

Policy analysis

Role of Civil Society in BiH Constitutional Reform



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Recommendations:

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Executive summary

This document is intended for organizations operating under the term “civil society” which have interest in participating in dialogue on reform of the Constitution of BiH. Its purpose is to present a vision of the role of civil society in constitutional reform, to set basic guidelines for active participation of non-governmental organizations, and to point out the necessity to recognize and accept one’s own strengths and weaknesses. One of its most important recommendations is for individual non-governmental organizations to recognize their interest in constitutional reform, formulate their own goals, messages and mechanisms to act in that direction.

It would be idealistic to expect that ‘political elites’, which have so far appropriated and absorbed discussions on constitutional reform, will simply realize all the advantages of including civil society in that process. That is why we point to a need to create a more positive environment for partnership and dialogue between civil society and political elites, as well as the media.

In the past several years, the BiH public witnessed many ways in which constitutional change can be politicized, even if it is strictly of technical nature and absolutely necessary for the functioning of the state. We are also witnesses of the fact that, since the unsuccessful voting on the ‘April package’ of the constitutional reforms in 2006, the only constitutional changes that have been subject to political negotiations are those that relate to territorial reorganization of the country.

Our research showed that civil society also perceives a degree of ‘non-freedom’ in public dialogue and in attempts to resist the damaging of the social and moral system of values in BiH. That is why the objective of civil society should be to insist on returning the public discourse into the framework of democratic, consensual and constructive dialogue, which would be led within the legitimate domestic institutions.

The first prerequisite for that is that NGOs themselves stop, or refrain from, acting as if they were participating in the elections themselves. They have to act as a strong social corrective which educates, offers solutions, and sobers from any kind of illusions.

Secondly, civil society needs to be focused on redirecting the discussion on constitution reform from unreal, ‘territorial’ topics to pragmatic topics with potential long-term contribution to better functioning of the state. Civil society should engage in ‘preparing the terrain’ for democratic and rational dialogue on constitutional changes. One of our collocutors called it ‘cleaning’ of the public space for dialogue, referring to continuous activities in encouraging the people to speak freely, raise questions on corruption and fight against media abuse.

And the third prerequisite is constructive communication with the public and media.

By taking over the initiative for a different approach in constitutional reform, inclusion and consulting the general public, by focusing on specific topics and through defining of contents and individual solutions, civil society can impose a different type of dialogue with government representatives, a dialogue based on consensus. Such a dialogue should discuss the ‘possible’, not the ‘desirable’. This means that priority should be given to possible compromises which will result in better functionality and openness of executive and legislative institutions of all levels of government, while questions that may cause new political disagreements and tensions should be avoided.

The perceived dysfunctionality of the state refers primarily to a complex decision-making system at state level and poor vertical and horizontal coordination between all government levels in BiH, which are results of systematically built-in dependence on the political will. The system is dysfunctional to the extent of being impossible to manage, mainly due to the fact there are neither adequate mechanisms of coordination nor any joint vision of state building. State

building has been a subject of political compromise, and that partially explains the creation of complicated administration with authority formally assigned to the state, while in reality they exist in formal or informal circles at the entity level.

However, in order for BiH to move towards EU integration, it needs to have supremacy and authority to ensure full implementation of laws. Experience tells us that these questions cannot be left to informal cooperation and coordination in BiH. Therefore, all international and national efforts should be focused on *deepening, not expansion, of reforms aimed at the development of the state.*

Having this in mind, it is necessary to direct activities of civil society at promoting measures that can be implemented within the framework of the current territorial division of BiH. In order to achieve a necessary compromise, it is necessary to avoid promotion of unrealistic solutions.

The unique advantages of the civil society enable it to exert public pressure and thereby bring a dialogue on constitutional reforms back to institutional structures and make it more transparent. Having in mind the current state of mind of the public and opportunities within the civil society itself, the role of the civil society should be multi-fold: developing an expert base in individual fields of interest, developing synergy between the interest-based and advocacy groups, and synchronizing positions with the media.

Civil society may be included in several areas of 'functional' constitutional reform, including division of power, the decision-making system, human rights and freedoms, European integration, protection of the Constitutional order in BiH, etc. Concrete activities of NGOs focusing on specific areas may prevent the principle according to which "everybody does everything".

Our research pointed to expectations that the Constitution will be changed in several iterations, and these changes may not be, essentially or formally, streamlined into one course of reform. Different factors, including timeframe, political climate and political will, and positions of the international community will, to a great extent, determine the approach the civil society could take in each individual stage of the process. Accordingly, it is recommended that the civil society acts reactively to minimalistic initiatives that may be launched prior to announcement of the 2010 elections. Simultaneously, they should work on preparation of a more comprehensive reform in 2011, at which time the civil society should be ready to stand as an equal partner to government in the process of improving the constitutional arrangement in BiH. Specific activities can be listed as follows.

Year 2009

- I. Insisting on transparency and bringing the dialogue back to the framework of legitimate domestic institutions, considering the advantages that flexibility and compatibility with interests of the citizens offer to civil society.
- II. Redirecting the constitutional reform discussion from unrealistic 'territorial' issues to pragmatic ones contributing to better functionality of the state in the long term, which are stated in this document, recommendations of the Venice Commission and EU reports.
- III. Depoliticizing the constitutional discussion and giving priority to issues with regard to which a compromise can be found.
- IV. Directing attention to incremental changes to the current constitution in those aspects preventing the functionality of the state and meeting of the SAA obligations, as well as other requirements made by the EU.
- V. Recording examples of clear constitutional system violations and preparation of required legal analyses and documents sanctioning such violations.
- VI. Establishing proper means of communication with the governmental sector, including amendments to the Council of Ministers Rules of Procedure, mandating consulting with the appropriate non-governmental sector before proposing laws.

Year 2010

- I. Creating expert bases in individual interest areas.
- II. Creating synergy between interest and support groups.
- III. Defining the content of the constitutional reform and imposing pragmatic issues and measures that can contribute to better efficiency of the BiH Institutions, particularly in the light of EU integration.
- IV. 'Preparing the field' for a democratic and rational dialogue about constitutional changes.
- V. Creating a more positive environment for partnership and dialogue between civil society and political elites, including close cooperation with the media.
- VI. Public consultations to clearly and accurately define the vital interest of constitutional reform.
- VII. Translating the Constitution into the languages of the constituent peoples.
- VIII. Monitoring incompatibility between the entity and state regulations, especially those from international obligations, including European integration.
- IX. Developing a BiH human rights catalogue reflecting consensus about the protection of human rights in the country.

Year 2011

- I. Establishing a consensual dialogue about the constitutional reform, agreeing on the 'possible' not the 'desirable'.
- II. Involving and consulting the general public, focusing on specific issues, and influencing the awareness and positions of citizens.
- III. Representing interests of the general public and 'channeling' them through the media and civil society organizations to institutions responsible for the constitutional reform.
- IV. Acting through thematic 'sectors' where the expertise of individual organizations would be engaged, which would result in better synergy in joint efforts of NGOs, enabling them to use the force of arguments in further dialogue with the government, the media and the public.
- V. Avoiding excessive 'institutionalization' of the role of civil society and avoiding the creation of a single constitutional reform 'movement', which would risk an unnecessary politicizing of the process.

Finally, it needs to be said that there is an overarching opinion among the civil society organisations that even if there may be a consensus about European integrations, there is still no consensus about the state of BiH itself. This fact represents the major challenge for civil society, whose role in constitutional reform should be to mitigate politicization of the process, and impose debate on 'functional' issues and accession to the European Union. However, by recognizing their own advantages, improving the synergy within civil society, and activities focusing on pragmatic and realistic goals, civil society can considerably contribute to a better quality of public dialogue about the constitutional reform. If positioned in a realistic timeframe, it will also contribute to finding compromise and defining improvements in constitutional arrangements.

