

Chapter Five

Challenges of Democracy in Bosnia and Herzegovina

Sasha Toperich and Mak Kamenica

Twenty years have passed since the Dayton Peace Accords stopped the war in Bosnia and Herzegovina (BiH). Since then, the reconciliation and the nation building process have had many ups and downs. The member states of the Peace Implementation Council (PIC), an international body in charge of implementing the Dayton Peace Agreement for Bosnia and Herzegovina, often disagreed on priorities for the international community in this country. The Office of the High Representative (OHR) that was mandated under Article II of Annex 10 of the Dayton Peace Agreements to monitor the implementation of the peace settlement lost its efficiency in recent years, passing the torch to the EU Special Representative in BiH and the EU Delegation to BiH. After 9/11, the United States faced a new set of national security threats and problems around the globe, leaving to the EU the leading role in BiH. But the EU was faced with a set of new problems as well: the crisis in Ukraine, Mediterranean migration, Greek debt uncertainty, economic crises, and lack of steam for further EU enlargement.

These new realities made the focus on unfinished business in BiH scattered. It resulted in a set of EU political inconsistencies in BiH, along with the rise of corruption and political anarchy in BiH. The country's progress towards EU membership was slow and insignificant. In February last year, huge violent demonstrations alerted local politicians in the country, to some extent. The international community (IC) has caught this moment, realizing it needed to engage more strongly in BiH. With several unsuccessful attempts to make BiH a more functional state, through efforts to implement constitutional reforms in the country, the EU has launched a robust socio-economic reform plan, accepted by BiH. If BiH successfully implements socio-economic reforms, it may indeed have better internal conditions to engage in political and institutional reforms and create a more functional country. Social and economic reforms will not address the Sejdic-Finci ruling at this point in

time, an issue that BiH politicians could not resolve after debating it for four years. EU membership without the implementation of the European Court on Human Rights ruling is simply not possible. Washington is strongly backing newly EU initiated social-economic reforms, but with many failed efforts in the past, caution is highly present.

What does the framework for reforms include? Will the effort, even if successfully implemented, achieve a better life for ordinary citizens, and create a more prosperous, politically stable country? Clearly there are fewer and fewer fans cheering for BiH, and maybe this time, local politicians got the memo. Engaging strongly in and implementing the socio-economic reforms may well be the last serious chance for BiH to catch the rest of the Western Balkans in the EU integration process. This chapter gives perspective on BiH's unique European journey.

From 1945 To 1995

Before its dissolution, the Socialist Federal Republic of Yugoslavia (SFRJ) consisted of six federal republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia), and two autonomies (Vojvodina and Kosovo). The Communist Party was the only party ruling the country from its formal inception in 1943 to Marshal Josip Tito's death in 1980. The role of the Communist Party was cemented in the 1946 Constitution and its influence grew proportionally since then, creating a very centralized system that ruled the country for almost four decades. The process of decentralization slowly began in the 1970s. After Tito's death in 1980, the country was ruled by a collective Presidency comprising eight members, one from each republic and one from each of the two autonomies. The Presidency chairmanship rotated every twelve months. Fifty years of one-party rule left a deep mark on the development of democracy in the countries of the former Yugoslavia. The dissolution of Yugoslavia began in the 1990s only to descend into brutal wars, ethnic cleansing, genocide, waves of refugees and hundreds of thousands dead and missing. In BiH, the General Framework Agreement for Peace was reached at the Wright-Patterson Air Force Base near Dayton, Ohio, United States on November 21st 1995, known as the Dayton Peace Accords.

Achieving peace in BiH at Dayton was a major international effort, successfully led by then-U.S. Secretary of State Warren Christopher and Accord's chief architect Richard Holbrooke with EU Special Repre-

sentative Carl Bildt and Russian First Deputy Foreign Minister Igor Ivanov as two Co-Chairmen. The main participants from the region were Alija Izetbegovic, President of Bosnia and Herzegovina and Muhamed Sacirbey, Foreign Minister of Bosnia and Herzegovina; Franjo Tudjman, President of Croatia; Slobodan Milosevic, President of the Federal Republic of Yugoslavia (representing Bosnian Serbs' interests, in the absence of Bosnian Serb leader Radovan Karadzic). U.S. General Wesley Clark, later NATO Supreme Allied Commander Europe; Pauline Neville-Jones, head of the UK team, and Colonel Arundell David Leakey from the UK military; and Paul Williams of the Public International Law & Policy Group that served as the legal counsel to the Bosnian government delegation.¹

The full agreement was signed in Paris on December 14th 1995, witnessed by Bill Clinton, U.S. President; John Major, UK Prime Minister; Jacques Chirac, President of France; Helmut Kohl, German Chancellor, and Viktor Chernomyrdin, Russian Prime Minister.

