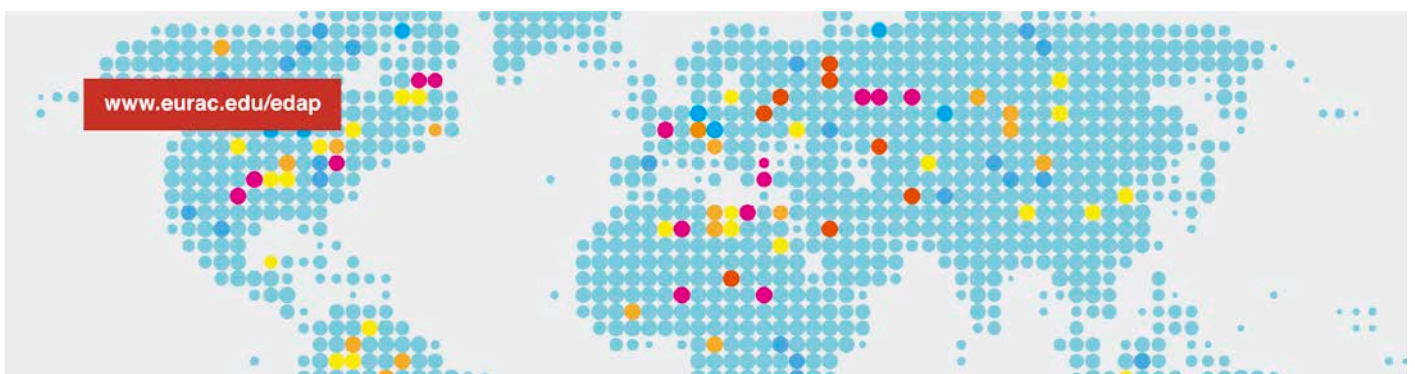


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# EU Conditionality on Nationality-Sensitive Matters in Bosnia and Herzegovina: Promoting Democracy or Maintaining the Status Quo?

Emilio Vettori



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## Abstract

This paper will analyse the impact of the EU conditionality in Bosnia and Herzegovina (BiH) and its efficacy in promoting democratic changes in this country. It will be argued that as BiH is a unique case, its constitutional constraints must be taken into account because every reform that affects the difficult balance between the three main ethno-religious groups of BiH is perceived as a nationality-sensitive issue and is therefore vulnerable to political pressure. With reference to two specific situations where EU has demanded the BiH political elites to adopt EU-compatible reforms, namely the police reform process and the implementation of the Sejdić and Finci ruling, it will be argued that the use of the conditionality tool has increased inter-ethnic polarization among the political parties, thus preventing Bosnia and Herzegovina from moving forward in the EU integration process.

## Author

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## Key words

EU enlargement - democracy promotion - conditionality - consociationalism - minority rights - Sejdić and Finci ruling - Police Reform.

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# EU Conditionality on Nationality-Sensitive Matters in Bosnia and Herzegovina: Promoting Democracy or Maintaining the Status Quo?

Emilio Vettori

## 1. Introduction

Since the end of the Cold War, the European Union has become the main external actor in the transition from authoritarian rule in most of the countries born from the dissolution of the Soviet Union and the Socialist Federative Republic of Yugoslavia (*Socijalistička Federativna Republika Jugoslavija* (SFRJ)). By offering EU membership as a policy goal for domestic elites, the EU has successfully supported the transition to democracy of these countries that in 2004 and 2007 were involved in the Eastern Enlargement. In all these countries the integration perspective was a powerful incentive that induced the domestic elites to comply with the strict set of conditions that the aspiring candidate countries have to fulfil to be admitted as full members in the EU (the so-called Copenhagen criteria). After the launch of the Stability Pact for South Eastern Europe in 1999, the same perspective was offered to the Western Balkan countries (WB) and was confirmed after at the Feira European Council (2000) and the Thessaloniki Council (2003). Among these countries, however, BiH, in particular, is lagging behind its neighbours and is considered the 'worst in the class'.<sup>1</sup> In BiH, the membership perspective has not been an effective inducement to domestic political elites to adopt key reforms necessary to enable the country to move forward both in its democratization and integration process. Following the external incentive model of Schimmelfennig and Sedelmeier, this article will argue that, as perceived by the BiH political elites, the costs of compliance with EU requirements exceed the benefits of membership.<sup>2</sup> The nationality issue, in particular, worked as a filter for the actions and the decisions of the main political parties in BiH).<sup>3</sup> Hence it has put substantial constraints on the implementation of the integration agenda set by the European Commission in every EU-demanded reform that affects the difficult balance between the main ethnic groups of BiH.

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<sup>1</sup> Knaus, Gerald and Bender, Krisof, "The Worst in Class: How the International Protectorate Hurts the European Future of Bosnia and Herzegovina", *ESI-European Stability Initiative*, Berlin-Brussels-Istanbul 2007, at [www.esiweb.org](http://www.esiweb.org).

<sup>2</sup> Schimmelfennig, Frank and Sedelmeier, Ulrike, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", 11(4) *Journal of European Public Policy* 2004, 661-679.

<sup>3</sup> Freyburg, Tina and Richter, Solveig, "National Identity Matters: The Limited Impact of EU Political Conditionality in the Western Balkans", 17(2) *Journal of European Public Policy* 2010, 263-281.

## 2. EU Democracy Promotion Through Conditionality in the WB: Mission (Almost) Accomplished?

Securing peace and stability in the Balkan region has always been a primary issue and matter of concern for the European Union and its Member States. After the violent break-up of the Socialist Federative Republic of Yugoslavia has shown the weakness of the EU Common Foreign and Security Policy (CFSP), the creation of stable and democratic states in the EU periphery has become a main foreign policy and strategic issue for the European Union.<sup>4</sup> To reach these goal the EU has developed several instruments of external action and has become the main international actor in the democratization process of the WB countries. This EU commitment reflects a major change in the post-Cold-War international system in which democracy and human rights promotion is now a major objective of international bodies, such as the UN and the Organization for Security and Co-operation in Europe (OSCE), and a foreign policy tool of both US and EU.<sup>5</sup> Especially in the Balkans, the EU has taken the lead of the international efforts to promote democracy and strengthen human rights.<sup>6</sup> While the EU cooperates with and coordinates its policies with the other international actors involved, with the UN, the North Atlantic Treaty Organization (NATO), OSCE, and the US having a strong influence,<sup>7</sup> the 'Balkan question' remains fundamentally a European responsibility that directly affects the credibility of the CFSP, as clearly stated in the first European security strategy in December 2003.<sup>8</sup>

This commitment was first expressed after the war in Kosovo when the EU changed its approach toward the Western Balkans, that was focused initially only on development aid and financial and humanitarian assistance.<sup>9</sup> The foundation of this change was the 1999 Stability Pact for South Eastern that clearly promised candidate status for EU membership to all the WB countries (Croatia, Macedonia, Albania, Bosnia and Herzegovina, and the former Federal Republic of Yugoslavia, now Serbia, Montenegro, and Kosovo) able to meet the Copenhagen criteria. These criteria, set for the Central and East European Countries (CEECs) that joined the EU in 2004 and 2007, establish a set of political, economic, and normative conditions for EU membership and require: (a) the achievement of stable institutions capable of guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, (b) the existence of a functioning market economy, and (c) the capacity to

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<sup>4</sup> Kopstein, Jeffrey, "The Transatlantic Divide over Democracy Promotion", 29(2) *The Washington Quarterly* 2006, 85-98.

