



# **Learn as We Go: The European Union's Involvement in Constitution Building in the Post-conflict Western Balkans**

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## Acronyms

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<b>CFSP</b>	Common Foreign and Security Policy
<b>DUI</b>	Democratic Union for Integration
<b>DPA</b>	Dayton Peace Agreement
<b>EEC</b>	European Economic Community
<b>EU</b>	European Union
<b>FBiH</b>	Federation of Bosnia and Herzegovina
<b>KLA</b>	Kosovo Liberation Army
<b>NLA</b>	National Liberation Army
<b>NATO</b>	North Atlantic Treaty Organization
<b>OFA</b>	Ohrid Framework Agreement
<b>OHR</b>	The Office of the High Representative for Bosnia and Herzegovina
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>RS</b>	Republica Srpska
<b>SRSG</b>	Special Representative of the Secretary-General
<b>SAP</b>	Stabilization and Association Process
<b>UNMIK</b>	United Nations Interim Administration in Kosovo

# Learn as We Go: The European Union's Involvement in Constitution Building in the Post-conflict Western Balkans

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## Introduction

Ethnic conflicts in Bosnia and Herzegovina (hereinafter Bosnia), the Former Yugoslav Republic of Macedonia (hereinafter Macedonia) and Kosovo erupted one after another following the break-up of Yugoslavia. The severity of the unfolding crises, the likelihood of spillover in the region and the immediate danger the conflicts presented for neighbouring European Union (EU) member countries induced the EU to become extensively involved in state building and conflict management in three countries. The incentive to take fast and decisive action in Kosovo, and later in Macedonia, was driven by the memory of late (and largely failed) humanitarian interventions in the early stages of the Bosnian war and Rwanda, Burundi, Sierra Leone, Liberia and former Soviet countries (Rogers 2009, pp. 842–46). Unlike other crises that unfolded in the aftermath of the Cold War, the conflicts in Bosnia, Macedonia and Kosovo took place in the immediate vicinity of the EU, which increased the pressure to take responsibility for the post-conflict recovery efforts. The EU extensively engaged in the post-conflict reconstruction of all three countries. The key to creating peaceful, democratic and multi-ethnic societies is helping build new constitutions that create inclusive institutional structures that are able to accommodate the grievances of the cleavage groups and eliminate incentives for renewed conflict.

Constitution building in post-conflict Bosnia, Macedonia and Kosovo is a unique example of a regional organization's consistent intervention in state building in the aftermath of intrastate conflict. All three countries share similar historical legacies of the Ottoman Empire and Yugoslavia, and the conflicts in each erupted in the aftermath of the disintegration of Yugoslavia, when the new emerging states were unwilling and unable to address the grievances of the cleavage groups. In all three cases, international actors had an important stake in the developments. Kin groups, kin states and powerful diasporas all had central roles in the conflicts, while peace in all three cases

was achieved through foreign diplomatic and military intervention. The three cases have largely adopted similar consociational approaches to constitution building, diverting to a certain degree from the ideal model of consociational constitutional design in each specific case. Bosnia exhibits the features of all of the consociational principles implemented through institutional mechanisms as recommended by consociational theory (Belloni 2004, p. 336). Kosovo and Macedonia adopted all of the consociational principles, but deviate slightly from consociational theory in how they achieved two of the four consociational principles. First, the principle of segmental autonomy was implemented in Kosovo and Macedonia not through a formal federal territorial structure, but through extensive decentralization in a formally unitary state structure. Second, the principle of mutual veto in Kosovo and Macedonia was restricted to certain issue areas and implemented through more indirect mechanisms (Bieber 2004).<sup>i</sup>

The cases differ from each other in two crucial structural aspects: the nature of the conflict and its intensity. The conflict in Bosnia and Kosovo was territorial in nature; the secessionist wars and polarized views of the cleavage groups centred on the issue of statehood. In Macedonia, the conflict revolved around the type of government; ethnic Albanians fought against continued discrimination and insufficient representation, government policy responsiveness (or lack thereof) and a lack of autonomy in issue areas of vital importance to the group. The ethnic Albanian minority in Macedonia never questioned the legitimacy of Macedonian statehood and did not attempt to secede (Daftary 2001, p. 296). The Macedonian case also dramatically differs from those of Bosnia and Kosovo in terms of the intensity of conflict. The conflict in Macedonia was restricted in time, space and the intensity of violence. The conflicts in Bosnia and Kosovo lasted much longer, resulted in thousands of deaths and many more displaced persons, and were accompanied by a series of war crimes and crimes against humanity.<sup>ii</sup>

Comparing these three cases is relevant for understanding the impact of the different strategies of involvement in constitution building and the different institutional elements of constitutional design. The similarity of the structural conditions permits a careful study of the impact of the different institutional elements of constitutional design without the need to account for potentially intervening structural factors. The differences in how the conflicts developed and the constitution-building processes allow the assessment of the impact of the different strategies of involvement in constitution building in different conflict scenarios. The changing strategies of involvement in constitution building employed in Bosnia and Kosovo allow also for a comparison within these cases, since the conditions that affected the choice of the mechanisms of



involvement changed after the immediate post-conflict phase.

Yet this case selection also has its limitations. Given the notable differences in the nature, duration and intensity of the conflicts, one has to be careful in making inferences about the strategies of involvement in constitution building, as these strategies were to a large extent driven by the severity of the conflicts and the resulting polarization of domestic actors. The EU's involvement in constitution building in these three cases has also been unique in the extent of its involvement as well as the multitude of levers to influence the process it has had at its disposal. Thus it is important not to overgeneralize the lessons of EU engagement in constitution building in the Western Balkans, as no other regional organization has the same mandate and institutional mechanisms to participate in such processes.

The constitution-building processes in the post-conflict Western Balkans thus present an instructive case of a regional organization's involvement in designing constitutions in a post-conflict society. These processes present clear differences in the mode and degree of involvement, as well as in the specific provisions of constitutional design. This paper shows that EU experienced a distinct learning curve with regard to its strategy of intervention in the constitution-building processes, as well as its choice of institutional elements of constitutional frameworks.

The paper is structured as follows. The next section provides a brief historical background of the three conflicts. Then the normative underpinnings of the EU's intervention in the Western Balkans are assessed, and the mode and degree of the EU's involvement in constitution building discussed. This analysis demonstrates the shift in the EU's intervention strategy from a rather forceful mechanism of imposing constitutional structures toward much softer mechanisms of engagement in constitution building. Next, a detailed account of the specific elements of constitutional design in the three countries is provided. The section argues that the choice of constitutional design elements has undergone considerable change both within and across cases; each new instance of constitutional design reflects lessons learned and overcoming the shortcomings of the previous instance. The following section outlines the general lessons that can be drawn from the EU's involvement in constitution building in the Western Balkans. The final section concludes.