Introduction

This document is intended for organizations operating under the term “civil society” which have interest in participating in dialogue on the reform of the Constitution of BiH, but also in taking a more significant role in activating certain constitutional mechanisms that have been neglected in the past. Having in mind the variety of interests represented by different civil society organizations as well as the broadness of the term ‘constitutional reform’, the purpose of this document is not to offer unique solutions for the reform of the constitution. To the contrary, one of its basic recommendations is to have each non-governmental organization recognize its interest in the reform, and formulate its own goals, messages and mechanisms, and to act in that direction, cooperating with organizations representing the same interests. Therefore, the purpose of this document is to present a vision of the role of civil society in the constitutional reform, to set basic guidelines for active participation of non-governmental organizations, and to point out the necessity to recognize and accept one’s own strengths and weaknesses.

Generally, the meaning of the term ‘civil society’ is hard to define, and we cannot use this term in BiH in the singular, considering the often contrasting interests of individual actors operating inside it. Civil society in BiH is quite diverse in terms of organizational capacity; however, a critical mass of professional non-governmental organizations does exist. According to the European Delegation in BiH, there are about 8,000 organizations in this country. However, it is estimated that somewhere between 500 and 1500 of these NGOs are active, while a significantly lower number can be described as professional organizations.¹

However, for the purpose of this brochure, the term ‘civil society’ will be used in its broadest sense, including domestic NGOs from local to state level, media, academic community, professional unions, etc. The reason for that is the fact that constitutional reform in the context of BiH politics and social environment goes beyond the discussion of expert, legal solutions. Having in mind the prevailing perception that Dayton constitutional solutions represent an obstacle to development of BiH and prevent efficient functioning of the state, and that it creates three different ‘pictures’ of the society, constitutional reform imposes itself as an interest of the general public, not just of BiH political elites. It is important to emphasise that the term ‘political elite’ is intentionally used here to stress the fact that the dialogue on the reform has been dislocated into some informal, but influential, non-institutional political circles.

More than any other political situation so far, implementation of the EU Stabilization and Association Agreement will show to what extent the negative aspects of the existing constitutional solutions have penetrated into the pores of our society, from breaching human rights, through (non)functioning institutions, to agricultural, economic, and social issues, etc. Therefore, it is imperative to include the general public, in the form of civil society organizations, in discussion of constitutional reform.

‘What do we have to do with constitutional reform?’

According to the Report “Non-governmental sector in BiH”, the dominant role among non-governmental institutions goes to organizations with activities similar to activities of the state. These include: humanitarian associations, associations of refugees and displaced persons, associations of war veterans, and various national associations. Also, considering the number of members, there are various professional associations, unions, associations for protection of fundamental human rights, gender equality, and associations for development of democracy, protection of the environment, etc.² According to the research conducted by the Center for

¹ Findings of the European Delegation

² Fadil Šero, Milan Mrđa, “NGO sector in BiH”

Promotion of Civil Society (CPCD), results indicate that “the largest number of activities is in the field of education and research, youth issues, social and humanitarian causes, development of local community and rights of vulnerable categories (about 40%), while ecology/environment protection failed to take a significant role, which is evident from the fact that only 6.86% of NGOs are active in this sector”³

However, this raises the question of quality and transparency of civil society activities. One can say that regardless of the uneven distribution between rural and urban areas, the percentage of non-governmental organizations which are active and visible to the media, is significantly lower than can be seen in statistics. If we look at those data from the aspect of participation of the civil society in the process of policy creation and constitutional reform so far, civil society activities are reduced to several significant non-governmental organizations in three or four urban centers in BiH, where it is possible to draw a certain attention of the media. Other organizations, coming from both rural and urban areas, usually remain quite invisible for the general public and political structures.

Thus it would be idealistic to expect that the political elites, which have completely appropriated and absorbed discussions on the constitutional reform, would realize all the advantages of including the civil society in that process on their own. This shows a need to create a more positive environment for partnership and dialogue between civil society and the political elites, for which both sides are responsible, including the media.

Research conducted for the purpose of this document has shown that representatives of civil society believe there is little chance for major developments in constitutional reform and overall stabilization of social and economic relations if the process is put in the hands of “the political elites”. It is believed that the destiny of constitutional reforms depends on realistic evaluation of possibilities to gain broader social support. This refers to the political environment in which logic will defeat the cravings and egotistical tendencies of the current political players. It was also pointed out that the practice of political calculation and covering up of real problems will result in poor chances for the process of constitutional reforms to end successfully while maintaining the stability of the state.

It was further pointed out that the possibilities offered by the Constitution of BiH have not been used to the utmost extent due to misguided or poor interpretation or implementation of some of its provisions. Therefore, it would be wrong to tie the current problems in BiH solely to the flaws in the Constitution. Portraying the current situation in a bad light could be rather due to some political calculations. Here we refer to groundless stirring up of the political atmosphere and presenting of constitutional reform as the “question of life and death” for Bosnia and Herzegovina. What is important to stress in such situations, and before going further into discussion on this issue, is that the existence of BiH is indisputable; what is questionable is its functionality and capacity for further integration into the EU.

Many members of civil society also believe that the current authorities lack the vision of which course Bosnia and Herzegovina should take in future. It is believed that the whole ‘stirring up’ of the story about the Constitution serves to cover the fact that this vision is lacking.

So, it can be said that the positive outcome of the process of constitutional changes would not be possible as long as there is evident ‘non-freedom’ in public dialogue and in attempts to resist the damaging of the social and moral system of values in BiH. As put by one of our collocutors, Bosnia and Herzegovina entered the world in which criticizing counterproductive behavior is treated and thought of as exceptional bravery, rather than the normal culture of democratic behavior.

That is one of the main reasons why constitutional reform should matter and be of concern to the general public and, especially, to civil society. The objective of civil society should be to insist on returning public discourse into the framework of democratic, consensual and constructive dialogue, which would be led within the legitimate domestic institutions.

³ CPCD, Report on the level of civil society development , 2008

Communication with the Government and capacities of the civil society

Establishing good communication instruments with the Government is of key importance for opening the dialogue on constitutional reform. Namely, in May 2007, an Agreement on Cooperation between the Council of Ministers of BiH and the Non-Governmental Sector in Bosnia and Herzegovina was signed. Also, a "Strategy for the Development of Stimulating Environment for Civil Society Development" is being prepared, with participants from the government, civil society, and European Commission in BiH. Apart from establishing the Civil Society Board, the agreement foresees establishing of a civil society council by the Council of Ministers, as well as a Civil Society Agency (within the Council of Ministers structures) which would serve as the executive body. However, as a form of temporary solution, a "Sector for Cooperation with the NGO Sector and Development of Civil Society" was formed at the Ministry of Justice of BiH. (For an autonomous administrative organization such as an "Office", a new law has to be enacted.) Implementation of these items of the Agreement would enable functioning of the envisaged institutions and that would result in an environment that supports general promotion of constructive dialogue between the Government and the NGO sector.

When it comes to the importance and seriousness of the tasks given to civil society organizations, the fact is that "many NGOs took some of the responsibilities that should be handled by state institutions, in accordance with their constitutional and legal rights and authorizations, and clearly defined procedures (for example, return of refugees, legal aid, etc.). Many non-governmental organizations provide alternative services which are not (sometimes intentionally) provided by the governmental institutions, such as legal aid for large groups of refugees helping in protection of their rights and interests".⁴

It can be argued that this represents a significant advantage and a proof of flexibility of the non-governmental sector in Bosnia and Herzegovina, and that it could be seen as a key resource for the opening of negotiations on constitutional reform. However, it should be noted that there is a general threat from too broad engagement of certain organizations by the principle "do it all", which finally results in reduced effect due to poor capacities. This is the reason that the following pages speak in favor of the 'sectored' approach to the engagement of the civil society, which would serve to focus certain organizations, keeping them engaged in the areas of their expertise.

Political environment and joint approach

The existing initiatives for forming the Constitutional Reform Commission in the Parliament of BiH, and the initiative for forming the Agency and the Office for Cooperation with the Civil Society at the Council of Ministers of BiH, represent a good basis for further institutionalization of the dialogue on constitutional reform between the governmental institutions and the civil society. However, in fighting for content over appearance, the civil society needs to resist the attempts of excessive 'institutionalization' of its role, and also to resist creation of an exclusive 'movement' for constitution reform which would be exposed to the risk of undesired polarization of the process.

