the sense of the “constitutional concept of the European-American world of states”.³ Although it has the character of a state-constituting framework and contains provisions on state organisation, fundamental rights, etc., it lacks an important constituent feature: the BiH Constitution did not come into being as a result of an internal constitutional process, but was drafted and put into force owing to the Dayton peace negotiations as part of the peace treaty. Although it was not adopted in an exclusively external process,⁴ the Bosnian people or their representatives did not directly adopt it either.⁵

In drafting the constitutional text, care was taken to ensure that no ethnic group could outvote the other.

The text can be characterised as a classic *real-politik* compromise between the warring parties at that time, drafted under strong pressure from the international community led by the United States of America, and attached as an annex to the peace treaty after being negotiated and formulated within a short period of time. Nevertheless, representatives of most of the population in the entity assemblies (the National Assembly of the Republika Srpska and the Parliament of the Federation of BiH) and the then still existing Republic Assembly subsequently approved the text, which is why the legal assessment seems justifiable that formal deficiencies should “not affect” the validity of a constitution that came into being under the conditions of an “international legal crisis”.⁶ However, this weakness of the BiH Constitution is likely to be the subject of repeated controversy, which is not conducive to

the country’s stability. In its 1997 decision, the Constitutional Court of BiH expressed the legal opinion (*obiter dictum*), which was not crucial in the case decided at the time, but was important for legal classification of the annexes, that the BiH Constitution must not collide with the Dayton Treaty and its other annexes and was on the same legal hierarchical level.⁷ It may be that the court consciously avoided adopting a position on the question of the legal quality of the BiH Constitution and the formal legality of its realisation. However, the decision allows the reading that the court indirectly attests the same legal quality to the BiH Constitution as to the other annexes of the Dayton Treaty.⁸ This, mind you, for a law that by definition has the highest rank in a constitutional state.⁹ Finally, a factor that seems of lesser importance at first glance, but which can scarcely be underestimated for the perception and impact of the document, is the fact that the legally binding original language of the constitutional text is not Bosnian/Serbian/Croatian, but English.¹⁰

The agreement’s primary goal, and thus also the content of the BiH Constitution, was the restoration of peace and the preservation of the status quo, i.e., more or less the legalisation of facts created by armed force. This did not resolve the conflict, though. Instead, it froze it in the hope that this new constitutional framework would foster greater integration of all parts of the country and ethnic groups in the future. This new constitutional framework is predominantly based on the construct of the “constituent peoples” (Bosnian Serbs, Croats, and Bosniaks). It has led to a constitutional system that emphasises the ethnically based division of power and grants the three constituent ethnic groups (too) many veto and blocking possibilities. In drafting the constitutional text, special care was taken (for understandable reasons) to ensure that no ethnic group could outvote the other.¹¹ This applies directly to the federal legislature and to the executive at almost all levels of government and indirectly affects the judiciary, too. As a result, the principle of unanimity and parity is preferred in voting and appointments to office. It is therefore not surprising that there is often

complete gridlock in decision-making processes at all levels, insofar as this principle applies.

The ethnically based constitutional framework also determines the state's territorial organisation. BiH became a highly complex and extremely decentralised state comprising three parts: the Federation of Bosnia and Herzegovina, populated by a majority of Bosniaks and Croats and in turn divided into cantons (three cantons with a Croat majority, five with a Bosniak majority and two without a clear majority); the Republika Srpska, populated by a majority of Serbs and organised in a centralised manner; and the Brčko District, a special self-governing body with far-reaching autonomy. The first two are also referred to as "entities".

The High Representative can make individual decisions, including dismissing state presidents, in order to maintain peace and stability.

Finally, in the 27 years since concluding the Dayton Treaty, cracks have also emerged in the construct of "constituent peoples" as a result of several decisions taken by the European Court of Human Rights (ECtHR) in Strasbourg.¹² In these decisions, since 2009, the Court has repeatedly established the illegality of discrimination against persons belonging to groups other than the constituent peoples in BiH, or belonging to one of the constituent peoples but residing in the territory of an entity in which they do not form a majority, regarding their right to stand for election to the "House of Peoples" (second chamber of the BiH Parliament) or for the federal presidency. Despite the ECtHR's decisions, which are binding on BiH, the ethno-national political elites have thus far failed to implement the court's requirements by amending the constitution and electoral law accordingly. Instead, decisions of the ECtHR have been used as an opportunity to further

undermine the constitutional foundations. Bosnian Croats, for example, are now demanding more extensive institutional and constitutional rights going beyond a mere change in electoral law, including the creation of a contiguous Croat-dominated constituency for elections to the federal presidency, with some voices even calling for a separate, third "entity".¹³ Should they succeed in this, it would mean a division of the state and further consolidation of the ethnic-national principle.