## **Historical background**

A devastating civil war erupted in Bosnia in 1992 following its declaration of independence from Yugoslavia. Bosnian Serbs who strongly opposed Bosnia's

secession from Yugoslavia mobilized against the Bosnian government, creating their own state—called the Serbian Republic of Bosnia and Herzegovina—in the areas dominated by Bosnian Serbs. Bosnian Croats simultaneously created their own quasi-state (the Croatian Republic of Bosnia and Herzegovina) in Croat-dominated areas. Both Croatia and Serbia actively intervened in the conflict to support their kin. Following the Srebrenica massacre, the North Atlantic Treaty Organization (NATO) launched air strikes in August and September 1995 on the positions of the Army of the Serbian Republic of Bosnia and Herzegovina in order to undermine its military capabilities. The war ended with the US-EU-Russia brokered Dayton Peace Agreement (DPA) negotiated in November 1995 in Dayton, Ohio and signed in December 1995 in Paris by the three signatories: President of Bosnia Alija Izetbegovic, President of Yugoslavia Slobodan Milosevic and President of Croatia Franjo Tudman.

The conflict in Macedonia between the Macedonian armed forces and the National Liberation Army (NLA), an ethnic Albanian rebel group, lasted from January to November 2001. The ethnic Albanian minority, which constitutes 23–25 per cent of the population, was formally represented in the legislative and executive branches throughout the country's independence. Despite this formal representation, ethnic Albanians accumulated a considerable list of grievances that were left unaddressed throughout the years of independence. These grievances were related to more extensive political representation, reform of the local governance system to provide ethnic Albanians with a degree of autonomy, recognition of the Albanian language as an official language and regulation of its use in public procedures and higher education, and the use of Albanian symbols. Finally, ethnic Albanians strived to attain the status of a constitutive nation within the Macedonian state (Daftary 2001, pp. 294–96). The Macedonian constitution defined the country as the state of Macedonian people and did not reference the ethnic minorities that constituted around 35 per cent of the population. The intensification of the conflict in 2001 was rapidly contained by the intervention of the EU, which brokered the Ohrid Framework Agreement (OFA), introducing amendments to the constitution and envisioning further legislative reforms pertaining to the electoral system and local governance.

Starting in 1989, Kosovo's ethnic Albanian majority led a campaign of non-violent resistance against the Serbian government after it revoked Kosovo's autonomy, purged ethnic Albanians from public office and repressed Albanians throughout Kosovo. As part of the resistance campaign, Kosovo Albanians created parallel state structures with an elected parliament, president and other parallel state institutions, and collected taxes and provided public goods such



as education and healthcare to the Kosovo Albanian population (Pula 2007). The conflict started to intensify in 1996, following sporadic attacks by the Kosovo Liberation Army (KLA) on Yugoslav police and army units. The most active phase of the conflict (1998–99) featured intensive fighting between the KLA and Yugoslav forces and resulted in several episodes of war crimes and the flow of hundreds of thousands of refugees to other countries in the region and the EU. The failure of the parties to sign the Interim Agreement for Peace and Self-Government in Kosovo at the Rambouillet Conference in January–March 1999, fears of renewed war crimes and the worsening humanitarian situation resulted in the NATO air bombing campaign of March–June 1999. The conflict ended in June 1999 when, following the withdrawal of the Yugoslav forces, the United Nations Security Council passed Resolution 1244, which placed Kosovo under the control of the United Nations Interim Administration in Kosovo (UNMIK).

## **Sustainable peace at the borders? The EU's involvement in constitution building in war-torn Bosnia, Kosovo and Macedonia**

### ***Normative framework for EU involvement in constitution building***

The EU aspired from the very beginning to take the leading role in handling the emerging crises in the countries of the disintegrating Yugoslavia (Gordon 1997/1998, p. 75). In 1991 the acting president of the European Economic Community (EEC) declared that the EEC would intervene in Yugoslavia because 'it was the hour of Europe and not the hour of the United States' (ibid.) and the Council of Ministers of the EEC<sup>iii</sup> established the Arbitration Commission to provide legal advice on the constitutional issues arising from the crises.<sup>iv</sup> The EU and its Common Foreign and Security Policy (CFSP) doctrine demonstrated that the EU was a civilian power (Juncos 2005, p. 94), an idea that emerged in the early 1970s through the writings of François Duchêne, who described the EEC as a new type of power that had a unique international role to play (Rogers 2009, p. 840). Unlike conventional military power, the notion of civilian power is defined through the centrality of economic power to achieve goals, the primacy of diplomatic cooperation to solve international problems and the willingness to use legally binding supranational institutions to achieve international progress (Manners 2002, pp. 236–7).

The EU's civilian power approach failed; the conflicts escalated and the EU sharpened its normative stance on comprehensive state-building action and more clearly defined a framework for intervention (Rogers 2009, pp. 842–6).

The horrific images of mass human rights atrocities in the crises had a huge impact on Western public opinion, pushing governments toward a much more decisive and forceful intervention to stop the violence (Woodward 1995). The lack of military component in EU foreign policy, and its reliance on NATO and individual EU member countries' capabilities for forceful military action, relegated the EU to a secondary role in resolving the conflict.

Following the CFSP's failure to handle the violent crises in Bosnia, the EU changed its approach from projecting itself as a civilian power to that of a normative power—which presumes that the EU is first and foremost a bearer and promoter of foundational norms and value principles. Manners (2002, p. 242) identifies five 'core' and four 'minor' norms. The core norms are centrality of peace, the idea of liberty, democracy, rule of law, and respect for human rights and fundamental freedoms. The minor norms are social solidarity, anti-discrimination, sustainable development and good governance. Normative power assumes that the EU—by stressing its legal and legitimate authority—seeks to persuade or condition others to incorporate these normative principles (Nunes 2011, p. 7). The EU's normative power is exercised when its presence and policy actions are sufficiently persuasive to affect policy change without coercion (*ibid.*, p. 6). Manners (2002, pp. 244–5) suggests that four modes of diffusion of the foundational norms are especially visible in the EU's policy toward the post-conflict countries in its neighbourhood: (1) contagion (the unintentional diffusion of norms from the EU to other political actors); (2) informational/procedural diffusion (the institutionalization of a relationship between the EU and a third party); (3) transference (when the EU exchanges goods or provides aid or technical assistance to third parties); and (4) overt diffusion (occurs as the result of the EU's physical presence in third-party states or international organizations).

The normative framework for comprehensive state building and reconstruction action is vivid in a 2002 speech by EU High Representative for CFSP Javier Solana, who argued that:

Our common foreign policy cannot just be interest-based. Protecting and promoting European values, which are part of our history and very dear to the heart of our citizens, must continue to be a priority. The values of solidarity, of tolerance, of inclusiveness, of compassion are an integral part of European integration. We cannot give up on them, especially now that ugly racist pulsions are surfacing again; and that fighting against poverty is becoming critically important to prevent whole societies falling prey to radical and terrorist tensions (Solana 2002, p. 4).