<sup>5</sup> Boutros, Ghali, *An Agenda for Democratization, United Nations* (Dept. of Public Information, New York 1996), points 56-59.

<sup>6</sup> Youngs, Richard, "Democracy Promotion: The Case of European Union Strategy", *Working Document No. 167*, Centre for European Policy Studies, Brussels, 2001.

<sup>7</sup> Bose, Sumantra, *Bosnia after Dayton. Nationalist Partition and International Intervention* (Hurst & Co, London, 2002).

<sup>8</sup> Solana, Javier, "A Secure Europe in a Better World", *First European Security Strategy*, Brussels, 12 December 2003.

<sup>9</sup> Boerzel, Tania, "Transformative Power Europe? The EU Promotion of Good Governance in Areas of Limited Statehood", paper prepared for the ERD Workshop "Transforming Political Structures: Security, Institutions and Regional Integration Mechanisms", Florence, 2009.

cope with competitive pressure and market forces within the EU and the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union (*acquis communautaire*).<sup>10</sup>

Offering the prospect of EU membership is one of the EU's strongest policy tools to promote democratic changes in non-member countries and is a powerful incentive for domestic actors to make democratic and EU-compatible reforms. Especially in the case of Central and Eastern Europe, the EU has acted as a transformative power<sup>11</sup> and has played a key role in anchoring to democracy the transitions from authoritarian rule in most of the states born from the dissolution of the Soviet Union and the Yugoslav federation.<sup>12</sup> Within about 15 years, stable liberal democracies were created in the countries that joined the EU in 2004 and 2007, which has led to the Eastern Enlargement being generally considered the EU's most successful foreign policy<sup>13</sup> and the most influential democracy promotion ever.<sup>14</sup> In all these countries, the potential EU membership proved to be a strong inducement for the domestic elites to comply with the strict set of conditions that the aspiring candidate countries have to fulfil in order to be admitted as full members of the EU. Political conditionality has proven to be a powerful instrument that improves the standard of protection of rights and freedoms in third countries, especially substantive aspects of democracy such as democratic institutions, the rule of law, and human and minority rights.<sup>15</sup>

However, when looking at the transitions from authoritarian rule in the former Yugoslav countries the outcomes appear to be more varied. According to the Freedom House data collected between 1992 and 2012 for its regular reports about freedom in the world and the path of democracy in the former communist countries, among the WBs only Slovenia, which joined the EU in

<sup>10</sup> See European Commission, *Enlargement - Accession criteria*, at [http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm).

<sup>11</sup> Schimmelfennig, Frank, "The Normative Origins of Democracy in the European Union: Towards a Transformationalist Theory of Democratization", *NCCR Working Paper No. 39*, 2009; Manners, Ian, "Normative Power Europe: A Contradiction in Terms?", 40(2) *JCMS* 2002, 235-258; Manners, Ian, "The European Union as a Normative Power: A Response to Thomas Diez", 25 *Journal of International Studies* 2006, 167-180; Tocci, Natalie, "Conflict Resolution in the European Neighbourhood: The Role of the EU as a Framework and as an Actor", *European University Institute Working Paper Series* 2004; Tocci, Natalie (ed.), *Who is a Normative Foreign Policy Actor? The European Union and its Global Partners*, Centre for European Policy Studies, Brussels, 2008; Tocci, Natalie et al., "The European Union as a Normative Foreign Policy Actor", *CEPS working document n. 281* 2008; Grabbe, Heather, *The EU's Transformative Power: Europeanization Through Conditionality in Central Eastern Europe* (Palgrave, Basingstoke, 2006).

<sup>12</sup> Youngs, Richard, "Democracy Promotion as External Governance?", 16(6) *Journal of European Public Policy* 2009, 895-915; Schimmelfennig, Frank and Sedelmeier, Ulrike, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", 11(4) *Journal of European Public Policy* 2004, 661-679; Vachudova, A. M., "Democratization in Postcommunist Europe: Illiberal Regimes and the Leverage of International Actors", *CES Working Paper no. 139* 2006.

<sup>13</sup> Schimmelfennig, Frank and Scholtz, Hanno, "EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development and Transnational Exchange", 9 *European Union Politics* 2007, 187-215.

<sup>14</sup> Youngs, Richard, *The European Union and Democracy Promotion: A Critical Global Assessment* (Johns Hopkins University Press, Baltimore, 2010).

<sup>15</sup> Pridham, Geoffrey, "Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities", 14(3) *Democratization* 2007, 446-471.



2004, is today a stable liberal democracy with standards of rights and liberties comparable to the other Member States of the European Union. Liberal democracy has been established only recently in Serbia, Croatia, Montenegro, and Macedonia. Of these countries, Croatia will join the EU in 2013 and the others have made progress toward EU integration, fulfilling the conditions in the Stabilization and Association Process (SAP)<sup>16</sup> framework and becoming candidate countries. Kosovo and BiH seem to follow a different path. While Kosovo obtained international recognition in 2008, and has only recently started its transition as an independent country, BiH is seriously lagging behind in its democratization and integration process. Its political regime cannot be defined as either authoritarian or democratic; it is a hybrid between the two models<sup>17</sup> because, while having some aspects of a liberal democracy, such as regular and competitive elections, it fails to meet the substantive aspects of a liberal democracy, or does so only ambiguously.<sup>18</sup> This kind of polity, which is the most common outcome of the Third Wave of democracy,<sup>19</sup> is typical of a transitional phase, but can also persist for more than a decade.<sup>20</sup> As Merkel observes, these regimes tend “to form stable links to their economic and societal environment and are often seen by considerable parts of the elites and the population as an adequate institutional solution to the specific problems of governing effectively”.<sup>21</sup> A hybrid regime has good chance of survival “as long as this equilibrium between problems, context and power lasts”.<sup>22</sup> A hybrid regime is usually the outcome of an electoral process that brought illiberal leaders or extremists into power because of the emergence of virulent nationalism and ethnic or other types of civil conflict.<sup>23</sup> A hybrid regime reflects, therefore, a ‘rough balance’<sup>24</sup> between actors involved in the transition from authoritarian rule, a balance where neither side is sufficiently powerful to dictate the rules of

<sup>16</sup> The Stabilization and Association Process is the framework for EU negotiations with the Western Balkan countries. It is a long-term policy that aims to stabilize the countries, encourage their transition to a market economy, and promote regional cooperation with the prospect of eventual membership of the EU.

<sup>17</sup> Diamond, Larry, “Thinking About Hybrid Regimes”, 13(2) *Journal of Democracy* 2002, 21-35; Carothers, Thomas, “The End of the Transition Paradigm”, 13(1) *Journal of Democracy* 2002, 5-21; Carothers, Thomas, “The ‘Sequencing’ Fallacy”, 18(1) *Journal of Democracy* 2007, 12-27.

<sup>18</sup> Linn, Karl T., “The Hybrid Regimes of Central America”, 6(3) *Journal of Democracy* 1995, 72-86; Diamond, Larry, “Thinking About Hybrid Regimes”, 13(2) *Journal of Democracy* 2002, 21-35; Lewitsky, Steven and Way, Lucan, “Elections Without Democracy: The Rise of Competitive Authoritarianism”, 13(2) *Journal of Democracy* 2002, 51-65; Bunce, Valery and Wolchik, Sharon, “Mixed Regimes in Postcommunist Eurasia: Tipping Democratic and Tipping Authoritarian”, paper presented at the Workshop on Democratization in European Former Soviet Republics, Florence (2008); Morlino, Leonardo, “Are There Hybrid Regimes? Or Are They Just an Optical Illusion?” 1 (2) *European Political Science Review* 2009, 273-296.