In the past several years, the BiH public had the opportunity to see all the ways in which topics referring to constitutional change can be politicized, even if they are strictly of a technical nature and absolutely necessary for the functioning of the state. We are also witnesses of the fact that, since the unsuccessful voting on the 'April package' of the constitutional reforms in 2006, the only topics which have been subject to political negotiations are those that related to territorial reorganization of the country.

⁴ Fadil Šero, Milan Mrđa, "NGO sector in BiH", CPCD

The context in which the civil society in BiH is active consists of a political market based on primitive premises, and the public is still unable to clearly articulate its attitudes outside institutional and other rules dictated by such politics. The public becomes a hostage of bad politics, and the politics a collateral damage of poor ideas and poor political elites. This environment makes the role of the non-governmental sector that much more important. Maybe this is the reason why it should be special, *sui generis*, since its activity model can hardly be borrowed from some Western country. Copying, or should we say, bad copying, is what created the current situation in BiH, with a significant number of NGOs that exist just for the sake of existing. The purpose of their activity, together with their terminology and denomination, may be reduced to a simple formula of anti-governmental engagement based on the principle: we know what we don't want and who we dislike, but we don't know what we want and who we favor, and even if we do, we don't know how to get there. There are only a few examples of NGOs with firmly determined goals and the ability to articulate what they want and how it can be achieved. Such organizations have the potential for a broader platform which can grow into a solid alternative.

This is what I believe civil society can achieve in the future when it comes to this issue. First, it has to act as a cleaner. It has to clean the grounds for constitutional changes. When I said that civil society should act as a cleaner, it is because that is what represents our biggest problem ... the problem of lack of freedom in this country. Lack of freedom where all players on the political scene get auto-censored, the censorship is not abolished, it is auto-censorship. – Focus group participant)

However, some requirements need to be met before such an important step. It can only be a part of the package in which NGOs become think-tanks for progressive media responsible for creating public opinion. So, it is necessary to create a symbiosis, based primarily on the joint need for change. NGOs need to be profiled as experts in their fields of activity, and be able to provide expertise which would be presented to the general public through cooperation with the media. Politics based on the spreading of nationalistic fears are strategy-free by default. Politics are based on daily-political tactics. In the long term, politics can be enlightened only by a platform based on very professional foundations in which NGOs and media can offer strategies instead of tactics; professionalism instead of compliance. That could serve as a solid preparation of the basis for crucial changes in the rules of the game of politics.

The first prerequisite requires that NGOs stop, or refrain from, acting as if they were participating in the elections themselves. Their role should not be reduced to populist messages – things that people want to hear. They have to act as a strong social corrective which educates, offers solutions, and sobers from any kind of illusions. That is why NGOs should be immediately freed from any political leadership, which is one of the key weaknesses of the NGO sector, recognized by the current politics and used as an anesthetic of normal reflexes.

Secondly, civil society needs to be focused on redirecting the discussion on constitution reform from unreal, 'territorial' topics to pragmatic topics with potential long-term contribution to better functioning of the state, and therefore, better quality of life of its citizens. Effects of civil society engagement in the process of constitutional reform will be greater if based on designing of contents of the constitutional reform, and imposing of pragmatic topics and measures which can improve higher efficiency of BiH institutions, especially in the light of EU integration.

Civil society should recognize the importance of 'preparation of the terrain' for democratic and rational dialogue on constitutional changes. One of our collocutors called it 'cleaning' of the public space for dialogue, referring to continuous activities in encouraging the people to speak freely, raise questions on corruption and fight against media abuse.

Our research also pointed out the need to have a civil society which creates the concept of a healthy relationship with political parties. Civil society should not run away from politics if it wants to affect political decisions, especially in the area of politics focused on caring for the community.

The third prerequisite is communication with the public and media. The activity of NGOs cannot be reduced only to organization of round tables and writing of public statements, occasionally boosted by a research of public opinion. NGOs should agree to work in the shadows as well; agree to generously give their strategies or law proposals to political forces they believe will be able to organize and implement in the right way. This means that NGOs, defined as non-governmental organizations, are not necessarily apolitical. This role in BiH needs to be stressed, since governmental institutions as such lack the potential to give careful contemplation to strategies, not due to lack of brains, but due to their narrow scope. So, NGOs that want to, and can, be part of that platform need to be ready to gather up and be capable of recognizing political forces which can implement socially beneficial solutions in the relevant institutions; in other words, political lobbying, but lobbying free from any adverse effect.

By taking over the initiative for a different approach in constitutional reform, inclusion and consulting the general public, by focusing on specific topics and through defining of contents and individual solutions, civil society can impose a different type of dialogue with government representatives, a dialogue based on consensus. Such a dialogue should discuss the 'possible', not the 'desirable', and that asks for a politics-free discussion of the constitution and an insistence on topics related to better functioning of the state. This means that priority should be given to possible compromises which will result in better functionality and openness of executive and legislative institutions of all levels of government, while questions that may cause new political disagreements and disconnection should be avoided. In this way the constitution would be free from the undesired political context.

Constitutional reform, apart from the importance in improvement of the existing legal framework, also has important 'symbolic value', since it will show that Bosnia and Herzegovina is capable of applying the principles of democratic behavior and it will signal to the citizens that they may participate in such important changes.

Why is constitutional reform necessary?

Prior to defining the specific activities of the civil society, it is necessary to raise the awareness of NGO activists and subsequently, other members, to the necessity of constitutional reform in this country. While trying to answer this question, this document relies on already existing recommendations of relevant international bodies.

The Venice Commission states that "it is high time for re-evaluation of the current constitutional arrangements... Constitutional reform is unavoidable, since current engagements are inefficient and irrational, and lack any democratic contents." The EC Report on Progress of BiH in 2008 states that "generally speaking, this was a reign of nationalist rhetoric, and leaders of Bosnia and Herzegovina failed to use constitutional reform to achieve progress in creating more functional and economically profitable state structures which support the process of European integration. Although there was progress within the current constitutional structure, this reign has disabled timely decisions and prevented development of capacities necessary for progressing towards the EU".

Research made in creating the Study on Governance Structures in BiH clearly indicates that lack of functionality of state institutions represents a direct or indirect result of non-existence of political will. A complex decision-making system on the state level and faulty vertical and horizontal coordination between all administrative levels in BiH are the results of systematically implanted dependence on the will of the political elites. Such a system cannot sufficiently motivate political leaders to participate and lead policies of local institutions in a meaningful way. In fact, state institutions of BiH simply lack the authority and autonomy to force politicians to seriously participate in their activities. Such an institutional environment opens the possibilities

of undermining the system so it becomes completely paralyzed, and that disables the creation of a forum for politics management. This situation is created by the institutional design (systemic problem) in which state government and parliament can be completely paralyzed by entity voting, or by insufficient support from representatives of the constituent peoples, or by the mechanism of vital national interest.

According to the Venice Commission, this situation “asks for the balance between the need to protect interests of all constituent peoples on one side, and the need for efficient government on the other. However, the Constitution of BiH offers many provisions which protect the interests of the constituent peoples, among others: a veto based on vital interest in the Parliament Assembly, a system of two houses and the collective Presidency based on ethnicity. The combined effect of these provisions results in extremely difficult, if not impossible, government.”

The system is dysfunctional to the extent of being impossible to manage, mainly due to the fact there are neither adequate mechanisms of coordination nor any joint vision of state development. State development has been a subject of political compromise, and that partially explains the creation of complicated administration with authority formally assigned to the state, while in reality they exist in formal or informal circles at the entity level. In most cases, the entities can keep their authority and control over finances, while state authorities are expanded mainly on paper. The balance of power has been only marginally shifted in favor of the state of BiH, which still lacks basic elements of autonomy, authority and credibility. The weakest state institutions are those which share their authority with those at the entity level. The majority are actually a result of political compromise, and they are built on the basis of a complex system of vaguely distributed and often overlapping responsibilities and jurisdictions which enable the state, entities and other institutions to coexist and overlap without any clear hierarchy or supremacy of the state.