This normative approach was also accompanied by pragmatic reasoning. The brutality of the wars on its borders demonstrated that the EU must actively intervene in peace building and state building in its immediate neighbourhood (Juncos 2005, p. 95). In this context, consolidating fragile states and promoting democracy, human rights and good governance in its immediate neighbourhood was seen as a strategy for securing the EU and its member countries:

It is in the European interest that countries on our borders are well-governed. Neighbors who are engaged in violent conflict, weak states where organized crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe.... The integration of acceding states increases our security but also brings the EU closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations (Council of the European Union 2003).

In line with a policy of more value-driven and active engagement in state-building activities in its immediate neighbourhood, the EU has over the years emerged as the largest donor in the Western Balkans and has become the most influential organization. It has significantly contributed to the stabilization and reconstruction of the countries in the region (Weller and Wolff 2006, p. 9) The EU's growing role in the region is related to the elaboration of its foreign policy mechanisms. Its enlargement policy has emerged as a powerful tool of exerting influence by emphasizing the conditionality of EU integration on the implementation of post-conflict peace agreements, and constitutional framework documents and reform (Cooley 2013, p. 180; Anastakis and Bechev 2003, pp. 8, 12). By inducing non-members to adopt EU norms and practices using incentives such as visa liberalization, trade liberalization, financial assistance (and ultimately EU accession), the conditionality and enlargement policies have contributed to democratic consolidation, rule of law, respect for human rights and the protection of minority rights. Thus EU support of the post-conflict Western Balkan countries is strictly conditional on their compliance with the Union's criteria (Freyburg and Richter 2010; Anastakis 2008, p. 368; Richter 2012, p. 509).

### ***Strategies of EU involvement in constitution building***

The EU has been involved (to varying degrees) in constitution building in all three countries analysed here. The initial stage of the constitutional design in Bosnia (the negotiation and signing of the DPA) was a product

of consistent US pressure to reconcile the warring sides (Bieber 2011, p. 1785). The EU's role in the Bosnian constitutional design process grew over the years and achieved its peak in the mid-2000s with attempts to reform Bosnia's constitutional system (ibid., p. 1783). The EU took the lead in the constitution-building processes in Macedonia and Kosovo, and was the most important international mediator in all stages of the processes (ibid.). The EU brokered the OFA between the Macedonian Government and the NLA. Elements of the agreement were subsequently incorporated into the amended Macedonian constitution of 2001. The EU—along with the UN and the Organization for Security and Cooperation in Europe (OSCE)—was also one of the main actors in the constitution-building process in Kosovo. It had a crucial role in designing all the framework documents that shaped Kosovo's constitutional structure, including the Constitutional Framework for Provisional Self Government in Kosovo (UNMIK 2001/2002), Standards for Kosovo (UNMIK 2003), the Comprehensive Proposal for the Kosovo Status Settlement (United Nations 2007) and, ultimately, the constitution of Kosovo (2008). Finally, the EU High Representative for Foreign Affairs and Security Policy was the international mediator who brokered the Brussels Agreement between Kosovo and Serbia in 2013.

Constitution building in post-conflict Bosnia, Kosovo and Macedonia has been a complex process that has involved initiating negotiations and exerting pressure to achieve agreements, implementing those agreements (in Bosnia and Macedonia) in the new post-conflict constitutional structures, introducing international executive administrative bodies (in Bosnia and Kosovo) and exerting further pressure to amend the post-conflict constitutional structures in all three countries. The initial stages of EU involvement in constitution building were marked by rather forceful measures, due to the severity of the crises and the divisions between the parties to the conflict; arriving at consensual decisions on the constitutional structure seemed impossible. Having committed to military intervention to end the war in Bosnia (and later in Kosovo), the EU and the United States added a powerful tool to their diplomatic efforts: the threat of further, deeper military involvement. This diplomacy supported by force, though controversial from a normative point of view, succeeded in ending the bloodshed and coercing the parties to the conflict to compromise on even the most sensitive issues.

However, the forceful imposition of institutions by external actors created a growing crisis of local ownership of the constitutional structures in the entire region. Even the most benevolent constitutional mechanisms, established in the interest of securing peace and assuring smooth democratic development, lacked domestic ownership and legitimacy in their establishment. Bearing this

in mind, the EU later shifted its strategy to indirect, softer ways of influencing the constitutional design process. The EU consistently used various forms of diplomatic pressure, trying to direct the constitution-building process in a way that would sustain peace and help the countries move past the conflict. The EU's enlargement policy was crucial in this regard. The EU's most important tool was its enforcement of norms and practices through mechanisms of conditionality: carrots (various benefits available through enhanced engagement and cooperation with the EU) and sticks (withholding these benefits in exchange for compliance with its demands) (Vasilev 2013; Gordon 2010; Richter 2012).

The main tool of the EU's enlargement conditionality is the Stabilization and Association Process (SAP). The SAP was launched in 1999 at the aftermath of NATO intervention in Kosovo when it became clear that the EU could have a much stronger impact on the stabilization of the former Yugoslav countries and the entire region if it granted them the prospect of membership upon fulfilment of the required criteria (Trauner 2009, pp. 778–9). The SAP has pursued two inter-related goals. The first was promoting the association of the post-conflict Western Balkan countries with the EU by encouraging trade and integration into the EU market. The SAP's second goal was political stabilization through a series of measures: proactive peace-building policies, inducing compliance with peace agreements and constitutional framework documents, protection of minority rights, post-conflict reconstruction and reconciliation, refugee return, cooperation with the International Criminal Tribunal for the former Yugoslavia, and more general goals of domestic political stabilization and policy support aimed at state and democratic consolidation (Anastakis 2008, p. 368; Richter 2012, p. 509; Gordon 2010, pp. 327–8, 330).<sup>v</sup>

The EU employed these strategies in different ways in each of the three countries analysed. Bosnia experienced a rather heavy-handed and guided process of constitution building. The DPA, which put an end to the bloodshed, was signed several months after NATO military intervention. The agreement was further incorporated into the Bosnian constitution and became the cornerstone of Bosnia's constitutional structure. Due to the severity of the crises, the depth of disagreements on the elements of the agreement and polarized views regarding Bosnian statehood, the mediators (including the EU) exerted pressure backed by the previous use of military force and the threat of further intervention, thus coercing compromise over even the most controversial issues.<sup>vi</sup> This heavy-handedness has also continued with regard to supervising the implementation and development of the constitutional framework through the establishment of the international administration in

Bosnia. The Office of the High Representative for Bosnia and Herzegovina (OHR)—with the High Representative as its head—was created by the DPA and given unprecedented executive power. It became the highest source of power in Bosnia with the authority to veto the decisions of all branches and levels of power and dismiss public office holders. Most importantly, the OHR was granted (and still retains) the power to unilaterally enact legislation against the will of the domestic actors if they are unable to reach consensus (Peace and Implementation Council 1997).

