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Dayton Plus:

# **A Policymaker's Guide to Constitutional Reform in Bosnia and Herzegovina**

February 2025



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Dayton Plus:

# A Policymaker's Guide to Constitutional Reform in Bosnia and Herzegovina

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(COVER) Flag of Bosnia and Herzegovina (rarrarorro / Getty Images)

### The New Lines Institute for Strategy and Policy

**Our mission** is to provoke principled and transformative leadership based on peace and security, global communities, character, stewardship, and development.

**Our purpose** is to shape U.S. foreign policy based on a deep understanding of regional geopolitics and the value systems of those regions.



## Foreword

Bosnia and Herzegovina is a country rich in history and culture. It captures the hearts of those who visit with the hospitality of its people and the splendor of its natural beauty. As the Dayton Agreement turns 30 this year, we should pause and reflect on the gift of peace, remembering the tragedy of the Bosnian War and the long shadow it continues to cast.

Peace is the bedrock upon which all else is built, but it cannot be the summit of ambition. Peace represents the opportunity for prosperity. Without it, no progress can be made, but it alone does not ensure progress is delivered. This requires sustained efforts, primarily by Bosnians themselves of all ethnicities, but also with the support of those allies who signed their names to a pledge to preserve peace and support development.

Those who drafted the Dayton Agreement understood it to represent both an end and a start – an end to the horrors of war and interethnic conflict, but also the start of a process culminating in a fully democratic Bosnia and Herzegovina taking its place confidently in the Euro-Atlantic family. This aim should animate the approach taken to Bosnia, both by its citizens and outside allies, but over time attention has shifted elsewhere and malaise has set in and stultified the process.

The consequences are clear, as people denied a meaningful stake in their country's governance and direction simply vote with their feet. Estimates suggest the population has dropped from 3.5 million people at the last census in 2013 to under 2 million today. The Republika Sprska entity claims a population of 1.4 million, but in reality, it may now be home to only 800,000 or less. Emigration by the young is a crisis, threatening the very viability and soul of the country – applying equally to all ethnicities.

Meaningful reform to Bosnia and Herzegovina's governing framework is required to give all citizens a voice, vanquish corruption, and allow hope to animate the efforts of its peoples once more. This report offers an important analysis of why reform is needed, both on its own merit and on a legal basis. It also sets out potential routes to reform, dissecting the mechanism of governance to identify a practical route forward and suggesting which areas might be addressed – both in the immediate future and as part of an ongoing process toward rationalization and democratization. The future of Bosnia and Herzegovina should be driven not by ethnicity but by a shared hope for a beautiful country and people.

Geopolitics and the increasingly disruptive reach of Russia and China have refocused minds on the Balkans. This focus cannot be solely reactive. It is time for Bosnians, supported by their friends and allies, to chart a new course. This will require determination, perseverance, and above all imagination. This report from the New Lines Institute for Strategy and Policy is an important contribution to this cause, demonstrating that an alternative route is conceivable and – perhaps most importantly – achievable. I commend it to all who have an interest in the wonderful, beautiful country of Bosnia and Herzegovina.

**Alicia Kearns**, M.P., U.K. Shadow National Security and Safeguarding Minister and Chair of the U.K. Parliamentary Foreign Affairs Select Committee, October 2022–May 2024



## Director's Note

The incomplete transition of the Western Balkans into the fold of the EU and NATO is an open wound on the body of the Euro-Atlantic community, providing fertile terrain for the West's adversaries and competitors to sow discord in Europe's soft underbelly. At the strategic center of this region lies Bosnia and Herzegovina (BiH), the site of the deadliest conflict during the decade of wars that accompanied the dissolution of Yugoslavia. Although 2025 marks the 30<sup>th</sup> year of peace in BiH, initiated through the U.S.-brokered Dayton Peace Agreement, the country's governance remains largely dysfunctional, hobbled by an onerous and discriminatory sectarian power-sharing regime that has been almost wholly struck down both by BiH's domestic courts and the European Court of Human Rights (ECtHR). Struck down, but down but not reformed.

The Western Balkans will not be fully secure until the most volatile polity in the region, BiH, is firmly ensconced under the aegis of the EU and NATO. To realize that generational achievement, BiH must undergo significant constitutional reform, in line with the rulings of the ECtHR and the broader EU aegis. The complexity of BiH's existing legal regime, and the mercurial nature of its politics, makes that no small feat.

The New Lines Institute's Dayton Plus report, however, lays out in comprehensive detail how this goal may be realized in timely fashion – by building on previous reform initiatives and charting a course of reasonable accommodation with all the country's major stakeholders – providing for Sarajevo's accession to the EU and NATO within the next decade. If enacted, the recommendations in this text offer an opportunity to positively alter the course of southeastern European politics in its entirety for the next century and beyond, and the completion of the dream of Europe, whole and free.

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## Executive Summary

Since the signing of the Dayton Peace Agreement in 1995 and the conclusion of the Bosnian War (1992-1995), the country's internal administration has been fragmented along severe ethno-sectarian lines. Today, BiH remains saddled with a constitutional regime staggering in its administrative and political complexity, which simultaneously denies as many as 400,000 BiH citizens basic rights to democratic representation. To date, the U.S. and the EU have based their policy toward BiH on a fantastical premise: that irrational governance modalities can produce rational outcomes. If BiH is to have a credible chance at EU and NATO membership – the stated aim of leaders in Sarajevo, Washington, and Brussels – the country must be able to produce its own reform initiatives and rational governance outcomes. For that to be plausible, however,

BiH must have a rational constitutional regime and accountable governance mechanisms; that requires constitutional reform, which may be limited in scope but must be substantive in its impact. This policy booklet is an aid for international policymakers in assisting these processes. It lays out in an accessible but comprehensive manner the legal pathways toward constitutional reform in BiH; the course of previous efforts toward the same; the legal and political necessity of constitutional reform; the sources of opposition to constitutional reform; emerging issues and problems with respect to constitutional reform; the political avenues available to the U.S. and EU to convince local political leaders to begin the process of constitutional reform in earnest; and proposals for concrete amendments to BiH's current constitution.



## Introduction

In March 2024, Bosnia and Herzegovina (BiH) was granted negotiating status by the European Union (EU), officially beginning the country's formal road toward accession into the bloc. Although BiH had been promised, along with the rest of the Western Balkans, a pathway toward membership as early as 2003 by the EU at the Thessaloniki Summit, the country's complex post-war political structure, specifically the country's constitution, Annex IV of the Dayton Peace Agreement (DPA), and its sectarian power sharing mechanisms slowed progress to a glacial pace. BiH waited more than a decade just to apply for candidacy, which it did in 2016, but Brussels did not approve the request until December 2023. Although the recommendation for the start of negotiations by the EU Commission and its subsequent approval by the European Council followed quickly thereafter, it did so largely on geopolitical rather than technical grounds. That is, European leaders had come to fear keeping BiH on the bloc's margins, due to Russia (and China's) malign influence, rather than being convinced that the country's leaders had made meaningful reformist strides.

Except for Kosovo, whose international status remains contested and unrecognized by five of the EU's member states, BiH was the last of the Western Balkans Six (WB6, i.e., BiH, Serbia, Montenegro, North Macedonia, Albania, and Kosovo) to be granted candidacy or negotiating status by Brussels. That is not because BiH is economically impoverished; among the WB6 its GDP is second only to Serbia (as is its population), while the country's GDP growth rate is a respectable 4.1%, twice the rate of Serbia and North Macedonia, and likewise well above that of both the EU as a whole and the individual member state average. Instead, it is in the (in)efficacy of BiH's institutions, and the scale of corruption therein, in which BiH is an outlier, and which explains the EU's traditional reservations. And here, again, the inarguable cause of this dysfunction is the country's constitutional regime.

Yet for nearly three decades, the U.S. and the EU have based their policy toward BiH on a fantastical premise: that irrational governance modalities can produce rational outcomes. As such, nearly every major American and European policy initiative in BiH to date has failed at the onset, or rapidly degraded, because of the inability of the country's constitutional regime, and the political system which it produces, to sustain such efforts. The only exceptions have been instances where direct, sustained international – and specifically American – engagement in BiH has, in effect, superseded the country's constitutional limitations (e.g. where the U.S. imposed significant and sustained costs on political elites who opposed meaningful reforms). But such practices are not sustainable, and they are external to BiH and its citizens. If BiH is to produce its own reform initiatives, its own rational governance outcomes, it must have a rational constitutional regime and accountable governance mechanisms in place to do so. And that requires constitutional reform, which may be limited in scope but substantive in its impact.

Since the signing of the DPA in 1995, and the conclusion of the Bosnian War (1992-1995), the country's internal administration has been fragmented along severe ethno-sectarian lines. The result is staggering in its administrative and political complexity, as even a cursory overview shows:

- Virtually all public offices in BiH are elected and/or appointed according to a rigid ethnic key, the centerpiece of which are the three “constituent peoples” (the Bosniaks, Serbs, and Croats) who are granted virtually all political primacy, while “the Others” (i.e. self-identifying Bosnians, Jews, Roma etc.) are barred from most executive offices within the constitutional architecture of the state, including the state presidency.<sup>1</sup>

<sup>1</sup> Despite the normative centrality of the constituent peoples concept (frequently but mistakenly translated in the local languages as “constitutive”) in BiH constitutional practice, the term is nowhere defined in the BiH constitution, nor any of the entity or cantonal constitutions, nor in the remainder of the DPA. It is clear *who* the constituent peoples are, but why or how they enjoy political or democratic privileges that are distinct from those of the Others is not. Since 2009, that fact has allowed Bosnian civil rights activists to win a succession of major legal victories against the BiH state at the European Court of Human Right (ECHR), discussed in greater detail in *Section III* onwards.



- BiH's executive consists of a tripartite state presidency whose membership consists of one Bosniak, one Croat, and one Serb, the former two of which are elected from the country's Federation entity (FBiH) while the latter is elected from the Republika Srpska (RS) entity.<sup>2</sup>
- BiH's state legislature, the BiH Parliamentary Assembly (BiH PA), consists of two chambers, the House of Representatives and the House of Peoples, the latter of which is itself an unelected body whose members are indirectly appointed via the legislatures of the two entities (and in the FBiH technically with reference to the results of cantonal assembly elections). Any legislation passed by the state parliament must pass both houses and, in practice, also have the support of at least one-third of the legislators from each of the entities (known as "entity voting" and/or the "entity veto") in addition to a simple majority of those present. Any legislation passed must also not run afoul of the so-called "vital national interest"<sup>3</sup> of any of the three constituent groups, the potential activation of which therefore serves as an additional veto mechanism in the legislative process.
- The Council of Ministers serves as the state government and consists of a Chairman of the Council of Ministers (i.e., the prime minister) and another nine ministers, although BiH has no state-level health, agricultural, EU integration/affairs, or environment ministry.
- The two entities each have their own legislatures and governments, as noted, but their respective constitutional regimes are not in synch. The FBiH has a bicameral legislature, while the RS entity is a unicameral regime.<sup>4</sup> The FBiH's president is nominated by the FBiH House of Peoples, along with two vice presidents whose consent is necessary for the nomination of the prime minister, whereas the RS president is elected directly by the populace of the entity, and while they also have two vice presidents, the constitutional powers of these are essentially ceremonial.
- The FBiH entity furthermore is subdivided into ten cantons, each of which has its own government and executives. The populations of these cantons vary wildly, with the Tuzla Canton, for instance, having a population of some 445,000, while the Bosnian-Podrinje Canton has a population of fewer than 24,000.
- The northeastern city of Brcko is a self-governing administrative unit known as the Brcko District, which likewise has its own legislature and mayor, along with an international supervisor.
- At the top of the BiH constitutional pyramid is the Office of the High Representative (OHR), the occupant of which (the high representative) is an internationally appointed official whose expansive fiat powers (the Bonn Powers) allow him to unilaterally amend the country's laws, the constitutions of the subnational units (i.e., all those other than the state constitution), sack publicly elected officials, and otherwise do whatever is deemed necessary to uphold the integrity of the DPA.