Political Scene from 1995 to the Present

Political leaders of post-war BiH are the inherited former Yugoslavian Communist Party political elites, suddenly 'transformed' into 'democratic,' 'pluralistic' leaders, and ethnic community dominant political party elites pursuing nationalist agendas. Interestingly enough, in the last twenty years of peace in BiH, almost all large political parties split up into two or more smaller political parties, creating antagonisms beyond the capacity to be resolved by such a small country. The platforms of all political parties are very similar. All of them profess joining the EU as matter of national interest, promising more jobs, justice, prosperity and reforms. Yet, immersed in the melting pot of day-to-day politics, and with such a complex constitutional structure, real progress on these promises is very slow. It often happens that one political party is represented not only both in power and in the opposition, depending where they had enough votes to join the ruling coalition and where they didn't, but also on what are the current fabrics of personal relations between political leaders, who changes their "firm alliances" in no time. The underlying interest of all political parties is to be the one that sets

1. https://en.wikipedia.org/wiki/Dayton_Agreement.

all the rules, gaining money, control, and power. This makes it very difficult for voters to really vote for change.

Democracy under the Most Complex Political System in the World

The Dayton Peace Accords stopped the war but also created arguably the world's most complicated political system, comprising a tripartite Presidency (Bosniak, Serb, and Croat members of the Presidency rotating the chairmanship every eight months), a Council of Ministers (at the state level), two entities (Federation of BiH and Republika Srpska), one district (Brcko), and municipalities. In the Federation of Bosnia and Herzegovina, in addition to these layers of administration, ten cantons were created. Annex 10 of the Dayton Peace Accords provided a legal basis for the creation of the Office of the High Representative (OHR) and for the High Representative to oversee the civilian implementation of the Dayton Agreement. The OHR also serves to represent the countries involved in the implementation of the Dayton Agreement through the Peace Implementation Council (PIC). At its 1997 meeting in Bonn, the PIC agreed to grant further substantial powers to avoid delays and obstructions by local politicians in implementation of the Dayton agreement. Hence, the small country of 3.8 million started its post-war building of democracy with fourteen governments and parliaments, 150 ministers, and all together, over 350 elected officials.

Candidates for the Presidency are, on an ethnic basis, self-defined and they can only be from within the three constitutive peoples. "Others," or minority representatives, are not eligible to run for the Presidency, a disqualification of a large percentage of the population seriously at odds with the very foundation of democracy.

As an example, following the general elections held on October 3rd 2010 that produced a fragmented political landscape, the country waited eighteen months before a ruling coalition and parliamentary majority was formed. Political crises spread to local levels as well and within the complex Federal entity, where political leaders need to agree not only on ministerial appointments for the government of the Federation of BiH, but also on the ministerial appointments for all ten cantons within the Federation of BiH. Political elites need to agree also on which political party controls seats in the administration of which public company,

as the main financial source for funding both party and installing loyal party members to their helms. Appointment of crucial positions in the justice and security apparatus also took a long time and plenty of negotiation, not because political leaders look for independent, professional, appropriate people for the jobs, but rather for politically suitable and “controlled” individuals that will serve as an added mechanism to fight their opponents. Depending how much and with how many political parties the “victory cake” has to be shared with, that takes much time to agree vertically on every position. Add to this that the national balance of power must be honored to represent each of the three ethnic groups in equal proportion, such processes can and most of the time do take a long time. After months of dysfunction and arguments about legality, the short-lived government of the Federation collapsed in February 2013, creating a major political stalemate that lasted until the following general elections held on October 12th 2014.