Over the years, the High Representative has exercised her veto power and unilaterally enacted legislation less frequently, and the EU's engagement strategy with the Bosnian authorities has evolved into dialogue and persuasion. This second phase of EU engagement in constitution building has taken place through the mechanisms provided by the EU enlargement policy and was consistently aimed at reforming the DPA. The most important such tool has been the use of conditionality, for example the SAP that was launched in Bosnia in 2005. Though the necessity of constitutional reforms was consequently mentioned in all the progress reports evaluating Bosnia's reform process, the EU conditionality did not produce the desired effect; all initiatives to reform Bosnia's constitutions have so far failed. The ethno-nationalist parties representing the three constitutive nations have consistently thwarted all attempts to reform the DPA. The characteristics of the constitutional structure, the heavy-handed approach to constitution building at the initial stage, and the resulting lack of local ownership of the political institutions established through the externally enforced constitutional engineering process froze the constitutional structure and created obstacles to its reform.

However, the obstacles to the success of EU conditionality are not only the result of the complex institutional structure and obstructive approach of the domestic actors. They are also rooted in the EU's failure to form unified and clear policy guidelines. EU members were deeply divided over the issue of extending the enlargement policy to the Western Balkans (Sebastien 2008). The EU Commission and the Council of the EU also had different views regarding Bosnia's constitutional framework. The EU has failed to provide substantive expert and technical assistance and clearly defined criteria, and has limited itself to a very general outline of what the reformed constitution should achieve (*ibid.*, p. 8).

Unlike Bosnia, Macedonia avoided any forceful involvement in its constitutional design process. Peace was sustained in Macedonia through diplomatic means rather than military intervention, which resulted in much softer pressure on the parties to the conflict to arrive at a peace agreement.

The OFA process was brokered by the EU, which was directly involved in the content of the agreement; it pressured the sides to accept even the previously non-negotiable parts of the agreement (Ilijevski and Talseki 2009; Popetrevski and Veton 2004). Once the amended constitution was enforced, the EU concentrated on supervising the implementation and further deepening of institutional reforms, particularly those related to the protection and empowerment of minorities—most importantly through decentralizing power to local communities (Ilijevski and Taleski 2009). Similar to Bosnia, the most important leverage for influencing the constitutional design process was the prospect of enhanced relations with (and ultimately membership in) the EU. The difference was that the SAP was signed between the EU and Macedonia in 2001 in the midst of intensive clashes, creating much stronger leverage for pressure through conditionality and playing a very important role in the peaceful resolution of the conflict (*ibid.*, p. 357). Adherence to the spirit of the OFA and its implementation have since been the key benchmark for assessing Macedonia's reform process (Sebastien 2008, p. 4).

Through constant monitoring of the situation on the ground, the use of conditionality and various diplomatic pressures, the EU was also active in the implementation and further development of constitutional design in the post-Ohrid period. It intervened in the two benchmark crises related to the development of the constitutional provisions. The first post-Ohrid political stalemate of 2005 was related to the demarcation of municipal boundaries as part of implementing the decentralization process envisioned by the OFA. The ethnic Macedonian majority resented attempts to redraw the boundaries along ethnic lines, which (often artificially) created ethnic Albanian majority municipalities. The opposition called a referendum to ban the law on municipal boundaries, which failed due to low turnout after EU pressure to boycott it.<sup>vii</sup>

The second crisis erupted in 2007 when the Democratic Union for Integration (DUI)—the NLA's successor, the dominant ethnic Albanian party—announced a boycott of the work of parliament, demanding negotiations on a number of issues left unspecified in the OFA and constitutional amendments. The EU made it clear that there could be no prospect of EU or NATO accession unless the government negotiated with the DUI (*ibid.*). The governing ethnic Macedonian party thus entered into negotiations that resulted in an informal agreement with four main points that filled the gaps left by the OFA and the amended constitution: (1) specification of which legislation is subject to minority veto; (2) social security provisions for former members of the ethnic Albanian rebel forces; (3) reform of the law on the use of languages; and (4) the mode of government formation (*ibid.*, p. 363). These examples

demonstrate that the EU has effectively utilized the leverage of conditionality to intervene in post-Ohrid developments and implementing the agreement and constitutional amendments; it has pressured ethnic leaders to compromise (and often to go against the dominant public opinion) (Vasilev 2013, pp. 56, 58). However, the prospects of NATO and EU membership were put on hold due to the name dispute with Greece. Greece has consistently refused to recognize the state under its constitutional name (Republic of Macedonia) and demands that it should change it so that it does not coincide with the historical region of Macedonia, which is part of Greece (Ilijevski and Taleski 2009, pp. 356–7).

Constitution building in Kosovo has been the most guided of these three cases. The EU and other international actors have been increasingly involved in all stages of the constitution-building process. The conflict in Kosovo came to an end in 1999 after the massive NATO military intervention, followed by UN Security Council Resolution No. 1244, which established international administration over Kosovo with the Special Representative of the Secretary General (SRSG) as its head. The constitution-building process started in 2001 when the SRSG enforced the first constitutional framework document. The international community has elaborated several other constitutional framework documents over the years. These documents were largely drafted by UNMIK and the SRSG, with expert assistance provided by the EU and other European organizations—primarily the OSCE, which is in charge of the institution-building pillar of the UN mandate over Kosovo. This extensive foreign involvement in constitution building resulted in a complete lack of local ownership of Kosovo institutions at the early stages of the process, and growing domestic dissent. The domestic actors were involved only in the later stages of the process, starting in 2007. The Ahtissaari Plan (United Nations 2007) and the 2008 constitution were drafted with international mediation and expert assistance, but extensively involved local actors (Weller 2009, pp. 245–9).

Similar to Bosnia, the understanding that domestic actors' direct active engagement in constitution building is crucial for the successful implementation and reform of the constitutional structure came as the crises of domestic ownership grew. It became clear that domestic actors have no incentive to abide by the rules unless they directly and actively participate in the process and arrive at compromises. However, unlike in Bosnia, a softer approach to constitution building was used in Kosovo much later, only after its formal promulgation of independence in 2008 and EU engagement via closer cooperation and engagement. The Kosovo case has been further complicated by the fact that five of the 28 EU members<sup>viii</sup> have refused to recognize its independence; thus the





EU officially began direct negotiations with Kosovo on SAP only in autumn 2013.

