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# CONSTITUTIONALISM AND THE NON-DISCRIMINATION PRINCIPLE WITHIN AN ETHNICALLY-BASED FEDERAL SYSTEM: THE CASE OF BOSNIA AND HERZEGOVINA


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# Constitutionalism and the non-discrimination principle within an ethnically-based Federal system: the case of Bosnia and Herzegovina

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# INTRODUCTION

> «*No one can imagine what it means to be born and live on the border between two worlds, to know and understand both of them and be unable to do anything to bring them closer, to love them both and oscillate between the two throughout life, to have two homelands and have none, to be at home anywhere and remain a stranger to all, in a word, to live crucified and be both executioner and victim at the same time*».
>
> ANDRIĆ, I., *Bosnian Chronicle: A Novel*, Skyhorse Publishing, New York, 2015

The Eastern border of Europe carries with it a recent historical memory laden with tragedy and devastation, yet often appears distant and almost unfamiliar. The Balkans represent the fracture between East and West, Christianity and Islam, capitalism and communism. Historically, they embody the *alpha* and *omega* of the western twentieth century, from the assassination in Sarajevo in 1914 to the Srebrenica genocide in 1995.

The Bosnian novelist Ivo Andrić wrote that it is precisely along the Eastern border that intense hatreds are born, authentic hurricanes of restrained animosity. Winston Churchill asserted that these peoples produce more history than they can digest. The European history of the past century indeed came to a conclusion in the Western Balkans, with the war in Bosnia, a conflict that interrupted the survival of the *Socialist Federal Republic of Yugoslavia*.

However, in 1995, at the end of the conflict, the international community deliberately decided to recreate a *Little Yugoslavia* – the State of Bosnia and Herzegovina.

The 1995 Dayton Peace Agreement provided the Western powers with the opportunity to seek a peaceful solution to a war with no clear victors or defeated States. The peace constructed at the negotiating table proved challenging, and eventually, the Dayton Agreement ratified and formalised all the reasons why the former Yugoslav Republics began fighting each other. The Dayton Peace Agreement justified the war giving a constitution to a State that includes within itself the coexistence of three nations.

> It is not even clear how to call it, this country. Bosnia-Herzegovina with a hyphen or Bosnia Herzegovina without a hyphen? Bosna i Hercegovina in Croatian-Bosnian or Босна и Херцеговина, in Serbian? Or perhaps with the simple abbreviation BiH? Or maybe Bosnia and Herzegovina with the conjunction? Or just Bosnia? [...] The most rhetorical and worn-out nickname has always been: 'Little Yugoslavia', because Bosnia and Herzegovina is as large as

Belgium, Slovenia, and Luxembourg combined but is a perfect miniature of what Tito's Babel was[1].

The Western powers conceived, hypothesised, discussed and formalised the creation of Bosnia and Herzegovina with minimal involvement of the parties concerned, outlining a constitution for the country while disregarding the historic principle of *cuius regio eius religio* in a constitutional dimension according to which the *pouvoir constituant* must be at the helm of a nation and not in the hands of external actors.

The history of this Eastern border, along with the constitutional history of Bosnia and Herzegovina, is paradigmatic in evaluating Western constitutionalism and the imposition of principles and values belonging to a universal legal culture considered common that has proven somewhat shortsighted and inadequate. These reflections have compelled me to commence the present research and analysis of the *hetero-imposed* constitutionalism in Bosnia and Herzegovina.

The theme of broadening the perspective to the Western Balkans remains highly relevant and poses a challenge for Europe and for European fundamental rights. The Balkans are "surrounded" by the European Union; these States, since the commencement of their respective constitutional transition, have observed Europe – both that of the Council of Europe and the European Union – as an objective to attain.

This present research aims to turn its attention to a specifically constitutional analysis by exploring the features of the Constitution of Bosnia and Herzegovina, following a brief historical overview in the first Chapter. Subsequently, the evaluation of the country's constitutional framework will be examined in light of a fundamental principle within the constitutional law framework: the right to non-discrimination. The perspective of non-discrimination allows, indeed, for the highlighting of the distortions in a constitution externally imposed that forcibly incorporates principles derived from the European and internationalist tradition but fails to encompass a genuine catalogue of rights derived from the history, culture, and roots of Bosnia and Herzegovina, a State with specific ethnic connotations.

The lens through which the distinctive constitutionalism of Bosnia and Herzegovina is to be explored is specifically that of the principles formulated by the Council of Europe,

[1] BATTISTINI, F. & MILAN M. G., *Maledetta Sarajevo: Viaggio nella guerra dei trent'anni. Il Vietnam d'Europa*, Neri Pozza Editore, Milano, 2022 (my translation).

assuming a fundamental value in this analysis in a dual manner. Firstly, the *European Convention on Human Rights* is integrated into the constitutional framework of Bosnia and Herzegovina, representing a primary source as it is superior to any other law in the State. Secondly, the *European Court of Human Rights* has highlighted the most distorted outcome of this ethnically based federal arrangement: the prevalence of collective rights guaranteed to *Constituent peoples*, namely the Serbs, Croats, and Bosniacs who fought against each other in the bloody conflict of the late 1990s, over the individual rights of the country's minorities. Therefore, the third Chapter will focus on the analysis of five judgments from the *European Court of Human Rights* that establish the substantial violation of the principle of non-discrimination.

In the realm of minority rights protection, it will be observed how, parallel to the internationalisation of the Constitution, the peculiarity of Bosnia and Herzegovina lies in the fact that a catalogue of constitutional rights has not been internally formulated. Instead, the Constitution merely refers to a series of international Conventions, specifically the *European Convention on Human Rights*. This research reveals how the protection of minorities under the principle of non-discrimination in Bosnia and Herzegovina remains the most problematic Achilles' heel of the country's constitutionalism. In this regard, the crucial knot of the research aims to be highlighted: the inherent deficiency of an external *povoir constituant* which established a *constitution without constitutionalism* that erodes the foundational equation between constitution and fundamental rights. According to the definition of constitutionalism[2], a constitution is grounded in ensuring the full realisation of fundamental rights and their safeguarding. Therefore, a genuine constitutionalism cannot shift its genesis and evolution towards an internationalist centre of gravity, and thus, not properly constitutionalist.

To conclude, the meaning and value of this research aim to be directed towards a constitutional analysis of the violent disintegration process of the former Yugoslavia, focusing on Bosnia and Herzegovina. This process will be examined in light of the non-discrimination principle explored under the dual dimension of the *European Convention on Human Rights* and the judicial activity of the Strasbourg Court. Bosnia and Herzegovina and its more recent constitutional history indeed represents an exceptional terrain of insights into fundamental rights in Europe. «Europe, indeed, either dies or is reborn in Sarajevo»[3].

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[2] The term "constitutionalism" refers to a set of principles that coalesce into a structured system of safeguards, ensuring the legitimacy and rightful exercise of power. This concept is based on the separation of powers and the guarantee of fundamental rights, ensuring their protection.

[3] LANGER, A., *L'Europa muore o rinasce a Sarajevo*, La terra vista dalla luna, 1995. Available at https://www.alexanderlanger.org/it/34/163

# CHAPTER ONE

## I. The *General Framework Agreement for Peace in Bosnia and Herzegovina*: State-building between International and Constitutional Law

> «*Bosnia remained a No Man's Land and therefore, everyone's land. A black hole that swallows every glimmer of light and hope: this was certified on November 21, 1995, in Dayton, Ohio, after three weeks of negotiations in the cold airbase of one of the most nondescript cities in one of the most uneventful states in America. It was there that Bill Clinton and the three leaders, Milošević, Tudman, and Izetbegović, finally sat down at a table, drew new borders, and signed the end of the war, pretending to also sign peace*».
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> BATTISTINI, F. & MILAN M. G., *Maledetta Sarajevo: Viaggio nella guerra dei trent'anni. Il Vietnam d'Europa*, Neri Pozza Editore, Milano, 2022 (my translation)

### I.1 *International Constitutionalism*

The following introduction to the first Chapter addresses the constitutional dismantling of the Yugoslav Socialist State and the subsequent adoption of a *hetero-imposed* constitutional framework by Bosnia and Herzegovina. This section aims to reflect on the manifestation of the "internationalisation of constitutional law"[4] related to the exercise of the *pouvoir constituant*, articulated in the so-called *heteronomous* constituent proceedings – more precisely defined as «internationally guided or assisted»[5]. It is academically and lawfully acknowledged that the fixed demarcation between constitutional law and international law is diminishing, and the phenomenon of international constitutionalism is increasing[6]: «We live in an era of constitution-making»[7].

[4] See the definition of the notion in MAZIAU, N., *Le costituzioni internazionalizzate. Aspetti teorici e tentativi di classificazione*, in Diritto pubblico comparato ed europeo, 2002, pp. 1397-1420.
[5] DE VERGOTTINI, G., *Le transizioni costituzionali: sviluppi e crisi del costituzionalismo alla fine del XX secolo*, Il Mulino, Bologna, 1998.
[6] See CASSESE, S., *Oltre lo Stato: verso una Costituzione globale?*, Il Mulino, Bologna, 2006; DE VERGOTTINI, G., *Diritto costituzionale comparato*, Vol. 52, CEDAM, Padova, 2004; O'DONOGHUE, A., *International constitutionalism and the state*, in International Journal of Constitutional Law, 2013, Vol. 11, Issue 4, pp. 1021–1045.
[7] HART, V., *Democratic Constitution making*, in United States Institute of Peace, Special Report No. 107, Washington D.C., 2003.

Traditionally, the dominions of constitutional law and international law have been perceived as detached legal domains and separate areas of academic analysis. Three key factors[8] contribute to this ongoing convergence.

Firstly, scholars have increasingly explored the impact of international law on established domestic constitutional systems, particularly concerning issues related to human rights and the promotion of democratic principles[9]. Secondly, there is a growing debate surrounding the "constitutionalisation of international law"[10], a rising practise that seeks to develop the international legal framework by incorporating principles that are commonly associated with domestic constitutionalism[11]. Lastly, the international community has become more actively engaged in state-building processes, often developing entirely new constitutional frameworks. This third feature constitutes the central element of the phenomenon of *internationalisation of constitutional law*, aligned with the analysis presented in this study.

The occurrence of internationalised constitutions is not of recent origin. It is noteworthy to recall the phenomenon of «imposed constitutional models»[12] by which the Constitutions of some defeated States came into being after the Second World War, such as the *Basic Law for the Federal Republic of Germany*[13] and the *Constitution of Japan*[14]. Moreover, from the 1950s onward, the constitutions of many countries that achieved independence after long years of colonial domination have emerged.

In the latter half of the 20th century and particularly since the 1990s, a distinguished and manifest tendency has arisen, marked by diverse forms of international engagement in constitution-building and constitution-making processes. Indeed, several cases of externally

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[8] See RIEGNER, M., *The two faces of the internationalized pouvoir constituant: Independence and constitution-making under external influence in Kosovo*, in Goettingen Journal of International Law, 2010, Vol. 2, Issue 3, pp. 1035-1062.

[9] See NOLTE, G., MALINVERNI, G., RUBENFELD, J., SONNEVEND, P., *The international influences on national constitutional law in states in transition,* American Society of International Law, in Proceedings of the Annual Meeting, 2002, pp. 389-400.

[10] For a comprehensive overview of the notion see the bibliography cited in the note no. 2 in BIFULCO, R., *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, in Rivista Associazione Italiana Costituzionalista, 2014, No. 4; FELDMAN, N., *Imposed Constitutionalism*, in Connecticut Law Review, 2004, Vol. 37 and PIERGIGLI, V., *Diritto constitutional e diritto internazionale: dall'esperienza dei procedimenti costituenti eterodiretti alla UN policy framework assistance*, in Rivista Associazione Italiana Costituzionalisti, 2015, No. 1.

[11] See KLABBERS, J., PETERS, A., & ULSTEIN, G., *The constitutionalization of international law*, in Oxford University Press, Oxford, 2009.

[12] See DE VERGOTTINI, G., *Le transizioni costituzionali: sviluppi e crisi del costituzionalismo alla fine del XX secolo*, Il Mulino, Bologna, 1998 and KUMM, M., *The legitimacy of International law: a constitutionalist framework of analysis*, in European journal of international law, 2004, Vol. 15, No. 4, pp. 907-931.

[13] See STEIN, E., *International law in Internal Law: Toward internationalization of Central-Eastern European constitutions?*, in American Journal of International Law, 1994, Vol. 88, Issue 3, pp. 427–450.

[14] See HALVERSON, C., *Imposed from Above: Post-Conflict Internationalized Constitutions and Local Ownership as part of State-Building*, Senior Honors Thesis, Department of Global Studies, University of North Carolina, Chapel Hill, 2021.

constructed Constitutions and a variety of constitutional assistance initiatives have raised, particularly in «deeply divided societies»[15]. Indeed, in more recent times, in addition to Bosnia and Herzegovina and Kosovo whose constitutions are the result of international agreements, the constitutions resulting from the Arab Spring are also the result of international processes and UN intervention[16].

### I.1. 1 *State-building and nation-building in post-conflict divided societies*

In the perspective of state-building and constitution-making processes in *divided societies*, the distinction elaborated by Armin von Bogdandy, Stefan Häußler, Felix Hanschmann, and Raphael Utz[17] is particularly relevant. Their theory pertains to the differentiation between the need for either *state-building* or *nation-building* in post-conflict reconstruction, especially in constitutional development.

According to their analysis, it is important to primarily define *State failure*. It signifies the incapability of public institutions to provide vital political attributes to citizens; State failure can brutally erode both the legitimacy and the continued existence of the State. This deterioration is discernible in various dimensions, encompassing the inability to ensure security, institute a functional legal system, maintain infrastructures, provide essential social facilities, and facilitate meaningful political participation.

State-building embraces the task of forming and strengthening a functional public administration within a specific region establishing sovereign capabilities. The ultimate objective is to create a government structure that represents collective authority. State-building incorporates efforts to rebuild, and sometimes establish for the first time, a functional indigenous government within a State or region where such governance capacity is absent or substantially undermined.

The practice of third-party state-building is a relatively modern development. Its origins trace back to colonial powers' efforts to strengthen the administrative abilities of territories under their control in anticipation of transferring sovereignty to local authorities. There are historical equivalents in the form of post-Second World War United States-led Allied

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[15] LERNER, H., *Making constitutions in deeply divided societies*, in Cambridge University Press, Cambridge, 2011.
[16] SBAILÒ, C., *Primaverra araba e crisi dello "ius publicum europeo". Riflessioni metodologiche*, in E. FAZZINI, GROPPI, T., SPIGNO, I., (edited by), *Tunisia, la primavera della Costituzione*, Carocci Editore, Roma, 2015.
[17] See VON BOGDANDY, A., HÄUBLER, S., HANSCHMANN, F., & UTZ, R., *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict situations: conceptual clarifications and an appraisal of different approaches*, in Max Planck Yearbook of United Nations Law, 2005, Vol. 9, No. 1, pp. 579–613.

reconstruction actions in Germany and Japan. «The allied reconstruction efforts in Western Germany and Japan following the Second World War, but also the process in Cambodia or post-communist Poland are examples of successful state-building»[18].

In recent years, third-party state-building has expanded to address the challenges posed by weak or "failed States". Moreover, it has become a component of international administration[19] in territories marred by conflict or strife. Notably, since 1995, the following international administrations have been conducted: the United Nations' interim administrations in Eastern Slavonia (UNTAES), Kosovo (UNMIK), and East Timor (UNTAET), as well as the *ad hoc* Peace Implementation Council's administration of Bosnia and Herzegovina. It is essential to differentiate the UN mission in Afghanistan (UNAMA), which is primarily an assistance mission, although state-building constitutes a significant component within its broader mission[20].

*Nation failure*, especially pertinent to multi-community States – such as Former Yugoslavia – characterises a scenario in which the societal structure disintegrates along ethnic, linguistic, or religious lines, supplanting a shared national identity. It occurs when «the cultural projection of a nation is no longer convincing to many […], there is no "usable past" […], when individual and mutually exclusive nationalisms replace the former common identity»[21]. This implies a more drastic manifestation of *State failure*, irreversibly resulting in a breakdown of State functions. The nation failure is explicitly evident in the collapse of the *Socialist Federal Republic of Yugoslavia* and the consequent Bosnian war[22]. Successful nation-building, contrariwise, hinges on the establishment of a collective identity that legitimises public authority within a delimited territory, often through a deliberate reconfiguration of existent traditions, common history, institutions, and customs as intrinsic national features. Nation-building is an inherently endogenous process that shapes a nation's identity, thereby

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[18] VON BOGDANDY, A., HÄUBLER, S., HANSCHMANN, F., & UTZ, R., *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict situations: conceptual clarifications and an appraisal of different approaches*, in Max Planck Yearbook of United Nations Law, 2005, Vol. 9, No. 1, pp. 579–613.