The legislative branch of the government also has mechanisms to stall progress. Any proposed decision of the Parliamentary Assembly of BiH in the House of Peoples could be declared destructive to the Bosniak, Croat, or Serb peoples’ vital national interest by a majority vote of delegates from the respective ethnic group. In such a case, the Speaker of the House of Peoples will immediately convene a Joint Commission consisting of three delegates, one Bosniak, one Croat, and one Serb, in an attempt to resolve the issue. If the Commission fails to resolve the issue within five days, the case will be transferred to the Constitutional Court of BiH that will review the issue under emergency procedure.

Politicians in BiH learned fast and well all the legal loopholes in the Dayton Accords, and have almost never failed to use them both when their national interest were indeed in question, and more often, when their own political (read: financial) interests were in question. Dayton Peace Accords were ad-hoc designed to bring peace, stop suffering and destruction, and start healing and reconstruction process in the country. It was understood twenty years ago, and so much more today that constitutional reform is desperately needed.

In addition, in 2006, representatives of the Jewish and Roma minorities in BiH, Jakob Finci and Dervo Sejdic, sued Bosnia and Herzegovina at the European Court of Human Rights in Strasbourg as under the Dayton Peace Accord, they were not eligible to be candidates for either

the Presidency of BiH or for the House of Peoples of the Parliament of Bosnia and Herzegovina.² (Under Annex IV of the Dayton Peace Accord only members of three ethnic groups—Bosniak, Serb, and Croat—can be considered candidates for these offices.) Contributing to their victory in December of 2009 at the European Court in Strasbourg were also Article 2 that guarantees human rights and liberties applying European Convention on Human Rights as the priority towards any other legislations. BiH is yet to implement Strasbourg’s ruling because political parties cannot agree on how to make room for minorities to take active part in political life in BiH. In 2012, the EU made resolution of the so-called Sejdic-Finci ruling a pre-condition for country to sign and activate a Stabilization and Association Agreement (SAA) with the EU, but pushed the issue aside after last general elections in BiH in 2014.

Constitutional Reforms

In the past twenty years, after the signing of the Dayton Peace Accords, several attempts were made to improve the constitutional framework in BiH. In post-Dayton negotiations on constitutional reforms, all political parties in BiH were engaged. The international community supported the efforts, but insisted on local ownership and local political consensus for the country’s future. Discussions amongst political parties in BiH reflected growing seeds of democracy but they have failed to produce any concrete breakthrough.

The first such major effort was initiated in 2005, commonly referred to as the April Package. On April 26th 2006, it fell short by only two votes of winning the needed two-thirds majority in the Parliament. For more than a year, representatives from across the political spectrum developed amendments to clarify ethnic, individual, and minority rights, along with the mechanism to protect the famous “vital national interest” of constituent peoples. Amendments also included reforms to strengthen government, redefining (strengthening) powers of the prime minister and reducing duties for the Presidency. Paul Williams, of the Public International Law & Policy Group, also helped the process.

In the autumn of 2009, the EU and U.S. initiated another effort to kick-start the constitutional changes, the so-called “Butmir process” launched by then-U.S. Deputy Secretary of State James Steinberg and Spanish Foreign Minister Miguel Angel Moratinos, with the hope of

2. Council of Europe, http://www.coe.org.rs/eng/news_sr_eng/?conid=1545.

paving the way for the Office of the High Representative (OHR) in BiH to be closed and an EU office to take over the leading role on behalf of the international community initiating the SAA process to set the country finally towards its EU path.

Unlike the April Package process that was thoroughly prepared and carefully crafted, the Butmir Process was exactly the opposite. It was ill-prepared, exposing divisions within the international community and, at the end, it created a depressive political mood and sense of desperation.

Realizing the Federation's troubling political landscape could continuously produce political crises and thus destabilize the country, the U.S. Embassy in Sarajevo initiated and coordinated locally owned debates, mobilizing grassroots organizations, students, academics, and civil society organizations throughout the Federation to draft proposals for constitutional reform in order to create a more functional and economically sustainable and less bureaucratic entity. From this effort, an expert group was formed that produced around 180 recommendations, among them: to delete the "Others" from the Constitution and instead state alongside the three constituent peoples there should be a reference to "those who do not declare themselves members of constituent peoples or members of national minorities"; to scrap the entity presidency and strengthen the position of the Speaker of the Parliament and that of the Prime Minister; to cut number of lawmakers in the assembly. Reduction of the number of the cantons or their total abolition was discussed. On June 24th 2013, the Federation Parliament accepted the expert group's proposal for constitution change as the basis for further work, yet to the present day no serious political effort and result-striving debate on this crucial issue has taken place in the Federal Parliament.