## **EU's learning curve in constitutional design in the Western Balkans**

Constitution building in the Western Balkans has appeared to be a sort of laboratory in which several variations of post-conflict power-sharing constitutional design have been tested (Bieber and Keil 2009, p. 337). The specific institutional choices in the constitution-building process have largely followed Arendt Lijphart's consociational approach to institutional design in divided societies (1969, 1977 and 2004). This approach maintains that sustainable peace in post-conflict and divided societies requires the institutionalization of existing cleavages through the implementation of special political institutions that devolve power to institutionalized ethnic groups in order to prevent further organized ethnic violence. This section discusses the evolution of constitutional provisions in Bosnia, Kosovo and Macedonia, all of which fall within the larger family of consociational regimes, but display important variation in institutional design.

### ***Constitutional design in Bosnia***

The DPA created a constitutional structure of unprecedented complexity, following a classic interpretation of the consociational model of institutional design. The system represents all the principles and institutions of consociational theory (Belloni 2004, p. 336). It features a collective central executive of co-presidents from each of the three constituent nations and a list proportional electoral system with a constitutionally prescribed proportional representation of the three constituent nations in public offices.<sup>ix</sup> The DPA created an ethno-federation of two entities: the RS (with a majority Serb population) and the FBiH (with a majority Bosniak and considerable Croat population). The RS is further subdivided into municipalities that enjoy considerable levels of local government. The FBiH is subdivided into cantons, which are in turn subdivided into municipalities with considerable local control.

The Bosnian system features three main minority veto mechanisms that provide each constituent group with a veto over all decisions that, in their opinion, harm their vital group interests. The first mechanism gives veto rights over central government decisions to the units of the federation (RS and FBiH). Second, representatives of the three constituent peoples can veto

any central parliament decision that is against vital national interests. Third, a double majority is required to pass certain decisions in the central parliament (Bieber and Keil 2009, pp. 352–3). These veto mechanisms, which were established to protect the vital interests of the ethnic groups, have become the main obstacle to state functioning, which results in more forceful intervention from the international administrators (Dzihic and Wieser 2011).<sup>x</sup>

While the constitutional structure has slightly moved toward strengthening the central government over the years, the fundamental consociationalist principles and remain strong (Cooley 2013, p. 178). Such a rigid constitutional system, based on the dominant ethno-religious social cleavages, empowered the ethnic groups that fought in the conflict (providing them with guaranteed stakes in the government and extensive autonomy)—and effectively deprived the central government of any consolidating power (Bieber 2006). The system has been widely criticized for its long-term effects on the functionality of the state structure, democratization and interethnic relations, as it essentially froze the divides and eliminated any opportunity for intergroup cooperation. Instead, it created incentives for constant collision and deadlocks, which have been fully exploited by the dominant ethno-nationalist parties. The constitutional system built around the three ethnic groups has also effectively discriminated against other ethnic groups and citizens, creating immense domestic and international dissent.<sup>xi</sup>

The constitution's discriminatory provisions, the complexity of the constitutional structure and the consistent weakness of the central state apparatus pushed the EU to demand constitutional reform as a precondition for deeper engagement/integration with the EU (European Parliament 2005; Cooley 2013, pp. 180–1). There have thus far been three attempts to reform the Dayton constitution: the April package in 2006, the Prud Agreement of 2007 and the Butmir agreement of 2009 (Bieber 2010; Sebastian 2012, 2013).<sup>xiii</sup> All of these reform attempts have intended to preserve the overall Dayton architecture, and have included only limited changes to strengthen the powers of the central state institutions (Belloni 2009, p. 368; Bieber 2006).

The EU has failed to provide any clear guidelines regarding what constitutional provisions Bosnia needs to adopt in order to qualify for further integration with the EU (Sebastian 2008). The responsibility for developing a roadmap for reforms was delegated to the Council of Europe's Venice Commission, which criticized a number of aspects of the constitutional arrangements: the weakness of the central state institutions, the overall complexity of the state structure, the emphasis on peoples rather than citizens as the basis of the state, and restrictions on non-constituent peoples (Council of Europe 2005). The



report suggested that constitutional reform should simplify the state structure, increase state centralization, eliminate the discrimination of non-constituent people, and remodel the OHR from a decision maker to a mediator (ibid.). Such reform would be a necessary step toward EU accession, which would require increased state functionality and effectiveness in decision-making procedures in order to harmonize Bosnian legislation with that of the EU (Sebastian 2009, p. 342).

Although the reform projects did not seek to considerably change the Dayton structure, any meaningful reform of the constitutional structure would strengthen the central institutions and weaken the power of the entities, thus harming the interests of the dominant ethno-nationalist parties. Despite enormous pressure from the EU, all of the reform projects have failed—either because they did not meet the supermajority threshold in parliament, or because certain actors walked out of negotiations as a result of intensified ethno-nationalist rhetoric and mutual accusations (Dzihic and Wieser 2011, p. 1817). EU conditionality has faced insurmountable difficulties in implementing reform in Bosnia, since the DPA gives political leaders the incentive to operate along ethno-nationalist lines, thus weakening Bosnian statehood (ibid.). The Council of Europe's deadline for constitutional reform is 2014; since there is no prospect of any viable reform, public officials elected in the 2014 elections may not be recognized as legitimate representatives by the EU and Council of Europe (ICG 2012)

### ***Constitutional design in Macedonia***

The cornerstone of Macedonia's post-conflict constitutional structure was the OFA, which was signed by four parties: the two major ethnic Macedonian and two major ethnic Albanian parties (the latter of which also indirectly represented the NLA). The agreement was brokered via EU mediation. The critical pressure to accept some of the most controversial elements came through the direct personal intervention of the EU High Representative for CFSP, Javier Solana (Popetrevski and Latifi 2004, pp. 33–4). The constitutional structure introduced by the OFA established a comprehensive institutional mechanism for incorporating ethnic Albanian grievances, providing the group with extensive access to power at the central and local levels. It also introduced a fully proportional electoral system that guarantees equitable representation for all minority groups in public office and a *de facto* recognition of Albanian as a state language.<sup>xiii</sup> One of the most important components was the implementation of wide-ranging decentralization reforms that devolved considerable decision-making powers

to local municipalities. This was done in parallel with redrawing municipal borders, often artificially creating municipalities with a considerable ethnic Albanian population, which allowed the ethnic Albanian community to enjoy the fruits of decentralization.

The system also informally incorporated two core consociational elements: grand coalition and mutual veto. The grand coalition is not constitutionally prescribed, but is effectively an imperative; thus far, all the cabinets have incorporated representatives of the largest ethnic Albanian party and other minority groups. The requirement of a two-thirds majority for adopting parliamentary decisions—and the bipartisan and highly polarized intraethnic competition within the ethnic Macedonian majority—has made it impossible for any ethnic Macedonian party to form a government without incorporating a major ethnic Albanian party. Furthermore, the OFA's mutual veto mechanism is less rigid than that of the DPA, and has a rather limited capacity.<sup>xiv</sup>

Though generally following the same consociational logic, the OFA is considerably different from the DPA. The OFA and the subsequent constitutional amendments lack formal references to ethnicity as a constitutive element of a state, and thus avoid building the political system around the ethnic groups (Bieber 2005, p. 109). The agreement and constitutional amendments did not formally change Macedonia's territorial organization. They preserved its unitary state structure, but implemented the consociational principle of segmental autonomy by decentralizing extensive decision-making power to communities at the municipality level rather than to larger geographic units, which are often characterized by a particular settlement pattern of ethnic groups. In addition to increased self-governance, ethnic Albanian-dominated municipalities can enhance their cooperation with each other across territories (ibid., p. 118). Because of the absence of a formal ethno-federal structure and the implementation of segmental autonomy through decentralization, Macedonia has avoided territorializing ethnic Albanian grievances and the secessionist tendencies that are present in Bosnia. Due to these important changes, Macedonia's constitutional structure is much more flexible and has avoided freezing the divides to the extent observed in Bosnia (Bieber 2004).