While this Byzantine structure may have been necessary to securing peace in 1995, it has increasingly become an impediment to the country's rational, democratic governance and evolution. In fact, as the EU itself has consistently made clear, BiH will be unable to join the bloc without significant constitutional reforms. More importantly, because of

<sup>2</sup> The FBiH comprises 51% of BiH's territory and is home to 62.85% of the population, according to the 2013 census, while the RS entity comprises 49% of the territory and 34.79% of the population. The population figures, as previously noted, are likely to be inaccurate as of this writing.

<sup>3</sup> As described in Article 4, Section 2e of the constitution, this provision means that "any proposed decision of the [BiH PA] in the House of Peoples can be declared destructive to the vital national interest of the Bosniak, Croat, or Serb people by a majority votes from the Bosniak, Croat or Serb delegates. Such a proposed decision has to be approved by the House of Peoples by a majority of Bosniak, Croat, and Serb delegates who are present and voting." Thereafter "the Speaker of the House of Peoples will ... convene a Joint Commission consisting of three delegates, each elected among Bosniak, Croat, and Serb delegates ... to resolve the issue. If the Commission fails to resolve the issue within five days, the case will be transferred to the BiH Constitutional Court which will review the procedural correctness of the matter, under emergency procedure."

<sup>4</sup> The RS entity assembly does have a second chamber, the Council of Peoples, but it is not a co-equal branch of the legislature and thus is not proximate in constitutional authorities to either the BiH or FBiH Houses of Peoples. The RS entity Council of Peoples only deliberates when one of the clubs of the three constituent peoples in the National Assembly of the RS entity successfully invokes the vital national interest veto. As such, the RS entity legislature is generally considered to be a unicameral institution.





its severe sectarian provisions BiH's constitution is also flagrantly discriminatory and denies basic rights to representation to approximately 400,000<sup>5</sup> of its citizens, and as a result, both the BiH Constitutional Court and the European Court of Human Rights (ECHR) have over the past two decades struck down large segments of the document. The decisions of the latter court are particularly important, not merely because of its European character but because Article 2, Section 2 of the BiH constitution states that the "rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law." Thus the succession of

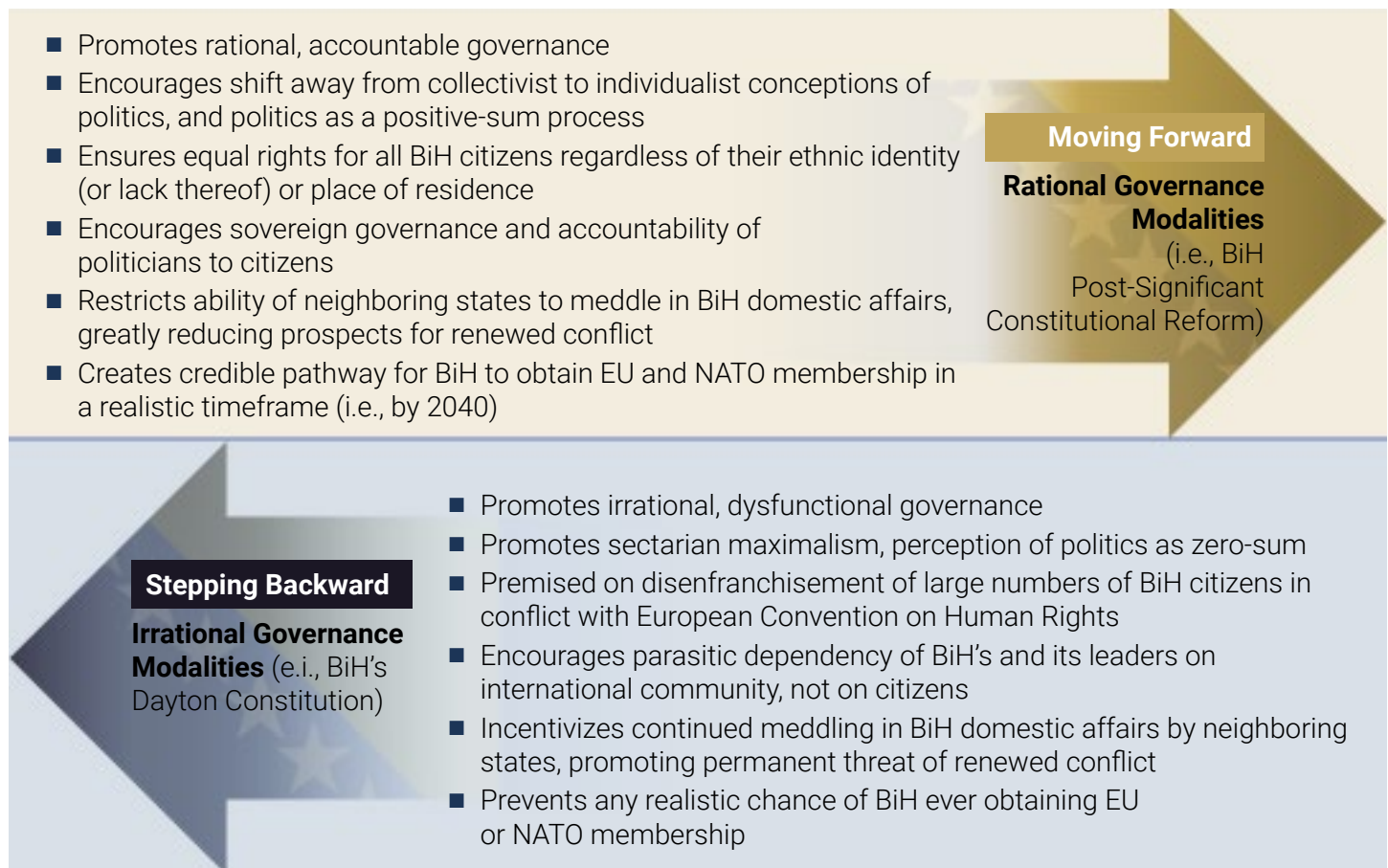
rulings by the ECHR since 2009, all of which have struck down various aspects of the BiH constitution on grounds of discrimination, are legally binding for the BiH state according to its own constitution, not merely for BiH being party to the European Convention on Human Rights or its EU membership aspirations.

Despite this obligation, BiH authorities have made no meaningful strides toward even the most modest amendments of the country's constitution means that BiH is in a de facto constitutional crisis. Large segments of its constitution are illegal and illegitimate, while the public officials tasked with amending the document to bring it in line with the relevant legal standards are unwilling or unable to act. Despite this,

5 Human Rights Watch, "Bosnia and Herzegovina: Ethnic Discrimination a Key Barrier," 2019, <https://www.hrw.org/news/2019/12/13/bosnia-and-herzegovina-ethnic-discrimination-key-barrier>.

## Constitutional Reform in Bosnia and Herzegovina

The diagram sums up the necessity of constitutional reform in BiH.







many in BiH and the international community continue to insist (explicitly and implicitly) that the country's status quo can be maintained indefinitely. This is false. Aside from the fact that the present constitutional regime is incapable of delivering on the stated Euro-Atlantic aspirations of both the BiH political class and their international partners and has left the country in a state of de jure lawlessness while also denying basic rights to representation to huge segments of its citizenry, BiH's short and long-term demographic trends are driving the country to a political inflection point. Because at base the current regime is premised on a static degree of demographic parity in the country that already fails to comport to reality. As noted earlier, the Bosniak community will likely make up 60% or more of the BiH population in the next decade. The available data suggests that they are already 52% to 55% of the population – which can be extrapolated just from the most recent election results – up from the official figure of 50.12% in the 2013 census. At some point soon, the demographic advantages of the Bosniak community will tilt BiH's political system irreversibly in their favor, regardless of what degree of ethnic gerrymandering is employed. Lest these

developments give way to base majoritarianism, it is necessary to ensure that BiH undergo peaceful constitutional reform now, to create a liberal, democratic, and representative constitutional regime that can accommodate the individual and communal interests of all its citizens.

In short, BiH's constitution must be amended. But to do so will require the marshaling of political will: that of the BiH public to demand it, that of BiH leaders to enact it, and that of the international community to ensure that the process can unfold in peace, without any malign foreign interference. Moreover, achieving virtually any degree of constitutional reform in BiH – provided it is in line with the norms of the European Convention on Human Rights – even if it is not comprehensive would prove that peaceful, procedural constitutional reform in BiH is possible, normalizing the future political evolution of the country's governance modalities.

This policy booklet is intended as an aid for international policymakers in assisting these processes.

## Section I: What is the amending formula of the BiH constitution?

Despite the complexity of the BiH constitution, its amending formula is, on the face of it, simple. Article 10, Section 1 states that the constitution may be amended “by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.” This means a constitutional amendment or package of reforms would have to pass the BiH House of Representatives by a two-thirds majority and the BiH House of Peoples by a simple majority, provided the pro-reform majority in the latter could ensure it met both the entity voting threshold and that it would not be halted through successful invocation of a vital national interest veto. Assuming a full quorum in each chamber, that would mean that 28 of 42 MPs in the House of Representatives and eight of 15 delegates in the House of Peoples would each have to approve the changes.

However, the constitution defines the minimum quorum for the House of Representatives as “a

majority of all members elected” (Article 4, Section 2b) and in the House of People as nine delegates “provided that at least three Bosniak [sic], three Croats, and three Serb Delegates are present” (Article 4, Section 1b). In theory then, that means that a constitutional amendment or reform package could pass with the support of as few as 14 of 22 MPs and eight of nine delegates in the House of Peoples. With respect to the latter chamber and its composition via the two entities, this means that the fewest number of delegates necessary to approve any constitutional reform would be 8, a cohort that however comprise, for instance, five Bosniak delegates and three Serb delegates, provided there were at least three Croat delegates present and that they did not oppose the motion.

While the parliamentary process of realizing constitutional reform in BiH is challenging, it is not insurmountably so. To wit, the BiH constitution was once amended, and it nearly underwent a package of significant reforms on another occasion.



## Section II: What previous efforts have been made at constitutional reform in BiH?

In the nearly thirty years since its adoption,<sup>6</sup> BiH's constitution has only once been amended. In March 2009 the BiH PA voted to cement the Brcko District as a constitutional category following the conclusion of the arbitration process in 1999 and the creation of the autonomous unit in 2000 via statute enacted through the then high representative Wolfgang Petritsch's Bonn Powers. By comparison, every other Western Balkan state, including the non-EU member states of the region and including Kosovo, which only declared its independence in 2008, have each gone through successive episodes of constitutional reform in that time. Moreover, since the signing of the DPA, the FBiH and RS entities have gone through a combined 26 rounds of constitutional amendments through a combination of legislative actions and interventions by the OHR. All ten of the FBiH's cantons have also gone through several rounds of constitutional reform apiece, with the Central Bosnia Canton alone, for instance, having amended its constitution 10 times since 1997 (an average of one amendment every two and a half years).

There have, however, been repeated attempts at the reform of BiH's constitution. Prior to 2009, these efforts focused largely on the idea of rationalizing and streamlining BiH governance as a normative good. After 2009, the process largely ground to a halt as the repeated decisions of the ECHR redirected the BiH constitutional debate toward basic questions of democratic legitimacy and representation, which both local leaders and the international community found difficult to accommodate. The most significant of the former efforts was the "April Package" in 2006, negotiated by the U.S. and agreed to by most of the major political actors in BiH at the time, including the SNSD and HDZ BiH. To date, the April Package is also the only round of attempted constitutional reform in

BiH that made it to the floor of the BiH PA for an actual vote, where it was defeated by a two-vote margin. Nevertheless, the core provisions of the April Package are worth highlighting.