However, in order for BiH to move towards EU integration, that is, to become capable of, at least, establishing standards and ensuring that such standards will be respected by lower levels of government, it needs to have supremacy and authority to ensure full implementation of the law. Experience tells us that these questions cannot be left to informal cooperation and coordination in BiH. Therefore, all international and national efforts should be focused on *deepening, not expansion, of reforms aimed at the development of the state*. This solution offers political compromise that should be acceptable for pragmatic BiH politicians: a stronger, more efficient state, with a limited number of jurisdictions, can coexist with the entities, and even support their functionality.

Having this in mind, it is necessary to aim the activities of the civil society at promoting measures that can be implemented within the framework of the current territorial division of BiH, measures that do not ask for redefining of entity borders or for transferring of whole sets of new sectors to the state level. These are the measures that are necessary for the previous reforms to reach the level at which the state has *real* jurisdiction and resources for implementation of its duties as any other state of a decentralized system. In order to achieve a necessary compromise, it is necessary to avoid promotion of unrealistic solutions. Bosnia and Herzegovina suffers from many transitional ‘illnesses’, just as have other countries which have gone through this process, countries that have demonstrated that the ‘illnesses’ can only be treated with long-term and effective integration into European structures.

Time is (not) on our side

As we have learned, it can be expected that the Constitution will be changed in several iterations, and these changes do not have to be, essentially or formally, linked to one course of reform. Different factors, including timeframe, political climate and political will, and positions of the international community will, to a great extent, determine the approach the civil society could

take in each individual stage of the process. Accordingly, it is recommended that the civil society acts reactively to minimalistic initiatives that may be launched prior to announcement of the 2010 Elections. Simultaneously, they should work on preparation of a more comprehensive reform in 2011, at which time the civil society should be ready to stand as an equal partner to government in the process of improving the constitutional arrangement in BiH.

I. Minimalistic approach in 2009

Given the existing and expected pressures exerted by the international community, and more importantly, given the responsibilities BiH assumed under various international agreements (primarily through membership in the Council of Europe, ECHR and SAA), prior to the 2010 General Elections one can expect a very limited discussion on constitutional reform based on minimalistic demands. According to our expectations and assessments, these discussions could be about "less painful issues" to make the impression in public that the reform processes are ongoing, and at the same time to meet certain international requirements. Still, in the opinion of some of our collocutors, we can expect that in this process some important issues such as discrimination may be addressed.

Thus, the civil society should be ready at that time to react and clearly define its positions concerning certain solutions proposed.

...that means, one should create an atmosphere, a climate in which everyone should understand that this needs to be done ...rather than to continue using the Constitution for gaining more, or winning once again. No one has and no one will gain more or win in this climate created around the new Constitution.

Focus group participant

II. Field preparation in 2010

By that time, civil society organizations can contribute to development of a better quality political life and thereby encourage the public to think constructively in terms of constitutional changes.

Comprehensive reform not before 2011

Deep political disagreement among the existing political parties can hardly create the ambience for constructive dialogue on essential constitutional changes before 2011. The main precondition for such a dialogue is a political ambience in which the logic will overcome the flames and egotistic aspirations of the current political players. Given the upcoming elections in 2010 and the current political ambience it is hard to expect that the level of necessary political seriousness and institutional stability required by such a process will be achieved. This position was also confirmed by our research, according to which there are no indicators on the current political scene in BiH showing sufficient political energy to launch and successfully complete this process prior to the upcoming general elections. The reason for this is, primarily, the presence of political trading and the setting of mutual conditions instead of cooperation and open dialogue.

Therefore, an active and diligent inclusion of the civil society and general public, based on common constitutional values, could be manifested in specific activities and projects focused on inclusion into constitutional reform in 2011.

Therefore, it would be good to create an atmosphere which would demand that shortcomings of the current Constitution be overcome so that the Constitution can take its place in the legal structure and so that other things can be done in the same way as in other countries. In other words, should we fail to create this situation, I believe that we will be wasting time and resources and that the new Constitution will bring no significant progress.

Focus group participant

Basic elements of civil society inclusion into constitutional reform

The unique advantages of the civil society enable it to exert public pressure and thereby bring a dialogue on constitutional reforms back to the institutional frames and make it more transparent. More constructive involvement of media is also very important, because by providing support to civil society efforts, the dialogue on constitutional reform will be made more transparent and would enable better representation of broader public interests and the channeling of those interests through media and civil society organizations all the way to the institutions in charge of constitutional reform.

As to the question whether the civil sector in Bosnia and Herzegovina is strong enough to establish a dialogue and develop a common vision, given the fact that the civil sector in Bosnia and Herzegovina is, to a certain extent, divided across entity and ethnic lines, our study has shown divided opinions. One group deems that there are common interests concerning certain issues, while the other believes that some civil society organizations are not quite ready to take the risk of confronting their political environment. However, the majority of our respondents agree that if this situation persists, in which people refrain from saying what they think, fearing being socially isolated in their living and working environment, the constitutional reform stands little chance of being successfully completed. It was mentioned that self-censorship is present not only in the civil society but also in politics, religious institutions, the academic community and the media.

When asked whether the civil society could count on the support of citizens in its constitutional reform activities, the majority of respondents answered in the negative. The prevailing opinion seems to be that citizens show no interest in this process.

Furthermore, when asked whether the civil sector in Bosnia and Herzegovina is strong enough to establish a dialogue and develop a common vision, given the fact that the civil sector in Bosnia and Herzegovina is to a certain extent divided across entity and ethnic lines, the opinions of our respondents were divided. One group deems that there are common interests concerning certain issues, while the other deems that it is rather questionable to what extent certain civil society organizations would be really ready to take the risk of confronting their political environment.

Having in mind the current state of mind of the public and opportunities within the civil society itself, the role of the civil society should be multifold: developing an expert base in individual fields of interest, developing synergy between interest and advocacy groups, including the broader public in advocacy activities and synchronizing positions with the media.

a. Developing an expert base

Individual NGOs should clearly define their fields of operation and accordingly focus exclusively on the chapters of the Constitution that regulate that particular matter. As mentioned earlier, the strength of NGOs lies in the harmonization of their actions with the needs of citizens and in their expertise in certain fields of the Constitution. This type of selection would automatically sort individual organizations into certain "sectors" in which their expertise could be best used and produce the best arguments in further dialogue with government, media and the public.

The starting point for each field could be an overview of prior and existing constitutional change initiatives, and in this, the expert assistance of the civil society would be instrumental. Thereby, different international and local organizations that earlier launched constitutional change initiatives would be able to focus their efforts on achieving specific and concrete goals. In this way, individual NGOs could focus on the topics relevant to their operations instead of having all

organizations dealing equally with all open questions or constitutional reform in general. It is important to highlight the necessity of having synergy in certain sectors and enabling joint actions directed at government and the public. This would equip the civil society with a greater legitimacy and influence in the advocacy process.

b. Synergy between "action" and "interest" organizations

The synchronized action of all parts of civil society is the only acceptable option that can win the civil society the credibility of a respected partner.

Accordingly, the civil society should define a uniform approach, agreed and accepted by all civil society organizations interested in this process. The role of organizations brought together by a common interest (e.g. trade unions, professional associations, human rights organizations, etc.) – or organizations operating at local level – is to clearly identify the issues important for their respective interest groups and to keep the public constantly aware of them. This could also apply to organizations that were not so far involved in similar activities, such as professional associations, which at the request of the civil society can offer their expertise and strength, providing an appropriate content for inclusion of the civil society in constitutional reform.

On the other hand, organizations that are in their nature more "advocacy" or "action" oriented and skilled in conducting public campaigns can offer their knowledge and capacities to the "interest organizations" in developing the messages intended for the public and government, as well as in developing appropriate action mechanisms.