<sup>19</sup> Huntington, Samuel P., *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman and London, 1998).

<sup>20</sup> Morlino, Leonardo, “Are There Hybrid Regimes? Or Are They Just an Optical Illusion?” 1 (2) *European Political Science Review* 2009, 273-296.

<sup>21</sup> Merkel, Wolfgang, “Embedded and Defective Democracies”, 11(5) *Democratization* 2004, 1.

<sup>22</sup> *Ibid.*

<sup>23</sup> Carothers, Thomas, “The ‘Sequencing’ Fallacy”, 18(1) *Journal of Democracy* 2007, 12-27.

<sup>24</sup> Bunce, Valery and Wolchik, Sharon, *Defeating Authoritarian Leaders in Post-Communist Countries* (Cambridge University Press, Cambridge, 2011), 10.



the political game. The main actors involved in the transition process gain a veto power and the only solution is an uneasy compromise that directly affects the political institutions and the standard of protection of rights and freedoms. Hybrid regimes are, therefore, considered to be only partially free and there are limitations on civil and political freedoms, violations of human and minority rights, inequality, corruption, and a lack of state effectiveness.

Accordingly to the Freedom House data, the EU's promotion of democracy in Bosnia and Herzegovina has been, at best, ineffective. Although BiH established relations with the European Union in the framework of the enlargement strategy in 1999, the hybrid regime has been remarkably stable, and the potential for a sustainable, liberal democracy is unclear. The country still faces a heavy democratic deficit and unlike the other former Yugoslav countries it seems to be "locked in a limbo". The political debate remains dominated by the main ethno-religious parties, which repeatedly failed to adopt the key democratic reforms needed to progress the EU integration process. Most recently, the political parties failed to implement the 2009 European Court of Human Rights (ECtHR) ruling in *Sejdić and Finci v Bosnia and Herzegovina* which ordered amendments to the BiH Constitution and the 2001 Electoral Act to remove ethnic and religious discrimination in the state institutions and to allow minorities to run for state-level posts, which are currently reserved for Bosniaks, Croats, and Serbs. The main political parties of BiH were unable to reach an agreement on the necessary amendments and this led to a 14-month political crisis. A solution was found in December 2011 with the formation of the central government, but the coalition lasted only six months. Therefore there is great uncertainty about the possibility of BiH implementing the enlargement agenda and submitting a credible EU membership application. Hence, the failure of the EU democracy promotion in BiH calls into question the viability of the EU conditionality as a tool to promote change in a divided society where the compliance costs exceed the benefits associated with the membership. However, it is difficult to view EU democracy promotion and the use of conditionality as independent variables because complex processes like democratic transition and consolidation are ultimately undertaken through domestic actors, institution, and procedures.<sup>25</sup> Therefore it is necessary to focus on the domestic factors that prevent BiH from moving forward in its democratization and Europeanization process.

### **3. National Identity and Party System in Bosnia Before and After the War**

BiH is an exception among the post-communist countries involved in the EU enlargement process. While the former communist countries that joined the EU in 2004 and 2007 and the other (former) Yugoslavian states can be regarded as nation states, with a leading national majority that share

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<sup>25</sup> Magen, Amichai and Morlino, Leonardo, *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* (Palgrave, London, 2008).

common identity features, such as language, culture, history, and religion and a common sense of belonging to a certain national community, Bosnia has always been considered a major example of multi-ethnic society.<sup>26</sup> During the authoritarian communist rule, BiH was one of the constituent republics of the Socialist Federative Republic of Yugoslavia, and due to its unique demographic composition, that is, without a clear majority but with three main ethnic-religious groups (Bosniaks-Muslims, Serbs-Orthodox, and Croats-Catholics) and other smaller nationalities, was regarded as a “Yugoslavia en miniature”. The different nationalities and ethnic groups were recognized as equals in the Socialist Republic of Bosnia and Herzegovina (*Socijalistička Republika Bosna i Hercegovina* (SRBiH) and ethnic representation was granted in all the state institutions.<sup>27</sup> The authoritarian regime also promoted a common sense of belonging, based on the principle of Tito’s nationality policy of ‘brotherhood and unity’ (*bratstvo i jedinstvo*), in order to avoid the emergence of ethno-religious nationalism, which was seen as a threat to the regime and to the integrity of both the country and the multi-ethnic society itself.<sup>28</sup> Minority and ethnic policy was, therefore, imposed from above and due to the strong authoritarian rule this policy was very carefully observed and exercised.

The importance of avoiding the emergence of ethno-religious tensions and stressing the principle of ‘brotherhood and unity’ were also confirmed at the beginning of the SFRJ dissolution process when the Parliamentary Assembly of the SRBiH amended the Constitution in July 1990, with delegates of all nationalities involved, in order to introduce democratic principles and pluralism into the political system. Article LX of the Constitutional Amendment, states that “the Socialist Republic of Bosnia and Herzegovina is a democratic sovereign State of equal citizens, the people of Bosnia and Herzegovina, Muslims, Serbs and Croats and the members of other peoples and nationalities living there” (*Socijalistička Republika Bosna i Hercegovina je demokratska suverena drzava ravnopravnih gradana, naroda Bosne i Hercegovine - Muslimana, Srba i Hrvata i pripadnika drugih naroda i narodnosti, koji u njoj žive*).<sup>29</sup> In addition, only one language was recognized as the official language, that is Serbo-Croatian, both in roman and Cyrillic letters,<sup>30</sup> and proportional ethnic representation was granted to the three main ethnic groups and the other smaller nationalities.<sup>31</sup>

This situation changed dramatically after the first multiparty elections, held in November 1990, when the reformed communist and the other multi-

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<sup>26</sup> Marko, Joseph, “Bosnia and Herzegovina – Multi-Ethnic or Multinational?”, in Council of Europe (ed.), *Societies in Conflict: The Contribution of Law and Democracy to Conflict Resolution* (Council of Europe, Strasbourg, 2000), 92-118.

<sup>27</sup> See Art. 3 of the consolidated version of the 1974 SRBiH Constitution.

<sup>28</sup> Andjelic, Neven, *Bosnia-Herzegovina: The End of a Legacy* (Frank Cass Publishers, London, 2003).

<sup>29</sup> See Official Gazette of the Socialist Republic of Bosnia and Herzegovina (*Sluzbeni list Socijalisticke Republike Bosne i Xercegovine*, Br. 32/1991, pos. 357).

<sup>30</sup> Art. 4 of the amended version of the Constitution of the SRBiH, at [www.republikabih.net/downloads/USTAV\\_RBIH\\_LATINICA.pdf](http://www.republikabih.net/downloads/USTAV_RBIH_LATINICA.pdf).