In light of the complex nature of the constitutional system, it is not surprising that the Dayton Agreement (Annex X) created the Office of the High Representative (OHR). This institution is supposed to ensure civilian implementation of the peace treaty and, equipped with the "Bonn powers"¹⁴, effectively secure peace by maintaining and strengthening the functionality of BiH institutions. The High Representative may regulate abstract as well as concrete and specific legal issues in a binding manner by issuing laws and regulations, culminating in amendments to the constitutions of the entities. In order to maintain peace and stability, he can also take individual decisions, including dismissing state officials, even state presidents, and recalling elected representatives. The High Representative made use of these powers on multiple occasions in the early years after the war's end, but the intensity of use of the "Bonn powers" under Paddy Ashdown as incumbent (2002 to 2006) in particular, provoked much criticism. As a result, the Venice Commission of the Council of Europe found that the "Bonn powers" were "fundamentally incompatible with the democratic character of the state and the sovereignty of BiH".¹⁵ It qualified the powers of the High Representative as emergency powers and stated that emergency powers must "cease together with the emergency originally justifying their use".¹⁶ Most jurists, however, characterise the powers of the OHR differently. The majority believe that the powers derive from the position of the OHR as a kind of international territorial administrator or trustee,¹⁷ while others even speak of a protectorate or quasi-protectorate¹⁸. This means that the OHR's powers would





Remembering the victims of the bloody war: According to estimates, over 11,000 people were killed in the siege of Sarajevo alone between 1992 and 1995. The Bosnian Constitution must be seen above all as an attempt to ensure peace in this multi-ethnic state. [Source: © Dado Ruvić, Reuters.](#)

not cease with the end of a state of emergency, which would be difficult to define and determine, but only with the formal dissolution of the OHR; this would have to be accompanied by the abrogation or termination of Annex X to the Dayton Agreement.

On the other hand, there is almost unanimous agreement with the 2005 finding of the Venice Commission of the Council of Europe that “[t]he combined effect of these [constitutional] provisions makes effective government extremely difficult, if not impossible. Hitherto the system has more or less functioned due to the paramount role of the High Representative.

This role is however not sustainable.” Finally, the Commission recommended that the use of the “Bonn powers” “should gradually be abandoned, preferably in parallel with a constitutional reform making the legislative process in BiH more efficient”.¹⁹ Over the past 15 years, the “Bonn powers” have indeed scarcely been used by the incumbents Schwarz-Schilling (2006 to 2007), Lajčak (2007 to 2009), and Inzko (2009 to 2021), to strengthen local ownership.²⁰ While the concomitant relative passivity of the OHR²¹ consequently left the institution “toothless”²², the constitutional reform strongly recommended by the Venice Commission, the Council of Europe,²³ and the international community has

not yet been implemented. Instead, there has been a slow erosion of the constitutional order, which the OHR has so far been unable to halt.

Institutions in the Existing Political-Social Framework

It is clear that the existing constitutional construction not only favours the creation and preservation of ethno-national political elites,

but essentially encourages it. The distribution of political power thus runs along ethnic lines, and the glue that holds the “political” parties together is primarily the ethno-national component and not, or only to a far lesser degree, political ideas. The political actors and their parties (usually in this order) do not focus on the well-being of the population, but rather pursue the particular interests of their own ethnic or interest group or, as is often unfortunately



the case, purely personal concerns. The existing constitution does not protect the rights and interests of the individual ethnic groups as intended, but rather protects the ruling elite from accountability.²⁴

Thus, the parties organised in this way, which play a decisive role in BiH's democratic constitutional system, and the correspondingly staffed governments, shape the entire organisation of

the state. Subsequently, the state institutions are not used as instruments to secure and promote the common good, but serve to enforce and defend the above-cited interests and concerns. Sometimes, therefore, the institutions are referred to as the "prey" of the ruling elites.²⁵ This infiltration and strong control of democratic institutions by the political parties and governments is one of the reasons why BiH is also characterised as a "hybrid regime"²⁶, a kind of tripartite ethnocracy.