Unless this relation is built upon the principle of substantial and organizational synergy of different civil society organizations, these efforts may remain good intentions only. It is also important to make clear the distinction between uniform approach and uniform position, because civil society is, in its nature, a conglomerate of different interest-oriented autonomous subjects. Therefore, uniform *approach* is a matter of good organisation and synergy between groups acting to protect similar interests. Uniform *position* can exist only at the level of a group of organizations representing the same or similar interests, and it represents a sublimation of different opinions translated into a defined concept of joint action.

c. Public advocacy – defining the message

The role of civil society organizations in constitutional reform can also be to encourage the broader public to think about what needs to be changed. According to one of our respondents, one of the possible ways to attract the attention of citizens is to "bomb" them with information about how certain constitutional changes really affect their everyday life and social needs. In this regard, one should avoid using slogans and theoretical contents.

In that regard, one can use the method of short messages aimed at convincing the citizens to support the initiative which has been launched. However, the message must be convincing.

... unless it includes all forms of organization, it will fail, that's for sure. If there is some sort of partnership between organizations familiar with the techniques of conducting public discussions, organization and management on one hand and organizations based on membership without such capacities on the other, one can expect to have a mass, not necessarily a critical mass, but at least a mass that will not be so easy to ignore.

Focus group participant

There is no uniform position. What is worth doing is to enable different interests. Then we need to learn to harmonize them and out of various different options to select the best ones. Thus, I am an optimist in that regard.

Focus group participant

I think that the key to this involvement and to the success of constitutional reform is in us being able to understand our interests in all this and to understand our problems.

Focus group participant

...one should identify the issues and the groups ... and maintain the attention of those civil society organizations all the time.

Focus group participant)

(So, for a winegrower it must be made clear and practically illustrated in his own context how a certain intervention in the Constitution is going to affect his business.

If we fail to explain this to him, we will make no impact, in other words, he will be not interested in it. This brings us back to the question of whether we need him or not. If we manage to explain this, we will have a story – now you make 100,000 KM a year, next year with these interventions you will be making 200,000 KM.
Focus group participant)

- Knowing what message we want to convey and accordingly collecting the exact data (three or four most important facts about the issue)
- Having a concise and precise message (boil it down to the essential content to be passed to the public)
- Simplicity (constitutional reform is a complex and comprehensive problem and therefore it must be simplified and translated into comprehensive messages understandable to the broader public. Citizens will ignore a message they do not understand.)
- Focusing attention on the importance of the message (the message must be strong enough to encourage action, and this can be achieved by explaining why something is “urgent, most important, best, worst, first, last, etc.”)
- Persistence (continuous repetition of the message makes people more aware of it.)

Apart from this ‘issue framing’ technique, the use of symbols is very useful in communication with the public. Language enriched with symbolism may influence development of attitudes,

whether it is about new or regular notions. The role of symbolism is twofold: shaping the public debate about the issue and influencing the awareness of the audience. In using symbolism, one should make an analysis to see the type of reactions certain symbols cause in the target audience.

It is recommended to create so-called *meta-symbols*, i.e. metaphors that could clearly and exclusively be linked to the goals and interests of the particular NGO. Metaphors defined in this way will easily attract the attention of the media, bring together supporters of different but related ideas, and most importantly, provide the message with the emotional dimension capable of mobilizing the feelings in supporters of the same idea in the audience. Practically, that implies the “condensing” of a wide spectrum of ideas into symbolic and recognizable metaphors, which the media can easily convey to the public.

Civil society has to be “alert” always when government or some other association launches initiatives of special importance for society.

...the questions should be translated into two or three messages that make sense to citizens. They should be worded in a way – RS as a part of BIH will not prosper unless BIH joins the EU. ... that is why we have to solve the issue of jurisdiction... ...thus, a group of three, four, five or six people has to be used to communicate this to the audience and thereby create an appropriate atmosphere... politicians who nowadays win credits on the stories told in certain situations will no longer be in the position to do that, for those stories will bring them no credit anymore. This is a huge effort, but I simply see no other way of doing this except through these two or three simple messages. They are to be blamed for this...it does not happen. People will understand this and support it.
Focus group participant)

d. Synchronizing positions with the media

When it comes to relations between NGOs and the media, one can often hear that the media tend to be rather sensation-oriented instead of dealing with the “real” problems of citizens and that it is hard to attract their attention. However, as said at the beginning of this document, given the prevailing apathy and saturation of the public with “major topics”, the role of the media in promoting joint action of NGOs is instrumental. The media should, in that context, be considered an ally of the NGO sector or even as active participants in advocating constitutional reform-related topics.

The media are the mirror of debate conducted in public. However, the media are also the creators of public debates and events. The media interpret positions and activities of the NGO sector and by conveying certain messages they are in a position to change and add attributes inherent to the perspective of individual reporters or even to certain political options toward which a certain medium is favorably inclined. For that reason it is very important that messages of NGOs be as brief, clear and precise as possible. Also, NGOs should be well informed about the media, their inclinations and positions about certain issues, and they should phrase and “shape” their messages accordingly. It is necessary to gradually build up open relationships with reporters, letting them know at the very beginning how they can contribute to a positive outcome of a certain campaign and keeping them informed on a regular basis about your activities and positions concerning concrete constitutional solutions proposed.

In that sense, it would be useful to appoint persons to be in charge of relations with the media and communicating a certain message to the public. Using so-called „meta-symbols” and symbolic metaphors, and regular appearance in public with consistent, concise and precise messages will contribute to strengthening or „anchoring” the public perception of the NGOs and the interests they represent, leaving less room for the media to provide their own interpretations of the message. Also, those organizations which decide to go for joint action and a uniform message can, through appearance of their representatives in the media, make an impression of a broader support to the NGO coalition.

One of the advantages of NGOs, although underused, is the visibility their membership and activities enjoy in the field. Given the size of the media space in BiH, the public soon becomes saturated with the familiar faces of our political life and classic methods of reporting the message such as press releases, press conferences or roundtables. The civil society in that sense can attract the attention of the media by presenting messages substantiated by evidence and arguments in innovative and creative ways, by organizing activities in the field, and through public, and informative actions of competent representatives of CSOs. The public is also fed up with conflicting situations and confrontational discourse; therefore one can only expect their positive reaction to messages offering compromise and pragmatic and functional solutions rather than idealistic, emotional, and yet unrealistic approaches.

... civil society should be actively involved in public discussions, not only about the Constitution but also about other laws. When I recently read the Judicial Development Strategy I noticed that a very small number of civil society organizations were involved in the process of public discussion. This is potentially disastrous!

Focus group participant

Functional Constitutional Reform

This section of the document is, to a large extent, based on existing reports on the conditions and capacities of the civil society, made by different local and international organizations, but also on the Study of Governance Structures⁵ and reports on the monitoring process of the BiH European Integration, published by our organization, and progress reports on reform processes in BiH made by the European Commission.

Based on previous experience and the current political environment in BiH, it can be concluded there is no political consensus to pass an entirely new Constitution. Therefore, efforts should be put into the making of incremental amendments to the existing Constitution, that is, amending the regulations which obstruct the functionality of the state and prevent the state from fulfilling SAA commitments or other requests made by the European Union.

The research among the BiH Parliament's political parties' representatives and the broader public sector, conducted during the preparation of the Study of Governance Structures, indicated that due to the inability to reach consensus on territorial reorganization of the middle government level, the amendments to the Constitution should be made within the existing territorial arrangement. A similar recommendation is given by the Venice Commission in the 2005 Opinion on the Constitutional Situation in BiH and Powers of the High Representative: "...in the multi-ethnic context of BiH it seems appropriate that major constitutional amendments have to be agreed between the three peoples. Therefore the option of abolishing the Entities does not seem to be viable for the foreseeable future ».

In addition to this inability to reach satisfactory territorial arrangement for all parties in the current political environment, there is also the consideration that no territorial arrangement made under such circumstances would bring about greater institutional functionality. Territorial reorganization is thus a priority from the past, whereas the functional restructuring of BiH for the purpose of EU integration is a priority for the future of this country. Hence, all communication regarding Constitutional reform should be directed to the making of functional amendments, which would provide the state with the authority, mechanisms and tools to fulfill the EU commitments. Likewise, this means "deepening" the existing competencies rather than delegating new ones to the state level.