<sup>31</sup> Constitutional amendment LXI, *Sluzbeni list Socijalisticke Republike Bosne i Hercegovine*, br. 21/1990

ethnic political parties were defeated by the newly formed ethno-religious parties - the Party of Democratic Action (*Stranka Demokratske Akcije* (SDA), the Serbian Democratic Party (*Srpska demokratska stranka*, (SDS), and the Croatian Democratic Union of Bosnia and Herzegovina (*Hrvatska demokratska zajednica Bosne i Hercegovine* (HDZ)) - that achieved a landslide victory in the parliamentary and the presidential elections, as well as at the municipal level. During the electoral campaign in 1990, these three parties agreed to run together in order to defeat the multi-ethnic, reformed, communist political organizations, which were, it was claimed, deeply corrupt and anti-democratic,<sup>32</sup> and the other multi-ethnic political forces, such as the Reformist Party of Ante Markovic. After the first multiparty elections, SDA, SDS, and HDZ formed a coalition government, but when it became clear that they had conflicting goals about the future status of the country (an independent Serb Republic, the Republika Srpska, within the territory of BiH, was proclaimed a day before the referendum on independence in 1992) this led to war among the three main ethnic groups and to widespread ethnic-cleansing in order to create ethnically homogenous territories. The Bosnian conflict, however, cannot be simply regarded as a civil war, as the Serbs and Croats maintained strict relations with their respective kin-states during the war. This was confirmed in the Dayton Peace Agreement (DPA) where, under US tutelage, a political compromise was achieved by BiH President Alija Izetbegovic on behalf of the Bosniak-Muslim community, and the Presidents of Serbia and Croatia, on behalf of the other two main ethnic groups in BiH. The DPA, signed in Paris on 14 December 1995, also contains the Constitution of Bosnia-Herzegovina (in Annex IV), and therefore it is a unique case of a constitution not based on a consensual arrangement, but one that was drafted by foreign experts and adopted without democratic legitimacy.<sup>33</sup> The DPA established a complex system of power-sharing and territorial autonomy that, to some extent, reflects the theories of consociational democracy<sup>34</sup> developed by Arend Lijphart in order to accommodate the interests and demands of conflicting groups in a deeply divided society.<sup>35</sup>

The DPA-imposed Constitution confirmed the legal existence of Bosnia and Herzegovina as a state,<sup>36</sup> but it modified its internal structure, establishing an asymmetrical federative state composed of two entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS) with strong territorial autonomy and devolution of competences. The division between

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<sup>32</sup> Pejanovic, Mirko, *The Political Development of Bosnia and Herzegovina in the post-Dayton Period* (TKD Šahinpašić, Sarajevo, 2007).

<sup>33</sup> Chollet, Derek, *The Road to Dayton: U.S. Diplomacy and the Bosnia Peace Process, May-December 1995* (Dayton History Project, US Department of State, Washington, 1997).

<sup>34</sup> Marko, Joseph, "Constitutional Reform in Bosnia and Herzegovina 2005-2006", 5 *European Yearbook of Minority Issues* (Brill, Leiden, 2007), 207 - 218.

<sup>35</sup> According to Lijphart's approach, a consociational democracy is based upon four pillars: (1) a grand coalition of elites from different groups, (2) a veto for each group in important policy areas, (3) proportional representation in key institutions, and (4) group autonomy (Lijphart 1977, 2002). See also Lijphart, Arend "Constitutional Design for Divided Societies", 15(2) *Journal of Democracy* 2004, 96-109.

<sup>36</sup> See Art 1.1 of the Dayton-Constitution.

the two entities is based on the so-called inter-entity boundary line,<sup>37</sup> which reflects the front line at the end of the war. According to Article III.3 of the Constitution, which states that “all governmental functions and powers not expressly assigned in this Constitution to the (common) institutions of Bosnia and Herzegovina shall be those of the Entities”, central institutions of Bosnia and Herzegovina have only residual competences on foreign policy, foreign trade policy, customs policy, monetary policy, international and inter-entity criminal law enforcement, and regulation of inter-entity transportation, and the budgets of those central institutions depend directly on the two entities, which also maintain control over military and police apparatus. The institutional arrangements differ in both Entities. According to the Constitutions of RS and FBiH, which were adopted in 1992<sup>38</sup> and in 1994<sup>39</sup> respectively, the former has a centralized system of government, while the latter is characterized by a federal arrangement with a strong devolution of political power to the cantons, which also have their own constitutions. All this creates a complex constitutional framework composed of 13 constitutions.

The two entities also differ in the ethnic composition of their populations, which were affected by the 1992-1995 war and ethnic-cleansing. As a consequence of the conflict and ethnic violence, the distribution of the populations has been altered dramatically, with 100,000 people killed, 1.2 million internally displaced people (IDPs) and the creation of ethnically homogeneous areas within the newly independent BiH.<sup>40</sup> The dramatic changes are shown by a comparison of the 1991 census results and the UN Refugee Agency (UNHCR) 1997 estimates. The changes also affect the judicial and the police apparatus of each entity.<sup>41</sup>

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<sup>37</sup> See Annex II of the DPA.

<sup>38</sup> The Constitution of RS was adopted in 1992 after the Serb Democratic Party declared independence from the Republic of Bosnia and Herzegovina.

<sup>39</sup> The Constitution of the FBiH was adopted in the framework of the Washington agreement that stopped war between Croats and Bosniaks in 1994.

<sup>40</sup> See International Crisis Group, “Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia and Herzegovina”, *Europe Report N°231* May 1997, at <http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/023-going-nowhere-fast-refugees-and-internally-displaced-persons-in-bosnia-and-herzegovina.aspx>.

<sup>41</sup> Marko, Joseph, “Bosnia and Herzegovina...”

	Republika Srpska		Federation of BiH	
	1991	1997	1991	1997
Bosniaks	28.77%	2.19%	52.09%	72.61%
Serbs	54.32%	96.79%	17.62%	2.32%
Croats	9.39%	1.02%	22.13%	22.27%
Other	7.53%	0.00%	8.16%	2.38%

Along with territorial autonomy the Constitution also introduced power-sharing rules in the central institutions, namely the State Presidency, the Parliamentary Assemblies, the Council of Ministers, and the Constitutional Court, in order to balance and protect the vital interests<sup>43</sup> of the three main ethno-religious groups that took part in the 1992-1995 war, thereby ensuring both ethnic proportional representation in the central institutions and a high level of self-government for each ethnic constituency.<sup>44</sup> Hence, accordingly to the DPA Constitution, only the three main ethno-religious groups are defined as 'constituent people', while other minority groups, such as Roma, Jews, Hungarians, and others who choose to not identify themselves as part of any ethnic group, are de facto excluded from 'constituent power'. Only Bosniaks, Serbs, and Croats can claim the protection of the 'vital interests' of their respective ethnic group and entity and exercise a veto power in all the decisions of the central institutions. In addition the DPA-imposed Constitution explicitly restricts membership of two elected institutions (the Presidency and the House of Peoples) to the constituent people. In conclusion, the Constitution established a strict identification of territory, institution, and ethnicity that affects party politics and decision-making at the state level and contributes to the weakening of the functioning of the central institutions of Bosnia and Herzegovina.

#### 4. Impact of the Dayton Constitution on Party Politics in Bosnia and Herzegovina

Almost 20 years after the DPA was signed, the government system of Bosnia and Herzegovina has proven to be ineffective. If the overlap between power-sharing and strong territorial autonomy was seen by the three main ethno-religious groups as the only solution to end the war, this consociational arrangement resulted in the extremely weak position of the central institutions in relation to the entities that are the real decision-making centres in the BiH political system.<sup>45</sup> The BiH state can, therefore, be defined

<sup>42</sup> Marko, Joseph, "Bosnia and Herzegovina..."

<sup>43</sup> See Article IV and V of the Dayton Constitution, at [http://www.ohr.int/dpa/default.asp?content\\_id=372](http://www.ohr.int/dpa/default.asp?content_id=372).

<sup>44</sup> Chandler, David, *Bosnia: Faking Democracy After Dayton* (Pluto Press, London, 1999).