[19] See CAPLAN, R., *A new trusteeship?: The international administration of war-torn territories*, Routledge, London, 2014.

[20] See CAPLAN, R., *International authority and state-building: the case of Bosnia and Herzegovina*, in Global Governance: A Review of Multilateralism and International Organizations, 2004, Vol. 10, No. 1, pp. 53–65.

[21] VON BOGDANDY, A., HÄUBLER, S., HANSCHMANN, F., & UTZ, R., *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict situations: conceptual clarifications and an appraisal of different approaches*, in Max Planck Yearbook of United Nations Law, 2005, Vol. 9, No. 1, pp. 579–613.

[22] «*Civil war or aggression*? Academic and popular literature on the war is deeply divided on a basic issue: was it primarily a case of internecine bloodletting *among* Bosnians, or was it an avoidable war caused primarily by the "aggression" of Serbia – and secondarily Croatia – *against* Bosnia and the failure of the "West" to confront the aggressors in good times?». BOSE, S., *Bosnia after Dayton: Nationalist Partition and International Intervention*, in Oxford University Press, Oxford, 2002, p. 18.

substantiating the legitimacy of the State structure and defining the constitutional framework[23]. «Nation-building is an all-encompassing concept whose key constituent element is state-building»[24].

The process of constitution-making has gained an essential role in post-conflict reconstruction and development initiatives and a «central aspect of democratic transitions, peacebuilding and state-building»[25] and, therefore, nation-building.

In the Yugoslav framework – and in the Bosnian context afterwards – the coexistence of multiple ethnic groups within a nation-state hinged upon the compatibility of their respective nation-building processes.

> Yugoslavia had six republics, five nations, four languages, three religions, two alphabets and one party[26]. Bosnia-Herzegovina, after the Dayton Agreement, is designed as a bicephalous country, with three homogeneous ethnic groups that were supposed to gradually merge into unity. Its most rhetorical nickname has always been that of the "Little Yugoslavia", […] a Titoist Babel uniting different peoples: united and equal, that was the spirit before the war; separated but equal, the hope after the war; separated and different, the certainty of today[27].

In the process of nation-building in Bosnia and Herzegovina following the war between 1992 and 1995, Western international actors formulated, created, and implemented the country's constitutional framework. The following analyses aim to examine the specificities of the traditional constitutional framework that characterises the processes of constitutional arrangement. Moreover, in the external efforts to shape constitutional nation-building in Bosnia and Herzegovina – paradigm of an integrally internationalised constitutionalisation[28] procedure – is fundamental to assess the external involvement as a result of a continuous

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[23] «At the core of the constitutional reforms in the countries of Central and Eastern Europe lies the self-determination of *nations*, which, in history—and not solely in territorial and legal connections – find the reasons for their rediscovered identity». See MONTANARI, L., *Le minoranze: il caso della Bosnia ed Erzegovina*, in Diritto Pubblico Comparato ed Europeo online, 2021 (my translation).

[24] SARAJLIĆ, E., *Between State and nation: Bosnia and Herzegovina and the challenge of political analysis*, in State or Nation, 2011, pp. 9-20.

[25] Guidance Note of The Secretary-General, *United Nations Assistance to Constitution-making Processes*, 2009. Available at https://digitallibrary.un.org/

[26] CONVERSI, D. *The dissolution of Yugoslavia: secession by the centre?*, in COAKLEY, J., *The Territorial Management of Ethnic Conflict. The Cass series in regional and federal studies*, Routledge, London, 2003, pp. 264-292.

[27] BATTISTINI, F. & MILAN M. G., *Maledetta Sarajevo: Viaggio nella guerra dei trent'anni. Il Vietnam d'Europa*, Neri Pozza Editore, Milano, 2022 (my translation).

[28] See PECH, L., *The International Guarantee of the Constitutional Order of Bosnia-Herzegovina*, in Revue Française de Droit Constitutionnel, 2000, No. 42.

process of constitutional transition's extended framework having its origins in the post-Second World War period.

### I.1. 2 *Pouvoir constituant*

The original definition of *Constitution* configures a system of rules, both substantive and formal, with the holders of power as their ultimate addressees[29]. This, in fact, is the definition of *Constitution* stipulated more than two centuries ago in Article XVI of the 1789 *Déclaration des Droits de l'Homme et du Citoyen*: «Any society in which the guarantee of rights is not assured, nor the separation of powers defined, has no Constitution»[30].

Western constitutions are characterised as a set of rules on public powers, characterised by mutual separation, and respect for the fundamental rights of all. As a result, the Constitutions are always, directly, or indirectly, designed to guarantee equality: political equality through the guarantee, and limitation, of political rights, civil equality through the protection of civil rights, and minimum levels of social equality through the fulfilment of social rights. In this regard, Constitutions not only represent the completion of the rule of law through the extension of the principle of legality to all powers but also serve as a political projection for the future: the stipulation of negative and positive imperatives directed at public powers as sources of legitimacy, but also, and above all, of delegitimisation and limitation.

> Constitutions can be seen as positive law utopias. Although they can hardly be perfectly realized, they establish a framework for reshaping the law itself towards greater equality in fundamental rights[31].

At the core of the traditional constitution-making process – belonging to the French revolution – lies the notion of *pouvoir constituant*. The concept of *pouvoir constituant* was originally formulated by constitutional republicanism, specifically by Emmanuel Joseph Sieyès, drawing its roots from Article XVI of the 1789 *Déclaration des Droits de l'Homme et du Citoyen*. Emmanuel Joseph Sieyès outlines the original notion of constituent power as the

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[29] See PORTINARO, P. P., LUTHER, J., ZAGREBELSKY, G. (edited by), *Il futuro della Costituzione,* Giulio Einaudi Editore, Torino, 1996.
[30] *Déclaration des Droits de l'Homme et du Citoyen,* 1789. Available at https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789
[31] PORTINARO, P. P., LUTHER, J., ZAGREBELSKY, G. (edited by), *Il futuro della Costituzione,* Giulio Einaudi Editore, Torino, 1996.

*grand collective legislator*[32], and his definition is considered a paradigm within continental legal theory of the Constitution. His ultimate purpose was to counterpose, as the original force behind the Constitution, the monarchical institutions and the dominion of the king based on law and tradition with the free, original, and unlimited power of political and constituent decision-making of the nation.

Emmanuel Joseph Sieyès, influenced by his background in theology, sought to permeate the concept of *pouvoir constituant* with divine attributes rooted in Christian theology – *potestas constitutuens, norma normans, creatio ex nihilo*[33]. The reason for this transposition of theological concepts into political ones – a prominent illustration of "political theology"[34] – is clear: the people, belonging to a specific socio-political ecosystem, must be recognised as having the power to determine the formation of the political-social order; the people must become its creator in a unique sense. The notion of *People* is, according to Sieyès, understood in the political sense as the nation, a group of individuals who have become conscious of themselves as a political entity, possessing the so-called *pouvoir constituant*.

It is with both the American and the French Revolutions that the Constitution as a product of a nation's decision acquires full relevance. However, there is a substantial difference between the two constitutional models. In the American constitutionalism, the idea of a "constitution as a contract"[35] prevails, where the union is defined through the agreement of individuals on the fundamental moral principles of their coexistence. In the French constitutionalism, the idea of a "constitution as an act"[36] prevails, representing a decision about the form of the political existence of a people as a subject of collective will[37]. American constitutionalism serves a preliminary function of nation-building, as there is no pre-existing State that has already shaped the nation. On the other hand, the French constitutionalism more imperatively focuses on state-building or defining the structure of State powers.

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[32] See FURET, F., *L'eredità della rivoluzione francese*, Editori Laterza, Roma, 1989 and GOLDONI, M., *At the origins of constitutional review: Sieyès' constitutional jury and the taming of constituent power*, in Oxford Journal of Legal Studies, 2012, Vol. 32, Issue 2, pp. 211-234.

[33] PORTINARO, P. P., LUTHER, J., ZAGREBELSKY, G. (edited by), *Il futuro della Costituzione,* Giulio Einaudi Editore, Torino, 1996.

[34] See FRANK, S., *The general will beyond Rousseau: Sieyès' theological arguments for the sovereignty of the Revolutionary National Assembly*, in History of European ideas, 2011, Vol. 37, Issue 3, pp. 337-343.

[35] See FIORAVANTI, M., *Costituzionalismo: percorsi della storia e tendenze attuali*, Editori Laterza, Roma, 2014.

[36] See ROGOFF, M. A., *Comparison of Constitutionalism in France and the United States*, in Maine Law Review, 1997, Vol. 49, No. 21, pp. 22-83.

[37] See PORTINARO, P. P., & LUTHER, J., ZAGREBELSKY, G. (edited by), *Il futuro della Costituzione,* Giulio Einaudi Editore, Torino, 1996.

Hannah Arendt[38] stated that American constitutionalism aims to institutionalise an order that already exists, while French constitutionalism aims to establish an order that does not yet exist and therefore seeks to transform the society, tracing its derivation back to the French Revolution. From the French Revolution onwards, constitutionalism derives the value and the legal quality of the constitution from the so-called *pouvoir constituant*.

This feature – as mentioned earlier – belongs to the nation, to the collective political entity represented by the *People*. It is the nation that possesses the legitimate power to establish a constitutional order. This tradition of constitution-making, rooted in the concept of *pouvoir constituant*, essentially aligns with democratic principles as it embodies the crucial exercise of self-determination.

Constitution-making within this framework can follow various procedures[39]. A constitutional convention can be convened to draft a constitution, subsequently ratified by the population. Another possibility involves a constitutional assembly, responsible for the composition and adoption of a new constitution. Additionally, a new constitution can be ratified through a referendum concerning a constitutional text developed through various means.

Throughout the last centuries, liberal democratic constitutionalism has shaped and solidified a position of significant influence. However, after the end of the Second World War, a widespread process of constitutional renewal emerged. New constitutions reaffirm and represent, in various forms, the principles of the separation of powers, the rule of law, and the protection of rights. However, they also transformed the nature of the constitution-making process and the constitutional derivation, representing a shift in the expression of the *pouvoir constituant*.

### I.1. 3 *Constitution-making transformation in the «short twentieth century»*[40]

In the evolution of the constitutional scenery, the principles of liberal democratic constitutionalism have been confronted with a multitude of phenomena that have surfaced following the conclusion of the Second World War and, notably, the fall of the Berlin Wall[41].

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[38] See ARENDT, H., *Sulla rivoluzione*, Giulio Einaudi Editore, Torino, 2009.
[39] See ELSTER, J., *Ways of constitution-making*, in Cambridge University Press, Cambridge, 1997, pp. 123–142.
[40] See HOBSBAWM, E. J., *Age of extremes: the short twentieth century 1914-1991*, Penguin Michael Joseph, London, 1994.
[41] See CULIC, I., *State Building and Constitution Writing in Central and Eastern Europe after 1989*, in Regio - Minorities, Politics, Society, 2003, pp. 38-58.

While the ascendancy of French-inspired liberal democratic Constitutions has had a persistent influence over the «short twentieth century», it is equally essential to engage in an analysis that goes beyond merely comparing legal institutions and constitutional features. To develop a comprehensive understanding, it is required to examine the historical and political variables that have deeply shaped the trajectory of a "new" constitutionalism.

Liberal democratic constitutionalism initially addressed the processes of decolonisation and later the processes of internationalisation and transnationalisation of Constitutions, alongside the demise of the Soviet model and European socialist systems, all within a wave of democratisation. While the year 1989 stands as an emblematic juncture for the examination of contemporary constitutional structures, it is essential to recognise that such an approach is inherently incomplete unless the analysis is considered also in a preceding historical juncture, commencing with the year 1945, which marked the conclusion of the Second World War.

This moment initiated an era in which political systems and their respective constitutional orders were reshaped, and numerous international organizations were established. The *Charter of the United Nations* and the *Universal Declaration of Human Rights* are of particular significance, as they exerted profound influence on the subsequent development of constitutional frameworks. Consequently, there emerged a discernible process of circularity in constitutional models, entailing the codification of provisions derived from international instruments, intertwined with formulations concerning the safeguarding of fundamental human rights.

Decolonisation emerged as the preeminent political phenomenon that extensively characterised the post-Second World War period. It facilitated the propagation of well-established constitutional principles from the nations that served as models to the territories gaining independence. Concurrently, there was the imposition of constitutional models by the victorious powers of the Second World War. This imposition bore witness to a transformation, particularly concerning the constitutional actors, of the *pouvoir constituant*, which, within the traditional consolidated constitutional doctrine, represents the core element of sovereign decision manifesting itself within a political community. Two emblematic cases in this regard concern Japan, compelled to adopt, in 1946, the draft of the Constitution prepared by the *Supreme Commander for the Allied Powers*, and Germany, in which the victorious States imposed precise constraints on the fundamental principles of the new constitutional order that, at that time, lacked the attributes of State sovereignty.

At the end of the 1980s, coinciding with the dissolution of multi-national States such as the *Union of Soviet Socialist Republics* and the *Federal Socialist Republic of Yugoslavia* and concurrent with the emergence of national diversities and the disintegration of federal structures, a phenomenon of constitutional construction of new States based on «internationally guided or assisted»[42] *pouvoir constituant* emerged. The most striking example of this phenomenon is the case of Bosnia and Herzegovina. Due to the impossibility and the unwillingness of convening specific constituent assemblies at the domestic level, the constitutional transition was entrusted to international mediators who constitutively drafted the country's Constitution. The resulting constitutional text, after numerous attempts of constitutional restructuring since the early 1990s that accompanied the various phases of the Bosnian conflict, also contains numerous references to various international instruments on fundamental rights, the implementation of which is delegated to the supervision of bodies affiliated with international organizations such as the *Council of Europe* and the *Organization for Security and Co-operation*.

The interrogative to be highlighted in this research is how a form of externally imposed constitutionalism, such as the one experienced by Bosnia and Herzegovina, might conceal an attempt of hegemony by the Western powers and a violation of the principle of "domestic" *pouvoir constituant* because

> Even in an external action motivated by necessity, inspired by humanitarian needs, guided by the most open and pluralistic institutional models, there should be a continuous need to look at the situation critically, without forgetting that in all these experiences, something is amiss. Or, at the very least, without forgetting that the Western powers are constantly *walking on the edge of self-contradiction*: on the edge, precisely, of a radical, undeniable, diabolical paradox[43].

Indeed, it is in consideration of the deep connection that exists between democracy and constitution that the idea of imposing them from the outside entails a contradiction in terms. This is true for democracy, which, as such, presupposes the free self-determination of the *démos*, and for the constitution, which presupposes self-foundation through a constituent process.

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[42] DE VERGOTTINI, G., *Le transizioni costituzionali: sviluppi e crisi del costituzionalismo alla fine del XX secolo.* Il Mulino, Bologna, 1998.

[43] ORRÙ, R., SCANNELLA, L. G. (edited by), *Limitazioni di sovranità e processi di democratizzazione: atti del convegno dell'Associazione di diritto pubblico comparato ed europeo*, Teramo, Università degli studi, 27-28 giugno 2003, edited by Giappichelli Editore, Torino, 2004 (my translation, emphasis added).

## I.2 *Historical framework*

In the post-Second World War era, Bosnia and Herzegovina was a constituent part of the Yugoslav Federation[44], which was reconstituted in 1945 as a political solution to accommodate the diverse South Balkan peoples. «The land of the South Slavs was born from resistance to the Nazists and from Marshal Tito's "Yugoslavism"[45], a political Byzantinism long nurtured by the Croatian elites of the Austro-Hungarian Empire»[46]. This Federation consisted of six Republics: Slovenia, Croatia, Bosnia, Montenegro, Macedonia, and Serbia.

> It was an alternative political model - a bridge between East and West, between capitalism and communism: *self-management* and market socialism. A new kind of democracy was apparently being constructed. The 'national question' was 'accommodated' and 'contained' within the concept of a single, multi-ethnic State[47].