The deal was premised on a rationalization and strengthening of the Bosnian state but balanced out with the preservation of the core aspects of the country's prevailing ethnic power-sharing structure. Specifically, the April Package<sup>7</sup> would have created:

- A single-member presidency, appointed by the BiH PA, with ceremonial powers and an additional two deputies. The president was to serve for a period of 18 months, at which time they would be succeeded by one of their deputies.
- Most existing authorities of the presidency were to be devolved to the Council of Ministers, whose roster would also be expanded to include a Ministry of Agriculture and Ministry of Technology and the Environment.
- Various state-level institutions that had been created by statute since 1996 were to be codified as constitutional categories (e.g., the Court of Bosnia and Herzegovina created by an act of the BiH PA in 2002).
- A provision for the state to assume certain competencies from the entities for the purposes of EU integration, while introducing shared competencies between the state and entities in several relevant areas (e.g., taxation).
- The number of legislators in both the House of Representatives and House of Peoples was to be increased, while the authorities of the latter chamber were to be limited to interpreting the validity of the vital national interest veto. Despite the expansion of the BiH PA, however,

<sup>6</sup> Whether the BiH constitution can even be said to have been "adopted" remains a contested (although functionally moot) point. It has never been voted on by the BiH PA; it has never been published in the BiH public gazette; nor does it have an official translation into any of BiH's official languages (Bosnian, Serbian, Croatian). Nor was the constitutional amending formula of the preceding BiH constitution – that of the internationally recognized Republic of BiH (RBiH, 1992–1995) – respected when the country's then presiding member of the presidency, Alija Izetbegovic, signed on to the DPA. As such, while the current BiH constitution is the de facto *Grundgesetz* of the contemporary BiH state, the question of its fundamental legality remains unclear. That matters because, as expert observers have noted, in the event of a serious political crisis in BiH – i.e., the attempted secession of the RS entity – it is likely that key political actors would argue that with the collapse of the existing constitutional order, BiH would legally default to the constitution of the RBiH. That would have a host of legal and political consequences, not least of which is that the RBiH constitution did not recognize any of the post-1995 territorial administrative divisions in BiH and it is thus unclear in what fashion the state would be governed.

<sup>7</sup> Davide Denti, "The European Union and Member State Building in Bosnia and Herzegovina," University of Trento, 2018.



the phenomenon of “entity voting” would be preserved, requiring that any legislation passed would also have to win the consent of at least one-third of the MPs from *each* of the two entities.

After the failure of the April Package in the BiH PA, the U.S. and EU officials both attempted to spearhead new negotiations in 2008 (the would-be Prud Agreement) and 2009 (the Butmir Process). Both the Prud and Butmir rounds were essentially repeats of the deal

made in 2006, but both failed to produce agreement or commitment from the major actors. Dozens of meetings between major party leaders have occurred over the course of the 2010s and 2020s to further discuss constitutional reform, with each convened by either U.S. and/or EU negotiators, but none of these have produced anything of substance. As such, the April Package remains the highwater mark of credible constitutional reform effort in post-war BiH.

### Section III: Why must the BiH constitution be amended?

In December 2009, the ECHR delivered its Sejdic-Finci decision, lodged by community leaders from the country’s Jewish and Romani communities, respectively. It found that the BiH presidency being reserved exclusively to Bosniaks, Serbs, and Croats was discriminatory and so too were similar reservations within the BiH House of Peoples. Because of the contents of Article 2, Section 2 of the BiH constitution, the ECHR’s decision meant that constitution now had to be amended, not merely as a matter of political rationalization but as a basic legal obligation to provide equal rights to representation for all BiH citizens according to the existing provisions of the constitution’s own supreme legal commitments. In short, BiH constitutional reform ceased to be a matter of *should* and became a matter of *must*.<sup>8</sup>

A series of subsequent challenges at the Strasbourg-based court, all lodged on similar grounds of discrimination, expanded the ECHR’s rulings against the BiH constitution and the legal case against its prevailing sectarian order. In the 2014 Zornic ruling, the court sided with an appellant who sued BiH on the grounds that as a self-identifying Bosnian she was barred from standing for election to the BiH presidency or the House of Peoples. In the 2016 Pilav ruling, the ECHR sided with a Bosniak appellant who could not stand for election to the BiH presidency as a Bosniak because he resides in the RS entity rather than the FBiH. Also in 2016, the ECHR sided with another

appellant, Samir Slaku, a member of the country’s Albanian community because he too could not stand for election to the BiH presidency or House of Peoples. In the ECHR’s 2020 Pudaric ruling, the court sided with an ethnic Serb from the FBiH entity who was also barred from standing for the BiH presidency due to his residency.

Finally, in August 2023, in its most expansive ruling to date, the ECHR sided with Slaven Kovacevic, who in effect had taken the sum of the preceding decisions and on their basis challenged the fundamental premise of the ethnicity-territory matrix at the center of the BiH constitution. Again, the court sided with the appellant, finding that the BiH constitution had unfairly limited the right to vote and be elected for large segments of the population through a “combination of territorial and ethnic requirements” that collectively amounted to “discriminatory treatment.” The ECHR appeared also to agree with the characterization of BiH’s constitutional regime as an illiberal “ethnocracy” and further instructed that BiH was both obligated to amend its constitution and that in so doing insomuch as any future BiH constitution would preserve a “system of ethnic representation ... in some form, it should be secondary to political representation.” That is, a universal, non-ethnically constituted right to participate in the electoral and democratic process had to supplant any collectivist, ethnic guarantees or quotas. As a practical consequence, this meant

8 Legal challenges at the BiH Constitutional Court, however, had already marked the way for the ECHR. Of these, what is popularly known as the “equality of constituent peoples decision” of 2000 is the most significant. Following an appeal by then BiH presidency member Alija Izetbegovic in February 1998 concerning what he alleged were discriminatory provisions of the RS entity constitution, the court found that all constituent peoples in BiH enjoyed equal democratic and political rights across the entire territory of the state. That is, despite its ethno-majoritarian name, the RS entity was not a “Serb entity” but an entity of all its citizens. While the practical consequences of the decision were initially limited, it nevertheless created a legal and institutional pathway for BiH reintegration whose overall weight the ECHR’s post-2009 interventions have only increased.



that elections for the BiH presidency had to treat the whole of BiH as a single electoral unit and that the BiH House of Peoples likewise had to significantly alter the methodology of how its delegates were selected – to ensure an equality of influence and/or representation

for all BiH citizens – or that its constitutional authorities had to be limited to such an extent that it would, functionally, become an advisory rather than legislative body.

## Section IV: What has the Venice Commission said about BiH's constitutional regime?

The rulings of the ECHR are not the only relevant international interventions in BiH's constitutional praxis. Although its opinions are not binding, the Venice Commission has also consistently sided with the pro-reform perspective in BiH's constitutional debates. This is clear even though its two most significant opinions (in 2008 and 2016) are overall considerably more reserved in their cumulative assessments than the rulings of the ECHR. To wit, in its 2008 *amicus curiae* brief regarding the ECHR's eventual Sejdic-Finci ruling, the Commission concurred that the exclusion of the Others from the BiH presidency was not justified. In contrast, in its 2016 opinion concerning the appeal by Croat nationalist politician Bozo Ljubic to the BiH Constitutional Court regarding the alleged conflict of the then existing method for allocation of seats in the FBiH entity's House of Peoples with the BiH constitution, the Commission largely deferred to view of the BiH court, which amounted to a rejection of further electoral segregation in the country. That is because Ljubic had complained to the BiH Constitutional Court that granting each of the 10 cantons in the FBiH entity at least one delegate from each of the constituent peoples was a form of discrimination as it meant, in practice, that a tiny canton like the Bosnian-Podrinje Canton, with a Croat population of barely two dozen people, would end up with a disproportionate degree of influence in the chamber and (worse, Ljubic and his supporters suggested) such delegates would invariably be apportioned on the basis of non-Croat votes (i.e., Bosniaks voting for Croat candidates). As the BiH Constitutional Court summed up Ljubic's position:

The applicant ... quotes Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina and Chapter IV.A.2 of the Constitution of the Federation of Bosnia and Herzegovina, whereby the number of

delegates in the House of Peoples is clearly determined stipulating: *Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population.* The applicant is of the opinion that the constitutional amendments imposed by the High Representative in 2002, when the number of 30 delegates per caucus was reduced so that currently that number is 17, amounted to discrimination with regards to the method of election of delegates to the House of Peoples, and deviation from the principle of proportionality. The applicant wonders whether the provision of the Election Law stipulating that there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body, although the number of the members of the respective people in that canton is very small, is used for the purpose of electoral manipulation and violation of the provision implying the proportional representation.<sup>9</sup>

Because the House of Peoples is not, as such, a purely representative institution, however, Ljubic's complaint was met with skepticism by the Venice Commission and ultimately the BiH Constitutional Court. The Commission's deferral to the BiH court allowed its justices to settle that "the European Commission concludes that the system under the Constitution of the Federation 'seems to be in line with European and other international standards in the field of elections and since the Election Law intends to render operational the relevant provisions of the Constitution of the Federation, it also seems to be in line with these standards.'" However, it continued to observe that in the "Venice Commission's view, the Election Law seems to depart slightly from what is

9 Constitutional Court of Bosnia and Herzegovina, Case No. U-23/14, 2016, <https://www.ustavnisud.ba/uploads/odluke/en/U-23-14-1058444.pdf>.





‘proportionality,’ as mandated by the Constitution of the Federation in the allocation of seats to the House of Peoples of the Federation. However, a solution might be envisaged by which the provision of the Election Law (‘Each constituent people shall be allocated one seat in every canton’) would be interpreted as worded in the Constitution of the Federation (‘In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body’).<sup>10</sup> Accordingly, the BiH Constitutional Court thus largely upheld the existing FBiH entity election law but instructed the authorities, in effect, to recalculate the formula for

delegate apportionment in line with the country’s most recent census data (i.e., from 2013 rather than 1991). After the BiH PA failed to act to resolve the corresponding conflict between the relevant state-level statutes and the FBiH election law, in July 2017 the BiH Constitutional Court struck down the most relevant offending passage in the BiH election law – the one stating that every canton was guaranteed at least one delegate from each of the constituent peoples – and allowed the BiH Central Election Commission (CIK) to issue a new writ that apportioned a new cohort of delegates for each of the ten FBiH cantons in December 2018.

## Section V: Why did the decisions of the BiH Constitutional Court and the CIK not resolve the debate about the Ljubic verdict?

The problem was, as the European Stability Initiative (ESI)<sup>10</sup> noted in a subsequent assessment, Ljubic and his hard-line Croat nationalist HDZ BiH were unsatisfied with this resolution because they had hoped that the BiH Constitutional Court ruling would allow them to deprive at least the Bosnian-Podrinje Canton of *all* of its Croat delegates to shift the balance of power within the FBiH House of Peoples, and thus the FBiH legislature and government as a whole, permanently in their favor. Specifically, by ensuring that the party would have a permanent veto-proof majority in the Croat caucus of the FBiH House of Peoples, which would in turn deliver it a permanent monopoly over the government formation process in the entity.<sup>11</sup> With that secured, the party would also simultaneously win a permanent role in government at the state level as well because of the FBiH’s House of Peoples influence on the composition of its state-level equivalent. So, even though the Ljubic case had, legally, been resolved by the interventions of both the BiH Constitutional Court and the CIK, with their political demands unmet the HDZ BiH and the government of Andrej Plenkovic in Zagreb spent the next five years lobbying systematically at every international

forum, in every international body, and in every relevant capital for the adoption of what they called “legitimate representation.”

Neither longtime HDZ BiH leader Dragan Covic, nor Plenkovic, nor Ljubic, nor any relevant Croatian government official has ever fully defined what the term “legitimate representation” means or what basis in the European legal tradition it has. Nevertheless, the HDZ BiH’s successive proposals for the reform of various electoral and constitutional statutes in BiH have distilled the essence of their demand: a fully ethnically constituted electoral regime in which cross-ethnic voting will be functionally, if not legally, impermissible. In 2024, for instance, the party submitted a bill to the BiH PA whereby the BiH election law would be used to amend the formula for the election of the Croat member of the state presidency – but only the Croat member.<sup>12</sup> The first problem with this attempt was that amendments to the BiH election law could not supersede the provisions of the constitution, which regulate the method for the election of the presidency, i.e. a law could not circumvent constitutional directives. The second problem was that any

10 European Stability Initiative, “Don’t believe the Hype – Why Bosnian democracy will not end this October”, 2018, <https://www.esiweb.org/publications/dont-believe-hype-why-bosnian-democracy-will-not-end-october>.

11 Ironically, despite its purported lack of influence, after the 2018 elections the HDZ BiH stonewalled government formation in the FBiH for the entire four-year mandate until its demands regarding the Ljubic decision were met. Party Vice President Marinko Cavara, then serving as President of the FBiH, even refused to appoint justices to the FBiH Constitutional Court as part of this blockade, which resulted in his eventual sanctioning by the U.S. for violations of the DPA.