Despite these important changes, compared to the DPA and the Bosnian constitution, the OFA has been criticized for a number of reasons. Since it is in essence a consociational model, the constitutional framework introduced by the OFA does not provide the two main ethnic groups with incentives for cross-group cooperation, and thus sustains their decades-long polarization and segregation. Like the DPA, the OFA provided crucial mechanisms to



accommodate the grievances of the biggest cleavage group, the Albanians, while leaving other minorities (most crucially the Roma population) largely under-represented and discriminated against. Finally, the OFA created fertile ground for intense intraethnic competition, rewarding ethnic outbidding rather than moderation within the ethnic Macedonian and ethnic Albanian communities (Bieber 2005; Vasilev 2013, p. 9). Moreover, the OFA and Macedonia's 2001 constitution did not produce a miracle; the interethnic relations in the country remained tense. The dominant political parties remain ethnic in nature, very frequently referring to symbolic politics and nationalist rhetoric. Since 2001 there have been sporadic outbursts of ethnically motivated protests, killings and street violence, but large-scale conflict. All of these conflicts could have developed into larger confrontations without EU pressure and the dominant political parties' keen interest in abiding by the constitutional norms and practices. Yet the negative interethnic situation in post-conflict Macedonia can hardly be blamed on negative social engineering produced by the OFA; the root cause of stable interethnic polarization lies in each community's struggle for recognition (Vasilev 2013).

### ***Constitutional design in Kosovo***

Unlike the constitution-building process in Bosnia and Macedonia, the process in Kosovo has taken a much longer path. Almost a decade passed between the end of the conflict in 1999 and the proclamation of Kosovo's independence and the adoption of its constitution in 2008. The constitution-building process started in 2001 and is still in progress at the time of writing; there are currently Kosovo-Serbia negotiations over a possible special quasi-autonomous status of the Kosovo Serb majority municipalities. The constitution-building process has been based on the adoption of four crucial framework documents: the Constitutional Framework for Provisional Self-Government in Kosovo (2001), Standards for Kosovo (2003), the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan 2007) and ultimately the constitution of Kosovo (2008). All of these documents have been elaborated under the strict guidance of the international community, the EU and OSCE in particular. These documents were intended to gradually decrease the executive powers of international administration and transfer political power to Kosovo's domestic institutions.

The constitution-building process has been highly responsive to the dynamics on the ground. Each new framework document was a reaction to ongoing developments and the implementation of the previous framework documents. The Standards for Kosovo was a reaction to the establishment of provisional

institutions of self-government, which appeared insufficient and required the establishment of standards of inclusiveness and consensualism, and much greater engagement with Kosovo Serbs as a precondition for progress on Kosovo's status. The Ahtisaari Plan was a reaction to the conclusions of a UN report on the progress of implementing the Standards for Kosovo. The report concluded that progress could only be achieved through faster movement toward resolving the question of Kosovo's status (United Nations 2005).<sup>xv</sup> Finally, Kosovo's independence and subsequent constitution, which has incorporated the spirit and institutional elements of all four framework documents, came about as the result of the failure of the status process, the rejection of the Ahtisaari Plan in the UN Security Council (due to the Russian veto) and the unilateral declaration of Kosovo's independence in 2008.

Kosovo's constitutional structure has become increasingly sensitive to a wide variety of structural contextual conditions, such as the number of ethnic groups, their settlement patterns, ethnic groups' strong kinship ties to their kin states in the region, and the unwillingness of some Kosovo Serbs to recognize Kosovo's statehood and engage with it. Kosovo's constitutional structure features an informal grand coalition similar to that of Macedonia; its electoral system is even more proportional with a single countrywide electoral district, thus maximizing the proportional distribution of seats in the legislature. Due to the consistent unwillingness of the Kosovo Serb community to engage with Kosovo institutions, the electoral system has incorporated an otherwise controversial (but under the circumstances justified) mechanism of reserved seats for Kosovo Serbs and other minorities, which has resulted in the considerable (around 20 per cent) over-representation of Kosovo Serbs in Parliament (Taylor 2005).

Constitution building in Kosovo has been widely influenced by the similar processes in Bosnia and Macedonia, and has avoided all their controversial elements. Like Macedonia, Kosovo has implemented wide-ranging decentralization reforms, devolving unprecedented power to municipalities, the country's unit of territorial organization. Unlike Macedonia and Bosnia, however, Kosovo's constitutional structure has avoided incorporating a rigid veto mechanism. Its veto powers are exercised through a mandatory requirement to involve the minority and majority communities at the parliamentary committee level. Thus the minority cannot unilaterally block any decision of the legislature. Furthermore, a bill cannot be put to a vote unless it has been ratified by the Committee of Minorities of the Assembly of Kosovo. The mediators were conscious of the dangers of the rigid power-sharing elements provided in the Bosnian constitutional structure, and managed to keep a good balance. They have accommodated Kosovo Serbs'



desires and overcome Kosovo Albanians' resentment of the intense power-sharing components, particularly the reserved seats in parliament and the central executive government. The constitutional structure has at the same time accommodated Kosovo Albanian fears of implementing power-sharing elements like those found in the Bosnian constitutional structure (Weller 2008, pp. 672–3).

The decentralization of power in Kosovo has been enhanced by a number of additional elements. Like in Macedonia, the process of decentralization has gone hand in hand with redrawing the borders of existing municipalities and the creation of new ones with a predominantly Serbian population. This process has also been accompanied by giving asymmetrical powers to various Serbian-dominated municipalities. Furthermore, the decentralization has been given an additional twist through regulation that allows deep cooperation among separate municipalities and administrative units in neighbouring countries. This measure permits the devolution of power and enhanced cooperation with the Serbian population throughout Kosovo and neighbouring states through a functional (rather than hierarchical or territorial) devolution of power, thus improving minority rights and escaping the dangers of territorializing grievances and secession. This delegation of decision-making power to various subunits of the country (e.g., Serb majority municipalities) by issue area and function is an important innovation of Kosovo's constitution-building process (Stroschein 2008, 2012).