In each Republic, one national group held a dominant position, except for Bosnia and Herzegovina due to its ethnically mixed population. According to the 1991 census[48], no single ethnic group in Bosnia and Herzegovina held an absolute majority. The population was composed of Muslims – who later adopted the term *Bosniacs* in 1993 – at 44 percent, Serbs at 31 percent, Croats at 17 percent, self-identified Yugoslavs at 5.5 percent, and *Others* at 2.5 percent. The ethnic division of Bosnia-Herzegovina became particularly evident during the August 1990 elections[49]. Prior to these elections, Bosnia and Herzegovina was seen as a single entity comprising multiple ethno-national groups. However, after the 1990 elections, it became clear that the citizens of the *Socialist Republic of Bosnia and Herzegovina* had aligned themselves along ethnonational lines. Each of the three main nationalist parties – one representing Muslims, one representing Serbs, and another representing Croats[50] – garnered

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[44] Originally the *King of Serbs, Croats and Slovenes*. See LADERER, I.J., *Yugoslavia at the Paris Peace Conference: A Study in Frontier Making*, in New Haven: Yale University Press, 1967.
[45] See DJOKIC, D., *Yugoslavism: histories of a failed idea, 1918-1992*, in University of Wisconsin Press, 2003.
[46] BATTISTINI, F. & MILAN M. G., *Maledetta Sarajevo: Viaggio nella guerra dei trent'anni. Il Vietnam d'Europa*, Neri Pozza Editore, Milano, 2022 (my translation).
[47] MCGOLDRICK, D., *From Yugoslavia to Bosnia: Accommodating national identity in national and international law*, in International Journal on Minority and Group Rights, 1999, Vol. 6, No.1/2, pp. 1-38.
[48] See TANOVIĆ, M. L., PAŠALIĆ, S., & GOLIJANIN, J., *Demographic Development of Bosnia and Herzegovina from the Ottoman Period Till 1991 and the Modern Demographic Problems*, in Procedia - Social and Behavioral Sciences, 2014.
[49] See HAYDEN, R. M., *Constitutional nationalism in the formerly Yugoslav Republics*, in Slavic Review, 1992, Vol. 51, No. 4, pp. 654–673.
[50] Namely the *Party of Democratic Action*, the *Serb Democratic Party* and the *Croatian Democratic Union*. See KAPIDŽIĆ, D., *Democratic Transition and Electoral Design in Plural Societies: The Case of Bosnia and Herzegovina's 1990 Elections*, in Ethnopolitics, 2015, Vol. 14, Issue 3, pp. 311-327.

a percentage of the vote that closely mirrored their respective population percentages. Together, these three parties secured a total of 79 percent of the vote.

> The death of Marshal Josip Tito in May 1981 certainly represented a watershed insofar as the one unifying force that diverted attention away from nationalism was now gone. However, the death of Yugoslavia in reality was not brought about by major sporadic political events, such as the death of Tito, but had its roots in much more subtle and indeed historical political occurrences. Ethno-national sectarianism had been allowed to fester for many years and the national elections between April and December 1990 finally accommodated the manifestation of such ethnic division. As reported in *Yugoslav Life* in March of 1990, there were "new parties appearing almost daily and there may well be nearly 100 by the end of the year. Almost all parties registered so far are nationalistic in name and even more so in nature"[51].

The real commencement of the dissolution of the Yugoslav Federation[52] was instigated in 1989 through a constitutional crisis, during which the constituent units of the Federation started to repudiate the jurisdiction of the central government[53]. The transformation of the former Yugoslavia – when *the former Yugoslavia became the "former Yugoslavia"*, when *Yugoslavia became the Western Balkans* – into distinct nation-states occurred as each of its constituent Republics democratically chose to establish separate sovereign entities, characterised by an ethnic definition of nationhood rather than a polity based on equal citizenship[54]. These ethno-centric interpretations of sovereignty were formally enshrined in the Constitutions of each Republic, resulting in the formal establishment of each as the nation-state of the majority ethnic group, as defined by ethnicity[55].

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[51] KEANE, R., *Reconstituting sovereignty: post-Dayton Bosnia uncovered*, Routledge, London, 2018.

[52] «The history of Yugoslavia – founded for the first time in 1918 and disappearing in the wars of the 1990s – is indeed a brief and tumultuous one. It practically coincides with the history of the twentieth century and represents an extraordinary summary of it. Nationalism, the two World Wars, the great totalitarian ideologies, the Cold War, and finally, the crisis and implosion of socialist political systems; all the most relevant historical phenomena of the *Short Century* are sometimes glaringly present in this territory, which is, not by chance, in the heart of Europe». GOBETTI, E., *Buon compleanno Jugo*, in Osservatorio Balcani e Caucaso – Transeuropa, 23 novembre 2023. Available at https://www.balcanicaucaso.org/aree/Balcani/Buon-compleanno-Jugo-228149

[53] See IGLAR, R. F., *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, in Boston College International & Comparative Law Review, 2002, Vol. 25, No. 1.

[54] «The principles of *nationality*, the idea of the *nation-state*, *nationalism*, and the concept of a *national minority* reemerged forcefully (with dramatic consequences) at the time of the dissolution of socialist Yugoslavia. After a "forced" coexistence in the Federation, at the moment of the collapse of the socialist State that held it together, each nationality sought to reconstruct/build its own nation-state». See MONTANARI, L., *Le minoranze: il caso della Bosnia ed Erzegovina*, in Diritto Pubblico Comparato ed Europeo online, 2021.

[55] See HAYDEN, R. M., *"Democracy" without a Demos? The Bosnian Constitutional Experiment and the Intentional Construction of Nonfunctioning States*, in East European Politics and Societies, 2005, Vol. 19, Issue 2, pp. 226–259.

In all the Republics except Bosnia and Herzegovina, the dominant ethnic group (e.g., Slovenes in Slovenia, Croats in Croatia, Serbs in Serbia) comprised a significant majority of the population. Consequently, the creation of an ethnic-based State was viewed as a reflection of the majority's preference, which was indeed ratified through democratic processes.

Slovenia and Croatia declared independence in June 1991[56], effectively ending the post-Second World War Socialist Yugoslav State. The emergence of the *new chauvinistic*[57] *nation-states*[58] in Croatia and Serbia led to Croatian and Serbian politicians pursuing the annexation of significant portions of Bosnia and Herzegovina into their respective States.

> Despite their leaders' rhetoric about democracy, the post-socialist transition in Serbia and Croatia was the replacement of one totalizing State structure with another, but with the State now pledged to advance the interests of the majority ethno-nation over the minorities rather than the working class over the bourgeoisie. The "class enemy" was thus replaced by supposedly threatening minorities. The change may be described as being *from State socialism to State chauvinism*[59].

Bosnia and Herzegovina faced a choice between remaining in a "truncated" Yugoslavia under Serbian dominance or pursuing independence, with the confidence of international recognition and military intervention to protect it from external aggression. The leadership of Slobodan Milošević[60], who controlled what remained of the Yugoslav Federation, intensified concerns among Bosnian political elites about Serbian influence. In the latter half of the 1980s, Milošević began using ethnic nationalism to neutralise his domestic political opponents and position himself as a defender of the Serb national cause wherever Serbs resided. Milošević's nationalist rhetoric and aggressive actions in Croatia, where he initiated a full-scale war following Croatia's declaration of independence in 1991, convinced Bosnian leaders that peaceful coexistence with Serbia was untenable.

Following Bosnia and Herzegovina's declaration of sovereignty –

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[56] BAGWELL, B., *Yugoslavian constitutional questions: Self-determination and secession of member republics*, in Georgia Journal of International and Comparative Law, 1991, Vol. 21, Issue 489, pp. 489-523.
[57] MOTYL, A. J., *The modernity of nationalism: nations, states and nation-states in the contemporary world*, in Journal of International Affairs, 1992, Vol. 45, No. 2, pp. 307-323.
[58] See HAYDEN, R. M., *Constitutional nationalism in the formerly Yugoslav Republics*, in Slavic Review, 1992, Vol. 51, No. 4, pp. 654–673.
[59] *Ibid.*
[60] President of the Yugoslav Federation from 1997 until its dissolution in 2000, he was a key figure in the Balkan Wars and later faced charges of war crimes at the International Tribunal for the Former Yugoslavia in The Hague. See SELL, L., *Slobodan Milosevic and the Destruction of Yugoslavia*, Duke University Press, Duke University, North Carolina, 2003.

> properly speaking this was Bosnia's first appearance as an independent State since 1463, commentators were quick to point out that Bosnia had spent the intervening 529 years as part of two Empires, a kingdom and a Communist Federal Republic[61]

– a referendum on independence was conducted in February 1992[62]. This referendum witnessed a 64 percent voter turnout, with an overwhelming 98 percent of the votes cast in favour of independence. However, it is important to note that the Serb population largely boycotted this referendum. Full-scale hostilities erupted in April when Bosnian Serbs, with the support of Slobodan Milošević, attempted to divide the newly formed *Republika Srpska*[63] along ethnic lines, with the goal of joining Serbia and creating a *Greater Serbia*[64]. In response, government forces, primarily comprised of Bosniacs, fought to defend and maintain Bosnia's territorial integrity as it existed during its time in Yugoslavia. In April 1993, Bosnian Croats, backed by the Croatian nationalist government in Zagreb, initiated their own territorial expansion. Under significant pressure from the United States, in March 1994, Bosniacs and Croats reached an agreement[65], forming a joint Federation. The Bosnian Serbs were eventually compelled to engage in negotiations due to extensive NATO airstrikes and advances made by Bosniac-Croat forces in Northwest Bosnia.

The Bosnian Serbs expeditiously established dominance over more than sixty percent of the nation's territory – leveraging their significant military advantage – and a systematic campaign targeting non-Serbs. The conflict evolved into a brutal three-sided struggle for territorial control, with civilians of all ethnic backgrounds falling victim to grievous crimes. It is approximated that the war that persisted from April 1992 to November 1995 resulted in the loss of over 100,000 lives and the displacement of more than two million people, which accounted for more than half of Bosnia and Herzegovina's population. The conflict was marked by the systematic rape of thousands of Bosnian women[66]. The most heinous atrocity of the war unfolded during the summer of 1995 in the Bosnian town of Srebrenica, which

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[61] MALCOLM, N., *Bosnia: A Short History*, in New York University Press, 1996, p. 234.
[62] See O'BALLANCE, E., *Civil War in Bosnia 1992–94*, in Springer, Berlin, 2016.
[63] *Republika Srpska* emerged following a unilateral declaration of independence passed on January 9, 1992, by the *Assembly of the Serb People of Bosnia and Herzegovina*, under the leadership of Radovan Karadžić.
[64] See LUKIĆ, R., *Greater Serbia: A new reality in the Balkans*, in Nationalities Papers, 1994, Vol 22, Issue 1, pp. 49–70.
[65] Namely the *Framework Agreement for the Federation* (Washington Agreement), a ceasefire accord was established between the Republic of Bosnia and Herzegovina and the Croatian Republic of Herzeg-Bosnia. This Agreement was formally signed on the 18th of March 1994, in Washington, D.C.
[66] SNYDER, C. S., GABBARD, W. J., MAY, J. D., & ZULCIC, N., *On the battleground of women's bodies: Mass rape in Bosnia-Herzegovina*, in Affilia, 2006, Vol. 21, Issue 2, pp. 184-195.

had been designated an UN-declared safe area. The town came under attack by forces commanded by Bosnian Serb leader Ratko Mladić. In a span of just a few days in early July, over 8,000 Bosnian Muslim men and boys were systematically executed by Serb forces in an act tantamount to genocide[67].

## I.3 *Constitutional Transition in Bosnia and Herzegovina*

### I.3. 1 *The Yugoslav State's sovereignty and its decline*

In its socialist State form, the *Socialist Federal Republic of Yugoslavia* and its constituent parts held a concept of dual sovereignty. This dual sovereignty was vested in both «*the working class and all working people*» and «*the nations and nationalities of Yugoslavia*»[68]. The 1974 Constitution of the *Socialist Federal Republic of Yugoslavia* primarily focused on establishing the distinctive Yugoslav system of socialist self-management[69] and it emphasised the equal treatment of all citizens before the law. It conferred both State and Federal citizenship upon citizens of all Republics.

> The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession […], together with the nationalities' with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people - the *Socialist Federal Republic of Yugoslavia*, in which, in the interests of each nation and nationality separately and of all of them together, they shall realize and ensure […][70].

Simultaneously, the concept of dual sovereignty alluded to in the Constitution of the *Socialist Federal Republic of Yugoslavia* found expression in Article I of the 1974 Constitution of the *Socialist Republic of Bosnia and Herzegovina* as follows:

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[67] See United Nations International Criminal Tribunal for the former Yugoslavia. Mladić (IT-09-92). https://www.icty.org/en/case/mladic

[68] HAYDEN, R. M., *Bosnia's Internal War and The International Criminal Tribunal*, in The Fletcher Forum of World Affairs, 1998, Vol. 22, No. 1, pp. 45–64.

[69] Under this framework, elected workers' councils were designed to oversee the operations of business enterprises, banks, administration, social services, hospitals, and other functioning entities. These workers' councils, in turn, elected the management boards responsible for governing these organizations. See ESTRIN, S., *Yugoslavia: The Case of Self-Managing Market Socialism*, in Journal of Economic Perspectives, 1991, Vol. 5, No. 4, pp. 187–94.

[70] Constitution of the *Socialist Federal Republic of Yugoslavia*, 1974, Basic Principles I.

> The *Socialist Republic of Bosnia and Herzegovina* is a socialist democratic State and socialist self-management democratic community of the working class and citizens, nations of Bosnia and Herzegovina - Muslims, Serbs and Croats, members of other nations and nationalities, that live within it, based on the authority and self-management of the working class and all working people and on the sovereignty and equality of the nations of Bosnia and Herzegovina and the members of other nations and nationalities living within it[71].

Article III of this Constitution ensured «proportional representation in the Assemblies of social-political bodies» for «the *nations* of Bosnia and Herzegovina - Croats, Muslims, and Serbs, as well as members of *other nations and nationalities*». However, the governing bodies established by this Constitution primarily focused on representation by «*the working class and all working people*» under the leadership of the *League of Communists of Bosnia and Herzegovina*.

The decline of Yugoslav Socialist State in the late 1980s saw the resurgence of separate nationalisms among the various Yugoslav peoples. In this context, nationalism referred to the political demand for each of the nations within the *Socialist Federal Republic of Yugoslavia* to have sovereignty in its own independent State. The success of nationalist politics in the Yugoslav Republics resulted in the adoption of constitutional formulations that justified each Republic's pursuit of self-determination for its specific nation (Slovene, Croat, Serb, Montenegrin, Macedonian). These constitutional changes primarily vested sovereignty in each respective nation, except in the case of Bosnia and Herzegovina. Indeed, as observed by Bougarel[72], the formalisation of a diverse party system in Bosnia and Herzegovina occurred at a later stage compared to the other Yugoslav Republics.

### I.3. 2 *Initial Constitutional debate in Bosnia and Herzegovina*

On July 31, 1990, a set of 31 amendments were introduced to substantially overhaul the Constitution of the *Socialist Republic of Bosnia and Herzegovina*. The *amendment no. 59* delineated Bosnia and Herzegovina as a democratic and sovereign State, comprised of equal citizens and the constituent nations of Bosnia and Herzegovina – Muslims, Serbs, Croats, and individuals from other nations and ethnic groups residing within its borders. This amendment marked the cessation of the dual sovereignty by eliminating references to «*the working class and all working people*» from the constitutional description of the State.

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[71] Constitution of the *Socialist Republic of Bosnia and Herzegovina*, 1974, Article I.
[72] BOUGAREL, X., *Bosnie, anatomie d'un conflit*, La Découverte, in Les Dossiers de l'Etat du Monde, Paris, 1996.

The first multi-party elections were held on November 8, 1990[73], culminating in the success of a coalition formed along ethnic nationalist lines. The nationalist parties within this coalition – the *Party of Democratic Action*[74], the *Serb Democratic Party*[75] and the *Croatian Democratic Union*[76] – garnered support in a manner that closely mirrored the ethnic composition of the population.

The transformation in constitutional perspectives regarding the State and sovereignty in Bosnia and Herzegovina following the decline of the socialist State was characterised by a shift from the earlier dual sovereignty involving the *working class* and *ethnic nations* to a new conceptual framework with a singular sovereign entity termed as the *nations and nationalities of Bosnia and Herzegovina*. However, this unitary sovereign was subdivided into segments, each of which was ensured equality. After July 31, 1990, the revised Constitution and the corresponding constitutional law mandated the inclusion of representatives from the *nations and nationalities* in governmental bodies at all administrative levels, proportionate to their respective demographic representations. Furthermore, a specific two-thirds majority was required to pass legislative measures that faced challenges related to potential violations of the principles of national equality.

Consensus at the level of the government became impractical in the initial years of governance, and the prospect of formulating a new Constitution to replace the 1974 version grew progressively remote[77]. The primary constitutional discourse in Bosnia and Herzegovina emerged on October 14-15, 1991, within a fervent parliamentary deliberation regarding Bosnia's sovereignty driven by Alija Izetbegović. This debate spread-out in the backdrop of Croatia and Slovenia's "secession" and the eruption of hostilities in June 1991. In the midst of this turmoil, the sovereignty of Bosnia and Herzegovina faced parliamentary scrutiny. The Muslim *Party of Democratic Action*, with the support of the *Croatian Democratic Union*, presented a memorandum on the sovereignty of Bosnia and Herzegovina in Parliament. This memorandum conveyed Bosnia and Herzegovina's support for the continued existence of the Yugoslav Federal State. However, it stipulated that Bosnia and Herzegovina would only

[73] BOKOVOY, M., MEIER, V., & RAMET, S. P., *Yugoslavia: a history of its demise*, in The American Historical Review, 2001, Vol. 106, No. 3.
[74] Namely the *Stranka Demokratske Akcike*.
[75] Namely the *Sprska Demokratska Stranka*.
[76] Namely the *Hrvatska Demokratska Zajednica*.
[77] See SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.

participate in Federal Parliament and Presidency activities if representatives from all other federal units were involved[78].