12 Republika, “HDZ BiH uputio svoj prijedlog izmjene Izbornog zakona o izboru članova Predsjedništva BiH,” 2024, <https://republika.info.com/hdz-bih-uputio-svoj-prijedlog-izmjene-izbornog-zakona-o-izboru-clanova-predsjednistva-bih/>.



amendment to the methodology for the election of the Croat member of the state presidency would mean that each of the three presidency members would be elected by a distinct method, each of which would also be in explicit violation of the European Convention on Human Rights and the rulings of the ECHR because all three would deny BiH citizens equal opportunities to elect the country's executive.

The third and most significant problem is the actual method the HDZ BiH has proposed for the election of the Croat member of the BiH presidency. Namely, in their most recent bill in the BiH PA the HDZ BiH proposed that the self-identifying<sup>13</sup> Croat candidate who wins the most votes in the race for the Croat seat on the BiH presidency would win the race – provided they *also* won the most votes in three of the five FBiH cantons with the largest Croat populations in the FBiH. If the top vote-getter overall does not meet *both* qualifications, the runner up would be declared the winner, assuming they do meet both criteria. If after this first round of tabulation there is still no victor, the counting would narrow further so that, in practice, only the votes of two of the five cantons in question would be tabulated (i.e., those with the greatest

portion of Croats in their overall population) and so on. This means it would be plausible to have a situation where a third- or fourth-place candidate would be declared the winner based on a miniscule number of votes collected exclusively in one or two cantons. For instance, if such an election were to come down to the West Herzegovina canton – the most ethnically homogenous Croat-majority canton in the FBiH – a candidate could be elected with a total vote count of 25,880, which is what the HDZ BiH won in the 2022 election for the canton's legislature – fewer votes than it would take to elect a single MP in the BiH House of Representatives (again using the 2022 general election results).

To date, the HDZ BiH does not enjoy any meaningful support among the international community or any other relevant parliamentary actors in BiH to realize these proposals; indeed, the U.S. has rejected them out of hand. But in the subsequent section we see how a similarly egregious method for the appointment of delegates to the FBiH House of Peoples nevertheless became a reality in October 2022 and won the support of the U.S. and U.K. despite their earlier stated opposition.

## Section VI: How and why did the OHR intervene in the 2022 BiH election?

Following the BiH Constitutional Court's decision in July 2017 and the CIK's subsequent issuance of a new methodology for the distribution of delegates in the FBiH House of Peoples in December 2018, the legal requirements of the Ljubic decision had been met, but as noted, the political objectives of the HDZ BiH and the Plenkovic government in Zagreb had not. As no amount of arm-twisting by these two could convince any of the leading "pro-Bosnian"<sup>14</sup> parties in either the BiH or FBiH legislature to agree to implement any version of their preferred modalities, the Croatian

authorities increasingly began focusing on an extra-political solution (i.e., securing a pliant candidate in the OHR who would use the Bonn Powers to realize their demands). This emerged as the major, indeed the exclusive, focus of Croatia's foreign policy after Plenkovic's election in 2016.

When exactly Christian Schmidt was identified as a suitable candidate for the high representative post, in line with Croatia's objectives, is unclear. What is known is that he was already in 2013 awarded

<sup>13</sup> The term "self-identifying" is relevant because in years prior the party has floated the introduction of various overt types of "purity" tests to establish whether a particular candidate was "truly" Croat (i.e., a hard-line Croat nationalist aligned with the HDZ BiH's sectarian agenda). Realizing that such provisions would never win the support of the international community (never mind the ECHR), Covic et al subsequently shifted to increasingly more elaborate methods to select not the candidates but the *voters* who could choose the Croat member of the state presidency. Thus, they reasoned, even if "false" Croats decided to run for the seat (e.g., candidates like Zeljko Komsic, whose voters are primarily moderate Croats and civic-oriented Bosniaks in large, multiethnic cities like Sarajevo, Tuzla, and Zenica) they would still fail to meet the necessary geographic threshold to secure victory. By extension, even if the HDZ BiH never made any overtures to moderate Croats in Sarajevo, Tuzla, Zenica, etc., they would still be ensured victory because their candidates' geographically concentrated base – although smaller than Komsic's overall vote – would weigh more according to their preferred methodology.

<sup>14</sup> "Pro-Bosnian" or "pro-BiH" is the catch-all term used local to describe both "Bosniak" political parties like the SDA and the conglomeration of multiethnic political parties like the SDP and DF who advocate for BiH's sovereignty, territorial integrity, and membership in the EU and NATO.



Croatian state honors, which he formally received in January 2020. On December 23, 2020, Bosnian media reported Schmidt's name for the first time as the presumed successor to then-High Representative Valentine Inzko, with the understanding that his nomination had come as a direct appointment from the Chancellery. Germany's ambassador to Sarajevo informed the BiH presidency of the same a day later. It is likely that Plenkovic's government had secured then German Chancellor Angela Merkel's approval for the nomination already by 2019, when Croatia's Marija Pejcinovic Buric was tapped as general secretary of the Council of Europe and Gordan Grlic-Radman replaced her at the Croatian Foreign Ministry. That transition coincided with the 2019 European elections, during which Merkel made only one campaign speech outside of Germany: at an HDZ rally in Zagreb in May. The Croatians may have conditioned their support for Germany's Ursula von der Leyen as president of the European Commission on Merkel's appointment of Schmidt as high representative. The exchange likely would have been presented by Zagreb as an appeal to Merkel's concern for Europe's stability on the eve of the 2020 U.S. elections, in which the German leader feared that Donald Trump's re-election as to the U.S. presidency would result in a major rupture within the Atlantic community. Von der Leyen was her personal pick to steer the EU through such an eventuality, while Schmidt was tasked with keeping BiH on course (a cause Merkel was known to be personally concerned with). Whereas Schmidt's proximity to the HDZ would make him an object of scandal and derision in BiH, Merkel may have seen the same as much needed "experience" with the difficult political terrain of the Western Balkans. While the U.S. and U.K. were not initially privy to Berlin's scheme, they fell onside once Schmidt's nomination became public.

Upon Schmidt's formal assumption of the post of high representative in August 2021, his obvious sympathies for the Croat nationalist cause in BiH were quickly revealed. Indeed, his very arrival in the country was symbolically charged: Rather than landing in Sarajevo, Schmidt first travelled to the Dubrovnik Forum, then traveled to Mostar (the purported "capital" of the Bosnian Croat community in BiH), and only then arrived

in Sarajevo. He was arriving in BiH – but through Croatia and the political heartland of the HDZ BiH. Almost immediately thereafter, Schmidt announced that his most urgent priority in BiH was the question of electoral reform, which he translated to mean the "implementation" of the Ljubic decision. Schmidt also made clear that he would use his Bonn Powers to address the Ljubic decision if the (F)BiH authorities failed to act on their own. An accompanying series of leaks obtained by Bosnian media<sup>15</sup> made clear that Schmidt's reasoning and interpretation of the case was entirely in line with that of the HDZ BiH, and thus the party had no incentive to engage in any debate when it knew that, in time, Schmidt would act on their behalf.

This became clear in July 2022 – weeks after the formal BiH election campaign had begun – as Schmidt moved to enact a series of constitutional and electoral law changes in the entity through his Bonn Powers. Controversy immediately erupted because large segments of the public saw Schmidt as interfering in the election in explicitly partisan fashion. Namely, media leaks suggested Schmidt wished to impose a 3% electoral threshold whereby a canton that had less than 3% of a particular constituent people within its population would receive zero corresponding ethnic delegates in the FBiH House of Peoples. In the aggregate, this would mean the disenfranchisement of *additional* tens of thousands of Bosnian citizens in comparison to the existing legal-electoral regime and the further empowerment of the country's leading sectarian parties. The HDZ BiH stood to benefit the most from the disenfranchisement of Bosnian Croats who resided outside of its western Herzegovina electoral heartland. On July 25, nearly 10,000 citizens from Sarajevo and other parts of BiH gathered in front of the OHR offices in opposition to Schmidt's intervention. It was the largest protest that had ever been convened against any action by the OHR in the body's history. Responding to the backlash, Schmidt initially relented but angrily pledged that he would not allow the 2022 elections to occur without what he claimed was the implementation of the Ljubic decision.

He delivered on his promise on Oct. 2, 2022, minutes after the polls had closed. Schmidt invoked his Bonn

15 Istraga. "Objavljujemo dokument OHR-a: Christian Schmidt namjerava da iz Ustava FBiH izbriše popis stanovništva iz 1991. godine!" July 21, 2022. <https://istraga.ba/objavljujemo-dokument-ohr-a-christian-schmidt-namjerava-da-iz-ustava-fbih-izbrise-popis-stanovnistva-iz-1991-godine/>



Powers to make significant changes to the FBiH entity constitution and the entity's election law, with the explicit purpose of realizing the political aims of the HDZ BiH. In the process, he also changed the outcomes of the elections themselves, at least in the FBiH. Most of the pro-Bosnian parties had composed their party lists to increase the odds of their candidates being nominated to the Croat caucus in the FBiH House of Peoples, but Schmidt's amendments closed off that possibility. As two analysts from the *Democratization Policy Council* (DPC) explained: "The controversial 3 percent proposal initially tabled by Schmidt ...[was] replaced now by raising the number of delegates of the caucuses representing the dominant ethnic groups in Bosnia ... in the Federation House of Peoples from 17 to 23. This change achieve[d] the same desired result: increasing of the share of delegates in the Croat caucus who are elected from cantons in the HDZ BiH stronghold of Western Herzegovina." Furthermore, Schmidt raised the "threshold required to nominate a candidate for Federation president ... from 6 of 17 members (35.3%) to 11 of 23 members (47.8%). This [was] even slightly higher than the threshold proposed in July (8 of 17, or 47%) – moving from just over a third to nearly half of members, magnifying HDZ leverage."<sup>16</sup>

International election observers on the ground were outraged, and among the key Western states only the U.S. and U.K. released statements welcoming his intervention. For his part, Schmidt justified his move by making two false claims: that his actions were required to implement the Ljubic decision (which had already been implemented by the BiH Constitutional Court and BiH CIK) and that his amendments would streamline the government formation in the FBiH entity. Observers immediately pointed out that Schmidt had done nothing of the sort and had only made the government formation process in the entity more dependent on the whims of the ruling nationalist blocs. Once the results of the election were fully tabulated, this too became evident. In the entity's House of Representatives, the HDZ BiH formed a coalition agreement with the so-called Troika (SDP, NiP, and NS) and an amalgam of smaller parties. While this bloc managed to secure a narrow governing majority in

the lower chamber, in the House of Peoples they only controlled two of the three relevant ethnic caucuses, the Croat and Serb, respectively. The Bosniak caucus, and therefore one of the three entity (vice) presidents, was controlled by the SDA, which the HDZ BiH and Troika sought to eject from government. The Bosniak vice president, Refik Lendo, refused to sign off on the new governing coalition unless the SDA were granted a role in government. Thus, contrary to Schmidt's claim of having streamlined the FBiH government formation process, the same impasse appeared in 2022 as in 2018, only with the roles of the HDZ BiH and SDA reversed (and the SDA's demands arguably much easier to accommodate than those of the HDZ BiH). The only thing his interventions on Oct. 2 had genuinely done was to increase the HDZ BiH's grip on power.

After seven months of failed pleading and cajoling, Schmidt was forced to intervene once more, to amend his own amendments, but again he did so in obviously perfidious fashion to serve the interests of the HDZ BiH. In April 2023, the high representative decreed to allow government formation in the FBiH to take place on the basis that there was a clear governing majority in the House of Representatives and two of the entity's three (vice) presidents had agreed to deliver this coalition the mandate for the nomination of a prime minister (i.e., the initiative to form government). But Schmidt's decision was ad hoc. While he again amended the election code to allow for two of three (vice) presidents to be sufficient for the appointment of a prime minister, he nevertheless included a clause stating that the third (vice) president had the right to invoke a vital national interest veto in such a case, which if upheld by his caucus, would again block the process. But Schmidt did not afford that right to Lendo for the purposes of his intervention. That is, Schmidt would impose a FBiH government on the consent of only two entity (vice) presidents, but he would not allow those processes to play out through the parliamentary procedure. Schmidt never explained his decision, but the BiH media and public drew their own conclusions: because otherwise in future the HDZ BiH might be easily circumvented in the government formation process through only the consent of the

<sup>16</sup> Bodo Weber and Kurt Bassuener, "US Reinvests in Ethnic Oligarchy in Bosnia, Abandoning Support for Integration," Just Security, 2022, <https://www.justsecurity.org/83373/us-reinvests-in-ethnic-oligarchy-in-bosnia-abandoning-support-for-integration/>.