BiH has an 'illness' caused by bad system solutions and lack of political will, of which we list only the major ones:

- The number of state institutions having exclusive powers is very low. In other areas the structure at the state-level has generally imposed transfer of only partial powers to the state level, thus keeping the complex system of divided powers whose effectiveness depends entirely on the good will of many different government levels. Although the state has a role in identifying the policies, particularly in terms of inter-entity harmonization of standards, and acting in accordance with international commitments, nonetheless the entities have the legislative power for all shared competencies and very often they either neglect or undermine the obligations stipulated by the state law.

⁵ The goal of the Study of Governance Structures in BiH, published in 2007, was to review the delegation of competencies and the decision-making system between different levels of BiH Government. The purpose was to open a discussion on measures to be taken so as to provide the minimum functionality of the state prior to closure of the Office of the High Representative (OHR). The focus was on the ability to enforce the existing constitutional framework, without rearrangement of internal borders, so as to prepare BiH for EU candidate country status. One of the first conclusions of such action, which is obvious without further analysis, is that the system which, without the international community's interventions as of 2005, proved to be dysfunctional, will not be sustainable without the general agreement that stable, credible and relatively autonomous state institutions are the main precondition for the end of the OHR mission.

- On the other hand, if the state enacts laws (framework laws), and the entities have the power to pass and enforce the laws, there is very little or almost no respect for the state legislation. Also, if the coordination or cooperation with the entities is a part of the state institutional design, the result is non-efficiency at best, or non-enforcement in the least favorable view, due to lack of harmonized decisions between the two levels.
- There is very little consultation, coordination or cooperation between different government levels in terms of separate sectors, or there are bigger problems regarding the cross-sectoral planning process and strategies (e.g. European Integration).
- BiH's association with the EU depends on cooperative management mechanisms, particularly if the strict technical conditions are to be fulfilled across the country. Based on previous experience – without significant structural changes this goal will remain unattainable.

According to earlier initiatives for Constitutional reform, and different documents with arguments about BiH Constitutional regulations and analyses made by local non-governmental organizations, we can see that that civil society may be included in several areas under 'sectoral' engagement principle for the purpose of functional Constitutional reform. These are the division of power, the decision-making system, human rights and freedoms, European integration, protection of the Constitutional arrangement in BiH, etc. Concrete activities of NGOs focusing on those areas may prevent the principle according to which "everybody does everything."

I. Distribution of Power

- The Venice Commission deems that voluntary transfer of competencies, which was in place so far, is not sufficient to make the country fit for future integration into the EU. Therefore it is recommended that the transfer of competencies be comprehensive rather than piecemeal, and that apart from legislative competencies it should include competencies inherent to executive bodies and financial resources.
- In that regard, the existing distribution of power should be revised in order to clarify the responsibilities of the state and entities and separate competencies, thereby decreasing the inter-dependency present among different levels of government and the need for vertical cooperation.
- Where competencies cannot be separated and where cooperation is required (e.g. fields subject to harmonization with EU standards), the enforcement mechanisms should be established as well as the bodies in which cooperation shall be mandatory rather than voluntary and occasional.
- In fields where state and entities share competencies vertically there shall be a clear legislative hierarchy according to which the state will have exclusive *legislative power* in matters subject to shared competencies. The entities shall remain in charge of enforcement of law, but shall no longer have legislative power over matters subject to shared competencies.
- In line with recommendations of the Venice Commission, provisions should be introduced to prevent the return of competencies from the state to entity level without consent of the State Parliament.
- In all fields the hierarchy of legislative, executive and enforcement competencies of the state and entities should be clearly defined. This implies revision of enforcement mechanisms and consideration of legal, administrative and financial tools required for application of the state laws and policies in the fields where legislative and enforcement competencies are shared with other levels of government.

- Constitutional supremacy should be introduced to concretely define that the state law has supremacy over inconsistent entity legislation, and the Constitutional Court of BiH should be empowered to monitor, enforce and sanction non-compliance with decisions made at the state level. This recommendation is also in accordance with the opinion of the Venice Commission from 2006.

II. The Decision-making System

- The Venice Commission deems that, if it is impossible to abolish entity voting, it would be logical to limit its application only to the cases when interests of the entities are brought into question. This means that entity voting would be applied in the House of Representatives of the Parliamentary Assembly of BiH on matters subject to shared competencies. However, the Commission deems that this matter is not of huge importance and therefore it should not be used to condition the other pragmatic measures.
- The Venice Commission highlights the need for harmonization of decision-making procedures in BiH, especially when it comes to vital national interest. In the opinion from 2006, the Commission was of the opinion that a precise and strict definition of vital interest is needed in the Constitution. "The main problem of the veto powers is not their use but their preventive effect. Under present conditions within BiH, it seems unrealistic to ask for complete abolition of the vital interest veto. The Commission nevertheless considers that it would be important and urgent to provide a clear definition of the vital interest in the text of the Constitution. This definition will have to be agreed by the representatives of the three constituent peoples but should not correspond to the present definition in the Entity Constitutions which allows practically anything to be defined as vital interest. It should not be excessively broad but should focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture."
- When it comes to the House of Representatives and House of Peoples of BiH, the Venice Commission deems that the competencies of the House of Peoples should be reduced only to the questions of vital national interest, while the number of delegates in the House of Representatives should be increased to better reflect the size of the state and increased number of state competencies and Parliament of BiH. Adequate and guaranteed representation of "Others" is also recommended.

III. Human Rights

- The Venice Commission highlights the essential contradictions between BiH and EU, especially those related to the direct breach of ECHR, as mentioned in the opinion about "... existence of tensions between a constitutional system based on collective equality of ethnic groups on one hand, and the principle of individual rights and equality of citizens on the other."⁶
- The Commission also points out specific shortcomings embedded into the system: "Rules on composition and election of the House of Peoples seem to be incompatible with Article 14 of ECHR, while the rules on composition and election of the Presidency seem to be incompatible with Protocol 12, which in BiH came into force on April 1, 2005."⁷

⁶ The Venice Commission, 2005, pp. 17

⁷ The Venice Commission, 2005, pp. 20

- The EC 2008 Progress report also points out this problem: “Due to failed reform of the Constitution, the elections are still conducted in breach of the European Convention on Human Rights (ECHR). Election of the three-member Presidency of BiH is still contrary to Protocol 12 of ECHR because it does not allow citizens other than those of the three constituent peoples to apply for candidacy and it establishes the ethnic affiliation of each candidate elected from the entity.”
- The Venice Commission explicitly states: “First of all, the interests of persons not belonging to the three constituent peoples risk being neglected or people are forced to artificially identify with one of the three peoples although they may, for example, be of mixed origin or belong to a different category. Each individual is free to change his political party affiliation. By contrast, ethnic identity is far more permanent, and individuals will not be willing to vote for parties perceived as representing the interest of a different ethnic group, even if these parties provide better and more efficient government. A system favoring and enshrining a party system based on ethnicity therefore seems flawed.”⁸
- As for ratification of human rights instruments, the 2008 EC progress report recognizes that Bosnia and Herzegovina ratified all important international conventions on human rights. In July 2008 Bosnia and Herzegovina ratified a revised European Social Charter. The Constitution contains the majority of the principles of these human rights conventions and guarantees that the conventions will have supremacy over local legislation. However, despite formal fulfillment of requirements in the area of human rights, and regardless of the fact that these conventions should be directly applied, Bosnia and Herzegovina is one of the rare countries in the region and broader in which the Constitution directly violates the rights of minorities and the right of constituent people to elect and be elected as free individuals rather than “ethnicized numbers.”
- According to the Venice Commission in “a multi-ethnic State such as Bosnia it appears also legitimate to ensure that a State organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined.”
- In the field of anti-discrimination policies, the EC recognizes that the state and entity constitutions guarantee equal treatment to all people. However, a comprehensive anti-discrimination law has not yet been adopted. Anti-discrimination legislation exists in some areas, but their application is insufficient.
- One of the main recommendations from the documents of EC, the Venice Commission, resolutions of the Council of Europe and SAA is the election process of the three-member Presidency of BiH, which does not allow citizens other than three constituent peoples to be elected and which establishes the ethnic affiliation of each candidate elected from an entity. The Constitution, thereby, stands as the only obstacle to implementation of key requirements from Title I of SAA, i.e. harmonization of Election Law with the *European Convention on Human Rights*.
- Furthermore, the Venice Commission also recommends that citizens of BiH should develop their own “catalogue of human rights, which would be a reflection of consensus on protection of human rights in the country.” In that, it would be desirable to have human rights defined based on criteria accepted in the entire country, rather than based on different international documents. The Venice Commission therefore recommends a broad public discussion throughout the entire BiH led by civil society organizations.