### I.3. 3 *The Cutileiro Plan: a "Cantonization" Agreement*

On the brink of the war, the international community acknowledged the critical need for dialogue involving all parties in Bosnia and Herzegovina concerning the future structure of the State. Facilitated by the *European Economic Community*, and led by its chair and chief negotiator, Jose Cutileiro from Portugal, discussions between the Muslim, Croat, and Serbian leadership[79] were held in Lisbon beginning on March 3, 1992. The primary aim was to reach a political agreement and a constitutional solution that would secure the consensus of the three-party leadership, thereby establishing stability and sovereignty in Bosnia and Herzegovina.

During the Lisbon negotiations in March 1992, by which time violence had already erupted in Bosnia and Herzegovina, the Cutileiro plan advanced the idea of dividing the canton-based *Confederation* into three ethnic districts

> with strong power devolved to the local level and power sharing mechanisms in all government and administrative levels, […] and with the guarantee that the three nations (Muslims, Croats and Serbs), as well as members of other nations, would be able to exercise their sovereignty through the Republic of Bosnia and its constituted units[80].

Embracing the principles of *Cantonization*[81], the parties collectively signed the *Statement of Principles for a New Constitutional Arrangement for Bosnia and Herzegovina*, «a clear precursor to the ethnic-based solution found at Dayton»[82] on March 18, 1992, following four negotiations sessions.

President Alija Izetbegović reneged on his commitment within a week and he was subsequently followed by Croat leader Mate Boban. By the end of March, Bosnia and Herzegovina had descended into armed conflict. On April 6, 1992, the United States and the

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[78] See HAYDEN, R. M., *Bosnia's Internal War and The International Criminal Tribunal*, in The Fletcher Forum of World Affairs, 1998, Vol. 22, No. 1, pp. 45–64.
[79] Namely Alija Izetbegović, Radovan Karadžić and Mate Boban.
[80] SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.
[81] See AITKEN, R., *Cementing divisions? An assessment of the impact of international interventions and peace-building policies on ethnic identities and divisions*, in Policy Studies, 2007, Vol. 28, Issue 3, pp. 247-267.
[82] SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.

*European Economic Community* recognised the sovereignty of Bosnia and Herzegovina, effectively extinguishing the final chance for a comprehensive settlement capable of averting further warfare.

### I.3. 4 *The Vance-Owen Plan: a "Regionalization" Initiative*

In August 1992, significant international diplomatic efforts concerning Yugoslavia shifted during *The London International Conference on the Former Yugoslavia*, which was held on 26-27 August 1992. The *European Economic Community* appointed a new mediator, Lord David Owen, who collaborated with the Personal Representative of the United Nations Secretary-General, Cyrus Vance. These two diplomats initiated consultations in Geneva, involving negotiations among Bosnian Serbs, Croats, and Muslims, with occasional participation from representatives of the governments of Croatia, Serbia, and the Federal Republic of Yugoslavia. The initial outcome of their negotiations was a *Report on Progress in Developing a Constitution for Bosnia and Herzegovina*, along with an accompanying *Annex* titled *Proposed Constitutional Structure for Bosnia and Herzegovina*.

The plan categorically rejected the idea of dividing Bosnia and Herzegovina into three districts aligned with ethnic lines. The plan was framed as a *Regionalization* initiative, as opposed to the previous proposal based on cantons. The alternative of creating a centralised State was also dismissed due to the belief that both Croats and Serbs would not support such a solution. The solution proposed by the co-chairmen was a

> *decentralized* State [...] in which many of its principal functions, especially those directly affecting persons, would be carried out by a number of *autonomous provinces*. The central government, in turn, would have only those minimal responsibilities that are necessary for a State to function as such, and to carry out its responsibilities as a member of the international community[83].

Despite the significant disparities among the three ethnic groups, a final settlement was presented in Geneva in January 1993. It encompassed three core components: a Peace Agreement to halt hostilities; a delineation of borders that, in contrast to prior constitutional proposals, incorporated a regional division of Bosnia and Herzegovina in ten provinces («three of the provinces would have a Serb majority, two a Croat majority, three a Muslim, and one mixed Croat-Muslim; the tenth province of Sarajevo would retain power-sharing

[83] HAYDEN, R. M., *Constitutional nationalism in the formerly Yugoslav Republics*, in Slavic Review, 1992, Vol. 51, No. 4, pp. 654–673.

between all three ethnic groups»[84]) – not solely founded on ethnic factors but also took into account other geographic, historical, and economic aspects; a constitutional framework founded on ten principles – later reduced to nine[85] – envisioning an extensively decentralised State with limited responsibilities.

Despite extensive negotiations[86], the Vance-Owen initiative reached an impasse in May 1993. Although *Republika Srpska*'s President Radovan Karadžić initially signed the agreement under pressure from Serbian President Slobodan Milošević, final approval hinged on ratification by the *Republika Srpska* National Assembly, which refused to accept the proposed boundary delineation. This marked a shift towards territorial division along ethnic lines, departing from the original Vance-Owen plan.

### I.3. 5 *The Invincible Plan*

After the Vance-Owen Plan proved unsuccessful, between August and September 1993, the Owen-Stoltenberg Plan was pondered in Geneva under the guidance of Jens Stoltenberg, the former Norwegian Foreign Minister who succeeded Cyrus Vance, and Lord David Owen. This proposal aimed to fragment Bosnia and Herzegovina into a Confederation of three ethnic *mini-republics*[87], each holding substantial governmental powers, whose boundaries

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[84] SILBER, L., & LITTLE, A., *Yugoslavia: death of a nation*, Penguin Publishing Group, London, 1997.

[85] See *The Vance-Own Plan. Agreement relating to Bosnia and Herzegovina*, 1993. Available at https://www.peaceagreements.org/wview/606/The%20Vance-Owen%20Plan.
I. Constitutional framework for Bosnia and Herzegovina. *(1) Bosnia and Herzegovina shall be a decentralized State, the Constitution shall recognize three Constituent peoples, as well as a group of Others, with most governmental functions carried out by its provinces. (2) The provinces shall not have any international legal personality and may not enter into agreements with foreign States or with international organizations. (3) Full freedom of movement shall be allowed throughout Bosnia and Herzegovina […]. (4) All matters of vital concern to any of the constituent peoples shall be regulated in the Constitution, which as to these points may be amended only by consensus of these constituent peoples; ordinary governmental business is not to be veto-able by any group. (5) The provinces and the central Government shall have democratically elected legislatures and democratically chosen chief executives and an independent judiciary. The Presidency shall be composed of three elected representatives each of the three constituent peoples. The initial elections are to be United Nations/European Community/ Conference on Security and Cooperation in Europe supervised. (6) A Constitutional Court, with a member from each group and a majority of non-Bosnian members initially appointed by the International Conference on the Former Yugoslavia, shall resolve disputes between the central Government and any province, and among organs of the former. (7) Bosnia and Herzegovina is to be progressively demilitarized under United Nations/European Community supervision. (8) The highest level of internationally recognized human rights shall be provided for in the Constitution, which shall also provide for the ensurance of implementation through both domestic and international mechanisms. (9) A number of international monitoring or control devices shall be provided for in the Constitution, to remain in place at least until the three constituent peoples by consensus agree to dispense with them.*

[86] See SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014. The Croats were the first to support it due to favourable territorial terms, while the Serbs rejected it for curtailing their territorial control and separating them from the Serbian republic. The Bosniacs initially opposed it due to military clauses and territory al concerns but later signed it after receiving assurances from the United States about international forces for a ceasefire.

[87] See *The Owen-Stoltenberg Plan. Agreement relating to Bosnia and Herzegovina*, 1993. Available at https://www.peaceagreements.org/viewmasterdocument/472.

mirrored and legitimised the Serbian conquests of the previous two years and «went back to the Lisbon notion of a tier-based cantonization of Bosnia and Herzegovina»[88]. This *Invincible Plan*[89] shared conceptual similarities with the Cutileiro Principles.

> President Franjo Tuđman of Croatia said the plan he and President Slobodan Milošević of Serbia were offering would preserve the nominal unity of the country. But in other respects, the proposal described by Mr. Tuđman resembled the current situation on the ground: three separate ethnic areas, with Muslims confined to two separate landlocked pockets of territory[90].

The final details were agreed upon on September 20, 1993.

This Plan ultimately failed due to a disagreement related to the allocation of territory. The portion allocated to the Muslims, amounting to thirty percent, was less generous than what was proposed in the Vance-Owen Plan.

### I.3. 6 *The European Union Action Plan*

The European Union, newly formed following the ratification of the Maastricht Treaty, made efforts to resuscitate the *Invincible Plan*, under the elaboration of the so-called *European Union Action Plan*. The peace plan developed by the French Foreign Minister, Alain Juppé, and the German Foreign Minister, Klaus Kinkel, aimed to address the territorial demands of the *Socialist Federal Republic of Yugoslavia* side through sanctions as incentives. The Serbian side eventually consented to allocate 33.3 percent of the territory to the Muslims and 17.5 percent to the Croats. However, they could not reach a consensus on the precise modifications required for the Owen-Stoltenberg plan. Consequently, by mid-January 1994, endeavours to salvage the *Invincible Plan* were terminated, coinciding with the deterioration of other existing agreements.

Following a pause in negotiations, an artillery shell struck a Sarajevo market hall in February 1994[91], resulting in the tragic death of sixty-eight civilians. In response, NATO

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Article I. *The Union of Republics of Bosnia and Herzegovina is composed of three Constituent Republics and encompasses three Constituent peoples: the Muslims, Serbs and Croats, as well as a group of other peoples […].*

88 SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.

89 See PIRJEVEC, J., *Le guerre jugoslave*, Giulio Einaudi Editore, Torino, 2017. The term *Invincible* was coined due to a significant meeting that occurred on September 20, 1993, involving the principal negotiators. This meeting took place on board the British aircraft carrier Invincible, which was navigating international waters in the Adriatic Sea.

90 LEWIS, P., *2 Leaders Propose Dividing Bosnia into Three Areas*, The New York Times, 1993. https://www.nytimes.com/1993/06/17/world/2-leaders-propose-dividing-bosnia-into-three-areas.html

91 See PIRJEVEC, J., *Le guerre jugoslave*, Giulio Einaudi Editore, Torino, 2017.

briefly intervened: «the images provoked the first engagement of NATO in European hostilities since it was founded four decades earlier and the first involvement of U.S. forces in combat in Europe since the beginning of the Cold War»[92]. Subsequently, the United States organised a consultation that included the Bosnian Muslim representation, the Bosnian Croat leadership, and representatives of the Republic of Croatia.

During this assembly, they explored a suggestion put forward by Croatian President Franjo Tuđman in early January. He proposed that the Bosnian Muslims and Croats create a Federation, which would, in turn, establish a Confederation with Croatia. Preliminary agreements were swiftly negotiated and signed in Washington on March 1, 1994. Subsequent negotiations took place at the U.S. Embassy in Vienna, and by March 18, the parties signed the *Proposed Constitution of the Federation of Bosnia and Herzegovina* and a *Preliminary Agreement between the Federation and the Republic of Croatia concerning the Establishment of a Confederation*.

The Federation Constitution essentially reverted to the constitutional principles of the Vance-Owen Plan[93] but applied to only two ethnic groups, dividing the territory into eight cantons. These cantons were four Bosniac, two Croat, and two mixed, representing regions of Bosnia and Herzegovina that had previously held either a Muslim or Croat majority.

The Constitution primarily delegated governmental powers to the lowest achievable level, such as municipal, cantonal, or federal, with the goal of ensuring citizens mainly interact with authorities of their own ethnicity. It also required democratic governance at all levels and contained provisions to prevent the Bosniac majority from dominating the Croat minority while reserving some influence for *Others*.

On March 30, 1994, a Constituent Assembly adopted the Constitution and subsequently amended it once. Although it was rapidly created and adopted, the actual implementation has been slow.

### I.3. 7 *The Contact Group Plan*

To assist in resolving these issues, the governments of the United States, Russia, Britain, France, and Germany established a five-nation *Contact Group* in May 1994.

When the Group was first established, the team was made up of Paul Szasz, an American expert on constitutional matters, David Manning, a British specialist on Slav affairs and Russian speaker,

[92] BINDER, D., *Anatomy of a massacre*, in Foreign Policy, 1995, No. 97, pp. 70-78.
[93] See SZASZ, P. C., *Peacekeeping in operation: A conflict study of Bosnia*, in Cornell International Law Journal, 1995, Vol. 28, No. 3, pp. 685–699.

and Michael Steiner, a German with extensive knowledge of the work of the *International Conference on Former Yugoslavia*[94].

The Group, after separate consultations with each party, jointly proposed a confederal structure for Bosnia and Herzegovina, consisting of a Muslim-Croat Federation and a Serb Republic. These self-governing Entities would be unified within a single State, featuring a relatively weak central government. Although this proposal faced rejection from the Bosnian Serbs, the *Contact Group*'s plan persisted and eventually served as the foundation for the agreement that emerged from the Dayton consultations in November 1995[95].

### I.3. 8 *Agreed Basic Principles in Geneva and New York*

On September 8, 1995, an agreement comprising three fundamental constitutional principles for Bosnia and Herzegovina was reached among the foreign ministers of Serbia, Croatia, and the representatives of the Republic of Bosnia and Herzegovina[96]. The text of the *Agreed Basic Principles*[97] mainly included the configuration of Bosnia and Herzegovina in two Entities and the partition of the territory as envisioned in the *Contact Group* Peace Plan. This marked the first consensus reached by all parties since August 1993[98]. The Geneva Agreement was followed on September 26 by another agreement in New York, where the same participants accepted two *Further Agreed Basic Principles*[99]. These principles outlined the structure of a Parliament, a Presidency, a cabinet of ministers, and a Constitutional Court for Bosnia and Herzegovina.

## I.4 *The Dayton Agreement: a "Pareto Optimal Peace"*

On November 1st, 1995, peace negotiations commenced in «a purposefully created hot-house environment at the secluded Wright-Patterson Air Force Base in Dayton, Ohio»[100],

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[94] MOE, M., *The contact group in Bosnia-Herzegovina and Kosovo: The Institution and Its Mediation Role*, University of London, University College London, in ProQuest Dissertations Publishing, 2003.
[95] See CAPLAN, R., *Assessing the Dayton Accord: The structural weaknesses of the general framework agreement for peace in Bosnia and Herzegovina*, in Diplomacy & Statecraft, 2000, Vol. 11, No. 2, pp. 213–232.
[96] Namely the Ministers Milutinović, Granić and Šaćirbegović. See SKREBO, E., *Costituzionalismo e diversità etnica: il caso della Bosnia-Erzegovina*, University of Milano-Bicocca School of Law, 2020, Research Paper No. 20-05.
[97] Available at https://www.ohr.int/ohr_archive/ohr-principles-geneva-8-sept-95/
[98] See HAYDEN, R., & MOSTOV, J., *The 1995 agreements on Bosnia and Herzegovina and the Dayton Constitution: The Political Utility of a Constitutional Illusion*, in Constitutionalism and Nationalism in the Balkans, 1996.
[99] Available at https://www.ohr.int/ohr_archive/further-principles-new-york-26-sept-95/
[100] BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.

with the participation of delegations representing the three parties involved, led by Milošević, Izetbegović, and Tuđman. «The Agreement came after numerous failed diplomatic attempts by Western mediators to secure an end to war»[101]. The Peace Conference was orchestrated under the leadership of Warren Christopher, the 63rd U.S. Secretary of State during the presidency of Bill Clinton. Richard Holbrooke played a pivotal role as the chief negotiator. The conference featured two co-chairmen: Carl Bildt, the European Union Special Representative, and Igor Ivanov, the First Deputy Foreign Minister of Russia. Among the prominent figures in the delegation of the United States was General Wesley Clark. Pauline Neville-Jones, the Political Director of the Foreign and Commonwealth Office, led the United Kingdom's team, with General Arundell David Leakey serving as the United Kingdom military representative. Paul Williams, representing the *Public International Law & Policy Group*, acted as legal counsel to the Bosnian government delegation throughout the negotiations. This framework substantiated that the Bosnian conflict was not solely a civil war within the Balkan region, contrary to the long-held belief of the international community. During the inaugural session, Milošević, Izetbegović, and Tuđman, who had not met together since 1991, refrained from even shaking hands[102], and they were essentially compelled to do so by Warren Christopher.