Bosniak and Serb (vice) presidents, regardless of the opposition of the Croat official.

The entire episode also had a curious judicial epilogue. Within hours of Schmidt's original October 2022 intervention, Presidents Zeljko Komsic and Sefik Dzaferovic filed an appeal to the BiH Constitutional Court to establish the legality of Schmidt's decision. Komsic and Dzaferovic were not questioning the use of the Bonn

Powers but the constitutionality of the decision itself. After initially delaying its decision, the Constitutional Court returned a verdict in March 2023 that found, by a narrow majority ensured by the HDZ-aligned chief justice, that Schmidt's intervention was in keeping with the BiH constitution. But the three dissenting justices submitted their own, scathing opinion that concluded: "The interference of the High Representative in Bosnia and Herzegovina in the General Elections held on

### Key Political Constituencies in Bosnia and Herzegovina

Constitutional reform in BiH can be realized by achieving synergy between the reformist and conservative camps, which will then create pressure on more moderate or pragmatic elements within the autonomist camp to assist in shaping the process, rather than opposing it outright.

Secessionists	Autonomists	Conservatives	Reformers
<p>The secessionists are chiefly represented by Milorad Dodik's SNSD and their sponsors in the government of Serbia and constitute the most radical pole of BiH institutional politics.</p> <p>At its extremes, some elements of the HDZ BiH and their sponsors in the HDZ government in Zagreb also exhibit secessionist tendencies (i.e., support for the (re-creation) of the "Croat Republic of Herceg-Bosna)).</p> <p>The secessionists are the least likely to support any sort of constitutional or political reform in BiH because they reject the very idea of BiH's sovereignty and statehood as such.</p>	<p>The autonomists are chiefly represented by Dragan Covic and his HDZ BiH, as well as the conglomeration of opposition parties in the RS entity (e.i., the SDS, PDP, ZPR etc.), and the minor ethnic Croat parties opposed to the HDZ BiH.</p> <p>The autonomists have traditionally gravitated towards explicit and implicit coalition(s) with the secessionists (particularly the HDZ BiH) but maintain linkages to the reform camp for the sake of political power.</p> <p>Of the two wings – i.e., the HDZ BiH and the RS opposition and the minor Croat parties – the latter have tended to be more pragmatic.</p> <p>The autonomists are wary of any "centralizing" reforms but are willing to entertain different federalist and/or power-sharing modalities.</p>	<p>The conservative camp is represented by the international community, in particular the U.S. but also the OHR, inasmuch as it exists as an independent actor outside of the influence of the U.S.</p> <p>Historically, the conservative camp has been ideologically sympathetic to the reformists but practically most committed to the secessionist and autonomist camps, fearing their propensity towards violence.</p> <p>The conservatives are not opposed to constitutional reform in BiH but are wary of upsetting the status quo because they fear it may lead to renewed strife.</p> <p>If presented with a plausible, locally led initiative for constitutional reform in BiH, the conservatives would support it, without major concern for its contents beyond its sustainability.</p>	<p>The reformist camp in BiH is the largest and most influential but also most amorphous of the four primary constituencies, whose chief representatives include the SDP, NiP, NS (the Troika), the SDA, DF, SBiH, and other "pro-Bosnian" political parties.</p> <p>The reformist camp is broadly divided into sovereigntist (i.e., DF) and accommodationist (i.e. the Troika) wings, but they share ideological commitments to BiH's constitutional reform, and the country's EU and NATO aspirations.</p> <p>Traditionally, the reformist camp has supported virtually any reform initiative in BiH provided it does not further deepen the sectarian element in the country's governance and does not lead to further ethnic-territorialization.</p>

Source: Dr. Jasmin Mujanović

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October 2, 2022 is unheard of. It is a unique case.”<sup>17</sup> Schmidt’s court victory was short-lived, however, as by the end of that summer, the ECHR delivered its Kovacevic ruling, which, although not directly dealing with the October 2022 case, nevertheless sharply rejected the entire ethnic power-sharing system of the existing BiH constitution, and with particularly

trenchant criticisms of the (F)BiH House of Peoples as a relevant legislative body (whose composition had wholly consumed Schmidt’s efforts). In short, Schmidt had succeeded in delivering a major political victory to the HDZ BiH but in so doing had only further exposed the inherent absurdity of the country’s prevailing ethno-sectarian regime.

## Section VII: What are the barriers to constitutional reform in BiH?

The preceding section identified the HDZ BiH and the current government of Croatia as one of the main advocates of further sectarian entrenchment in BiH and therefore also as one of the main opponents of substantive constitutional reform. That discussion further forces the question of who and what exactly the chief impediments to meaningful constitutional reform in BiH are, beyond the two already discussed. These actors can be categorized into four groups that we shall refer to as the autonomists, the secessionists, the conservatives, and the reformists.

The autonomists are chiefly represented by the HDZ BiH and their partners in the Zagreb HDZ. Although their practices have been discussed, it is worthwhile to unpack their actual ideological perspective. They autonomists are not, in principle, opposed to the existence of BiH as a sovereign state but wish for its internal administration to be further fragmented along strictly sectarian lines. Ideally, they imagine BiH as constituted of three entities: the existing Serb-majority RS entity, a Bosniak-majority entity, and a Croat-majority entity (often referred to simply as “the third entity”). The members of the BiH presidency would then be elected from their territories without the need for explicit ethnic labels because the winning candidates would, they assume, come from

the respective majority communities and likewise maintain a commitment to the principle of sectarian governance. The autonomists have little to say about the ECHR’s rulings, particularly the August 2023 Kovacevic ruling, because they have yet to devise a coherent answer to the court’s categorical rebuke of their platform. The Kovacevic decision, for instance, established that any national executive necessarily requires the consent of all BiH citizens (i.e. all Bosnians had to have an equal opportunity vote in a single national election), and so the ethnically constituted model floated by the HDZ BiH in this instance is a non-starter. Accordingly, although neither the HDZ BiH nor the Zagreb HDZ have made this explicit, it is understood that their position is that the ECHR’s decisions, although binding according to the BiH constitution itself, should simply not be implemented because any substantive implementation of the ECHR’s decisions would necessarily mean a rejection of the autonomists’ sectarian-based platform.<sup>18</sup>

The secessionists are represented by Milorad Dodik’s SNSD and their sponsors in Belgrade. At their extreme, the secessionists reject the very idea of BiH as a singular state and openly advocate for the completion of war-time Serb nationalist project: the secession of the RS entity and its incorporation into

17 Istraga. “Troje sudija Ustavnog suda BiH u izdvojenom mišljenju napisalo: ‘Miješanje visokog predstavnika u Opće izbore 2022. je nečuveno,’” 2023, <https://istraga.ba/troje-sudija-ustavnog-suda-bih-u-izdvojenom-misljenju-napisalo-mijesanje-visokog-predstavnika-u-opce-izbore-2022-je-necuveno/>.

18 Advocates of this view have occasionally suggested Belgium as a “model” of what BiH’s future governance might resemble. While the comparison is not meritless per se, it is nevertheless awkward and ultimately unconvincing. To begin with, Belgium is functionally a binational state, with the tiny German-speaking community representing barely 1% of the population. The two dominant ethno-linguistic groups, the Flemish and the Walloons, inhabit contiguous regions with less ethnic co-mingling than is the case in BiH. The ethnic sorting method applied in Belgium would therefore be difficult to replicate in BiH. For example, in Belgium all those deputies elected to the Chamber of Representatives in the Flemish Region are immediately sorted into the Dutch caucus. In BiH, by contrast, the two cantons with the numerically largest Croat populations – the Herzegovina-Neretva canton and the Central Bosnia canton – each also have large Bosniak populations (41.44% and 57.58%, respectively). As such, any ethnic sorting of the sort seen in Belgium would require either self-sorting by candidates and/or parliamentarians (which the HDZ BiH rejects because they believe it allows anti/non-nationalist Croats to “usurp” the voice of “legitimate” Croats) or the sorting of voters, i.e., ethnically segregated ballots. The latter would never survive a challenge at the ECHR, and so any such “reform” would be moot. Finally, and by no means insignificantly, Belgium is a constitutional monarchy in which the crown has significant reserve powers to assist in the resolution of political crises, as occurred after between 2007 and 2011.



a new, “greater” Serbian state (which may or may not also include parts of Kosovo, Montenegro, and North Macedonia). Therefore, they also reject the entire concept of a multinational BiH state, the European Convention on Human Rights, the legitimacy of the ECHR, the rulings of the UN’s International Criminal Tribunal for the former Yugoslavia (ICTY), and the liberal-democratic rules-based order as such. The more “moderate” wing of the broader Serb nationalist camp in BiH (represented by the RS opposition parties like the SDS and PDP) do not believe that secession is a viable project but also appear reserved about the possibility of significant reforms of the country’s existing constitutional regime. But no RS opposition bloc has ever fully fleshed out their position on the ECHR’s rulings, and therefore it is possible that their views may be more moderate than those of both the SNSD and HDZ BiH. After all, Dodik himself was initially a champion of the April Package, and over the past two decades various ethnic Serb figures from the RS entity, including Zdravko Krsmanovic, Dragan Cavic, Mirko Sarovic, Nebojsa Vukanovic, Vojin Mijatovic, have hinted at some strikingly pragmatic views. These include abandonment of secessionist policies, recognition of the Srebrenica Genocide, strengthening of state institutions, and substantive support and commitment to BiH’s EU and NATO aspirations (the latter two of which necessarily imply support for constitutional reform). However, the influential Serbian Orthodox Church, a deeply reactionary institution, would likely oppose any moves toward greater rationalization and/or integration in BiH, especially if it was perceived as a loss of significant constitutional prerogatives for the RS entity.

The conservative camp in the BiH constitutional debate is primarily represented by the international community specifically the United States. “Conservative” here refers to the overall orientation of the U.S. toward BiH’s post-war settlement, not an ideological position. For the U.S., the unequivocal success of the Dayton Agreement was that it brought the Bosnian War to an end. Yes, U.S. policymakers are aware that it was an imperfect peace, perhaps even an unjust peace, and certainly one that produced dysfunction in BiH’s post-war governance. But the peace has endured, and if that remains the case, the Dayton regime remains acceptable to Washington on that basis alone. It would be preferable for U.S.

interests if BiH had a constitutional regime that was in keeping with the European Convention on Human Rights and one that could provide a functional governance apparatus to push the country into the EU and NATO, but the U.S. will only pursue that course if it is certain that it will not lead to renewed conflict and/or if it enjoys the approval of Zagreb and Belgrade (i.e., the leadership of the Bosnian Croat and Bosnian Serb nationalist camps). Accordingly, the animating principle(s) of U.S. policy in BiH are maintenance of the status quo and accommodation with Croat and Serb nationalist interests. Not because the U.S. is sympathetic per se to the latter but because American policymakers know that these groups are the ones most likely to resort to violence and most willing to abandon the idea of a single BiH state. The Bosniak community, because it is far and away the most moderate of the three major ethnic blocs and because it is the only one categorically attached the survival of a single, sovereign BiH, can be most easily pressured by the U.S. to make concessions and thus allow for, at least, the simulation of progress and negotiation when the need arises.

This perspective explains why since 2006 nearly all political agreements made in BiH through the mediation of the U.S. and EU have involved the weakening of the central state apparatus and the rule of law and the empowerment of Milorad Dodik and Dragan Covic. The U.S. and the West more broadly have primarily pursued the maintenance of the status quo in BiH, in which the imperative is always to appease those challenging or upsetting the country’s peace and security. The U.S. position, and with it also the orientation of the broader West, could change, but this requires a shift in their fundamental calculus of regional political realities. Either the absence of a functional, liberal-democratic constitutional regime in BiH needs to be recognized by the West as an actual threat to Euro-Atlantic security interests or the accommodation of Bosniak and/or pro-Bosnian sentiment needs to overtake the concern with Serb and/or Croat nationalist interests among Western policymakers. Absent either one of those or some combination of the two, it is difficult to imagine a significant shift in Western policy toward BiH or the question of constitutional reform in the country.