<sup>45</sup> Recchia, Stefano, "Beyond International Trusteeship: EU Peacebuilding in Bosnia and Herzegovina", 66 *EU-ISS Occasional Paper*, EU Institute for Security Studies, Paris 2007.



as a *minimalist state* that emerged as the consequence of a lack of consensus among the warring parties about how to empower the state with greater competences. Moreover, the scope and the strength of the central institutions are limited by the lack of legitimacy of the BiH state, which is ultimately the result of the international efforts to hold Bosnia and Herzegovina together.<sup>46</sup> In addition, political debate remains dominated by the three main ethno-religious parties that emerged in the first round of multiparty elections in 1990. As noted by Marko, “instead of a positive elite consensus for cooperation in order to establish mutual trust through power-sharing, the Bosnian party leaders from all of the three ethnic communities formed and still form an ethnocratic power cartel based on a negative consensus to block each other in the decision-making processes”.<sup>47</sup> Unlike other cases of power-sharing arrangements, such as Canada and Switzerland, where party competition is based along the socio-economical cleavage<sup>48</sup> and there are no ethnically homogenous sub-state levels,<sup>49</sup> in Bosnia and Herzegovina power-sharing and self-government, along with an ethnicity-based party competition, have led to persistent deadlock at the central level and have established two, de facto, segregated ethnic enclaves within a dysfunctional state. In addition, the veto power granted by the Constitution to only the three main ethno-religious groups and to the entities, to be used to protect the national interests, has been mostly used within the Parliamentary Assembly of BiH to stop the reform process.<sup>50</sup> The entity veto (*entitetsko glasanje*), in particular, has proven to be a powerful tool to block the decision-making of the central institutions. Since 1995, the entity veto has been used 160 times - 140 times by the representatives of the Republika Srpska - to stop the adoption of state laws that were perceived as threats to the national interests of the main ethno-religious groups.<sup>51</sup>

If the BiH constitutional framework was adopted to stop the war, after almost two decades it has served to constrain the creation of a functioning and fully democratic state. Given that “autonomy *and* integration are functional prerequisites for the maintenance of different ethnic groups and of a culturally pluralist social and political system”, and that only autonomy *plus* integration “allows for the institutional organization of equality based on the recognition of difference”, it is to be noted that the power-sharing arrangements of BiH have failed to foster both the dimensions, leading to a de

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<sup>46</sup> Bieber, Florian, “Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans”, 63(10) *Europe-Asia Studies* 2011, 1783-1802.

<sup>47</sup> Marko, Joseph, “Constitutional Reform in Bosnia and Herzegovina 2005-2006”, 5 *European Yearbook of Minority Issues* (Brill, Leiden, 2007), 207 - 218.

<sup>48</sup> Bose, Sumantra, *Bosnia after Dayton* (London, Hurst, 2002), 208.

<sup>49</sup> Stojanovic, Nenad, “Mononational and Multinational States: A Valid Dichotomy?”, Paper presented at the Conference ‘Legal Reasoning and European Law: The Perspective of Neil MacCormick’, European University Institute, Fiesole (21 May 2010), 15.

<sup>50</sup> Bieber, Florian, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (Palgrave, London, 2006); Dzihic, Vedran, *Ethnopolitik in Bosnien-Herzegowina: Staat und Gesellschaft in der Krise* (Nomos, Baden Baden, 2009).

<sup>51</sup> Dzihic, Vedran and Wieser, Angela, “Incentives for Democratisation? Effects of EU Conditionality on Democracy in Bosnia & Herzegovina”, 63(10) *Europe-Asia Studies* 2011, 1803-1825.

facto ghettoization instead of to a common recognition of the different ethnic groups.<sup>52</sup> Hence, BiH's institutional arrangements contribute to the maintenance of a political regime that is a hybrid of democracy and authoritarianism, as well as preventing the country moving forward in the process of democratic consolidation. This brings into question the viability of power-sharing, not only as tool to stabilize deeply divided societies, but also as an adequate institutional framework to foster substantive aspects of democracy and to guarantee effective protection of rights and freedoms.

Accordingly to Choudry, what makes a divided society is that "ethnic differences are politically relevant and represent persistent markers of political identity and bases for political mobilization. Ethno-cultural diversity translates into political fragmentation, political claims are reflected through the lens of ethnic identity, and political conflict is synonymous with conflict among ethno-cultural groups".<sup>53</sup> On the basis of this definition, if power-sharing in BiH has succeeded "in promoting participation of representatives of all significant groups in political decision-making",<sup>54</sup> at the same time it has failed to foster intercommunal peace over communal interests and has had the effect of re-enforcing the ethnic cleavage in both the political system and society. Public administration and educational systems remain ethnically segregated in the two entities, and the return of refugees and internally displaced persons to their areas of origin is an open issue because of the lack of economic opportunities, inadequate housing, and people's reluctance to return to areas where most residents are of a different ethnicity.<sup>55</sup> In addition, loyalty to the BiH state is, at best, weak and it undermines the very foundations of social cohesion<sup>56</sup> and a common sense of belonging to the broader political community associated with the central state, a community in which ethnic differences are not politically relevant and citizens support ethnic tolerance.<sup>57</sup> This also prevents the formation of multiple identities, a formation that is necessary for a multi-ethnic state and democracy.<sup>58</sup>

All these considerations question the efficacy of territorial approaches to balance integration and accommodation<sup>59</sup> and confirm, at least to some extent, the criticism that consociational solutions for divided societies can further entrench and institutionalize pre-existing sources of division and

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<sup>52</sup> Marko, Joseph, "Constitutional Reform..."

<sup>53</sup> Choudry, Sujit, *Constitutional Design for Divided Societies. Integration or Accommodation?* (Oxford University Press, Oxford, 2008), 5.

<sup>54</sup> Lijphart, Arend, "The Wave of Power Sharing Democracy", in Andrew Reynolds (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (Oxford University Press, Oxford, 2002), p. 41.

<sup>55</sup> See Human Rights Watch, *World Report 2011: Bosnia and Herzegovina*, at <http://www.hrw.org/world-report-2011/bosnia-and-herzegovina>.

<sup>56</sup> Kymlicka, Will, "Multicultural Citizenship within Multination States", 11 *Ethnicities* 2011, 281-302.

<sup>57</sup> Woodward, Susan, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (The Brookings Institution, Washington, 1995), p.233.

<sup>58</sup> Marko, Joseph, "Constitutional Reform..."

<sup>59</sup> Choudry, Sujit, *Constitutional Design...*



decrease the incentives for elites to adopt moderate behaviour.<sup>60</sup> It may, therefore, not be surprising that the Bosnian party system has remained dominated by the main ethno-religious parties that were not able to agree to reform the DPA Constitution and strengthen the central state institutions.<sup>61</sup> Every proposal to amend the Constitution is perceived as a threat to the rights of Bosnia's constituent peoples that the ethno-religious parties claim to defend. Moreover, every reform's attempt risks eroding "reserved domains" based on ethnic belonging and weakening the very source of power legitimization of the ethno-religious parties, which ultimately rests in the Dayton Constitution itself.

Despite strong international support, mainly from the EU and US, every comprehensive reform of the BiH Constitution has not been adopted. The strongest attempt to amend the Constitution came from the Constitutional Court of BiH, which is composed of - accordingly to Annex 4 of the DPA - national and international judges. With its landmark decision in 2000 (case U-5/1998, known as the "constituent peoples" case) that ordered the harmonization of the Constitutions of the Entities with the DPA Constitution, the Court tried to counteract the ethnic homogenization and foster recognition among the different ethnic groups by strengthening individual rights and the competencies of the state institutions.<sup>62</sup> However, due to the entities' authorities' lack of will to implement the ruling, a set of legal binding decisions was imposed by HR Wolfgang Petrisch in 2002.