> No one except Christopher was allowed to speak: "I welcome you on behalf of the American people to these historic proximity peace talks. If we fail, the war will resume and future generations will surely hold us accountable for the consequences". Afterwards, he walked around the table and pushed the three men together, urging them to shake hands. "We were afraid, and we were quite right", he later admitted, "if they made statements on the record, they would be so polarized that maybe the event would not get off to a good start"[103].

The Dayton Peace Agreement was the culmination of intermittent negotiations lasted 21 days held within the framework of the *International Conference on the Former Yugoslavia* – formally established during the London International Conference on the Former Yugoslavia, which convened on August 26-27, 1992[104] – and the *Contact Group*, an informal coalition of major

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[101] BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.
[102] See MACDONALD, D. B., *Balkan Holocausts?: Serbian and Croatian victim centered propaganda and the war in Yugoslavia*, Manchester University Press, Manchester, 2002.
[103] SILBER, L., & LITTLE, A., *Yugoslavia: death of a nation*, Penguin Publishing Group, London, 1997, p.364.
[104] See DE ROSSANET, B., *Humanitarian Policies and Strategies: The International Conference on the Former Yugoslavia*, in Nordic Journal of International Law, 1994, Vol. 63, pp. 109-121.

powers with substantial interests in Balkan policy, comprising the United States, United Kingdom, France, Germany, Italy, and Russia[105]. These negotiations were intentionally restricted to a select group of participants. Western powers aimed to secure an agreement among Bosniac leadership and the leaders of Croatia and Serbia, with minimal involvement from Bosnian Croats, and the Bosnian Serbs were effectively excluded.

On December 14th, 1995, the *General Framework Agreement for Peace in Bosnia and Herzegovina*[106], commonly referred to as the Dayton Peace Agreement, was signed in Paris by the President Franjo Tuđman of the Republic of Croatia, the President Alija Izetbegović of the Republic of Bosnia and Herzegovina, and the President Slobodan Milošević of the Federal Republic of Yugoslavia. Representing the international community were French President Jacques Chirac, United States' President Bill Clinton, the Prime Minister of the United Kingdom John Major, German Chancellor Helmut Kohl, and Russian Prime Minister Vladimir Chernomyrdin.

The Agreement consisted of a basic Treaty and eleven *Annexes*. The composition of the negotiating parties suggested that the conflict revolved not around power dynamics within the State, but rather whether the State itself should continue to exist[107]. The Agreement outlined a system of *Corporate Consociation*[108] with federalizing elements. One such element was the pre-existing *Federation of Bosnia and Herzegovina*. The other was the Confederation (or Federation)[109] of two *Entities*, namely the *Republika Srpska* – the Serbian Republic – and the *Federation of Bosnia and Herzegovina*.

The Agreement emphasised that Bosnia and Herzegovina would remain internationally recognised, with its capital in Sarajevo. The Bosniac-Croat Federation and the Serbian Republic would form the Bosniac-Erzegovian Confederation, with common institutions including the Presidency composed of three members, the Council of Ministers, the bicameral Parliament, the National Bank, and the Constitutional Court. The government

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105 See LEIGH-PHIPPARD, H., *The Contact Group on (And in) Bosnia: An Exercise in Conflict Mediation?*, in International Journal, 1998, Vol. 53, Issue 2, pp. 306-324.

106 *General Framework Agreement for Peace in Bosnia and Herzegovina*, Dayton, Ohio, 14 December 1995. Available at http://www.ohr.int/dpa/default.asp?content_id=380.

107 See KEIL, S., *Building a Federation within a Federation: The Curious Case of the Federation of Bosnia and Herzegovina*, in L'Europe en Formation, 2013, Vol. 369, No. 3, pp. 114-125.

108 See FONTANA, G., *War by other means: cultural policy and the politics of corporate consociation in Bosnia and Herzegovina*, in Nationalism and Ethnic Politics, 2013, Vol. 19, Issue 4, pp. 447–466.

109 It has been contended that, owing to the distinctive constitutional arrangement of the two *Entities* amalgamated within an unconventional framework, Bosnia and Herzegovina does not adhere to the requirements characteristic of either a *Federation* or a *Confederation*. See BATAVELJIC, D., *Mutamenti giuridico-costituzionali nei paesi in transizione con particolare riferimento ai paesi dell'ex-jugoslavi*, in GAMBINO, S. (edited by), *Costituzionalismo europeo e transizioni democratiche*, Giuffrè Editore, Milano, 2003.

would handle foreign and commercial policy, customs, monetary policy, immigration, domestic and international communications, and control of air traffic.

The Agreement guaranteed the right of refugees to return to their homes, ensured freedom of movement throughout the country, and stipulated that individuals who had committed war crimes would be prosecuted and excluded from political positions. Furthermore, all foreign military forces, military advisors, and volunteers, except for United Nations troops, were required to leave Bosnia and Herzegovina within thirty days.

The concise general text is reinforced by a multitude of comprehensive Annexes that provide a more elaborate clarification of the parties' commitments. *Annex* 1A primarily addresses the military aspects of the peace accord, encompassing the cessation of hostilities, force redeployment, and the deployment of the Implementation Force (IFOR). *Annex* 1B delineates the measures related to regional stabilization, encompassing confidence-building measures, security measures, and regional arms control principles. *Annex* 2 delineates the boundaries between the constituent *Entities*. *Annex* 3 focuses on election modalities, safeguards for fundamental rights, democratic structures, and inter-institutional relationships. *Annex* 4 encompasses the constitutional framework for Bosnia and Herzegovina. *Annex* 5 establishes the binding arbitration procedure for disputes arising between the Bosnian Federation and the *Republika Srpska*. *Annex* 6 outlines the domestic institutional structures devised to safeguard and enforce human rights in the post-war phase, including a Human Rights Commission, an Ombudsperson, and a Human Rights Chamber. *Annex* 7 institutes mechanisms to facilitate the return and protection of refugees, involving a commission for displaced persons and refugees. *Annexes* 8-11 pertain to the preservation of national monuments, public corporations, civilian implementation, and the establishment of an International Police Task Force.

Within the scope of the Dayton Agreement's constitutional provisions – the *Annex* 4 – an elaborate framework was established. This framework implemented an intricate system of constitutional safeguards for ethnic groups and mechanisms for power-sharing[110]. It aimed to ensure that the Serbs, Croats, and Bosniacs, formally recognised as *Constituent peoples* possessing special group rights, would participate in nearly every state-level decision-making process.

[110] For a comprehensive analysis see GAETA, P., *The Dayton Agreements and international law*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 147–163.

> The compromise agreed at the Dayton Peace conference can be summed up in *three points*: (1) most of Bosnia and Herzegovina's powers are devolved to *two territorial sub-units*; (2) Bosnia and Herzegovina remains a formally sovereign State; and (3) ethnic groups are equally represented at the federal level, where they have a *veto right*[111].

The Dayton Peace Agreement, while not without its inherent limitations, stands as the sole guiding framework for post-war Bosnia and Herzegovina. In retrospect, scholars are prompted to contemplate a broader question: whether the international community should establish minimum thresholds when facilitating peace agreements among contentious third parties;

> is any agreement acceptable as a means to end mass violence? Or are there minimal protections related to both the integrity of the individual and State that are non-negotiable in such processes? An Agreement born out of the policies of ethnic cleansing and massive human rights violations must ensure that it does not become a vehicle to facilitate the continuation of the war by other means[112].

The Dayton Peace Agreement was implemented as a means to terminate the war in Bosnia and Herzegovina. Among Western guarantor States, the Accord was widely lauded for its diplomatic success in replacing chaos with order, substituting reasoned agreement for warfare, and establishing a multilateral framework that compelled all parties to the conflict to acknowledge the legal existence and viability of the Bosnian State. However, despite its undeniable achievement in putting an end to large-scale violence within Bosnian territory, the Agreement embodies a paradox both in substance and implementation. On one hand, it confirms the State's existence, but on the other, it incorporates elements that delineate separate political and legal *Entities*. The Accord emphasises self-reliance in rhetoric while ensuring the perpetuation of a long-term international presence as an essential element for the State's survival. The Dayton Agreement reinforces the tripartite division of the nation, community, and individual in the new Bosnia and Herzegovina, where ethnic identity takes precedence, and the body politic remains a fractured entity[113].

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[111] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
[112] BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.
[113] See BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.

## I.5 *Internationalised state-building and Constitutionalism. «We have come to the heart of America to try to bring peace to the heart of Europe»*[114]

> In addition to its dubious moral value, given that it apparently rewarded ethnic cleansing, the Agreement also lacked *domestic legitimacy*, but not for this reason alone. It had been negotiated in far-away Dayton, Ohio, on a US air force base subjected to a state of quarantine until an agreement had been hammered out[115].

The Dayton Constitution of Bosnia and Herzegovina represents the increased engagement of the international community in state-building processes[116], topic that has been previously addressed in the introduction of this Chapter. While not an entirely novel phenomenon, the practice of internationalised constitution-making has gained significant traction since the mid-1990s.

The internationalised constitutional initiatives typically incorporate fundamental principles of western liberal constitutionalism, such as democracy, the separation of powers, the rule of law, and the protection of human rights. However, constitutional decision-making in these complex settings transcends conventional deliberations about the structure of democracy and the rule of law. It basically addresses the challenges of constitutional design within divided societies and simultaneously raises crucial questions about the legitimate constitutional role of international actors.

In Bosnia and Herzegovina, the process of constitution-making took place within the context of diplomatic peace negotiations conducted behind closed doors[117], «the unlikely venue was the Bob Hope centre at the Wright-Patterson air force base in Dayton, Ohio»[118]. The international intervention sought the purpose of halting hostilities and compelling warring factions to find a compromise for a new institutional framework.

The outcome of these negotiations was the *General Framework Agreement for Peace in Bosnia and Herzegovina*, an international Treaty supplemented by eleven Annexes, with *Annex* 4 containing the Constitution of Bosnia and Herzegovina. This Constitution was drafted in

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[114] Statement by Warren Christopher at the beginning of the negotiations in Dayton. See SILBER, L., & LITTLE, A., *Yugoslavia: death of a nation*, Penguin Publishing Group, London, 1997, p.364.
[115] WELLER, M., & WOLFF, S., *Bosnia and Herzegovina ten years after Dayton: Lessons for internationalized state building*, in Ethnopolitics, 2006, Vol. 5, Issue 1, pp. 1–13.
[116] See MILLER, L. E., & AUCOIN, L., *Framing the State in times of transition: Case Studies in Constitution Making*, in United States Institute of Peace Press, Washington D.C., 2010.
[117] See DAALDER, I. H., *Getting to Dayton: The Making of America's Bosnia Policy*, Brookings Institution Press, Washigton D.C., 2014.
[118] SILBER, L., & LITTLE, A., *Yugoslavia: death of a nation*, Penguin Publishing Group, London, 1997, p.364.

English only. The constitutional solution adopted does not, therefore, exhibit the characteristics of an ordinary constitutional process and lacks inclusion of the language and history of the country. The Constitution of Bosnia and Herzegovina was thus internationally approved, without any form of popular participation[119].

> The written Constitution follows the principles of liberal constitutionalism, providing for the separation of powers, an original constitutional court that includes foreign judges chosen at the international level, and a system of safeguards. However, all of this occurs in the *absence or irrelevance of local popular will* within a substantial framework of international protection and armed surveillance, in a situation where the resumption of a bloody and inevitable interethnic conflict is always looming if external presence were to cease[120].

The nature of Constitutions traditionally implies that they should be established by an entity vested with special political authority, the *pouvoir constituant*, which is one of the attributes of sovereignty. However, the Dayton Agreement imposed a new Constitution through an international Treaty. In this scenario, the original *pouvoir constituant* of the State was elevated to the realm of international law, which served as its immediate source. Consequently, the Constitution of Bosnia and Herzegovina seems to have been granted by the international community.

Indeed, the Constitution of Bosnia and Herzegovina directly stems from the Dayton-Paris Treaty.

> The Dayton Peace Agreement was unlike any other Peace Treaty of modern times, not merely because it was *imposed by powers* formally *external to the conflict*, but because of the far-reaching powers given to international actors, which extended well beyond military matters to cover the most basic aspects of government and State. The majority of annexes to the Dayton Agreement were not related to the ending of hostilities, traditionally the role of a peace agreement, but the political project of state-building in Bosnia, of "reconstructing a society"[121].

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[119] It has been observed that a democratic deficit is inherent in the constitution-making process, wherein the *pouvoir constituant* has been "usurped" from local actors by international powers. It can be argued that there has been a lack of a "bottom-up" approach to constitution-building, establishing a connection between the State and civil society. Instead, there has been a predominance of a "top-down" imposition of a constitutional framework. See SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.

[120] CALAMO SPECCHIA, M., CARLI, M., DI PLINIO, G., TONIATTI, R. (edited by), *I Balcani occidentali: le costituzioni della transizione*, Giappichelli, Torino, 2008.

[121] CHANDLER, D., *State-Building in Bosnia: The Limits of "Informal Trusteeship"*, in International Journal of Peace Studies, Spring/Summer 2006, Vol. 11, No. 1, pp. 17–38.

The signing of the Treaty reaffirms the legal continuity of the existence of Bosnia and Herzegovina. While recognised in 1992, the Republic of Bosnia and Herzegovina's status as a sovereign State was confirmed by the Dayton-Paris Treaty. Therefore, the Constitution of Bosnia and Herzegovina appears to ensure the continuity of the Republic of Bosnia and Herzegovina, while revising and supplanting the previous Constitution of the Republic of Bosnia and Herzegovina of 1993. This transition from an old to a new Constitution remains legally problematic[122].

Notably, Article XII (1) of the new Constitution implies that the mere signature of the Dayton Treaty constitutes a repudiation of the old Constitution promulgated in 1993: «This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina». However, the previous Constitution had prescribed an entirely different revision procedure. Proposing an amendment to the old Constitution involved a specific set of procedures. According to Article 268[123] of the old Constitution, the process required the legislative proposal for amending the Constitution to be drafted by the Assembly at the joint session of the Assembly. It had to be made available for public discussion and had to be ultimately decided upon at a joint session of all chambers of the Assembly. For an amendment to be adopted, a two-thirds majority of the total number of deputies from each chamber of the Assembly needed to vote in favour of it.

However, the language of the Dayton Constitution does not conform to these established requirements. It does not mandate presentation to the Assembly or public debate, nor does it necessitate approval through a joint session of the Assembly. «This means that the New Constitution is not an amendment to the old, but a completely new one. The Old Constitution has simply been jettisoned. A new regime is being established»[124].

In Bosnia and Herzegovina, the Constitution only took effect upon the signing of all parties to the Dayton-Paris Peace Agreement, according to Article XII of the Constitution[125]. The Constitution, nevertheless, asserts that the *Constituent peoples* presided over its creation.

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[122] See YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.
[123] See SKREBO, E., *Costituzionalismo e diversità etnica: il caso della Bosnia-Erzegovina*, University of Milano-Bicocca School of Law, 2020, Research Paper No. 20-05.
[124] YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.
[125] Article XII, Constitution of Bosnia and Herzegovina. *This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.*

Article XII reflects the absence of any self-determination mechanism preceding the establishment of a sovereign State in Bosnia and Herzegovina. Consequently, it seems plausible to assert that an international *pouvoir constituant*, represented by the parties to the Agreement, established the Constitution of Bosnia and Herzegovina. Therefore, Bosnia and Herzegovina is more a symbolic construct of the international community than a State entity consented to by the majority of the people of Bosnia and Herzegovina. The legal nature of the Constitution of Bosnia and Herzegovina raises scepticism regarding whether it pertains to constitutional law or international law.

The text was never ratified or formally approved by the representatives of the entire population of Bosnia and Herzegovina: «No ratification by referendum was required for its entry into force. Neither was ratification by the legislature of the Republic of Bosnia and Herzegovina, or by the legislature of the Federation of Bosnia and Herzegovina or that of *Republika Srpska*»[126]. Its formal validity is rooted in international law, and its legitimacy is derived from the international law principle of State consent, rather than the constitutional law principle of popular sovereignty. The constituent power, traditionally the embodiment and symbol of State sovereignty, has been largely transferred to the international community, «the guarantor and chief architect of Bosnia as it exists today»[127], the «fourth constituent part»[128] at the Dayton negotiations.

While the *General Framework Agreement for Peace in Bosnia and Herzegovina* succeeded in ending the armed conflict, the Constitution's lack of representativeness and transparency, along with its imposed character, has raised questions about its internal legitimacy because it is a «Dayton Constitution and not a Bosnian Constitution, and this difference is quite substantial»[129].

[126] YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.
[127] BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.
[128] BOSE, S., *Bosnia after Dayton: Nationalist Partition and International Intervention*, in Oxford University Press, Oxford, 2002.
[129] BEIBER, F., & SOKOLOVIĆ, D., *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina*, Routledge Revivals, 2018, pp. 63-94.