The emigration of young and educated people abroad further strengthens the ethno-national power structure.

The population's trust in the institutions is accordingly low,²⁷ which, in turn, negatively impacts the development of the rule of law.²⁸ To better understand these processes, it is necessary to include and consider the socio-psychological background: Bosnian society is a (fear) society still marked by war and its repercussions. Such societies live with a collective social trauma accompanied by low social trust, which is also passed on to the next generation.²⁹ This is exacerbated by the young and educated, including democratically educated, migrating abroad,³⁰ strengthening the ethno-national and at times nationalist power structure over the short and medium term. Especially considering the assumption that precisely the population group with a lower level of education tends towards authoritarian political views,³¹ emigration of the educated increases the relative share of the population with illiberal and less democratic attitudes.

Protests against corruption and political gridlock: The elites in Bosnia and Herzegovina have made the state and its citizens increasingly hostage to their personal interests.
Source: © Dado Ruvic, Reuters.



The role and extent of organised crime must also be considered in this political-social context: BiH has one of the highest rates in Europe.³² Besides corruption in the political and economic spheres,³³ the level of corruption in public administration has recently increased, too.³⁴ The interdependency between politics and organised crime is alarming,³⁵ especially because it means that state institutions no longer serve the public, but rather the interests of criminal groups along with those of the political parties.

The weakening of the order established in Dayton began as early as 2006.

Rule of Law: A Justice System without Significant Results

A functioning and independent judiciary is invariably one of the most important prerequisites for the rule of law. BiH has regressed in this area in recent years, as evidenced in both quantitative³⁶ and qualitative³⁷ analyses.³⁸ The EU attested to BiH's judiciary in 2021 that the "[p]ersistent and evident signs of deterioration continue to require urgent measures to strengthen the integrity of and regain citizens' trust in the judiciary. Lack of commitment to judicial reform from political actors, and the poor functioning of the judicial system continued to undermine the citizens' enjoyment of rights and the fight against corruption and organised crime."³⁹ Former EU Special Advisor to the Bosnian Judicial Council Kees van der Weide has pointed out that some 75 million euros has gone into reforming Bosnia's judiciary over the past 15 years, with no tangible results.⁴⁰

The reasons for this situation are multi-faceted. In most cases, political influence on the work of the judiciary,⁴¹ and the complex and fragmented legal system are cited as explanations.⁴² These factors certainly play a major role, but the mentality and underlying attitude of those

working in the judiciary is also crucial. Some of the informal structures in the BiH administration and judiciary still function according to the old socialist patterns of the pre-war period. Politicians and holders of public office submit to discipline as in the times of the nomenklatura. This attitude is deeply rooted in the judiciary and has its origins in the socialist legal tradition, in which judges and prosecutors do not see themselves as organs of justice and servants of the population, but as loyal wielders and executors of state power. Numerous changes in the law and reforms initiated by the international community have not yet led to a rethink in the way public officials deal with the law and citizens: there continues to be a positivist⁴³ and inflexible adherence to procedural formalities, a rigid and dogmatic-formalist interpretation and application of the law, and an eschewal of substantive decision-making through merely cursory examinations of legal issues, as was common in the outdated socialist legal practice.⁴⁴

Drivers of Dysfunctionality: The Ethno-National Political Elites

The weakening of the system established by the Dayton Constitution and its institutions began as early as 2006, when two of the three major parties, the Croatian Democratic Union in BiH (HDZ BiH, led by Dragan Čović and elected by a majority of Bosnian Croats) and the Alliance of Independent Social Democrats (SNSD, led by Milorad Dodik and elected by a majority of Bosnian Serbs) articulated their calls for reversing some state-building reforms and for more autonomy, including secession. An important aspect of their policy was to remove international judges and prosecutors from the highest courts and from the BiH prosecutor's office. With success: only the Constitutional Court of BiH has three of its nine judges appointed by the international community ("hybrid court"⁴⁵). The removal of international actors from the judiciary correlates with the gradual regression of the Bosnian rule of law.