Although constitutional reforms are seen by the EC Commission as a main issue for BiH politicians in order to strengthen the central government before it is able to continue the integration process, the different interests of political parties continue to prevent the central institutions from adopting such reforms and BiH from speaking with one voice vis-à-vis the EU institutions. Therefore, BiH as a divided society recovering from post-conflict settlement and the constraints of its constitutional framework represent two key elements that challenge the impact of EU conditionality because every attempt to reform the state directly affects the difficult compromise reached among the three main ethnic groups of BiH. Moreover, the decisional deadlock and the persistent weakness of the central institutions question the efficacy of using EU membership as an incentive to changes in a divided society, as well as a tool to face nationality-sensitive matters and unresolved post-conflict issues.

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<sup>60</sup> Horowitz, Donald L., "Constitutional Design for Divided Societies", 4(4) *Journal of Democracy* 1993, 18-38; Horowitz, Donald L., "Electoral Systems and Their Goals: A Primer for Decision Makers", 14(4) *Journal of Democracy* 2003, 115-127.

<sup>61</sup> Sarajlić, Eldar, "Bosnian Elections and Recurring Ethnonationalism: The Ghost of the Nation State", 9(2) *Journal on Ethnopolitics and Minority Issues in Europe* 2010, 66-88.

<sup>62</sup> Marko, Joseph, "Constitutional Reform..."

## 5. Constraints on EU Conditionality in Bosnia and Herzegovina: Nationality Matters

The promise of EU membership is the most sizeable incentive that the EU can offer to induce democratic changes in non-member countries. Especially during the transitions from authoritarian rule in the Central and Eastern European Countries that joined the EU in 2004 and 2007, the perspective of EU integration and the use of political conditionality emerged as powerful tools to promote democratic reforms and to ensure high standards of protection of rights and freedoms comparable to those in the West European countries. However, unlike the Eastern Enlargement, in the Western Balkans the EU faces difficulties with countries suffering from unsettled statehood and nationality issues.<sup>63</sup> Following the break-up of the SFRJ, all the Balkan countries emerging from this dissolution process inherited national minorities, secessionist threats, and unsettled borders, all of which represent major obstacles for the creation of stable and fully democratic states (Linz and Stepan 1996, p. 366). In order to face these state- and nation-building-related issues, the EU has attached great importance to the fact that addressing unsettled problems of statehood should be considered as a precondition to fulfil the political criteria that require the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities as necessary conditions for integration in the EU.<sup>64</sup> This was the aim of the EU's Stabilization and Association Process (SAP), but the difficulties the enlargement process faced in the Western Balkan countries brought into question the efficacy of the EU approach and the impact of the conditionality tool on divided societies recovering from violent conflict. As noted by Pridham:

*it may be said the EU faces in the Western Balkans first-order democratization concerns, such as those relating to state-building, while having to confront problems of regional stability deriving from recent war as well as difficulties of political consensus, ethnic harmony, and socio-economic development far more taxing than in East-Central Europe at a similar stage a decade ago. In other words, conditionality has had to deal with questions that relate more to democratic transition than just democratic consolidation. This has had the effect of further expanding the conditionality agenda; however, at the same time, it has made the reinforcing process of conditionality with respect to democratization rather more difficult.*<sup>65</sup>

Especially in BiH, the use of the conditionality tool, along with the promise of EU membership, has been largely ineffective in attempts to overcome the lack of commitment by political elites to adopt democratic reforms and

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<sup>63</sup> Pridham, Geoffrey, "Change and Continuity in the European Union's Political Conditionality", 14(3) *Democratization* 2007, 446-471.

<sup>64</sup> See the political conditions to fulfil established in the framework of the Copenhagen Criteria, at [http://ec.europa.eu/economy\\_finance/international/enlargement/criteria/index\\_en.htm](http://ec.europa.eu/economy_finance/international/enlargement/criteria/index_en.htm).

<sup>65</sup> Pridham, Geoffrey, "Change and Continuity..."

implement the integration agenda.<sup>66</sup> In order to strengthen the effectiveness of BiH institutions, the EU has used the conditionality tool to demand changes to the internal balance of power between the central government and the two entities. However, every reform of the complex institutional framework established in Dayton risks reopening unsettled issues and is perceived as a threat to the interests of the main ethnic groups of BiH, which still maintain a low level of intra-communal trust. This puts the focus on the role of the domestic political élites, which are ultimately responsible for the decisional deadlock that affects the BiH central institutions. Unlike the countries that joined the EU in 2004 and 2007, the domestic élites in Bosnia and Herzegovina have failed to comply with the conditions set by the EU and the membership perspective has been a limited incentive for political parties to pursue the reforms needed for the integration process. EU conditionality can be considered as an interactive process between the EU and the applicant countries<sup>67</sup> and driven by domestic elites and administrations.<sup>68</sup> The EU accession process is based on the interaction between the domestic political elites and EU officials that rely on elected representatives to coherently implement necessary reforms. Following Schimmelfennig and Sedelmeier's external incentive model, EU political conditionality is expected to induce change in non-member countries when the political costs of compliance with EU requirements do not exceed the benefits linked to membership.<sup>69</sup> In other words, there is a trade-off between compliance costs and accession benefits, which depends on: (i) the determinacy of conditions, (ii) the size and speed of rewards, (iii) the credibility of threats and promises, and (iv) the amount of adoption costs.<sup>70</sup> Hence, accordingly to this model, in BiH the political élites perceive the costs of compliance with EU conditionality as very high because the set of conditions of membership touch on sensitive issues of statehood and national identity and affect the difficult compromise reached in Dayton under US tutelage by the three main ethno-religious groups of Bosnia and Herzegovina.<sup>71</sup> Therefore, domestic political elites continue to use ethno-nationalist arguments, resist adopting domestic reform, and have so far failed to cooperate across ethnic lines. National identity emerges as a key factor in BiH that works as a filter for governmental action,<sup>72</sup> affects the compliance patterns of domestic élite, and prevents the fostering of moderate and EU-oriented attitudes among the BiH main political parties. Hence, EU conditions

<sup>66</sup> Bieber, Florian, "Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans", 63(10) *Europe-Asia Studies* 2011, 1783-1802

<sup>67</sup> Pridham, Geoffrey, *Designing Democracy* (Palgrave Macmillan, London & New York, 2005).

<sup>68</sup> Grabbe, Heather, *The EU's Transformative Power* (Palgrave, Basingstoke, 2006).

<sup>69</sup> Schimmelfennig, Frank, et al, *International Socialization in Europe* (Palgrave Macmillan, Basingstoke and New York, 2006); Vachudova, A. M., "Democratization in Postcommunist Europe: Illiberal Regimes and the Leverage of International Actors", *CES Working Paper no. 139* 2006.

<sup>70</sup> Schimmelfennig, Frank and Sedelmeier, Ulrike, "Governance by Conditionality", 11(4) *Journal of European Public Policy* 2004, 661-679.

<sup>71</sup> Freyburg, Tina and Richter, Solveig, "National Identity Matters", 17(2) *Journal of European Public Policy* 2010, 263-281; Subotić, Jelena, "Explaining Difficult States: The Problems of Europeanization in Serbia", 24(4) *East European Politics and Societies* 2010, 595-616.