## I.6 *The Political Consociation*

The Dayton Agreement has been categorised as a classic illustration of a consociational settlement[130]. It establishes political elites to jointly hold power, enforces proportionality in government and assures reciprocal veto rights and communal autonomy;

> it created a complex institutional structure, composed of one State, two *Entities*, three peoples, an estimated 3.9 million citizens, and five layers of governance led by 14 prime ministers and governments, making Bosnia the State with the highest number of Presidents, prime ministers, and ministers *per capita* in the entire world[131].

The Bosnian Constitution unquestionably reflects the foundational principles of Arend Lijphart's consociational model[132]. «Dayton even represents two consociational settlements within the boundaries of a single State – the sovereign consociation of the State of Bosnia and Herzegovina and the regional consociation of the Federation»[133].

Consociationalism is a political system utilised in *deeply fragmented societies*, characterised by power-sharing arrangements among elite representatives from various social factions. This framework seeks to establish a stable democratic structure amidst societal divisions by facilitating collaboration and cooperation among these diverse groups[134]. Firstly, it establishes the concept of the joint exercise of governmental power, often realised through a *Grand coalition*. In the Bosnian context, this means that post-election, an inter-ethnic coalition is formed, considering the division of the country into three distinct ethnic groups, the Bosniacs, the Croats and the Serbs. Each group is represented by the political parties that have garnered the highest electoral support within their respective constituencies. Secondly, the Constitution enshrines the idea of group autonomy. This autonomy can take various forms, including federalism, where ethnic groups have clearly defined territorial demarcations, or a non-territorial arrangement that grants considerable autonomy in areas

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130 See BOSE, S., *Bosnia after Dayton: Nationalist Partition and International Intervention*, in Oxford University Press, Oxford, 2002, p. 216.
131 BELLONI, R., *Bosnia: Dayton is Dead! Long Live Dayton!*, in Nationalism and Ethnic Politics, 2009, Vol. 15, Issue 3-4, pp. 355-375.
132 See LIJPHART, A., *Consociational democracy*, in World Politics, 1969, Vol. 21, No. 2, pp. 207–225.
133 WELLER, M., & WOLFF, S., *Bosnia and Herzegovina ten years after Dayton: Lessons for internationalized state-building*, in Ethnopolitics, 2006, Vol. 5, Issue 1, pp. 1–13.
134 See ANDEWEG, R. B., *Consociational Democracy*, in Annual Review of Political Science, 2000, Vol. 3, pp. 509-536.

like culture and education. Bosnia and Herzegovina opts for a mixed approach[135]. While recognising the major ethnic groups as *Constituent Peoples* with special group rights, it also decentralizes the State significantly, splitting it into two highly autonomous ethnic-based *Entities*. Moreover, the principle of political and allocation proportionality is evident throughout the Constitution. This extends beyond the electoral system and civil service to encompass all decision-making institutions. Ethnic-based parity formulas play a prominent role in most state-level institutions in Bosnia and Herzegovina. Lastly, the Constitution empowers ethnic groups by granting them a veto on crucial matters. This minority veto serves as a safeguard, allowing groups to protect their fundamental interests effectively. In essence, the Bosnian Constitution adopts and embodies the core principles of consociationalism as advocated by Lijphart, ensuring that all ethnic groups, particularly the major ones, have a meaningful role in decision-making and the protection of their interests within the State's framework.

Lijphart issued a notable caution regarding the potential misuse of veto power by one or more ethnic groups, as it carries the risk of destabilising the entire power-sharing system. This assumption undertakes particular significance when applied to the Bosnian scenario, characterised by the existence of numerous veto mechanisms at both the governmental and legislative levels. Given the prevailing atmosphere of pervasive inter-ethnic distrust, these multiple veto points heighten the complexity and potential challenges faced by the power-sharing framework.

## I.7 *The Constitution of Bosnia and Herzegovina: main features*

### I.7. 1 *The Entities Form of State*

The Constitution of Bosnia and Herzegovina was established as *Annex 4* to the *General Framework Agreement for Peace in Bosnia and Herzegovina*. It has been in force since December 14, 1995, following its signing in Paris.

The Preamble explicitly articulates the document as a constitution determined by the *Constituent Peoples*[136] – namely, the Bosniacs, the Croats, and the Serbs.

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[135] See SEBASTIÁN-APARICIO, S., *Post-War state-building and constitutional reform: Beyond Dayton in Bosnia*, Springer, Berlin, 2014.

[136] In the Preamble of the Constitution of Bosnia and Herzegovina, it is stated that *Bosniacs, Croats, and Serbs, as Constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows*: […].

The Constitution upholds the appearance of a unified State of Bosnia and Herzegovina through the establishment of a central national government that supersedes the operational frameworks of two distinct *Entities* – two *state-like ethno-nationalist Entities*[137] – within its jurisdiction. It explicitly states that these two *Entities*[138], namely the *Republika Srpska* and the *Federation of Bosnia and Herzegovina*, should be recognised as constituent parts of a Federal State, the Republic of Bosnia and Herzegovina. The two *Entities*, namely the *Republika Srpska* and the *Federation of Bosnia and Herzegovina*, possess, in a constitutional and legal context, the status of federal *Entities* rather than that of member States[139]. «The Constitution is not a document of one nation, but a document that recognises three nations within its confines […] the term *Entity* appears fifty-five times in the document, while the term *citizen* appears only seven times»[140].

As previously stated, the Preamble of the Constitution designates Bosniacs, Croats, and Serbs as *Constituent peoples* of Bosnia and Herzegovina, while it makes only passing reference to *Others* and *citizens*, «Bosniacs, Croats, and Serbs, as *Constituent peoples* (along with *Others*), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows […] ». Consequently, some scholars believe that the Preamble transfers State sovereignty from the citizens to these three ethnic groups[141].

A significant consequence of this arrangement is the status of *Others*, individuals who do not belong to any of the three constitutionally recognised ethnic groups. They find themselves in a State of legal ambiguity regarding their standing in this ethnically designed nation.

> This is not a Constitution whose primary goal is navigating the relationship between the individual citizen and the State, […] is a document binding *Entities* […] an agreement of geographical coercion glued together by common institutions of which the Constitution is a part[142].

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137 TUATHAIL, G. Ó., O'LOUGHLIN, J., & DJIPA, D., *Bosnia-Herzegovina Ten Years after Dayton: Constitutional Change and Public Opinion,* in Eurasian Geography and Economics, 2006, Vol. 47, Issue 1, pp. 61–75.
138 Art. I (3), Constitution of Bosnia and Herzegovina.
139 See MEŠKIĆ, Z., & PIVIĆ, N., *Federalism in Bosnia and Herzegovina*, in International Journal of Constitutional Law, 2011, Vol. 5, No. 4, pp. 597-617.
140 AOLÁIN, F. N., *The fractured soul of the Dayton Peace Agreement: A legal analysis*, in Michigan Journal of International Law, 1998, Vol. 19, Issue 4, pp. 957–1004.
141 See PAJIĆ, Z., *A critical appraisal of human rights provisions of the Dayton Constitution of Bosnia and Herzegovina*, in Human Rights Quarterly, 1998, Vol. 20, Issue 1, pp. 125–138.
142 AOLÁIN, F. N., *The fractured soul of the Dayton Peace Agreement: A legal analysis*, in Michigan Journal of International Law, 1998, Vol. 19, Issue 4, pp. 957–1004.

It becomes evident that all three ethnic groups collectively establish a constituent nation solely at the level of the central State of Bosnia and Herzegovina, which, in practical terms, possesses limited authority;

> The Dayton Agreement created an asymmetric federal State with an extremely weak centre, dependent on the two *Entities* and with institutions in which territorial representation (of the *Entities*) primarily serves ethnic representation (of the three *Constituent peoples*)[143].

The comprehensive list of «enumerated powers»[144] designated to the central government is delineated in Article III (1) of the Constitution[145]. Consequently, the *Entities* hold responsibilities solely in cases where specific substantive or legal domains are not within the jurisdiction of the State as defined in Article III (1) or in Article III (5) of the Constitution which outlines the Additional responsibilities assigned to the State[146].

### I.7. 2 *The Legislative Power*

All allocations are divided into equal thirds, with representation from the Serbian, Bosniac, and Croatian groups. The bicameral legislature is composed of an upper house, the *House of Peoples*, including five members from each group[147], indirectly elected, and a lower house, the *House of Representatives*, with fourteen members from each group elected directly – twenty-eight must be voted in the territory of the Federation, and the remaining fourteen from the *Republika Srpska*[148]. The House of Peoples comprises ten members elected from the Federation, and five – mandatory of Serb ethnicity – elected from *Republika Srpska*. In the Federation, the ten delegates are equally divided between Croats and Bosniacs. The selection

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143 WOELK, J., *La transizione costituzionale della Bosnia ed Erzegovina: dall'ordinamento imposto allo Stato multinazionale sostenibile?,* CEDAM, Padova, 2008.

144 YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.

145 *The following matters are the responsibility of the institutions of Bosnia and Herzegovina: (a) Foreign policy. (b) Foreign trade policy. (c) Customs policy. (d) Monetary policy as provided in Article VII. (e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina. (f) Immigration, refugee, and asylum policy and regulation. (g) International and inter-Entity criminal law enforcement, including relations with Interpol. (h) Establishment and operation of common and international communications facilities. (i) Regulation of inter-Entity transportation. (j) Air traffic control.*

146 Art. III (5)(a), Constitution of Bosnia and Herzegovina. *Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.*

147 Art. IV (1), Constitution of Bosnia and Herzegovina. *The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).*

148 Art. IV (2), Constitution of Bosnia and Herzegovina. *The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.*

of delegates from the Federation is carried out by the House of Peoples of the Federation, while the *Republika Srpska National Assembly* selects the delegates from *Republika Srpska*.

The Venice Commission – the *European Commission on Democracy through Law* – has identified several legal issues concerning the appointment and composition of the House of Peoples[149]. Individuals in Bosnia and Herzegovina who do not belong to the Serb, Croat, or Bosniac ethnic groups have no legal standing as candidates for election to the House of Peoples. Likewise, even Serbs, Croats, and Bosniacs residing in another Entity are denied candidacy. Consequently, this results in limitations on the corresponding voting rights of citizens, as they can only vote for candidates of a specific ethnicity[150].

Both legislative bodies are to have three presiding officers who assume their roles through a rotational system[151]. The approval of both chambers is a requisite for the adoption of all legislation[152]. Article IV of the Constitution predominantly delineates the composition, procedures – Art. IV (3), and powers – Art. IV (4) of the chambers.

In the upper house, the *House of Peoples*, a majority of each ethnic group's members must be present to establish a quorum, allowing an opposing ethnic group to obstruct actions by having fewer than three of its five members attend sessions[153]. In both chambers, the presiding officers are tasked with promoting decisions that have the majority consent of each ethnic group. In the absence of such extensive support, a simple majority can make decisions[154]. However, if two-thirds of an ethnic group opposes the legislation, it will not go into effect.

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149 *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative* adopted by the Venice Commission at its 62nd plenary session in Venice, 11-12 March 2005. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e

150 See ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

151 Art. IV(3)(b), Constitution of Bosnia and Herzegovina. *Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.*

152 Art. IV (3)(c), Constitution of Bosnia and Herzegovina. *All legislation shall require the approval of both chambers.*

153 Art. IV (1)(b), Constitution of Bosnia and Herzegovina. *Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.*

154 Art. IV (3)(d), Constitution of Bosnia and Herzegovina. *All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.*

### I.7. 3 *The Executive Power*

The Presidency, according to Article V of the Constitution, comprises three members, each hailing from one of the three ethnic groups[155]. The Presidency is therefore jointly constituted by three representatives from each of the *Constituent peoples*. «The tri-presidency of Bosnia-Herzegovina, like other State institutions in Bosnia, is designed to divide power between the three *Constituent peoples*»[156]. Specifically, it comprises a Bosniac and a Croat, who are subject to direct election from the Federation. It is noteworthy that voters in the Federation possess the liberty to vote for either the Bosniac or Croat presidential candidate, without regard to their ethnic background. Furthermore, the Presidency includes a Serb member elected by ethnically Serb citizens among candidates from the *Republika Srpska*.

A citizen of Bosnia and Herzegovina who does not belong to one of the three *Constituent peoples*, such as a member of a national minority or someone constitutionally defined as *Other*, is not eligible for election to the Presidency.

The three-member Presidency is required to make decisions through consensus[157]. In the event consensus cannot be reached, a decision can be adopted by two of the three members. However, the dissenting member has the option to declare that the decision is «destructive of a vital interest of the *Entity* from the territory from which he was elected»[158]. In such a scenario, the matter is referred to the legislature representing the ethnic group from which the dissenting member of the Presidency originated. If this legislative body upholds the position of "their" member of the Presidency by a two-thirds majority vote, the challenged action does not go into effect[159].

A clear demonstration of the enduring ethnic divisions within the nation is evident in the sections addressing the armed forces. While the Presidency typically operates through

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155 Art. V, Constitution of Bosnia and Herzegovina. *The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Sipska.*

156 ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

157 Art. V(2)(c), Constitution of Bosnia and Herzegovina. *The Presidency shall endeavor to adopt all Presidency Decisions (i.e., those concerning matters arising under Article V (3) (a)-(e) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.*

158 Art. V(2)(d), Constitution of Bosnia and Herzegovina. *A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory, to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member, or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.*

159 Art. V(2)(d), Constitution of Bosnia and Herzegovina.

consensus on civilian matters, it takes a different approach to military affairs. The Constitution states: «Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces»[160]. This provision reflects the undisputable reality that each ethnic group maintains its own military force, which does not answer to a single central authority. In essence, while it is one country, it effectively has three separate armies.

The executive authority, however, is jointly held with the Council of Ministers, which is tasked with executing the policies and decisions of Bosnia and Herzegovina, reporting to the Parliamentary Assembly[161]. The Presidency designates the Chair of the Council of Ministers, and the Chair and the ministers nominated assume their roles only following confirmation by the House of Representatives. Conversely, both chambers have the authority to dismiss the Council of Ministers through a vote of no confidence[162].

The Council of Ministers also adheres to the principle of equal representation among *Constituent peoples*[163]. This is notably evident in the appointment of Ministers and Deputy Ministers. According to Article 5 (4)(b), the Deputy Prime Ministers appointed by the Prime Ministers must belong to different *Constituent peoples* from that of the Prime Ministers. Similarly, the appointment of Ministers must uphold a specific territorial equilibrium. This entails that no more than two-thirds of the ministers can have been elected in the electoral districts of the *Federation of Bosnia and Herzegovina*, and no less than one-third must have been elected in those of the *Republika Srpska*.

### I.7. 4 *The Constitutional Court*

According to Article VI, the composition of the Constitutional Court comprises nine judges, «four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the *Republika Srpska*» – and three foreign neutrals,

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160 Art. V(5)(a), Constitution of Bosnia and Herzegovina. *Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the goverment of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.*

161 Art. V (4)(a), Constitution of Bosnia and Herzegovina. *Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fi elds referred to in Article III (1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).*

162 Art. V (4)(c), Constitution of Bosnia and Herzegovina. *The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.*

163 See SKREBO, E., *Costituzionalismo e diversità etnica: il caso della Bosnia-Erzegovina*, University of Milano-Bicocca School of Law, 2020, Research Paper No. 20-05.

designated by the President of the *European Court of Human Rights* following consultation with the Presidency[164].

> The composition of the Constitutional Court reflects both the country's power-sharing system as well as international oversight of Bosnian constitutionalism: every *Constituent people* is in practice "represented" by two judges, and three international judges are chosen by the president of the *European Court of Human Rights*[165].

The Constitutional Court possesses limited jurisdiction, encompassing authority for cases arising between the *Entities*, between the *Entities* and the central government, or between central government institutions[166]. Additionally, it holds appellate jurisdiction solely over cases involving constitutional matters[167]. In instances concerning human rights, the Constitutional Court has jurisdiction when legal questions are referred to it by the Courts in either of the two *Entities*.

[164] Art. VI (1)(a), Constitution of Bosnia and Herzegovina.
[165] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
[166] Art. VI (3)(a), Constitution of Bosnia and Herzegovina.
[167] Art. VI (3) (b), Constitution of Bosnia and Herzegovina.

# CHAPTER TWO

# II. The non-discrimination principle within the framework of an ethnically-based Federal system

## II.1 *Introduction*

This Chapter aims firstly to elucidate the scope of human rights protection outlined in the Dayton Peace Agreement in order to build a reasoning on the importance of the non-discrimination principle. Furthermore, the Chapter Two seeks to scrutinise the substantive content and extent of the provisions addressing protection against discrimination in the Constitution of Bosnia and Herzegovina. It subsequently explores the applicability of the non-discrimination principle outlined the in the human rights instruments of the constitutional framework to instances that may be characterised as *discrimination* in Bosnia and Herzegovina.