The OHR's annual reports to the UN Security Council⁴⁶ illustrate that since 2006, Dodik has

reinforced his threat of secession with claims that the central government has “stolen” the authority of the Republika Srpska against the will of the Bosnian Serbs. His rhetoric has become increasingly aggressive since the end of 2021. He and his party took concrete legislative steps in the local parliament of the Republika Srpska that unconstitutionally curtailed the central BiH state’s authority. Among other things, the High Representative had to repeal a new law regarding state property of the Republika Srpska, which was in clear violation of the Constitution, as determined by the BiH Constitutional Court.

Besides Dodik, the OHR’s reports also name HDZ BiH leader Čović, who is urging an independent Croat entity in Bosnia. For years, HDZ

BiH has pursued a strategy of attacking certain laws at state level. It challenged several legal provisions from the Criminal Procedural Code, which included an effective approach to prosecuting organised crime, before the Bosnian Constitutional Court. The Constitutional Court subsequently declared some of them (arguably correctly) unconstitutional. While lawsuits before the Constitutional Court are legitimate in principle and warranted in certain cases, there are indications they are being used by the HDZ BiH as a tactical tool for delegitimising the legislature.⁴⁷ A party involved in the government, which also took part in the legislation itself, should constructively pursue legislative changes in parliament and only appeal to the Constitutional Court as a last resort.



Putin’s man in Bosnia: Bosnian Serb leader Milorad Dodik is destabilising the heterogeneous Western Balkan state from within under Kremlin guidance. Source: © Mikhail Klimentyev, Sputnik, Kremlin via Reuters.

In the BiH parliament, HDZ BiH and SNSD are also blocking legislative reforms that are important for EU accession or further rapprochement, including reforms to electoral law and the Judicial Council.⁴⁸ Finally, the Party of Democratic Action (SDA, the largest Bosniak party led by Bakir Izetbegović) is not free from blame either when it comes to undermining BiH institutions. It has been represented as a governing party at all state levels almost continuously since BiH's independence and, similar to other parties mentioned, is involved in nepotistic and clientelist machinations,⁴⁹ which further weaken the rule of law.

Owing to their destructive activities and corruption, the United States has placed high-ranking officials of HDZ BiH, SNSD, and SDA on its sanctions list.⁵⁰ Among others on this list is Dodik, who is also considered "Putin's man" in Bosnia and Herzegovina. He is accused of permanently destabilising BiH at the behest of the Kremlin.⁵¹ Thus far, he has successfully prevented BiH from introducing sanctions against Russia through his ministers and parliamentarians and with the support of the HDZ BiH. Dodik also firmly opposes the country's potential accession to NATO, of which Bosniak and Croat politicians as well as corresponding sections of the population are in favour.

External Drivers of Instability

BiH's instability is not only homemade. The above-mentioned structural challenges are compounded by Russia's efforts to further destabilise BiH. Russia's influence is based on two pillars. The first pillar is investment. For example, in 2018 and 2019, Russia ranked first in direct foreign investments in BiH.⁵² Russia remains one of the biggest investors, with most investments having been made in the energy sector. For example, one major investment was in an oil refinery in Brod, a town in the Republika Srpska. Such investments expand Russia's political influence, but are also a source of income for tycoons in Putin's entourage, who often act as financiers in BiH.⁵³ What is more, BiH is heavily dependent on gas imports from Russia. Finally,

there are economic ties between individual influential persons from BiH and oligarchs and state actors in Russia; Dodik, in particular, is rumoured to have such ties to Moscow.⁵⁴

The second pillar is the political influence on politicians in the Republika Srpska and on local pro-Russian voices in BiH. Russian propaganda is also carried into BiH, for example, by the Serbian Orthodox Church and disseminated through dubious organisations such as the biker association Night Wolves and so-called humanitarian associations.⁵⁵ As a result, Russia can be seen as the biggest external disruptive factor in BiH.

It has recently become clear that the ethno-national political elites do not want a functioning Bosnian state.

Besides Russia's influence, it is important not to underestimate the destabilising effect of certain policies from the immediate neighbouring countries. Serbia and Croatia, who view themselves as advocates and protectors of the Bosnian Serbs and Bosnian Croats, respectively, are increasingly interfering in the country's internal affairs. Serbia, whose policy is supported by Russia, relatively openly promotes Dodik and his ethno-national policy.⁵⁶ Croatia, meanwhile, supports the ethno-national policy of Čović and the Bosnian HDZ in BiH, who seek to establish their own autonomous region (entity) detached from the Federation of Bosnia and Herzegovina.⁵⁷

Outlook

BiH is a complexly organised state, with numerous levels of government and long decision-making processes. However, formally this state has all the necessary institutions to guarantee the rule of law. So far, what has been lacking is the political will to do so. In recent years, especially in recent months, it has become clear that the ethno-national political elites do not want a functioning Bosnian state. The dominant parties

disagree about which path the common state of BiH should embark on. Rather, they are also contesting the minimal consensus that exists in the form of the Dayton Constitution. The weak and partly politically influenced judiciary cannot counter this dismantling of the Bosnian state and rule of law.