## **Constitution building in the post-conflict Western Balkans: lessons learned**

The EU's involvement in the Western Balkans presents a unique case of a regional organization's involvement in constitution building in its own region. The EU's experience provides four valuable lessons learned for other regional organizations: (1) the importance of choosing the appropriate intervention strategy and responding when circumstances on the ground change; (2) the need to have a clear understanding of the constitution-building process and the elements that should be incorporated into constitutional structures; (3) the importance of tailoring and contextualizing the institutional elements of the constitutional frameworks according to the immediate interests of domestic actors; and (4) the need to avoid rigid constitutional structures that freeze the post-conflict momentum, create incentives for constant stalemate, remove incentives for moderation and create obstacles to the further development of the constitutional structure.

At the beginning of the constitution-building process, much of the EU's strategy was ad hoc and driven by the circumstances, rather than by a clear agenda. The rather forceful intervention in the process during the immediate post-conflict period can be explained by the severity of the crises. As a result of the intense violence, the positions of the parties to the conflict were so polarized that reaching a consensus on elements of the peace agreements and constitutional framework documents would have been impossible unless the EU and other mediators used forceful measures. Yet the EU and its partners were highly responsive to ongoing developments, and changed their strategies accordingly. The initial forceful intervention in Bosnia was later substituted with diplomatic means of pressure and persuasion through the mechanisms of EU conditionality from the mid-2000s. Similarly, after its forceful involvement in Bosnia's constitution building, the EU used softer mechanisms of intervention in Macedonia. The complexity and severity of the challenges of crisis management in Kosovo required a Bosnia-like forceful intervention at the initial stage of constitution building from 2001–03; like in Bosnia, this strategy was later replaced by much softer mechanisms of intervention.

A comparative analysis of constitution building in post-conflict Bosnia, Macedonia and Kosovo shows that forceful intervention mechanisms through unilaterally imposed constitutional norms and practices are rather undesirable. The experience shows that, depending on the intensity of the preceding conflict and the resulting polarization, softer intervention mechanisms through different forms of conditionality can produce an equally extensive level of involvement in constitution building without the negative consequences of forceful mechanisms. Finally, these cases demonstrate the importance of adapting engagement strategies to the changing dynamics on the ground.

Due to its initial lack of experience in the constitution-building process, the EU did not have a clear idea of what institutional elements should be incorporated into constitutional frameworks. The EU outlined the goals of constitution building (i.e., peaceful multi-ethnic societies, competitive democracies, market economies), but did not have a clear understanding of the specific institutional instruments required to achieve them. Rather, the EU and other international mediators followed (at a very general level) the consociational approach to constitutional design that has become international organizations' favourite approach to institutional design globally (Rothschild and Roeder 2005). The fundamental EU documents that established benchmarks for EU enlargement—such as the Copenhagen and Madrid criteria, the foreign and security policy doctrines, and progress reports—have



all lacked reference to specific institutional elements. Thus the EU followed the globally dominant mode of constitutional design without appropriately adapting it to the circumstances on the ground. During the later stages of constitution building in the region, the EU gained experience and had a clearer understanding of which institutions from the menu of constitutional design would best fit the situation on the ground. This accumulation of experience helps explain the more context-sensitive constitutional building in Macedonia and the later stages of the process in Kosovo, particularly with regard to negotiating the Ahtisaari Plan and drafting Kosovo's 2008 constitution. Thus, regional organizations must have a clear agenda for an emerging constitution-building process and a thorough understanding of the institutional elements that would be best suited to constitutional engineering in a given case.

The EU's experience demonstrates the importance of the extensive involvement of domestic actors in the constitution-building process and the instrumental value of including incentive mechanisms in the constitutional structure. The later stages of constitutional design in Macedonia and Kosovo, and attempts to change the constitutional framework in Bosnia, show that the EU and other international mediators involved in constitution building in the region have learned this crucial lesson. Bearing in mind the problematic elements of constitution building in Bosnia, the constitutional design processes in Kosovo and Macedonia have shown a rather sophisticated tailoring of the constitutional design around the immediate interests of the domestic actors, creating incentives for them to abide by the rules established by the constitutional structures. This was achieved by actively involving the domestic actors in the process. Domestic ownership was shown to be crucial for the effectiveness of constitution building in the later stages of these processes in Kosovo and Macedonia. The same pattern can be observed in attempts to amend the Bosnian constitution through engagement with domestic actors.

Finally, comparing the elements of constitutional design in Bosnia, Macedonia and Kosovo demonstrates the negative consequences of implementing rigid consociational constitutional mechanisms that freeze the post-conflict momentum. Bosnia's constitutional design has attracted considerable criticism and has become an example of the negative consequences of the consociational model of constitutional design. Institutional mechanisms such as a formalized grand coalition, ethno-federalism, rigid mutual veto, and building the state around constitutive nations and peoples rather than citizens (at the expense of discriminating against other minorities) are among the most controversial of these institutional features. The EU and other partners have shown considerable responsiveness to ongoing developments

in Bosnia and have made important conclusions that were later applied to constitution building in Kosovo and Macedonia, which have avoided rigid institutional mechanisms and have performed much better with regard to reducing polarization and creating incentives for moderation. Furthermore, Kosovo's experience has shown that international mediators can be creative in tailoring the constitutional design to the circumstances on the ground. Regional organizations that intend to have an active role in constitution building in their regions could draw important implications from this comparative evidence, avoiding whenever possible constitutional mechanisms that freeze social cleavages and become an obstacle to moving away from the post-conflict phase.

## Conclusion

The conflicts in Bosnia, Macedonia and Kosovo that erupted one after another following the break-up of Yugoslavia presented a serious challenge to the EU, and became a test of its ability to intervene in emerging humanitarian crises on its immediate borders. The EU has from the beginning claimed to be a champion of state-building and peace-building actions in the region, considering state failure and the danger of renewed and protracted conflicts in its immediate neighbourhood to be key security challenges. Projecting itself as a normative power, it has used the mechanism of political conditionality to intervene in state-building processes, supporting the consolidation of fragile states and promoting the core European values of democracy, tolerance and human rights. Constitution building emerged as the key component of the complex state-building action. The EU—along with other partners, most importantly the UN and OSCE—recognized early on that the post-conflict societies of the Western Balkans urgently needed to design new constitutional structures, some of them completely from scratch. Building new, inclusive constitutions has been considered key to accommodating the grievances of the belligerent cleavage groups in the societies, thus preventing a recurrence of organized intergroup violence.