Therefore, this section of the thesis aims to frame the emergence of potential conflicts between constitutional dictates and factual provisions, starting from the foundational core of the principle around which the Constitution of Bosnia and Herzegovina has structured its ethnic-federal framework: the principle of the *Constituency of peoples*. This foundational paradigm of the Constitution, embodying collective equality among the so-called *Constituent peoples* of Bosnia and Herzegovina, brings with it a robust constitutional jurisprudence, notably the U/58 case on *Constituent peoples*, a significant concern from international institutions and organizations regarding the prohibition of discrimination and the constitutional vagueness concerning the rights of those who are not included, or choose not to be included, in the category of *Constituent Peoples*.

## II.2 *The Fundamental Rights Guarantees in the Dayton Constitution*

The catalogue of fundamental rights envisaged by the Constitution of Bosnia and Herzegovina is delineated in the following texts: the Preamble of the Constitution, Article II of the Constitution – titled *Human Rights and Fundamental Freedoms*, *Annex* 1 – *Additional Human Rights Agreements to be applied in Bosnia and Herzegovina*, *Annex 6 – Agreement on Human Rights* between the Republic of Bosnia and Herzegovina, the *Federation of Bosnia and*

*Herzegovina* and the *Republika Srpska*, and *Annex* 7 – *The Agreement on Refugees and Displaced Persons*.

### II.2. 1 *The Preamble of the Constitution*

This Preamble and its 10 lines give "10 commandments" to Bosnia and Herzegovina and its citizens for a peaceful life together in a heterogeneous society[168].

The Preamble of the Constitution of Bosnia and Herzegovina places, in its first line, an accent on fundamental moral principles: «respect for human dignity, liberty, and *equality*»[169]. It further highlights the commitment to «peace, justice, tolerance, and reconciliation».

The Preamble also emphasises the obligation «to ensure full compliance with international humanitarian law»[170]. Following this, there is a reference to international legal instruments, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. Moreover, the Preamble alludes to «other human rights instruments»[171].

### II.2. 2 *Article II: Human Rights and Fundamental Freedoms*

Article II of the Constitution is entirely dedicated to human rights. It bears a distinct title, *Human Rights and Fundamental Freedoms*. It explicitly underscores the obligation of Bosnia and Herzegovina, along with all Courts, agencies, governmental organs operating within or under the *Entities*[172], to apply and adhere to «the highest level of internationally recognised human rights and fundamental freedoms»[173]. The wording of Article II anticipates the provision contained in *Annex* 6 for the establishment of a *Human Rights Commission*[174].

Article II clearly emphasises the duty of Bosnia and Herzegovina to align with fundamental rights, particularly as outlined in the *European Convention on Human Rights* and its associated Protocols: «The rights and freedoms set forth in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its Protocols shall apply directly in

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168 See ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.
169 Preamble, Constitution of Bosnia and Herzegovina.
170 *Ibid.*
171 *Ibid.*
172 Art. II (6), Constitution of Bosnia and Herzegovina.
173 Art. II (1), Constitution of Bosnia and Herzegovina.
174 *Ibid. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.*

Bosnia and Herzegovina. These shall have priority *over all other law*»[175]. Article II, in its third paragraph, further enumerates a list of rights and freedoms following the formulation of the second paragraph:

> All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: a. The right to life. b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment. c. The right not to be held in slavery or servitude or to perform forced or compulsory labour. d. The rights to liberty and security of person. e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. f. The right to private and family life, home, and correspondence. g. Freedom of thought, conscience, and religion. h. Freedom of expression. i. Freedom of peaceful assembly and freedom of association with others. j. The right to marry and to found a family. k. The right to property. l. The right to education. m. The right to liberty of movement and residence[176].

The fourth paragraph of Article II introduces the principle of non-discrimination as a fundamental paradigm for the implementation and guarantee of the rights and freedoms outlined in Article II. Each right delineated in Article II of the Constitution must indeed be guaranteed to every individual without discrimination based on gender, race, colour, language, religion, political opinion, social origin, association with a minority, property, or any other status[177]. The significance, meaning, and implementation of this right in its various arrangements within the constitutional context of Bosnia and Herzegovina will be further examined in this Chapter.

Paragraph 5 of Article II asserts that «all refugees and displaced persons have the right freely to return to their homes of origin». It is important to interpret Paragraph 5 and *Annex* 7 – *The Agreement on Refugees and Displaced Persons* – under the light of the constitutional guarantee of freedom of movement throughout Bosnia and Herzegovina provided for in Article I (4) of the Constitution.

The seventh paragraph anticipates the provision regarding Bosnia and Herzegovina's agreement to international Treaties included in *Annex* I to the Constitution[178].

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[175] Art. II (2), Constitution of Bosnia and Herzegovina.
[176] Art. II (3), Constitution of Bosnia and Herzegovina.
[177] Art. II (4), Constitution of Bosnia and Herzegovina.
[178] Art. II (7), Constitution of Bosnia and Herzegovina. *Bosnia and Herzegovina shall remain or become party to the international Agreements listed in Annex I to this Constitution.*

Lastly, the concluding paragraph of Article II introduces an innovative approach in the realm of constitutional human rights. Its objective is the comprehensive enforcement of human rights on the national stage. It achieves this by obliging «all competent authorities»[179], a comprehensive wording encompassing the judiciary, executive, and legislative branches across all levels of government, to collaborate with international human rights organizations and institutions. «Without this provision, the human rights section of the constitution could be criticised as a mere catalogue of internationally recognised human rights and fundamental freedoms»[180].

### II.2. 3 *Annex 1: Additional Human Rights Agreements to be applied in Bosnia and Herzegovina*

*Annex* I to the Bosnia and Herzegovina Constitution incorporates a list of fifteen international accords[181] regarding the safeguarding of human rights and freedoms, as well as international humanitarian law. These Agreements possess direct applicability within Bosnia-Herzegovina, establishing a substantive constitutional framework that holds constitutional stature[182].

### II.2. 4 *Annex 6: Agreement on Human Rights*

*Annex* 6 defines in Chapter One that Bosnia and Herzegovina and the constituent *Entities* are mandated to ensure that all individuals within their jurisdiction enjoy the highest standard of internationally recognised human rights and fundamental freedoms, in accordance with

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[179] Art. II (8), Constitution of Bosnia and Herzegovina. *All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.*

[180] PAJIĆ, Z., *A critical appraisal of human rights provisions of the Dayton Constitution of Bosnia and Herzegovina*, in Human Rights Quarterly, 1998, Vol. 20, Issue 1, pp. 125–138.

[181] *Annex* I to the Constitution of Bosnia and Herzegovina. *1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide. 2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto. 3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto. 4. 1957 Convention on the Nationality of Married Women. 5. 1961 Convention on the Reduction of Statelessness. 6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination. 7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto. 8. 1966 Covenant on Economic, Social and Cultural Rights. 9. 1979 Convention on the Elimination of All Forms of Discrimination against Women. 10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 12. 1989 Convention on the Rights of the Child 13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. 14. 1992 European Charter for Regional or Minority Languages. 15. 1994 Framework Convention for the Protection of National Minorities.*

[182] See ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

the provisions outlined in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, along with its Protocols and several international Agreements listed in the appendix of the *Annex*[183]. Thirteen rights are enumerated in Article I of *Annex* 6 – the same listed in Article II (3) of the Constitution, and these rights are to be upheld without discrimination.

Chapter Two of *Annex* 6 establishes the Commission on Human Rights, composed of the *Office of the Ombudsman* and the *Human Rights Chamber*[184]. This Commission is responsible for investigating reported violations of human rights in accordance with the *European Convention on Human Rights* and its Protocols[185] and alleged instances of discrimination based on any of the various grounds listed in the enjoyment of rights specified in the designated international Agreements[186]. Such alleged violations should involve either Bosnia and Herzegovina or one of its constituent *Entities*, or individuals or entities acting under the authority of Bosnia and Herzegovina or one of its *Entities*.

The Ombudsperson serve a single, non-renewable term lasting for five years and is to be appointed by the Chairman-in-Office of the *Organization for Security and Cooperation in Europe*. The Ombudsman must not hold citizenship in Bosnia and Herzegovina or any neighbouring State[187].

«Alleged or apparent violations of human rights»[188] lodged with the Commission will typically be directed to the Ombudsman, who holds the discretion to investigate such applications. The Ombudsman's priorities lie with cases involving «particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds»[189]. The Ombudsman is granted access to all official documents and can compel any individual to provide pertinent information[190]. Upon concluding an inquiry, the Ombudsman is obliged to issue findings and conclusions. Any party identified by the Ombudsman as breaching human rights must provide a written explanation of how it intends to comply with the conclusions[191].

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183 Art. I, Annex VI *Agreement on Human Rights*.
184 Art. II (1), Annex VI *Agreement on Human Rights*.
185 Art. II (3), Annex VI *Agreement on Human Rights*.
186 Art. II (4), Annex VI *Agreement on Human Rights*.
187 Art. IV (2), Annex VI *Agreement on Human Rights*.
188 *Ibid*.
189 Art. V (3), Annex VI *Agreement on Human Rights*.
190 Art. VI (1), Annex VI *Agreement on Human Rights*.
191 Art. V (4), Annex VI *Agreement on Human Rights*.

Should a person or entity fail to adhere to the Ombudsman's conclusions and recommendations, the report will be elevated to the High Representative. Additionally, the report will be forwarded for further action to the Presidency of the relevant *Entity*. The Ombudsman also has the authority to initiate proceedings before the Chamber based on the report and can participate in any Chamber proceedings[192].

The *Human Rights Chamber* is comprised of fourteen members[193], with four hailing from the *Federation of Bosnia and Herzegovina*, two from *Republika Srpska*, and the residual eight being appointed by the Committee of Ministers of the Council of Europe[194].

Applications are presented before the *Human Rights Chamber* either through the referral by the Ombudsman or directly when specified by the applicant. The Chamber possesses the authority to determine which applications to accept and in what order of priority.

The Chamber can attempt to mediate an amicable resolution, a «friendly settlement»[195]. Typically convening in panels of seven[196], the Chamber receives written pleadings and, if deemed necessary by the Chamber, conducts oral arguments and evidence presentations. Hearings are generally open to the public[197], and applicants are entitled to legal representation[198]. Upon concluding a proceeding, the Chamber issues a decision indicating whether a Party has breached its obligations under the *Agreement on Human Rights*[199], and if so, the necessary corrective measures[200].

A review of a panel decision may be undertaken by the full Chamber, instigated by the Ombudsman or a party to the case[201]. Chamber decisions are made public and distributed to the relevant parties, the High Representative, the Secretary-General of the Council of Europe, and the Organization for Security and Cooperation in Europe[202]. Paragraph 6 of Article XI specifies that Bosnia and Herzegovina and the *Entities* «shall fully implement decisions of the Chamber».

The inclusion of the provision regarding the *Human Rights Commission* in the Dayton Peace Agreement signifies, once more, the participation of international and supranational entities

192 Art. V (7), Annex VI *Agreement on Human Rights*.
193 Art. VII (1), Annex VI *Agreement on Human Rights*.
194 Art. VII (2), Annex VI *Agreement on Human Rights*.
195 Art. IX (1), Annex VI *Agreement on Human Rights*.
196 Art. X (2), Annex VI *Agreement on Human Rights*.
197 Art. X (3), Annex VI *Agreement on Human Rights*.
198 Art. X (4), Annex VI *Agreement on Human Rights*.
199 Art. XII (1), Annex VI *Agreement on Human Rights*.
200 *Ibid*.
201 Art. X (2), Annex VI *Agreement on Human Rights*.
202 Art. XI (5), Annex VI *Agreement on Human Rights*.

in shaping the constitutional framework for protecting fundamental rights in Bosnia and Herzegovina. This externally guided and internationally mandated constitutionalism[203], as seen in the previously discussed enforced Constitution found in *Annex* 4 of the Agreement, continues to rely on essential external support even in the context of safeguarding individual fundamental rights. However, it is evident that «the Commission is an example of the lack of faith in the domestic State's ability to run certain affairs to international satisfaction, thereby creating a need for international personnel to do the job instead»[204].

### II.2. 5 *The obligation to directly enforce the European Convention on Human Rights*

The *internationalist*[205] character of the Bosnian Constitution – meaning the general imprinting of the provisions that confirms the great importance and influence given to international rights and principles – finds its most relevant expression in the already mentioned Article II (2) of the Constitution of Bosnia and Herzegovina.

> The rights and freedoms set forth in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its Protocols *shall apply directly* in Bosnia and Herzegovina. These shall have priority *over all other law*.

First and foremost, it is significant to emphasise that during the negotiations leading to the Dayton Peace Agreement, Bosnia and Herzegovina did not hold membership in the Council of Europe. As a consequence, it was not practicable for Bosnia and Herzegovina to accede to the *European Convention on Human Rights*. However, a deliberate decision was made to endow Bosnia and Herzegovina with a human rights framework aligned with European standards. This was achieved by granting direct applicability to all substantive rights and freedoms enshrined in the *European Convention on Human Rights* within Bosnia and Herzegovina through Article II (2) of the Constitution.

The symbolic significance of this constitutional provision is evidently crucial in conveying a significant imprint, shaping the internationalist nature of the new constitutional framework,

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[203] «Victor Bojkov argued that Bosnia can be described as a "*controlled democracy*", whereby international administrators take decisions after Bosnian politicians failed to agree on necessary reforms». See KEIL, S., *Multinational federalism in Bosnia and Herzegovina*, Routledge, London, 2016 and BOJKOV, V., *Democracy in Bosnia and Herzegovina: Post-1995 Political System and its Functioning*, in Southeast European Politics, 2003, Vol. 4, No. 1, pp. 41–67.

[204] AOLÁIN, F. N., *The fractured soul of the Dayton Peace Agreement: A legal analysis*, in Michigan Journal of International Law, 1998, Vol. 19, Issue 4, pp. 957–1004.

[205] *Ibid.*

and emphasising the importance of fundamental human rights, especially in the aftermath of a violent and tumultuous conflict.

Accordingly, it can be contended that Bosnia and Herzegovina possesses one of the most sophisticated frameworks for human rights and one of the most comprehensive safeguards for fundamental freedoms[206]. This assertion is indeed attributable to the intertwining of Bosnia and Herzegovina's constitutional provisions with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe, which takes precedence in case of any discrepancies[207]. This embedded safeguarding of rights is closely associated with a *resolute commitment to non-discrimination*, as enunciated in Article II (4) of the Bosnian Constitution:

> The enjoyment of the rights and freedoms provided for in this Article or in the international Agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[208].

Article II (2) confers therefore precedence upon the rights and freedoms enshrined in the *European Convention on Human Rights* and its associated Protocols over any other legal provisions. In the event of a conflict between one of these rights and a domestic Bosnian regulation, the former shall take precedence. The formulation *all other laws* encompasses legislation on both the *Entities* and State levels.

An open question arises regarding whether the reference to *all other laws* extends to the Bosnian Constitution itself[209]. The Constitution's intent, as stated in Article X (2) on the *Amendment* provisions, stipulates that «No amendment to this Constitution may eliminate or

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[206] See KEIL, S. *Equality and Inequality in Bosnia and Herzegovina*, in BELSER, E.M., BÄCHLER, T., EGLI, S. and ZÜND, L., *The Principle of Equality in Diverse States Reconciling Autonomy with Equal Rights and Opportunities*, Brill, Leiden, 2021, pp. 338-360.

[207] Beyond the primary position of the *European Convention on Human Rights* in the constitutional framework of Bosnia and Herzegovina, the general observation that emerges is the richness and breadth of the catalogues of rights guaranteed by international Conventions on human rights. Bosnia and Herzegovina adopts a "monist" approach in its Constitution, signifying that norms of international law are immediately effective and applicable in domestic law. It has been noted that this "excessive constitutionalization" of internationally derived rights not only risks trivialising them but also complicates their implementation and the subsequent process of democratic consolidation. See CALAMO SPECCHIA, M., CARLI, M., DI PLINIO, G., TONIATTI, R. (edited by), *I Balcani occidentali: le costituzioni della transizione*, Giappichelli Editore, Torino, 2008.

[208] Art. II (4), Constitution of Bosnia and Herzegovina.

[209] See MEŠKIĆ, Z., & SAMARDŽIĆ, D., *The application of international and EU law in Bosnia and Herzegovina. Judicial application of international law in Southeast Europe*, Springer, Berlin, 2015, pp. 109-134.

diminish any of the rights and freedoms referred to in Article II of this Constitution, or alter the present paragraph». Beyond this restriction, the Parliamentary Assembly retains the authority to amend the Constitution «by a decision including a two-thirds majority of those present and voting in the House of Representatives»[210].