<sup>72</sup> Freyburg, Tina and Richter, Solveig, "National Identity Matters", 17(2) *Journal of European Public Policy* 2010, 263-281

on nationality-sensitive issues have limited potential to work in BiH because a broad consensus among national elites is needed to adopt the demanded reforms as a necessary requisite for meaningful compliance with EU conditionality.<sup>73</sup>

## 6. Reform of the Police System: Inconsistent Compliance with EU Conditions

In order to overcome the central institutions' decisional deadlock, the EU has constantly addressed the need for the political parties to reach a consensus on a shared vision of the future of the country in order to prove that they are capable of engaging constructively in the integration process. This commitment has been repeatedly expressed since 2002 in the annual progress reports of the European Commission (EC). Most recently, this was stated in the 2011 EC Progress Report on Bosnia, according to which "a shared vision by the political representatives on the overall direction and future of the country and its institutional setup is lacking. The EU accession process requires political will and functional institutions at all levels with an effective coordination mechanism on EU matters." However, EU-demanded reforms and conditions have fostered an opposite result. Rather than being a strong incentive to reach a consensus, the EU conditions have increased the tensions among the main parties on nationality-sensitive issues. The most striking example of the limits of EU conditionality is the impasse over the reform of the police system, which was considered by the European Commission as a necessary precondition for the conclusion of a Stabilization and Association Agreement (SAA).<sup>74</sup> The struggle of the police reform process clearly shows the limited impact of the EU conditionality on nationality-sensitive issues.

The EU's efforts to promote policing reform were first addressed in the 2003 Feasibility Study on the preparedness of Bosnia and Herzegovina to negotiate a Stabilization and Association Agreement with the European Union. Police reform should be adopted in accordance with three basic criteria in order to strengthen state-level competences, with emphasis on efficiency and operational aspects. The three principles established by the EC as guidelines for the reform process provided a shift of competences from the entity to the state level, with exclusive state-level competences for the police, the elimination of political interference by the police, and a reorganization of the police system using purely technical and professional criteria.<sup>75</sup> The link between police reform and the integration process could act, as is the intention of the EU Commission, as an incentive to transform into a single

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<sup>73</sup> Konitzer, Andrew, "Speaking European: Conditionality, Public Attitudes and Pro-European Party Rhetoric in the Western Balkans", 63(10) *Europe-Asia Studies* 2011, 1853-1888.

<sup>74</sup> A Stabilization and Association Agreement is an international agreement adopted in the framework of the SAP that establishes legally binding contractual relations between the EU and the applicant country. The SAP between BiH and EU was signed on 16 June 2008, but has not yet entered into force because the ratification process has not been completed.

<sup>75</sup> See Opinion no. 649/2011 of the Venice Commission on the draft law on internal affairs of the FBiH and of the Canton of Sarajevo, at [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)048-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)048-e.pdf).

state body the very fragmented police system created by the Dayton Agreement, which established a highly decentralized police system with no competences granted to the state institutions. However, the EU-demanded reform of the police system touched one of the key aspects of the DPA and, therefore, remained vulnerable to political pressure, especially from the Republika Srpska, which opposed the Bosniak proposal to abolish the separate police structure of the Serb entity that was formally recognized within the framework of the Dayton Constitution. Between 2004 and 2005, the representatives of RS constantly rejected any reform proposal as unconstitutional and BiH was, therefore, not able to meet the deadline set by the European Commission to start the negotiations of the SAA. This led to the first impasse between the BiH parties, which was overcome only after the RS National Assembly adopted an agreement on police reform and restructuring on 5 October 2005 (the so-called October Agreement). This was subsequently adopted without any changes by the FBiH Parliamentary Assembly and, at the state level, by the House of Representatives and the House of People on 14 and 18 October respectively. Following the consensus reached among the BiH parties, the EC recommended the start of the SAA negotiations, which officially commenced on 5 November 2005 in Sarajevo. Although the agreement accepted the three criteria laid down by the European Commission, it did not contain any proposals for how to restructure the police organization, and there was no mention about the crossing of the Inter-Entity Boundary Line. Consensus was reached about the fact that any substantial decision on the police reform should be postponed for up to five years. The weakness of the October Agreement emerged in early 2006, when a draft proposal on police reform was not adopted by the BiH parliamentary assemblies. National elections in 2006 further exacerbated differences among the main ethno-religious parties, which retreated to diametrically opposed positions about the future status of the country.

Despite all the efforts of the EC to maintain the debate along technical lines, ethno-nationalist rhetoric flourished during the electoral campaign and police reform emerged as a main dividing issue among the BiH parties. After the elections the new prime minister of the RS, Milorad Dodik, rejected all previously reached agreements on police reform, leading to another deadlock in decision-making at the state level. During 2007, the major political parties repeatedly failed to agree on police reform, and decision-making at the state level was almost completely stopped, preventing the country from taking the necessary steps to fulfil the conditions set in the SAP framework. In light of the deadlock, the EC warned BiH political parties that without an agreement on police reform in accordance with the EU's three principles, the EU would be unable to conclude a SAA with BiH. Once again, the political impasse was overcome when leaders of the six main parties gathered in Mostar on 27 October 2007 and jointly declared their commitment to move forward in the reform of the police system.<sup>76</sup> Following the 'Mostar declaration', the main

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<sup>76</sup> These were Party for Democratic Action (SDA) and the Party for Bosnia and Herzegovina (Stranka za Bosnu i Hercegovinu (SBiH)) for the Bosniaks, the Croat-Democratic Unione (HDZ), the Croat-



BiH parties agreed on an action plan in Sarajevo, which incorporated the three principles laid down by the EC. Subsequently, the 'Law on Independent and Supervisory Bodies of the Police Structure of Bosnia and Herzegovina' and the 'Law on the Directorate for Coordination of Police Bodies and Agencies in Bosnia and Herzegovina' were adopted in April 2008, but the political parties again failed to achieve consensus on a detailed timeline for necessary actions to implement the police reform. Criticism was expressed by the EC in its 2008 progress report in which it stated: "there has been some progress in reforming the police forces in Bosnia and Herzegovina, although the fragmentation of the police has not been addressed. Cooperation and information exchange between law enforcement agencies remain weak." Nevertheless, the plan was accepted by the European Union as a sign of the commitment of the BiH political elites to adopt the EU-demanded reforms, and the SAA was signed in June 2008. However, after the agreement was signed the weakness of the consensus emerged once again and the political parties returned to obstruction and mutual accusations, leading again to deadlock at state level. After the consensus was reached in April 2008, no further steps were taken to implement the police reform. The main political parties decided that any decision to restructure the police system would not be taken until a new constitution for the country was agreed, but the 2006 'April package', as well as the 'Prud process' and the so-called 'Butmir process' have failed to produce concrete results.<sup>77</sup> The Serb authorities, in particular, remain reluctant to merge the RS police force into a unique state body as long as any attempt to reform the police system is perceived as a direct challenge to the Serb national interests.