An analysis primarily focused on rule of law issues can only identify the relevant problems and point out their reasons; the solutions must be worked on by politicians. In every sovereign state, the government and parliament are responsible for this. Yet, BiH is in a special situation: the international community, especially the United States and the EU, but also other states, have exerted such a great influence on the country's development since conclusion of the peace treaty that a purely internal solution hardly seems possible. The country is not only economically highly dependent on other states and external donors, but also politically. It is doubtful whether the political elites see any reason to further develop the rule of law under these conditions. In any case, an intrinsic motivation to do so cannot emanate from the legal tradition of the former socialist country. The lack of motivation may also be due to the lack of external incentives or pressure from the Western partners, while the incentives and pressure coming from Russia and China seem to be effective to some extent.

If the Bosnian decision-makers do not give up their blockade attitude, the High Representative will again have to resort to the “Bonn powers” more often.

One major challenge is the lack of a common strategy and common goals among external players, which is also obvious to the people of BiH. This not only refers to the EU and the United States on one side, and Russia and China on the other; there is also no clear consensus

among Western partners on the development paths BiH should take, nor does the EU seem to have developed a clear concept for its policy towards BiH, even after Russia's attack on Ukraine. The legal reforms in BiH are a case in point. While the EU strongly promoted continental European civil law, which is mainly based on the Roman-Germanic legal system, when developing the Bosnian legal system, the United States and Great Britain successfully “exported” their legal institutions, established in common law, to BiH. That means different legal systems apply in various areas within BiH.

In this situation, the international community, above all embodied in the institution of the OHR, has more than just the duty arising from the Dayton Treaty and the self-imposed responsibility to secure peace and ensure the stability and functionality of constitutional institutions. That BiH continues to need the presence of the international community became clear most recently in June 2022, when Čović and Dodik blocked funding for the elections scheduled for October 2022. High Representative Christian Schmidt had to use the “Bonn powers” to mandate sufficient funding.⁵⁸

If the Bosnian decision-makers and parliament do not give up their blockade attitudes, which is unlikely at present, the High Representative will again have to resort to the “Bonn powers” more often so as to stabilise the country and ensure that proper elections are held. Only in this way will the ethno-national rhetoric be quietened and moderate political forces able to push through a different (especially economic, rule of law, and social) agenda. In the next step, institutions such as the judiciary in particular must be depoliticised.

Schmidt, meanwhile, had a difficult start in BiH. As soon as he assumed office, he inherited a conflict from his predecessor, Valentin Inzko, whose last official act was to enact a penal provision criminalising the denial of the genocide. Dodik used the OHR's decision, supposedly directed against the Bosnian Serbs, as a template for intensifying his secessionist rhetoric, and the

Republika Srpska parliament declared its intention to withdraw from the national judicial system. Meanwhile Russia, and with it Dodik, has not recognised Schmidt's appointment and does not consider his decisions legitimate.⁵⁹ Schmidt's attempt to start a constructive dialogue has thus far been met with separatist rhetoric in the Republika Srpska.

To enable opportunities for action in BiH and to achieve real progress in democracy and under the rule of law, what the country needs more than new reforms and legislative changes is a shift in mentality and strategy. This change in mentality is necessary on both sides, because too often in BiH there is an impression that external players with considerable influence on Bosnian politics do not sufficiently understand Bosnian society and politics, that their approach towards BiH is superficial and overly bureaucratic, to the point of feeling that there is no international political interest in further developing BiH or resolving its conflicts. The average Bosnian citizen's hope that Western democracies want Bosnia "in Europe" at all has come under pressure. This is not a good environment for bringing a state closer and binding it to the EU in the long term. The EU – in cooperation with international partners – must develop a strategy that corresponds to the new geopolitical situation and especially to the needs and mentality of BiH and its people.

– translated from German –

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