EU Inconsistency

In 2003, the European Commission conducted a so-called feasibility study for the SAA, outlining 16 priority areas that needed progress before the SAA would commence. In 2005 the OHR mandated conditionality for BiH to implement police reform if it were allowed to start SAA negotiations with the EU. No other countries of the former Yugoslavia received such a condition from the EU. Also, there were no EU standards as to how to organize the police force.³After three years

3. <http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/164-bosnias-stalled-police-reform-no-progress-no-eu.aspx>.

of endless negotiations, in 2008 police reform was pushed aside after the OHR accepted cosmetic changes.

The SAA was initiated on December 4th 2007, and was signed on June 16th 2008 but 32 months passed before it was ratified by all EU member states. (France ratified it last, in February 2011.) The SAA had to be suspended again before it could enter into full force; in 2009, BiH was found to be in violation of the European Convention on Human Rights in the famous Sejdic-Finci lawsuit.

For a full four years, political leaders discussed but could not find any solution to the European Court ruling; this continues to the very present day. The EU's inconsistency was once again visible in the European Commission enlargement strategy published on October 14th 2009 where it stated that the EU would not consider BiH's application for EU membership until the OHR is closed, only to soften that prerequisite at the EU General Affairs Council meeting in December 2009 stating: "The EU will not be position to consider an application for membership until the OHR transition to a reinforced EU presence is decided."

BiH made some positive steps towards EU candidacy status namely by adopting a census law and reaching a political agreement on immovable defense property. With mixed signals from Brussels on ways to move forward and a lack of implementation of Sejdic-Finci by local politicians, a breakthrough never happened, even after the EU General Affairs Council concluded "satisfactory implementation of the Interim Agreement, as a whole."

Discontent for lack of any progress and economic stagnation produced by the entrenched political elite in BiH culminated in violent demonstrations in February 2014, with attacks on government buildings. People demanded jobs and progress. Realizing the political conditionality will not unblock the stalemate, in late 2014, a British-German initiative came to life, later to be endorsed by the entire international community. It focuses on socio-economic reforms in BiH.⁴

On March 16th 2015, foreign ministers from the 28 EU member states agreed that the SAA between BiH and the EU should enter into force. Some critics argue that the EU has yet again been inconsistent by pushing aside addressing the European Court demand for implementa-

4. <http://www.balkaninsight.com/en/article/uk-germany-propose-bosnia-s-renewed-eu-perspective>.

tion of Sejdic-Finci ruling, but after six years of lack of progress this may well be a positive strategic and concrete breakthrough.

Reform Agenda for 2015—2018

The Council of Ministers of BiH, government of the Federation of BiH, government of Republika Srpska, and the governments of all ten cantons in the Federation of BiH and Brcko District have jointly declared and recognized the urgent need to initiate economic recovery processes and modernization of the economy to strengthen sustainable, efficient, socially just and stable economic growth. Governments also recognized the urgent need to create new jobs, to increase and reorganize (better distribute) welfare benefits, and to create a sustainable and just social environment. Officials also acknowledged awareness that these reforms are crucial for BiH to receive EU candidacy status. Priorities foreseen in this reform agenda were already discussed with international financial institutions, and they should serve as the foundation for negotiations for individual programs for financial and technical assistance from the international financial institutions and the EU, as well as other partners and donors that would possibly be willing to support the reform effort. Reform agenda is closely tied with new EU goals for the Western Balkans' economic development and is in accordance with the EU program for economic reforms intended to establish macroeconomic stability and encourage growth and competitiveness. The set of mid-term priorities includes fiscal consolidation to gradually reduce the budget deficit and reduce public debt. BiH has committed to a three years fiscal consolidation program and will sign arrangements with the International Monetary Fund, The World Bank, and the European Commission to secure financial support. In order for fiscal reform to succeed, BiH will have to carry out a set of structural reform: reform in public administration sector and in policy for public sector job recruitment, improvements in business climate and competitiveness, restructuring of publicly owned companies, reform in welfare sector, reform in health sector, and reform in rule of law. Fiscal consolidation will be implemented by increasing the tax income and tax base expansion with reduction of gray economy and various tax reliefs along with the improvement of the tax authority performance efficiency. Tax increase will be considered if these measures fail to produce results by the end of 2015. Officials in BiH also recognized the need to significantly reduce government administration and government spending and improve effi-