The 2010 general elections, the second election since the Dayton Agreement to be entirely administered by the authorities of Bosnia and Herzegovina, led to a 15-month political crisis that ended on 29 December 2011 with an agreement between the BiH parties on the formation of the central government. However, the police reform remained an open issue, which shows that the reward of EU membership does not outweigh the costs connected to the EU-demanded reforms, especially when these reforms affect nationality-sensitive issues and are perceived to threaten the national interests of the main BiH ethno-religious groups. The use of the EU conditionality has produced no compliance, or an inconsistent compliance, by the political parties with the conditions established by the European Commission.<sup>78</sup> Moreover, the strict use of conditionality on nationality-sensitive issues has increased inter-ethnic polarization and disputes and

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Democratic Union 1990 (Hrvatska demokratska zajednica 1990 (HDZ 1990)) for the Croats, the Alliance of Independent Social Democrats (Savez nezavisnih socijaldemokrata (SNSD)), and the Party for Democratic Progress (Partija demokratskog progresa (PDP)) for the Serbs.

<sup>77</sup> See Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (2011), The functioning of democratic institutions in Bosnia and Herzegovina, at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12112.htm>.

<sup>78</sup> Freyburg, Tina and Richter, Solveig, "National Identity Matters", 17(2) *Journal of European Public Policy* 2010, 263-281.

further weakened the decision-making process at the central level, thus preventing BiH from implementing the integration agenda.

## 7. Sejdić and Finci vs BiH: The Same Mistake Again?

Another major case of inconsistent or no compliance with the EU conditionality on nationality-sensitive issues is the implementation of the ECtHR decision in the *Sejdić v Finci* case. On 22 December 2009, the Grand Chamber of the ECtHR declared the restrictions on standing for election to the House of Peoples and to the State Presidency of Bosnia and Herzegovina in violation of Article 14 (non-discrimination) of the European Convention on Human Rights (ECHR), as well of Article 3 of Protocol No.1 ECHR (right to free elections) and Article 1 of Protocol No. 12 ECHR (general prohibition of discrimination).<sup>79</sup> As stated by the Court, the DPA-imposed Constitution grants the right to be eligible for election to high offices at state level only to BiH citizens who declare themselves to belong to one of the constituent peoples of BiH, namely the Bosniaks, Croats, and Serbs. The same right is not given to the BiH minorities and to BiH citizens who do not declare themselves to belong to any ethnic group. The case was brought to the Court by Dervo Sejdić and Jakob Finci, two prominent Bosnian citizens of Roma and Jewish origins, respectively, who could not run for elections because of their ethnicity. The judgment condemned BiH for discrimination against its ethnic minorities, ordering it to amend the Constitution, as well as the 2001 Election Act provisions violating the ECHR.<sup>80</sup> The ECtHR ruling is a landmark decision that requires the removal of the institutional discrimination of the Dayton Constitution against minorities and provides an opportunity to improve the existing system in order to ensure substantive equality of individual and collective rights to all citizens of BiH.<sup>81</sup> The implementation of the judgement, however, represents a difficult issue for BiH political leaders to deal with because it would directly affect the balance amongst the political parties, the entities, and the main ethno-religious groups of BiH. Following the ECtHR's binding decision, the ratification of the SAA between BiH and the EU was stopped and the harmonization of the DPA- Constitution with the ECHR was added by the EC as a necessary condition for BiH to fulfil in order to move forward in the integration process. So far however, BiH's main political parties have struggled to adopt the necessary EU-demanded reforms and have failed to reach a consensus. Although all parties accepted the necessity of implementing the *Sejdić and Finci* judgment and amending both the Constitution and the Electoral Act in order to remove formal discriminations, they have been unable to reach an agreement on a substantive proposal and timeline. As a result of the government crisis, during 2010 and 2011 no real

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<sup>79</sup> See *Sejdic and Finci v BiH* (applications no. 27996/06 and 34836/06), at [http://www.coe.org.rs/eng/news\\_sr\\_eng/?conid=1545](http://www.coe.org.rs/eng/news_sr_eng/?conid=1545).

<sup>80</sup> See Interim Resolution CM/ResDH(2011)291 - Execution of the judgment of the European Court of Human Rights, at <https://wcd.coe.int/ViewDoc.jsp?id=1881897&Site=CM>.

<sup>81</sup> Marko, Joseph, "The Law and Politics of Diversity Management: A Neo-institutional Approach", 6 *European Yearbook of Minority Issues* (Brill, Leiden, 2008) 252-279.



effort was made to implement the ECtHR decision. According to the 2011 Progress Report of the EU Commission (p.4):

*the overall pace of reforms has been very limited. Respect for democratic principles and the right to equal treatment without discrimination, as embodied in the ECHR, remain essential requirements of the Interim Agreement and of the Stabilization and Association Agreement. The lack of a credible process for the harmonization of the Constitution with the European Court of Human Rights decision of December 2009 in the Sejdić and Finci case, remains an issue of serious concern.*

Despite the formation of the new state government in late 2011, leaders of the BiH political parties failed to reach an agreement and although a special parliamentary committee was established and tasked to establish amendments to the constitution, its mandate ran out on 12 March 2012 without concrete results. Talks on implementation of the Sejdić and Finci judgment stopped when the government coalition between the Social Democratic Party of BiH (*Socijaldemokratska Partija Bosne i Hercegovine*, SPD BiH) and SDA broke down little more than two months later, on 31 May 2012, after the annual state budget was approved by the House of Peoples. In conclusion, although the EC moved the Sejdić and Finci judgment to the top of the agenda, the inconsistent compliance of the BiH political élites shows once again the limited impact of the conditionality tool on the promotion of key reforms. Most recently, efforts to promote an agreement were made on 27 June 2012 at the High Level Meeting for the Accession Process between the new Enlargement Commissioner, Štefan Füle, and the leaders of the six main political parties of BiH. At this meeting, the BiH leaders agreed on a Road Map with a list of obligations that the country has to meet by given deadlines to remove the last obstacles for a Decision of the EU Council on the entry into force of the SAA. A proposal to implement the ECtHR judgment should be submitted to the BiH Parliamentary Assemblies by August 31 2012 and the Constitution should be amended by November 2012. Moreover, both the EU and OSCE have warned that they would not recognize the results of the local elections scheduled for 7 October 2012 or the 2014 parliamentary elections as long as the BiH government does not amend discriminatory provisions in the Constitution and the electoral law. However, the new government coalition has not been able to meet the deadline set by the EC. The October local elections polarized the positions of the main ethno-religious groups and there is serious concern that no real attempt would be made to remove restrictions on ethnic minorities running for office before the 2014 parliamentary elections.

## 8. Conclusion

As shown by the police reform and the implementation of the ECtHR ruling in Sejdić and Finci, EU conditionality on nationality-sensitive issues has, so far, been ineffective and compliance with the conditions set by the EU has been inconsistent or absent. The BiH political parties have been able to agree only on general commitments, but have failed to take substantive steps to

implement the reforms and move forward in the EU integration process. If the membership perspective was an important incentive for democratic changes in the CEECs countries joining the EU in 2004 and 2007, in BiH, nationality has emerged as a decisive filter for the main political actors and a substantial constraint on the EU conditionality. The benefits of integration are outweighed by the political costs of EU-demanded reforms. The strict use of conditionality on nationality-sensitive issues has increased tensions among the main parties rather than being a strong incentive to reach the broad consensus necessary to implement the EU-demanded reforms. Every attempt to force BiH parties to cooperate led to stalemate in state-level decision-making and increased inter-ethnic polarization and disputes, further undermining the BiH path toward EU integration. Moreover, it prevented the BiH political elites from adopting and implementing the reforms needed to create a functioning and fully democratic state, and contributed to maintaining the status quo. All these considerations question the viability of the conditionality tool as a workable means to induce democratic changes in divided societies, but also suggest moving toward a revised EU strategy to promote constitutional changes in Bosnia and Herzegovina.

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