Finally, there are the reformists, who represent the single largest constituency in BiH but whose political power is the most suppressed, although, in fairness, it is not a heterogeneous group either. “Reformist” in this context refers specifically to the idea of being in favor of the reform of the BiH constitutional regime in line with the provisions of the European Convention on Human Rights and the rulings of the ECHR; it is not a catch-all descriptor of the ideological and political platforms of each group sorted into this camp. Thus, the reformist camp in BiH includes parties on both the political left and right and those identifying explicitly as Bosniak as well as those identifying exclusively as Bosnian (i.e., in pointed rejection of the dominant ethno-nationalist regime in the country, in which proponents include the SDA, the largest ethnic Bosniak party in the country). In the current sitting of the BiH House of Representatives, for instance, the reformist camp could be said to include the SDA, the DF-GA, the SDP, NiP, NS, BHI, and the NES, among others – that is, 24 of 42 MPs, or 57% of the lower chamber. In the FBiH House of Representatives, this same group has at least 77 of 98 MLAs (or 78.5% of the lower chamber). Of course, because the reformist camp is internally divided along different political-ideological camps

and because of the sectarian provisions of both the BiH and FBiH constitution, even these overwhelming majorities are not in and of themselves enough to enact constitutional reform. Even so, the reformist camp also includes essentially the entire BiH civil society sector, most of the academic community, the country’s leading NGOs, and the representatives of every minority community in BiH (Bosnian Jews, Roma, Albanians, etc.). Moreover, if the country’s current demographic trends persist, it is plausible that within the next two decades – perhaps even sooner – the collective pro-reform electorate in BiH, broadly defined, could constitute as much as two-thirds of the overall population, with approximately 60% of that total populace being made up of just the Bosniak community, as previously observed. The political consequences of depriving two-thirds of the BiH population of their right to peacefully, democratically alter the governance of their own state – as is the prevailing view of the autonomist, secessionist, and even conservative camps – will, in time, produce a generational political crisis that the country’s existing constitutional regime and political system is unequipped to manage.

## **Section VIII: What key issues need to be resolved in the next round BiH constitutional reform?**

There are two primary sets of issues that need to be resolved in BiH in the next round of constitutional reform if the country is to receive a functional, lasting political system capable of ushering it into EU and NATO membership. One set is made up of binding, legal obligations, and the other is made up of fundamental political – but not necessarily legal – concerns. The first set can be summarized as the implementation of all the ECHR rulings against BiH to date, beginning with the 2009 Sejdic-Finci ruling and running up to (as of this writing) the 2023 Kovacevic decision. At minimum, this would mean:

- Ensuring that all citizens of BiH, regardless of their ethnic identity (or lack thereof) or place of residence, have equal right to elect and be elected to the BiH presidency. Alternatively, the constitutional role of the BiH presidency must be transformed or eliminated and its powers devolved to the BiH Council of Ministers.
- The s/election of delegates to the BiH and FBiH House of Peoples must either be categorically democratized, or the constitutional authorities of both chambers must be reduced, to ensure that they do not sublate the democratic will of the BiH electorate as expressed through the BiH and FBiH House of Representatives, as is presently the case.
- It is necessary for BiH Constitutional Court’s 2015 Komsic decision to be implemented, which ruled that both the current method for the s/election of the FBiH president and their vice presidents as well as those of the RS president and their vice presidents are unconstitutional on grounds of discrimination against the Others.
- The concept of the constituent peoples must be clarified and defined, ensuring that members of this group are not afforded *greater* political rights than any other BiH citizen. Alternatively,





the concept must be scrapped in its entirety or devolved into a purely symbolic/ceremonial category. This also means ensuring full civic equality of all BiH citizens in the country's democratic processes, including the rights of the Others in all relevant decision-making bodies.

The political docket of major constitutional concerns is longer and includes issues that have not yet necessarily become subject to court challenges but are likely to evolve in that direction if they are not resolved or addressed in the interim. While it is impossible to provide a comprehensive accounting of all possible political-constitutional issues in a polity such as BiH, the 2006 April Package provided a useful signpost for the necessary direction of future constitutional arrangements in the country. Nevertheless, issues that have emerged in the two decades since will warrant addressing in any future round of BiH constitutional reforms because they have to do with salient political concerns beyond matters of government-institutional efficiency. These include, but are not limited to:

- Streamlining and clarifying the division of powers between the BiH presidency and the Council of Ministers, with an emphasis on empowering the latter, and turning the former into a ceremonial institution, if it is to be maintained at all.
- Increasing the competencies of the BiH government through the creation of new ministries, with an emphasis on a state-level health ministry, and a state-level agriculture ministry. A ministry for EU integration is also necessary to effectively coordinate the accession activities of the BiH government. Some of the existing ministries, however, could be dissolved, such as the Ministry of Security, and its authorities apportioned to the Ministry of Defense and Ministry of Justice. In line with the U.S. Women, Peace, and Security Act (2017) and the ongoing U.S. Strategy on Women, Peace, and Security, the promotion of gender equity in BiH politics should also result in the creation of either a dedicated ministry or a directorate within the existing Ministry of Human Rights and Refugees.
- Decreasing the degree of institutional asymmetry between the entities, either by increasing

opportunities for the representation of non-Serbs in the RS entity or by streamlining the governance of the FBiH entity in line with the existing regime in the RS entity, provided either decision is brought in line with the rulings of the ECHR. Alternatively, the entities themselves could be entirely scrapped with all their existing powers devolved to the cantons and with the current RS entity divided into two self-governing cantons (e.g., a western half centered on Banja Luka and an eastern half centered on East Sarajevo or Zvornik).

- Streamlining the institutional-administrative apparatus of the FBiH entity to decrease ballooning public expenditure costs and opportunities for corruption and increase basic governance efficiency. This may mean either completely dissolving the cantons and devolving their authorities to the municipalities (i.e., the K-143 "municipalization" model) or decreasing the number of cantons (for example, merging the Bosnian-Podrinje Canton into the Sarajevo canton and the Livno canton with the West Herzegovina canton). It may also include further administrative changes, such as merging the Posavina canton with the Brcko District, depending on political appetites and the ability of the negotiators to square such efforts with the decisions of the ECHR.
- Rectifying ethnically charged names of administrative units. The BiH Constitutional Court has repeatedly struck down ethnically charged name changes of towns and regions which were instituted after the war (e.g., rejecting the constitutionality of renaming Foča to "Srbinje," or the use of the "Herceg-Bosna" for name of the Livno canton, or the use of the term "županije" for cantons, or even the use of the Herceg-Bosna emblem in official capacity). The most obvious outstanding example of this practice is the name *Republika Srpska*, which is discriminatory to Bosniaks, Croats, and other non-Serbs on the face of it. The geographic naming convention of the FBiH cantons lends itself to a simple solution, however: The existing RS name could thus be replaced with "the Sava-Drina entity" (*Savsko-drinski entitet*), drawn from the two primary rivers



that form BiH's northern and eastern borders and along which the entity sits.<sup>19</sup> Alternatives are possible, provided the eventual name is not one promoting ethnic or sectarian interests.

Other potential constitutional and political issues certainly exist in BiH, but remedying the above would complete the largest segment of the problems facing the country's governing regime.

## Section IX: What political paths are available to achieve constitutional reform in BiH?

It is evident that there is no political appetite among the autonomists (the HDZ BiH) or the secessionists (the SNSD) for BiH constitutional reform in line with the rulings of the ECHR. That, however, does not foreclose the possibility of achieving the same. The two key constituencies that need to be moved toward unified action are the conservatives (i.e., the U.S.) and the reformists. If the latter two can mount a credible, sustained campaign advocating for constitutional reform in BiH, it will occur even in the face of entrenched opposition by the autonomist and secessionist camps. This can occur through two broad paths: one institutional, the other unilateral. Ideally, the two approaches would be combined to some degree.

The institutional path means amending the BiH constitution through its existing amending formula, as described in Section I of this document. To incentivize an appropriate degree of participation and acquiescence to such a process by the HDZ BiH and SNSD, however, will require meaningful consequences for anti-reform actors or activities. Such consequences must come from both the international community and from pro-Bosnian political establishment. To begin with, the U.S., above all, must communicate to Zagreb and Belgrade that it is making constitutional reform in BiH a priority and that it will not tolerate their interference in the process. Thus, the U.S. must make the liberalization and democratization of BiH's constitution a bilateral issue between it and Croatia and Serbia by warding off any further incursions against BiH's sovereign democratic processes, in line with its role as the architect of the original Dayton Agreement.

Next, meaningful costs must be imposed on those obstructing genuine movement toward constitutional reform. The combined vote of the HDZ BiH and SNSD at the 2022 BiH general elections – based on returns

in the BiH House of Representatives – was 25%. Their hard-line stances represent a minority view in BiH, and it is inconceivable that the country's entire political and historical trajectory should be stymied based on their fringe intransigence. Accordingly, the U.S. should begin increasing financial and political pressure on these parties, including the regions they presently govern, by ramping up sanctions against their members and the institutions they presently occupy. Even if the EU or its member states do not impose their own measures – although it would be far more preferable if they did, as it would hasten the success of this approach – no relevant financial institution will be willing to deal with political leaders or regions under U.S. sanctions, provided the U.S. enforces these measures as it has begun to do recently with respect to Dodik. A stringently applied policy of financial and political exclusion will move even Dodik and Covic because such measures have moved far more powerful political actors to enact far more consequential policies – e.g. Iran and the JCPOA – than what is being asked of the SNSD and the HDZ BiH. If applied earnestly and with a clearly articulated set of desired concessions, it is extremely likely that the SNSD will approve BiH constitutional reforms in line with the decisions of the ECHR, enacted through the existing constitutional amending formula. To further hasten the success of this approach, pro-Bosnian political actors should refuse to form any government coalitions at any level of government with either the SNSD or HDZ BiH until both make concrete commitments to engage in meaningful constitutional reforms within clearly articulated timeframes.

The unilateral approach assumes willingness on the part of the international community, but again specifically the U.S., to push the OHR and its Bonn Powers to force BiH to undergo at least a degree of constitutional

<sup>19</sup> This name may also have the advantage of referencing St. Sava, the first archbishop of the Serbian Orthodox Church, and thus maintaining a nod to the entity's majority Serb population, without negating the existence of other communities.



reform.<sup>20</sup> Because the state constitution cannot be amended using the Bonn Powers, this approach would necessarily focus on the entities and cantons instead, in which the OHR has frequently used its executive prerogatives to amend the respective constitutions (including the contentious 2022-2023 FBiH constitutional amendments by Schmidt). This approach, however, may also encompass changes to the BiH election code, which could facilitate the election of more moderate and/or reformist candidates depending on the methodology used and which would in the aggregate begin to increase the odds of domestic constitutional reforms. Because of the extraordinary nature of the Bonn Powers, there is virtually no limit to how significantly the OHR could amend the sub-national constitutions in BiH, provided these changes were in line with the ECHR's decisions. Indeed, even if its changes were in direct conflict with the BiH constitution, assuming the conflict was one in which the ECHR had already made clear the inadmissibility of the provisions of the state constitution, even such changes could be legally viable, even if politically contentious.

For instance, the OHR could use its Bonn Powers to radically change the nature of the FBiH House of Peoples and bring its operation in line with both the rulings of the ECHR and the BiH Constitutional Court. The high representative could unilaterally reduce the powers of the chamber to the deliberation of vital national interest vetoes and eject it from the legislative process otherwise, including from the process of government formation. The OHR could additionally grant the Others caucus the right to the same veto powers as the other three caucuses and give them their own representative among the FBiH (vice) presidents. If the existing formula for government formation were to be preserved, wherein the FBiH (vice) presidents grant the mandate for government formation, the OHR could decree that only the consent of three of the four (vice) presidents is needed and that the process cannot be halted using the vital national interest veto. The high representative could also create a House of Peoples in the RS entity or completely change the nature of

the FBiH (and/or RS) House of Peoples by modeling it on the erstwhile "Council of Municipalities," which served as the upper chamber of the BiH PA under the RBiH constitution. In such a scenario, delegates would no longer be apportioned indirectly through cantonal assemblies but would be elected directly through each of the 79 FBiH municipalities (or their 64 counterparts in the RS entity). The OHR could also simply remove individual political officials from office from across the BiH political hierarchy who obstruct movement toward constitutional reform, a common practice in the late 90s and early 2000s.