⁸ Ibid.

IV. **European Integration**

This document also relies on recommendations and findings from the report on the Foreign Policy Initiative project entitled 'Monitoring EU Integration Process in BiH', which follows the implementation of the Stabilization and Association Agreement, trying to demystify this process and bring it closer to the general public in order to open an argument-supported discussion about specific issues and problems relating to individual fields within the European Integration.

The SAA implementation has become an international obligation of our country, which has activated a provision in the BiH Constitution enabling the taking over of all the necessary powers of the state in the process of harmonization of BiH legislation and practices with the standards applicable in the European Union.⁹ Article III of the BiH Constitution, defining the responsibilities and relationships between the BiH Institutions and entities, stipulates the following in paragraph 2.b): "Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina."

The following measures are therefore recommended:

- Adopt a constitutional amendment giving the state of BiH legislative powers for meeting the requirements of the EU integration. The adoption of this amendment should be seen as a precondition for the further stabilization and association process. According to the Venice Commission, this is one of the most important recommendations with regard to constitutional reform. The state of BiH should be given the powers and responsibilities for further negotiations with the European Union, so that it could adopt and implement all measures necessary for meeting the EU requirements: "Only in this way can the state become fully involved in the integration processes and overcome systemic deficiencies incorporated in its Constitution."
- Build the political will and institutional mechanisms necessary for integration into the EU, defining the maximum executive powers of the entities and the minimum executive powers of the state of BiH, acknowledging the subsidiary principle for the efficient administration of the *acquis communautaire*¹⁰.

'Monitoring the EU Integration Process in BiH' recognizes that BiH has made a certain progress in each of the SAA sections and the European Partnership Priorities, but further progress in these areas will be limited by the existing constitutional solutions. The analysis of meeting the requirements in the field of the general SAA principles is particularly concerning, indicating that BiH has reached its limit in this capacity and that any serious continuation will require profound changes of the constitutional system, political climate and social awareness. The following is thus recommended:

- In terms of political dialogue, Title II identifies that the harmonization of cantonal legislation with the BiH Federation legislation is inconsistent. The BiH Institutions function as a 'virtual state' with regard to entities. The status of the Brčko District is only recently incorporated into the constitutional system of BiH by an amendment to the BiH Constitution. The state

⁹ The Venice Commission also recognizes that Bosnia and Herzegovina will not be able to make substantial progress towards European integration, since the negotiations with the European Union require state institutions with necessary capacities and expertise for solving a wide range of technical issues. "The EU will want to have one partner and will definitely not be ready to negotiate with the two entities separately. BiH will need the necessary legislative powers to create conditions for concluding and implementing such an agreement. And not the least important, BiH will be expected to ensure efficient implementation of such agreement in both entities. At this moment, the state level is not able to effectively ensure that the obligations of the country towards the Council of Europe and the international community in general are met. In terms of the EU, it is inconceivable that, with its current constitutional arrangements, BiH could make any real progress. The EU will not tolerate the delays, indecisiveness and insecurity that the segmentation of government implies," states the Venice Commission in its opinion of 2005.

level of government has no powers in local self-governance, which further complicates meeting the obligations of our country in the field of political dialogue.

- This is particularly evident in terms of meeting the obligations relating to sustainable return. There has been no complete division of powers between the relevant institutions. The implementation of rights in practice is limited by the complex legal, political and economic situation in BiH.
- Title V of the SAA treats several areas where meeting the obligations requires adoption of specific laws and solving the problem of shared powers between BiH and the entities, and implicitly the transfer of powers, too. Almost all the key areas in the above title are governed by entity legislation. Before an analysis of the degree of legislative harmonization with the EU is made, it is necessary to solve the major problem that BiH is facing, i.e. the transfer of powers from the entity level to the state one.
- The field that is of vital interest for the development of the economy, i.e. the field of companies, is not governed by a single regulation at the BiH level but by entity laws. We can therefore not talk about the harmonisation of domestic legislation with the *acquis communautaire* before we harmonize our own legislation. In this regard, the proposed amendments to the BiH Federation Law on Companies is a step ahead towards the harmonization of legislation in the territory of Bosnia and Herzegovina, because a similar law, but with better content, has already been passed in Republika Srpska. The best solution would be to adopt a single law at the state level, as this would enable the full implementation of the OECD principles of corporative governance and the EU directives. This position is also supported by the European Commission.
- In Title VI, relating to the application and implementation of laws and policies as well as market competition, there is a problem of responsibilities with regard to the establishment of complex systems of governance and harmonization of development and implementation of the country's economic and industrial policies that imply interaction among several areas such as economy, fiscal and social policies, and economic and developmental planning. The problem lies in the fact that these areas are within the entity responsibility and are governed completely separately, whereas an adequate approach to integrated development requires a single harmonized policy that would include the generation and implementation of these obligations over the whole territory of BiH, for which there is not yet enough political will.
- In Title VII, dealing with the fields of justice and security, asylum and visa regime, the problem arises with regard to certain functional principles relating to the adoption of the Law on Border Control and the Law on Amendments to the Law on State Investigation and Protection Agency, which stipulates the establishment of a department for international police cooperation, implying the cooperation with the Europol. The failure to fulfill the obligations relating to the adoption of these laws, establishment of agencies and appointment of key officials – which has its background in constitutional policy – has brought to a standstill the visa regime liberalization process of the EU towards BiH, although these are mainly technical procedures.
- Analyzing the relationship between the constitutional solutions and the legislation at the entity, cantonal and municipal levels in the field of cooperation policy, treated in Title VIII, the following characteristics can be identified: in most cooperation policies stipulated by the Agreement, the powers and responsibilities of the state are not foreseen, with the legislative and executive responsibilities being at the entity level, i.e. they are distributed among the entities and cantons in the BiH Federation (e.g. agriculture, social policy, education and research, culture, audio-visual and IT services, telecommunications, etc.). In certain areas, by reaching political agreement and by inter-entity harmonization, state-level institutions have

been created and entrusted with tasks related to the coordination and implementation of cooperation policies (e.g. BiH Agency for Statistics, RAC, Fiscal Council). Even though the EC has identified the reform of the BiH Constitution as the most important issue in the EU accession process, it should be noted that this issue can also be considered relevant with regard to cooperation policies and the implementation of the European Partnership priorities. Namely, harmonization at the entity level, harmonization and compatibility of entity legislation in certain areas (as well as the lower-level legislation) with the *acquis*, and implementation of other foreseen measures and activities would be possible with more political will to reach consensus on issues crucial for the EU accession process, even without the constitutional reform, for which there is no minimum agreement among political stakeholders (since the transfer of constitutional powers from the entities to the state level is not always the key to the problem but rather the key is a sincere desire to make substantial, not make-up changes). This would mean, for instance, that more joint efforts should be put into the work of the Coordination Board for Economic Development and European Integration in order to harmonize the state and entity programmes of activities.

- With regard to financial cooperation referred to in Title IX, the constitutional grounds for the adoption of legislative solutions in the field of free movement of capital are contained in provisions of paragraph 4 of Article I of the BiH Constitution, stipulating that Bosnia and Herzegovina and the entities shall not obstruct the full freedom of movement of persons, goods, services and capital throughout BiH. Still, there remains the need to establish the most functional model for meeting this obligation, considering the degree of division of powers and the degree of the required cooperative inter-institutional coordination.
- The attitude of institutions involved in the implementation of obligations under the SAA through ministerial and inter-ministerial committees and subcommittees, as defined in Title X of the SAA, actually shows the degree of required coordination and cooperation within the current constitutional framework in BiH, but the previous practice of these institutions does not offer much hope that this system of cooperation among institutions at different levels in BiH will result in effective implementation of these obligations.