The EU used different strategies of intervention during the process of constitution building in the post-conflict Western Balkans. Due to the severity of the crises and the polarization of the groups, the EU and its partners started with the rather forceful imposition of constitutional norms and practices in the early stages of constitution building in Bosnia and Kosovo. Much softer, indirect ways of influencing the implementation and development of constitutional structures (primarily through the mechanism of EU conditionality) later replaced these early forceful methods. The key



goal in this second stage was to enhance the participation of domestic actors in the constitution-building process in order to increase local ownership of the constitutional structures. The forceful strategies had negative effects, which had a decisive impact on the strategy used in Macedonia. The much more benevolent conditions on the ground allowed the EU to intervene in Macedonia using diplomatic pressure and conditionality; the local actors were *de facto* owners of the process, and had a keen interest in abiding by the rules established in the constitution.

The post-conflict constitutional structures in Bosnia, Kosovo and Macedonia have largely followed the globally dominant consociational approach to constitutional design in divided societies. Although they belong to the same consociational family, the constitutional structures in these three countries differ in the degree of interpretation of the consociational model. The Bosnian design has become a textbook example of all the possible shortcomings of the consociational theory and its prescriptions. Its constitutional structure has achieved the goal of preventing a recurrence of organized intergroup violence. Yet the DPA has largely failed to decrease intergroup polarization and antagonism, and has created by far the most complex state structure in the world, which suffers from chronic dysfunctionality.

Kosovo and Macedonia diverted from the consociational model and implemented the principles of segmental autonomy and mutual veto through different institutional mechanisms, which provided much more flexibility to the entire constitutional structure. Both Kosovo and Macedonia have managed to escape the over-institutionalization of ethnicity, at least formally building a civic state rather than an ethnocracy. Both avoided controversial features such as formalized grand coalitions, rigid mutual veto mechanisms and ethno-federalism. Kosovo, which consolidated its constitutional structure later than Macedonia and Bosnia, implemented learned lessons from both of them. Its structure shows a high degree of sophistication in avoiding the over-institutionalization of ethnicity, creating incentives for minority engagement with the state, and sensitivity to the socio-demographic structure of the society. Kosovo's constitutional design has come up with the important innovation of moving from a hierarchical to a functional devolution of power.

Rather unique in character, the EU experience in the post-conflict Western Balkans offers four valuable policy implications for other regional organizations aiming to support constitution-building processes in their own regions. The first implication refers to the appropriate strategy of intervention in constitution building. The comparison shows that softer, indirect mechanisms of pressure to adopt certain constitutional provisions

are as effective as forceful methods, without the costs of the more coercive approaches. The experience also demonstrates the importance of a flexible and context-specific approach to constitution building, which shifts the strategies of intervention as the context on the ground changes. Second, the regional organizations must be well informed about the available instruments of constitutional design and the dynamics on the ground to be able to apply the right design to the given context. This requires the regional organizations to develop their own constitutional design agenda, with specified goals and a clear understanding of what institutional elements should be implemented to achieve the goals. Third, the experience in these countries demonstrates the importance of domestic ownership of the constitution-building process. The analysis of Macedonia and Kosovo shows that constitutional provisions are much more effective if they are tailored to the immediate interests of the domestic actors. They should abide by constitutional norms and practices due to their rational self-interest, rather than be imposed by external pressure. Finally, constitutional structures that over-institutionalize ethnicity are undesirable, whenever the conditions on the ground allow. The comparison of institutional choices and their outcomes in the three cases shows that rigid constitutional structures freeze the post-conflict momentum, preserve the deep dividing cleavage lines and prevent societies from moving toward a more sustainable peace.

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## Notes

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- <sup>i</sup> The implementation of mutual veto and segmental autonomy in Kosovo and Macedonia is discussed in detail below.
- <sup>ii</sup> The magnitude of these conflicts is a hotly contested issue, but Kosovo deaths are estimated as 2,621 battle-related deaths and 992 civilians; Bosnia as 16,232 and 12,871, respectively; and Macedonia as 70 battle-related deaths. See Uppsala University Conflict Data Program.
- <sup>iii</sup> The EEC was renamed the European Community and incorporated as one of the three pillars of the EU in the 1993 Maastricht Agreement.
- <sup>iv</sup> The Arbitration Commission was convened in 1991 by the EEC within the framework of the International Peace Conference for Yugoslavia. Often referred to as the Badinter Commission, it was composed of the heads of the Constitutional Courts of France, Germany, Spain, Italy and Belgium and chaired by the head of the French Constitutional Court, Robert Badinter. The Commission issued several opinions between 1991 and 1993 related to the various legal issues arising from the self-determination aspirations of the Yugoslav republics. Though its opinions were non-binding, they became the guiding principle for the EEC and its member countries' policies toward these countries (Hannum 1993). For a detailed discussion of the work and impact of the Arbitration Commission, see Weller 1992; Pellet 1992, Radan 1997; Pomerance 1998/1999; Radan 2000; Terret 2000; Caplan 2005.
- <sup>v</sup> See Richter 2012 on the inherent contradiction of the SAP's two goals and the resulting failure of this policy.
- <sup>vi</sup> Such as the borders of the Federation of Bosnia and Herzegovina (FBiH) and Republica Srpska (RS), and the status of the Brcko District.
- <sup>vii</sup> Though, as Ilijevski and Taleski mention, 95 per cent of those who turned out for the referendum supported banning the law on redrawing municipal boundaries (2009, pp. 361–2).
- <sup>viii</sup> Cyprus, Greece, Romania, Slovakia and Spain.
- <sup>ix</sup> Candidates for any public office must declare themselves as belonging to one of the three ethnic groups.
- <sup>x</sup> As of 2009, vetoes had blocked over 160 legal acts (of which 140 were vetoed by the RS), which resulted in the High Representative enacting 112 laws unilaterally against the will of the domestic actors (Dzihic and Wieser 2009, p. 1811).
- <sup>xi</sup> According to the Bosnian constitution, only representatives of the 'constitutive' nations (Bosniak, Serb, Croat) can be elected to the presidency and House of Peoples of Bosnia and Herzegovina. The European Court of Human Rights ruled that Bosnia's constitution contradicts the European Convention of Human

- Rights and that Bosnia must amend its constitution accordingly (ECHR 2009).
- xii Of these three documents, only the Prud Agreement is publicly available.
  - xiii The constitution formally recognizes the Macedonian language, written using its Cyrillic alphabet as the official language. However, Amendment V (introduced into the constitution by the OFA) states that 'Any other language spoken by at least 20 percent of the population is also an official language, written using its alphabet'. Since Albanian is the only other language that is spoken by more than 20 per cent of the population, it has since become a *de facto* official language.
  - xiv Article 131 (introduced to the constitution through Annex A of the OFA) stipulates that all decisions concerning minority issues 'require a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in the majority' (OFA 2001). See also Daftary 2001, pp. 300–1.
  - xv The sanctioning of the report in 2005 was a reaction to the 2004 deadly communal riots, which left dozens dead, thousands of Kosovo Serbs displaced and dozens of Serbian cultural sites vandalized. The 2004 riots constituted a cold shower for the international community, uncovering the need for a much faster move toward greater domestic ownership and faster developments on the Kosovo status issue.