In a separate set of actions, the OHR could also increase the legal and political capacities of ordinary citizens to participate in the legislative process by, for instance, creating legislation concerning popular referenda, snap elections, or even the creation of citizen assemblies whose oversight or recommendations could become legally binding on the respective legislatures. Such citizen assemblies have already become the norm across the democratic world, and they have become especially prominent in the process of constitutional and/or election systems reform. The OHR could create the legal-institutional framework for the convening of a set of similar assemblies across BiH whose recommendations for constitutional and/or electoral reform would, at the very least, be introduced into the respective legislative assemblies. Failure to do so could result in the OHR dissolving any assembly that failed to do so and initiating snap elections or even, in the extreme, barring officials who failed to vote for the adoption and enactment of the recommendations of the citizen assemblies from future office. The citizen assemblies could even be made a permanent feature of the BiH democratic system, or at least a semi-regular feature that could be used to evaluate the efficacy and/or fairness of the country's constitutional regime (e.g., sitting once every 10 years, to coincide with the conduct of the census).

Whether the approach is nominally institutional or (as it has been referred to here) unilateral, the fundamental

<sup>20</sup> It is doubtful that Christian Schmidt has the credibility, public support, or even personal willingness to engage in such a process, and therefore it is likely necessary for him to be replaced by a more suitable candidate if this approach is to succeed. Canada briefly floated a competing candidate to Schmidt in 2020, and as there has never been a non-European high representative (or a woman in the role), the country may be the ideal state to deliver a replacement for Schmidt. Moreover, Canada's own Office of the Governor General is a proximate institution to the OHR, and therefore a past Canadian governor general, for example Michaëlle Jean, may be well suited for the function.



ingredient required for both is the political will to act, first and foremost on the part of the international community, above all the U.S., and then on the part of the reformist camp in BiH and BiH civil society, to assist in the adoption of meaningful constitutional reforms in line with the decisions of the ECHR. How that political

will can be generated is a question outside the purview of this report, but at base it will require convincing the international community that its own interests in BiH and the Western Balkans are best served by use of its political weight and power to realize the agenda, or at least aspects of the agenda, of the reformist camp.

## **Section X: What kinds of specific changes to the BiH constitution could be enacted through the above modalities that might be broadly acceptable to all relevant actors in BiH but would not involve the state's complete re-organization?**

Dozens of specific blueprints for constitutional reform in BiH have been floated over the years by a host of organizations and institutions, including several prominent proposals that emanated from BiH civil society. In short, there is no lack of hypothetical models for the reform of BiH's constitution. What has generally been lacking, and what this report has sought to remedy, are accounts of how to marshal the political will within BiH and the international community to realize such changes. With respect to that, there is still the question of what modest changes to BiH's constitutional regime, which nevertheless realize the rulings of the ECHR, might look like. Namely, what former U.S. Secretary of State Antony Blinken has articulated as U.S. demands for "limited constitutional changes" in BiH.

Although this report has referenced some scenarios for the possible territorial re-organization of BiH, the realization of such an idea would imply a significant degree of political will among all relevant actors. Institutional reforms without territorial corrections represent a more conservative course. Institutional reforms that preserve most of the existing constitutional and

political modalities in BiH but modify these in line with provisions that would allow them to survive further challenges at the ECHR and BiH's own Constitutional Court are the *most* conservative but realistic course available. The proceeding proposals seek to articulate one model for realizing such changes.

To be clear, these proposals are not exhaustive, nor are they necessarily the most optimal in terms of overall efficiency or even maximum democratic legitimacy. They are not meant as the final word on the process of constitutional reform in BiH but are instead – like the original April Package – an interim regime that would allow BiH to move closer toward its Euro-Atlantic aspirations while also generating, in time, enough collective goodwill among the country's citizens and leaders for still more comprehensive reforms in the future. As noted earlier, it is, in one respect, first necessary to show that meaningful constitutional reform of any sort can occur in BiH, simply to normalize the same as a legitimate and (relatively) routine aspect of parliamentary politics in the country, before efforts at the realization of an ideal-type social contract can bear fruit.

### **A Model for Limited Constitutional Reform in BiH**

- One non-ethnically designated president with ceremonial powers (such as that of the Republic of Ireland) elected across BiH, whose supreme responsibility is preserving the sovereignty and territorial integrity of the Bosnian state and who may act as a ceremonial representative of the BiH state (e.g., at the U.N. General Assembly).
- A two-round presidential election system, maximizing odds of non-Bosniak candidates winning (i.e., near certain Bosniak vote splitting in the first round; HDZ BiH, SNSD, and other non-Bosniak voters can pool votes in the second round for a credible chance at blocking Bosniak domination of the institution).





- All existing presidential powers devolved to the BiH Council of Ministers. The BiH president, however, retains executive civilian powers over the BiH Armed Forces and acts as commander-in-chief. The BiH defense minister sets day-to-day defense policy, which is determined by the Council of Ministers (as in most Central European polities).
- The BiH Council of Ministers shall have flexible composition (i.e., its membership can be increased or decreased by statute), but two-thirds of its members must come from the FBiH entity and one-third must come from the RS entity, in keeping with current norms.
- In line with the reforms to the BiH presidency, the existing entity veto will be devolved to the BiH Council of Ministers. The purpose of the entity veto will be rolled into the vital national interest veto (see below); i.e., the entity veto can only be invoked on grounds of imminent and credible harm to a particular community (within that entity), not because the entity government or majority objects to a state-level initiative. The entity veto can be invoked through a decision of two-thirds of the ministers from either entity. The merit of the veto will be determined by the Constitutional Court of BiH and cannot be further challenged.
- The establishment of unicameral legislatures at both BiH and FBiH entity levels, establishing symmetry with existing system in the RS entity. For the BiH Parliament, MPs will be elected directly across existing electoral district lines. Brcko will be its own electoral district.
- Single transferable vote and/or ranked choice voting may also replace the country's existing electoral system, as it would better represent voters' preferences and promote a more moderate form of politics while further moving the country away from a winner-take-all system.
- The post of president of the FBiH is abolished. The FBiH prime minister assumes the FBiH president's powers, but a constitutional clause is inserted that the prime minister post must rotate among four caucuses (see below); i.e., if a Bosniak held the post in 2026-2030 term, the next prime minister *must* be from Croat, Serb, or Civic bloc. The speaker of the house and prime minister cannot be from the same caucus. The same policy will be replicated in the RS entity to ensure symmetry between the two units.
- All members of the BiH, FBiH, and RS legislatures must join one of four caucuses: Bosniak, Serb, Croat, or Civic. The choice cannot be altered once made, even during subsequent parliamentary mandates.
- Each of the four blocs can invoke a vital national interest veto if two-thirds of the members of the bloc invoking the veto vote to do so. The caucuses shall have no parliamentary or constitutional function beyond this; they exist purely to replace the role of the House(s) of Peoples. The merit of the veto will be determined by the Constitutional Court of BiH and cannot be challenged further.
- The constitutive people concept will be defined, and the definition shall read: "the Bosniaks/Serbs/Croats are a recognized indigenous community of Bosnia and Herzegovina with rights to their own cultural, religious, and linguistic customs and the reasonable accommodate of the same within the public institutions of BiH. The rights of constitutive peoples do not supersede those of other Bosnian citizens."
- General and local elections will occur simultaneously and be organized once every four years. Provisions for snap elections, recall elections of individual parliamentarians, and popular referenda shall be introduced at all administrative levels.

## Conclusions

In 2025, the BiH constitution, originally agreed to in Dayton, Ohio, will turn 30 years old. It will be a remarkable and improbable milestone given that no one, including its original American authors, believed

that the document would (or should) prove to be that durable. For all its flaws, however, the experience of the original DPA proved that when the U.S. and international community had the will to act, they could



resolve even the most seemingly intractable conflicts. It was a far more difficult task to bring peace to BiH in 1995 than the prospect of securing constitutional reforms in line with the rulings of the ECHR in BiH in 2025. BiH can and must undergo constitutional reform. Its political future depends on it. The U.S. and the

broader Euro-Atlantic community have an interest and responsibility in assisting BiH in achieving the same. The task is difficult, but it is far from impossible. The fundamental resource required to accomplish this, for BiH and for all its citizens, is simply the will to act. □

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## Biography



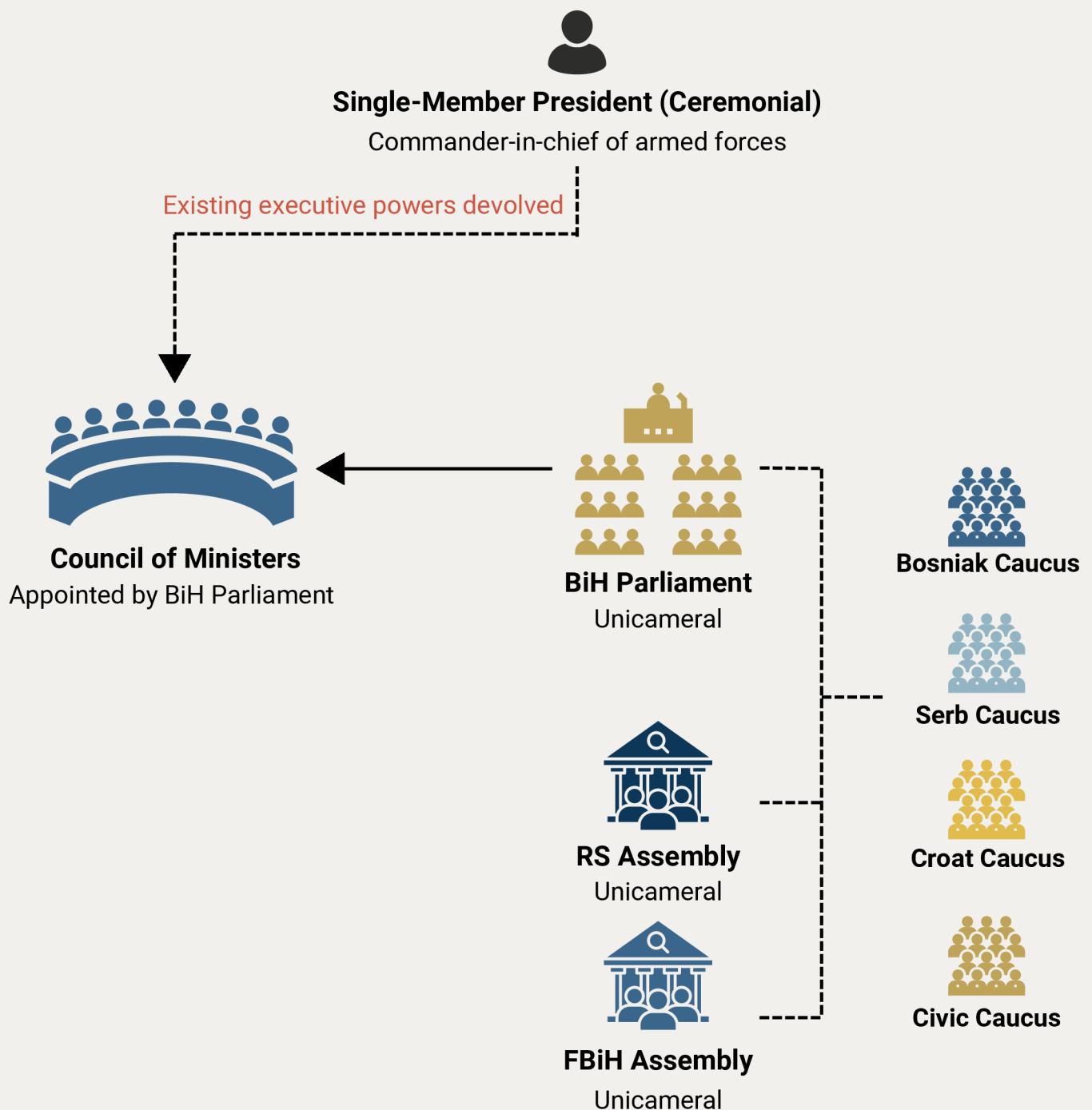
**Dr. Jasmin Mujanović** is a political scientist with a doctorate from York University specializing in the politics of post-authoritarian and post-conflict democratization. He is the author of two books, "Hunger and Fury: The Crisis of Democracy in the Balkans" and "The Bosniaks: Nationhood After Genocide." His analyses have also appeared in The New York Times, The Washington Post, The Guardian, Foreign Affairs, Foreign Policy, and other leading global media outlets. He has a prominent social media presence and makes regular appearances on international television and radio programs, including numerous Balkan media outlets. Originally from Sarajevo, he is a Senior Non-Resident Fellow at the New Lines Institute for Strategy and Policy in Washington, D.C. .