V. Respecting the Constitutional System

The European Commission Report on the progress of BiH in 2008 states that “the implementation of the Dayton-Paris Peace Agreement is still ongoing, but the frequent nationalist rhetoric of political leaders from all the constitutional peoples denies this agreement and the constitutional system (for further details see also Section 2.1, the Constitution)”.

Considering the generally negative attitudes in the public regarding the Dayton Agreement, and the Constitution as an integral part of it, respecting the constitutional system is usually disregarded as a constitutional and legal obligation of all citizens of BiH and its politicians. The disrespect for the constitutional system is evident in several ways, but the two most frequent examples of this disrespect is the public rhetoric and policy of government officials (including the disrespect for state insignia), as well as the disrespect for state laws through a lack of harmonization of legislation at lower levels of government.

Provisions of Article VI/3 of the BiH Constitution serve to protect the BiH Constitution, primarily through the powers of the BiH Constitutional Court; it reads as follows: “The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court’s decision.”

The part of the Constitution defining the legal system and responsibility of the institutions (Article III/3) states that “the Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities”.

However, that same disrespect for the constitutional system and manifestations thereof are not subject to the Criminal Code and are therefore not punishable. Formally, disputes before the BiH Constitutional Court can be instigated by a Presidency member, Chair of the Council of Ministers, the speaker or deputy speaker of any chamber of the Parliamentary Assembly, one quarter of representatives to any chamber of the Parliamentary Assembly, or one quarter of representatives to any chamber of the legislative body of an entity. However, this field also offers a lot of room for a more active role of civil society, which can be manifold. Civil society can play a key role in recording examples of clear violations of the constitutional system, particularly committed by public figures and government officials (in terms of the role of civil society as a watchdog). In addition, non-governmental organizations with adequate professional capacities can be put at the disposal of competent bodies in preparation of required legal analyses and documents in order for provisions legally sanctioning disrespect of the constitutional system to be incorporated into the Criminal Code.

This also applies to the incompatibility of the entity and state legislation, particularly that arising from various international obligations, including European integration.

The Venice Commission mentions another related issue where the contribution of civil society would be important. The BiH Constitution is a unique case of a constitution that has never been published in the official languages of the country it relates to, but was adopted and published in a foreign language – English. The international community pointed out this problem; however, domestic institutions have never solved it. Non-governmental organizations could reopen this issue and undertake specific activities for the BiH Constitution to be translated into the languages of the constituent peoples in BiH.

Civil society and constitutional reform – what is next?

As mentioned several times in this report, current discussions about constitutional reform have come down to talks about territorial rearrangement of the state within closed, informal political circles, although constitutional reform is in the interest of the general public. This is why the initiation and opening of a transparent, consultative and participatory dialogue about constitutional reform is regarded as a greater challenge than defining its content. In order for this process to include various interests and involve the most general public, it should, as suggested, include domestic NGOs from the local to the state levels, provided that their activities are closely related to interests of the citizens. It is also suggested that the media be included in order to generate support for efforts of NGOs and to place specific topics before the public and the government. The role of the academic community is also important as it can help with the expertise and professional explanations of certain solutions. This also applies to labor and trade unions, which could generate pressure for finding solutions to problems which are preventing the economic and industrial development of BiH. This would ensure representation of different interests, from human rights violations to (non-)functionality of institutions and agriculture, economy, social issues, etc.

Having in mind the time frame stated above, further courses of action of civil society in constitutional reform could be pursued through the following activities.

Year 2009

- I. Insisting on transparency and bringing the dialogue back to the framework of legitimate domestic institutions, considering the advantages that flexibility and compatibility with interests of the citizens offer to civil society.
- II. Redirecting the constitutional reform discussion from unrealistic 'territorial' issues to pragmatic ones contributing to better functionality of the state in the long term, which are stated in this document, recommendations of the Venice Commission and EU reports.
- III. Depoliticizing the constitutional discussion and giving priority to issues with regard to which a compromise can be found.
- IV. Directing attention to incremental changes to the current constitution in those aspects preventing the functionality of the state and meeting of the SAA obligations, as well as other requirements made by the EU.
- V. Recording examples of clear constitutional system violations and preparation of required legal analyses and documents sanctioning such violations.
- VI. Establishing proper means of communication with the governmental sector, including amendments to the Council of Ministers Rules of Procedure, mandating consulting with the appropriate non-governmental sector before proposing laws.

Year 2010

- I. Creating expert bases in individual interest areas.
- II. Creating synergy between interest and support groups.
- III. Defining the content of the constitutional reform and imposing pragmatic issues and measures that can contribute to better efficiency of the BiH Institutions, particularly in the light of EU integration.
- IV. 'Preparing the field' for a democratic and rational dialogue about constitutional changes.
- V. Creating a more positive environment for partnership and dialogue between civil society and political elites, including close cooperation with the media.
- VI. Public consultations to clearly and accurately define the vital interest of constitutional reform.
- VII. Translating the Constitution into the languages of the constituent peoples.
- VIII. Monitoring incompatibility between the entity and state regulations, especially those from international obligations, including European integration.
- IX. Developing a BiH human rights catalogue reflecting consensus about the protection of human rights in the country.

Year 2011

- I. Establishing a consensual dialogue about the constitutional reform, agreeing on the 'possible' not the 'desirable'.
- II. Involving and consulting the general public, focusing on specific issues, and influencing the awareness and positions of citizens.
- III. Representing interests of the general public and 'channeling' them through the media and civil society organizations to institutions responsible for the constitutional reform.
- IV. Acting through thematic 'sectors' where the expertise of individual organizations would be engaged, which would result in better synergy in joint efforts of NGOs, enabling them to use the force of arguments in further dialogue with the government, the media and the public.
- V. Avoiding excessive 'institutionalization' of the role of civil society and avoiding the creation of a single constitutional reform 'movement', which would risk an unnecessary politicizing of the process.

Instead of a conclusion

A consideration of the above should include the evident weaknesses of civil society and the fact that the public image of 'civil society' is poor, and that the civil sector is not sufficiently recognized by the public, the government and the business sector as an important partner in building a democratic society. In addition, the environment in which BiH civil sector operates is neither encouraging nor affirmative.¹¹ Weaknesses of the BiH civil society are usually attributed to the fact that it does not have adequate capacities, disregarding the enormous resistance of political elites and the state to internal pressures for changes. The so-called privatization of public offices, typical of BiH and this region, suppresses the role of civil society in relations with the state in favor of informal/private influences. This increases the resistance of the state and its officials to pressures coming from civil society and undermines the concept of democratic accountability of politicians to society as a whole.

The relation between the government and the civil sector in BiH is not adequately defined or structured. This is particularly the case with higher levels of government which lack a policy that would define the role and responsibilities of the governmental and non-governmental sectors and identify transparent cooperation mechanisms and processes. Despite all the attempts to improve the role of citizens in a democratic BiH society on the part of local government and the international community, citizens seldom have an opportunity to express their opinions and attitudes, and they are almost sure not to receive feedback from representatives of the government.¹²

Furthermore, many studies conducted in BiH indicate that, even if there is a consensus about European integration, there is still no consensus about the state of BiH itself. Accession to the EU could be acceptable for citizens, even if it would require possible constitutional changes. However, support for the EU integration considerably decreases when conditioned by issues involving an ethnic and national dimension. This casts a certain doubt on the capacity of the European integration to gain advantage with regard to nationalism as the predominant value in BiH society.

This fact represents the major challenge to civil society, whose role in the constitutional reform should be to anaesthetize the politicization of this process and impose issues relating to efficiency of the state and accession to the European Union. However, by recognizing their own advantages, better synergy within civil society, and activities focusing on pragmatic and realistic goals, civil society can considerably contribute to a better quality of the public dialogue about the constitutional reform, which would also contribute to finding better constitutional solutions.

¹⁰ "Civil society and citizens", Centre for Civil Initiatives.

¹¹ Ibid.