ciency. It is necessary to implement the reduction of burden on labor by reducing contributions for health insurance, but it is also necessary to provide additional revenue and budget funds to cover the losses that will be incurred due to the reduction in the contribution rate. It will be necessary to determine the total wage bill and all current expenditures at all levels of government, which cannot be increased regardless of the growth in tax revenues. Measures to improve tax collection will be actively implemented. This will include efforts to share information between the four tax administrations and acceptance of access audits and inspections based on risk, all in accordance with the constitutional system and the responsibilities of each of the tax agency in the framework of the concluded Memorandum of Cooperation, as well as increasing efforts to collect unpaid tax debts. E-services for VAT and income tax will be introduced.

Governments of the entities, cantons and Brcko District will seek financial and technical assistance from the World Bank to implement the reform of the health sector. Reform implies resolution of debts of the health sector, the introduction of the treasury system and the definition of new models and sources of funding, with the precise standardization of the network of health care institutions. The World Bank will look through the DPL program to provide technical and financial support for the reorganization of the health sector. Entity and cantonal governments and Brcko District will use these means for the settlement of arrears in the health sector (in particular the contribution) by the end of 2015. In parallel, the authorities in BiH will support an increase in excise taxes on tobacco and alcohol, which will be the direct revenues of the Fund for Health Insurance and health insurance funds in the Federation and the cantons and the Brcko District by the end of 2015.

Further growth and prosperity must be based on attracting investment. There is a need to improve competitiveness by eliminating the well-known and documented obstacle to investments. In addition, there is a need to unify the ground for investment by removing hidden subsidies and other forms of assistance to many large enterprises and improving bankruptcy procedures and extension activities to address the problems with some of the non-viable companies. In addition, there are inconsistencies and complexity of the regulatory framework and tax systems, which is the main problem for potential investors in the economy, accompanied by high administrative barriers.

Business environment reforms will include: FBiH, the cantons, and Brcko District passing new laws on corporations and foreign direct investment including simplification and automation of business registration; speeding up the procedures for obtaining building permits and electricity connections; exports' continued inspections reforms and the strengthening of national quality control, harmonized according to EU requirements; and examination of the feasibility of implementing fiscally sustainable public-private partnerships and achieving greater private sector participation in infrastructure development. All levels of government will prepare and publish a comprehensive list of para-fiscal levies in order to ensure their transparency and reduction in accordance with the division of responsibilities.

Officials in BiH also recognized the need for better laws and practices for the protection of investors, including improvement in corporate governance, strengthened risk management practices in order to improve access to finance (especially for new companies), better protection of minority shareholders and a more efficient framework for insolvency by changing the bankruptcy law that would introduce new pre-bankruptcy proceedings, with the objective of financial restructuring of the debtor to avoid bankruptcy and preserve jobs but also unable continued performance of the core business of the company. Both entities, cantons, and Brcko District will revise their bankruptcy legislation in order to shorten the bankruptcy proceedings. FBiH will be introducing Commercial Courts as well.

Public enterprises will be divided into viable (with minor or major needs for restructuring) and unviable lists, with the envisaged publication of a list of such companies. These lists will form the basis for a comprehensive program of restructuring and privatization program or liquidation in the medium term. Government entities, cantons, and Brcko District will seek financial and technical assistance from the World Bank to prepare and to implement public enterprise restructuring program. Special attention will be given to the restructuring of the railways (in both entities), and coal (in the Federation), which implies reorganization. The drafting preliminary plans in order to prepare BH Telecom for partial privatization in FBiH.

To improve trade, governments will ensure the implementation of the new law on customs policy to simplify customs processing and reduce administrative requirements.