## Dayton Plus:

# A Policymaker's Guide to Constitutional Reform in Bosnia and Herzegovina

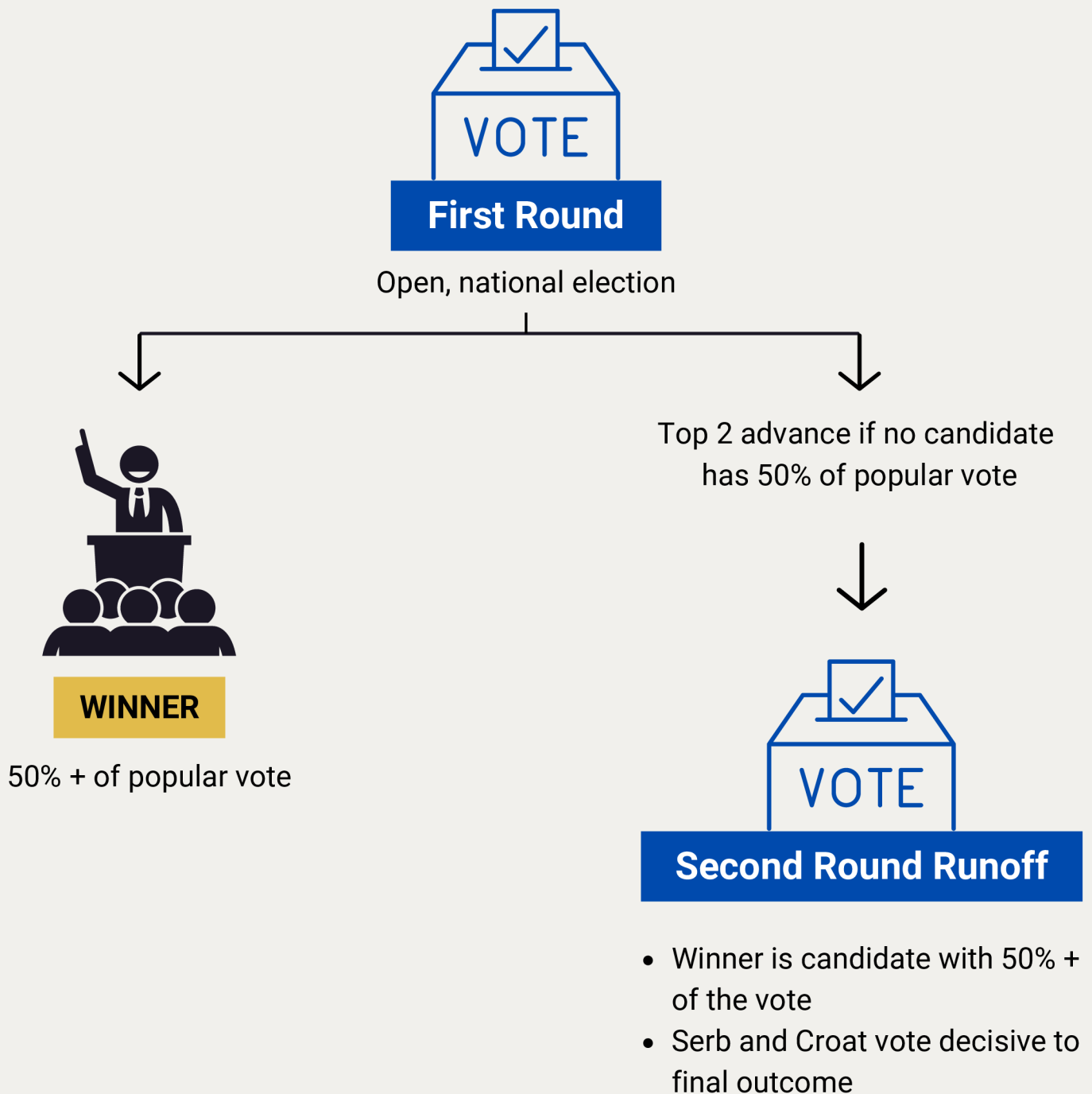
## BiH Governance Structure

A Model



## BiH Presidential Election

**A two-round system to ensure competitive, moderate outcomes**





## BiH Unicameral Legislature



### Vital National Interest **Veto**



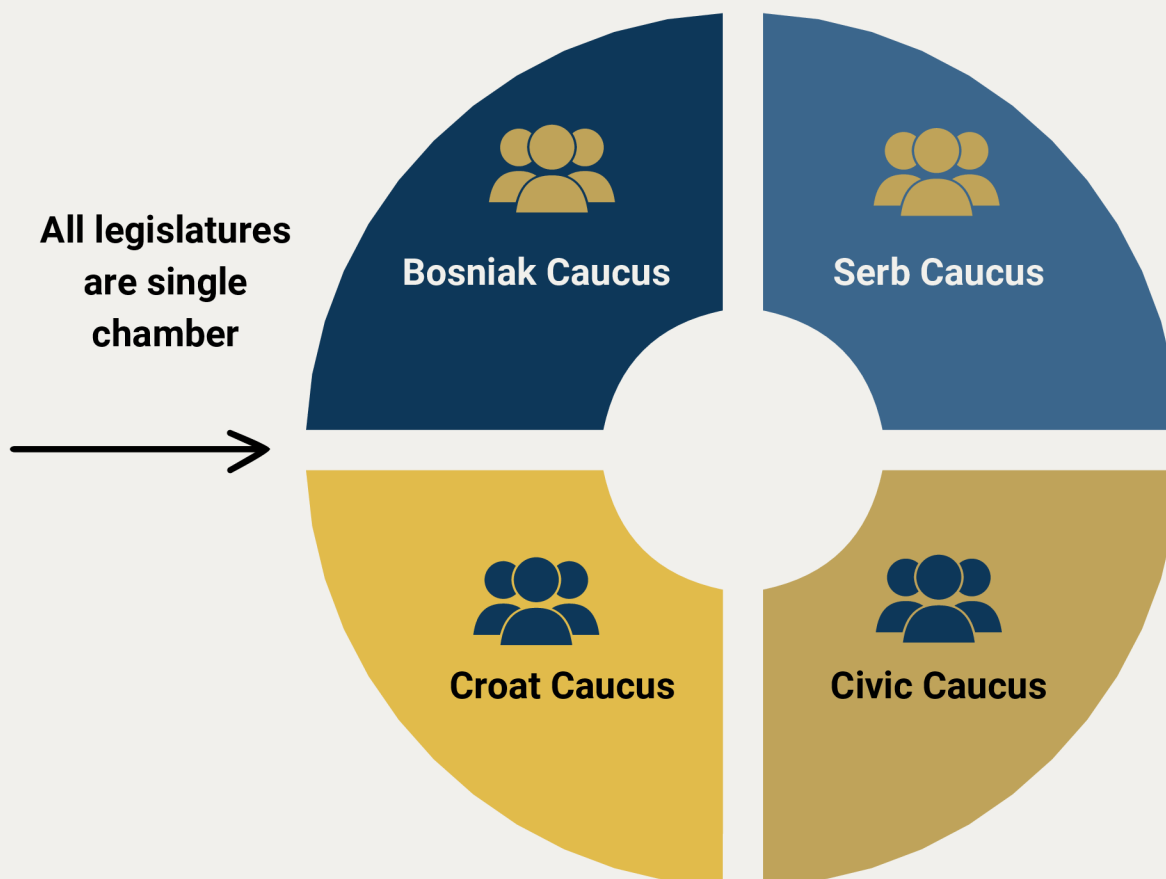
Two thirds of any caucus can invoke **veto**.



**Veto** is evaluated by BiH Constitutional Court.



The choice is permanent.

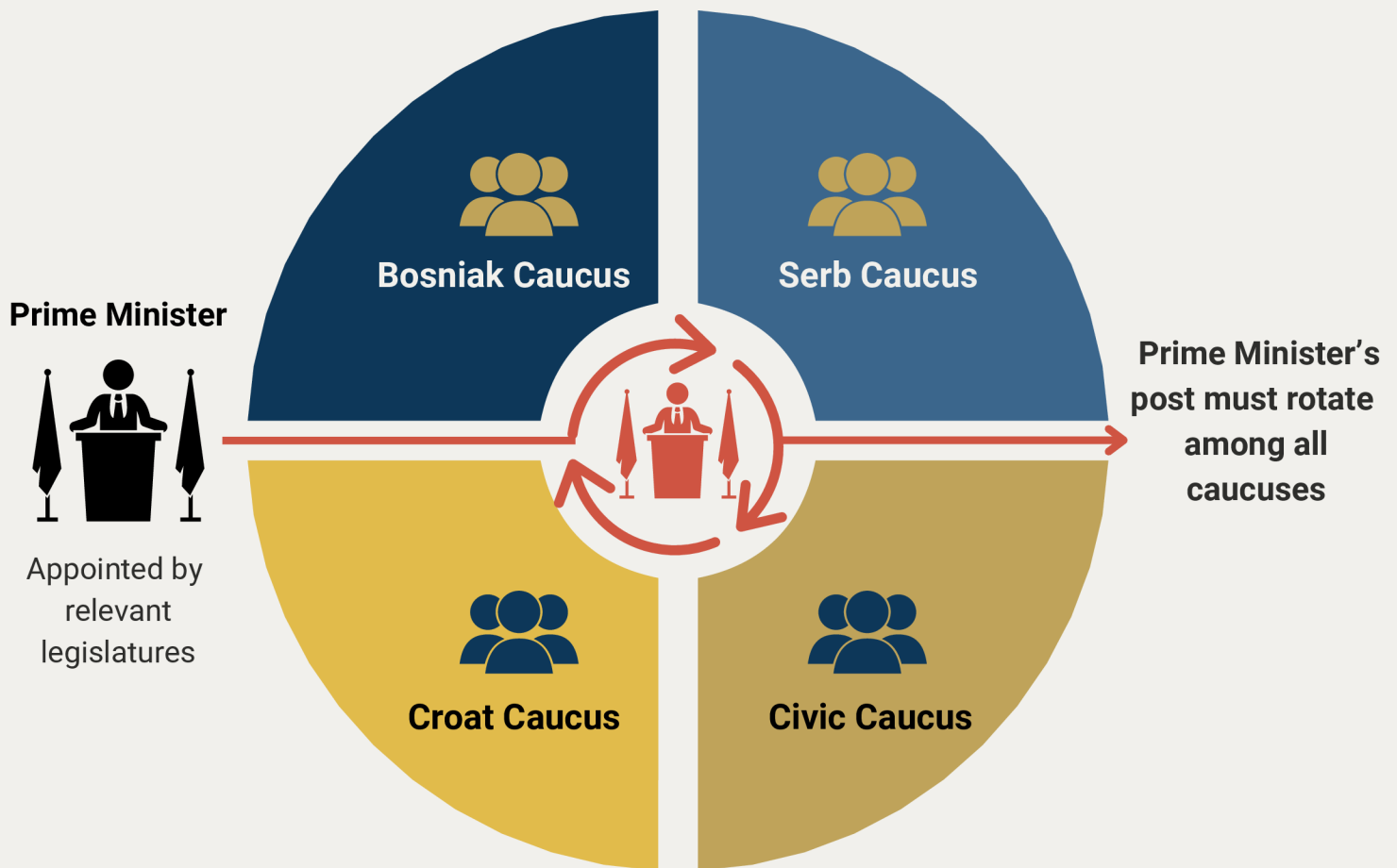


All MPs or MLAs declare for 1 of 4 caucuses.



The choice is permanent.

## Rotation of BiH, FBiH, and RS Prime Ministers



**FBiH and RS presidents abolished.**



**BiH presidential powers largely  
devolved to Council of Ministers.**

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