Social protection systems will be reformed (in consultation with the World Bank and the IMF), including improved targeting of social protection that is not financed by contributions. Reform will also establish centralized databases of all social benefits users in the FBiH and the cantons. Reform efforts will aim to encourage members to be active participants in the economy, and with the protection and enhancement of social assistance for those who need it most. The Federation and the cantonal assurance systems must be placed on a solid financial footing as follows: freezing the cost of privileged pensions and reducing the option of early retirement for risk occupations, and the introduction of reasonable penalties for early retirement and bonuses for later retirement, in order to prolong the effective retirement age and introduction of sustainable indexing income. The audit work of verifying the eligibility of existing customers will be accelerated throughout the Federation and the cantons to strengthen the legal framework for improving the audit process. Reforms will accelerate the implementation of pension reforms under the new law on pensions in FBiH.

FBiH and the cantons will seek World Bank assistance in resolving the issue of unpaid obligations to the social fund from employment. In RS, the government will examine the need to reform the pension system parameters. Both entities, cantons, and Brcko District will vigorously work on drafting the scheme for voluntary retirement. FBiH and the cantons will work to introduce necessary legislation, while RS will continue with activities on the establishment of the first voluntary pension fund.

A judicial system reform strategy/action plan for 2014-2018 will be adopted, to establish effective prevention of corruption and conflicts of interest in the judiciary; increase professionalism and integrity by stipulating objective criteria for the appointment of judicial functions and the adoption of measures for the integrity of the entire judicial system in BiH; strengthen the disciplinary accountability of judicial functions by adopting new rules of disciplinary proceedings and the introduction of new disciplinary measures. Courts will have to make decisions within a reasonable time and to consider the possibility that the municipal cases are resolved out of court. Procedure for the sale of seized property and enhance the role of judicial executors in order to reduce the burden on the courts in enforcement proceedings must be improved. Rule of law institutions will adhere to the highest standards of integrity and adequate measures will be in place at all levels of government to ensure

preventing corruption and sanctions effectively applied. The fight against serious crime and corruption, in addition to effective investigation, prosecution and conviction will also be based on more solid legal and institutional framework governing the seizure of property, money laundering, and returns at all levels of government. In addition to the strategies adopted to combat terrorism in BiH, accompanying action plans will be completed with operational agreement with Europol in order to ensure a two-way flow of confidential information about crime between BiH and the Member States. Improvement of the flow of information between police and prosecutors can be achieved by increasing the efficiency of data exchange system, and adoption of the new strategy of integrated border management ensuring better cooperation between all related agencies and across its borders with harmonization of legislation on civilian possession of weapons.

All levels of government will draw up new laws on civil servants and employees, with the help of the World Bank and SIGMA, that would facilitate the reform of public administration and introduce greater flexibility of working arrangements. These laws will be adopted soon after the adoption of new labor laws in the entities, cantons and Brcko District. Candidates for employment in the civil service will be assessed on the basis of pre-determined eligibility criteria and the results of tests of competence and administrative bodies to ensure the employment of the best ranked candidates

The Council of Ministers of BiH, entity and cantonal governments and Brcko District will impose restrictions on employment in public administration until revised personnel systems are adopted and implemented. The total wage bill in the public sector will be frozen until the adoption of the revised wage setting system, based on values.

Publication of decisions on appeals in public procurement procedures (as a legal obligation) will be of central importance to ensure transparency in procurement procedures, decision-making on complaints and ensured public access to the decisions of the procurement review body. It will be given full support for the successful implementation of activities related to the census of population, households and apartments, with full respect for the provisions of the list, by-laws and European statistical standards in census activities.

Conclusion

After the last European Parliament elections held in May 2014, Brussels pushed back on further EU enlargement. Greece's economic crises, challenges of undocumented immigration in the Mediterranean, and the crises in Ukraine are but a few reasons for it. The EU also recognized some recently accepted member states were not entirely ready to be admitted to full membership and that they may cause further instability within the Union. It also became evident that it is difficult to export rules and norms, especially with such diverse cultures and religions throughout the European continent. Bosnia and Herzegovina must look forward and work hard to implement initiated reforms in order to bring the country to the EU's doorstep. The recently adopted new labor law in FBiH is an optimistic sign. The decision by the government of FBiH to privatize several public companies is another. To keep the current momentum, the EU and the U.S. should speak with a unified voice, seconded by civil society groups in BiH, to get everyone breathing for a change—something that is long past due for the citizens of BiH.