If indeed *all other law* encompasses the Constitution, the logical implication is that any constitutional provisions conflicting with the rights or freedoms outlined in the *European Convention on Human Rights* and its applicable Protocols could be considered void.

Some scholars[211] have advocated for the supremacy of the *European Convention on Human Rights* over the Constitution. This matter was the subject of Case No. U 5/04[212] before the Constitutional Court of Bosnia and Herzegovina. The Court was tasked with determining its authority to assess the compatibility of the Constitution with the *European Convention on Human Rights*. As per Article II (2) of the Constitution of Bosnia and Herzegovina, the *European Court on Human Rights* holds direct applicability. However, the Court constrained its jurisdiction to the interpretation of the Constitution. In an *obiter dictum*, it inferred that the Convention cannot take precedence over the Constitution of Bosnia and Herzegovina since it was brought into force through the Constitution itself. This *obiter dictum* establishes a formal hierarchy that constrains the authority of the Parliament. The Parliament possesses the legitimacy to amend the Constitution to incorporate international law into national legislation[213].

The Bosnian Constitutional Court has reaffirmed the supremacy of the Constitution over the *European Convention on Human Rights*, specifying that the Convention is an international act in force in Bosnia and Herzegovina due to its incorporation into the Constitution, from which alone it derives its constitutional significance.

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[210] Art. X, Constitution of Bosnia and Herzegovina.

[211] See ALFREDSSON, G., GRIMHEDEN, J., RAMCHARAN, B. G., & DE ZAYAS, A. (edited by), *International human rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, Brill Academic Publishers, Leiden, 2009 and YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.

[212] See DICOSOLA, M., *The Constitutional Court of Bosnia and Herzegovina declares the system of ethnic federalism of the Entities inconsistent with the principle of non-discrimination: much ado about nothing?*, in Diritti Comparati, 2015.

[213] See MEŠKIĆ, Z., & SAMARDŽIĆ, D., *The application of international and EU law in Bosnia and Herzegovina. Judicial application of international law in Southeast Europe*, Springer, Berlin, 2015, pp. 109-134.

### II.2. 6 *Considerations on the Constitutionalisation of international principles and the Universality of Human Rights*

The constitutionalisation of the rights derived from the *European Convention on Human Rights* in the Constitution of Bosnia and Herzegovina highlights a crucial aspect of analysis: the concept of the *universality of human rights* in contrast with *cultural relativism*[214]. The forced importation of human rights derived from internationalist principles is indeed one of the means of implementing the concept of the universality of human rights.

In the case of Bosnia and Herzegovina, the internationalisation of rights catalogues stems from the *internationalist* nature of the Constitution itself, which originated and was ratified not through constituent power and political participation but rather through an international peace agreement. Regarding the catalogue of rights, the peculiarity in the case of Bosnia and Herzegovina is that there is no formulation of an internal constitutional catalogue of rights. Instead, the Constitution merely defers to a series of international Conventions, particularly the *European Convention on Human Rights*, thus constituting the substantive regulation of the rights in Bosnia and Herzegovina.

The imposition of the constitutionalisation of the *European Convention on Human Rights* in the context of Bosnia and Herzegovina tends, indeed, to disregard the concept that values and rights are determined at a specific historical moment and within a precise territorial area.

The connection between internationally recognised rights and those specific to a State, within a particular area shaped by specific historical events, should not clash with the unique characteristics of the referring State[215], in this case, Bosnia and Herzegovina. This requirement is crucial for the development of fundamental rights and increased protection. It is compulsory to construct a system of fundamental rights based on a European "lowest common denominator", which is represented by the guarantees of the *European Convention on Human Rights*, but it is mandatory to advocate for a higher level of protection considering the

[214] This dualism, derived from international legal doctrine, constitutional theory, and legal philosophy, refers to the conflict between the thesis of the so-called *universality of human or fundamental rights*, as asserted in Western legal civilisation, and the *cultural relativism* thesis that denies such universality. Instead, it affirms the particularity and specificity of values, needs, and expectations that, in different cultures, are either protected or require protection.

[215] See ORRÙ, R., SCANNELLA, L. G. (edited by), *Limitazioni di sovranità e processi di democratizzazione: atti del convegno dell'Associazione di diritto pubblico comparato ed europeo*, Teramo, Università degli studi, 27-28 giugno 2003, edited by Giappichelli Editore, Torino, 2004.

specificity and uniqueness of the State system[216]. According to the *dynamic interpretation* of the Convention it is essential to take into consideration the evolution of culture and doctrine of the adherent State. Therefore, the Convention must be interpreted in the light of the present-day conditions of a specific State.

Certainly, including the fundamental rights from the *European Convention on Human Rights* in a constitutional text is essential for the development of a unified constitutionalisation process at the European level and for establishing an inseparable link between rights and Constitutions, a key aspect of contemporary constitutionalism. However, "multilevel constitutionalism"[217] must consider the peculiarities of systems from the perspective of pluralism and specific forms of democracy different from Western ones. Therefore, the *European Convention on Human Rights* should have a complementary status compared to the rights elaborated by the State.

The *universality of human rights* can be achieved by acknowledging cultural differences, as the international community's role should not be to impose a single model of constitutionalism and democracy. Universal rights can only emerge if they accept a flexible, non-imposed version. The universality of rights should be based on a narrow set of values and principles, with each universal right finding application in specific contexts, considering different histories and cultures.

Promoting liberal and European-inspired constitutionalism should focus on enhancing the local dimension specific to the referenced context, fostering a genuine affirmation of human rights.

It will further be developed how Bosnia and Herzegovina's ethnic federalism, in conjunction with the *internationalist* nature of its Constitution, especially in light of the profound significance of the *European Convention on Human Rights and Fundamental Freedoms*, has, in the more than two decades since the Dayton Agreement, not contributed to the

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[216] Indeed, in the absence of European or international consensus, the *European Court of Human Rights* itself has leaned towards aligning with national law, adopting a "lowest common denominator" approach, or accommodating variations in state practice through the margin of appreciation doctrine when determining the interpretation of the Convention.

[217] "Multilevel constitutionalism" involves the overlap of multiple hierarchies of norms intersecting with the Constitution of a State. In the case of Bosnia and Herzegovina, this notion pertains to the hierarchy of principles derived from the Constitution, international charters, and the primacy of the *European Convention on Human Rights over all other laws*. The concept of "multilevel constitutionalism" has emerged in reference to the interaction between EU and national sources in fulfilling the traditional tasks of constitutionalism, namely, "establishing, organising, sharing, and limiting powers". See BILANCIA, P., & DE MARCO, E., *La tutela multilivello dei diritti: punti di crisi, problemi aperti, momenti di stabilizzazione*, Giuffrè Editore, Milano, 2004; DELLA CANANEA, G., *Is European constitutionalism really multilevel?*, in Zeitschrift Für Ausländisches Öfentliches Recht Und Völkerrecht, ZAOR, Heidelberg Journal of International Law, 2010, Vol. 70, Issue 2, pp. 283–317.

solidification of constitutional democracy within Bosnia and Herzegovina. Rather, there has been a progressive elucidation of the challenges surrounding the implementation of the principle of non-discrimination within the framework of a consociational democracy characterised by intricate power-sharing arrangements among *Constituent peoples*, the presence of veto powers, and a complex ethnically based territorial electoral system.

Nonetheless, it is of paramount importance to contextualise the principle of non-discrimination historically, within the realms of modern constitutionalism, and in the framework of international and regional human rights law, prior to undertaking a comprehensive analysis of this very principle within the constitutional structure of Bosnia and Herzegovina.

### II.3 *The non-discrimination principle*

The subsequent paragraph aims to provide a concise examination of how the principle of equality, and concomitantly, that of non-discrimination, finds its origins in a historical-philosophical analysis and attains full significance within the context of modern constitutionalism and international and regional human rights law.

#### II.3. 1 *A brief philosophical perspective on Equality*

The concept of equality has traversed the Western thought for over two millennia, influencing various domains of the human thought. Herodotus, in the third book of his *Histories*[218], portrays Otanes as a supporter of equality within the context of the *logos tripolitikòs*[219]. For Otanes, equality, particularly in the form of *isonomy*[220], emerges as the fundamental and essential value, and democracy is depicted as its political embodiment.

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[218] HERODOTUS, *The History Ἱστορίαι*, translated by GREN, D., University of Chicago Press, 1987.

[219] The *logos tripolitikòs*, a debate concerning the three forms of government (monarchy, oligarchy and democracy), is situated in Book III of Herodotus' *Histories*. This passage is embedded in the Persian setting, where two Magi seized the opportunity during Cambyses' Egyptian campaign to orchestrate a coup. Subsequently, they met their demise through the conspiratorial efforts of seven Persian nobles. Among these nobles, namely Otanes, Megabazus, and Darius, contemplation ensues regarding the reconfiguration of Persia's political structure. Their deliberations revolve around advocating for the governance of the many, denoting democracy, the governance of the few, which signifies oligarchy, and the governance of the one, representing monarchy.

[220] During the constitutional debate depicted by Herodotus, in which the three contenders (Otanes, Megazabus and Darius) vied for the succession to the Persian king Cambyses, Otanes, the advocate for democracy, declared «The people in power bear the finest name: isonomy». In this context, the term, often attributed to the Athenian leader Cleisthenes and his reforms, would become a key concept in ancient democracy, signifying the legal and political equality – *isonomy* (derived from *ísos*, "equal", and *nómos*, "law") of all citizens, irrespective of their origin and social standing.

Dynamic or evolutionary interpretation denotes an approach that considers the evolving culture and doctrine of the adherent state.

In Otanes' words,

> democracy [...] firstly, bears the most illustrious name of all, equality before the law (isonomy, precisely). Secondly, it refrains from actions characteristic of a monarch because it appoints magistrates by lot, exercises power subject to oversight, and presents all decrees to the general assembly[221].

Consequently, he advocates for the «abandonment of monarchy and the empowerment of the populace, as all authority resides within the masses»[222].

The concept of equality has evolved through the centuries, discussed within ethics and logic by philosophers like Plato[223] and Aristotle[224] and subsequently approached from a theological perspective, notably by figures like St. Augustine. Nevertheless, tracing the path of equality and its manifold manifestations throughout history and philosophy is an exceedingly complex endeavour.

### II.3. 2 *The formal origin of non-discrimination in the modern constitutionalism*

This research aims to elucidate the principle of equality coupled with the non-discrimination principle, commencing with its formal origins, within the context of modern constitutionalism and the emergence of the liberal State.

It is widely acknowledged that the principle of equality, particularly in its formal sense, emerged in the late 18th century with the establishment of the liberal State. Notably, the momentous 1789 *Déclaration des Droits de l'Homme et du Citoyen* firmly enshrined this principle, asserting that «men are born and remain free and equal in rights»[225] and that «social distinctions can be founded only upon the common good»[226]. This declaration marked the translation of a moral imperative into a concrete legal framework.

Therefore, equality in rights coexists with the capacity to differentiate between individuals and circumstances, provided that such differentiation is rooted in the common good. Hence, in adherence to the principle of equality, it follows that all citizens are bound by the same

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[221] HERODOTUS, *Le storie*, Mondadori, Milano, 1980, p. 80.
[222] *Ibid.*
[223] See PLATO, *Leggi*, translated by FERRARI, F. POLI, S., BUR classici greci e latini, Rizzoli, Milano, 2005.
[224] See ARISTOTELES, *Etica nicomachea*, translated byi MAZZARELLI, C., Bompiani, Milano, 2000.
[225] Art. I. *Déclaration des Droits de l'Homme et du Citoyen*, 1789.
[226] *Ibid.*

general and abstract laws, with any form of discrimination rooted in personal circumstances deemed impermissible.

Throughout the centuries, the discourse on equality has assumed varying degrees of significance, contingent upon the specific constitutional context in which it has been embedded.

The consolidation of equality prominently manifested within the *Minority Treaties*[227] instituted by the League of Nations with newly established States following the First World War. The notion of equality fundamentally constituted the foundational paradigms of the 1926 *Slavery Convention*, albeit remaining implicit[228]. Nevertheless, the subsequent expansion of international and European frameworks and mechanisms to confront discrimination and advance the principle largely materialised in the post-Second World War period[229].

### II.3. 3 *General international and regional human rights provisions on non-discrimination*

Following the Second World War, principles that had historically been confined primarily to the political culture of select Western nations, some of which were actively engaged in colonial enterprises on other continents, expanded and metamorphosed into a shared heritage of humanity. Notably, the principle of non-discrimination ascended to a prominent position among these principles. The first provisions in general international human rights law on non-discrimination are included in the 1945 *Charter of the United Nations* and in the 1948 *Universal Declaration on Human Rights*.

Article I (3) of the 1945 *Charter of the United Nations* expressly states the aim to promote and encourage «respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion». While Article II (1) explicitly affirms that the «Organization is based on the principle of sovereign equality of all its member States» the principle of non-discrimination in the protection of human rights is restated in Articles XIII

[227] See ROSTING, H., *Protection of minorities by the League of Nations*, in American Journal of International Law, 1923, Vol. 17, Issue 4, pp. 641–660.
[228] See JENKS, C. W., *The Equality of Man in International Law*, in Howard Law Journal, Vol. 13, Issue 2, pp. 321-336.
[229] See ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

(1)(b)[230], 55(c), and CXXVI (c)[231]. The United Nations Charter attests to the fundamental importance of «universal respect for and adherence to human rights and fundamental freedoms for all, without distinction as to race, gender, language, or religion» for international peace and security.

The *Charter of the United Nations* has established the legal foundation over the ensuing years for the formulation and ratification of a diverse array of agreements. These encompass both broad-spectrum guarantees against discrimination and specific Treaties addressing its various expressions.

The non-discrimination principle was indeed subsequently deliberately enshrined in Article II of the *Universal Declaration of Human Rights* in 1948:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article II served as a direct expression of the overarching postulate of the equal dignity of all human beings, encapsulated in Article I: «All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood».

A comprehensive list of universal[232] legal provisions guaranteeing the right to equality and the right to non-discrimination includes: the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*[233], the 1951 *Convention relating to the Status of Refugees*[234], the 1960 *Convention*

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230 *The General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*

231 *The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: […] to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world;*

232 International instruments concerning the prevention of discrimination encompass general clauses in Treaties that safeguard a wide array of human rights and liberties, alongside specific Treaties or clauses within them dedicated to addressing discrimination within particular contexts or in relation to specific groups.

233 It can be argued that genocide is the ultimate negation of equality.

234 Art. III, *Convention relating to the Status of Refugees*, 1951.

*against Discrimination in Education*, the 1966 *International Covenant on Civil and Political Rights*[235], the 1954 *Convention relating to the Status of Stateless Persons*[236], the 1966 *International Covenant on Economic, Social and Cultural Rights*[237], the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*[238], the 1979 *Convention on the Elimination of All Forms of Discrimination against Women,* the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*[239], the 1989 *Convention on the Rights of the Child*[240], the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[241]**,** the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[242] and the 2006 *Convention on the Rights of Persons with Disabilities*[243].

Among the Regional provisions at a European level ensuring the right to equality and the right to non-discrimination the most relevant Treaty in this thesis research is the 1950 *European Convention on Human Rights.*

The *European Convention on Human Rights and Fundamental Freedoms* distinguishes itself from other overarching human rights Treaties in that it lacks a distinct standalone prohibition against discrimination. Instead, it incorporates a prohibition that is intrinsically tied to the exercise of the rights and freedoms safeguarded by the Convention and its Protocols. Consequently, claims of discrimination unrelated to the exercise of these rights and freedoms do not fall within the jurisdiction of the *European Court of Human Rights.* Article XIV of the Convention is formulated as follows:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

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235 Art. II (1), art. XIV (1), art. XX (2), art. XXV, art. XXVI, art. XXVII, *International Covenant on Civil and Political Rights,* 1966.
236 Art. III, *Convention relating to the Status of Stateless Persons*, 1954.
237 Art. II (2), art. III, art. VII (a)(i), *International Covenant on Economic, Social and Cultural Rights.* (1966).
238 Art. I (1), art. II, art. III, art. V. *International Convention on the Elimination of All Forms of Racial Discrimination,* 1965.
239 Art. I, art. II. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 1981.
240 Art. II (1), art. II (2), art. XXIX (d), art. XXX, *International Convention on the Elimination of All Forms of Racial Discrimination,* 1989.
241 Art. VII, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 1990.
242 Preamble (6), art. I (1), art. II, art. III, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 1992.
243 Art. V, *Convention on the Rights of Persons with Disabilities*., 2006.

opinion, national or social origin, association with a national minority, property, birth or other status.

The member States of the Council of Europe have undertaken significant measures to address the aforementioned gap in the Convention. On November 4, 2000, they ratified *Protocol No. 12 to the European Convention on Human Rights*, which introduces a comprehensive prohibition of discrimination as follows:

1. The full enjoyment of any rights established by law shall be ensured without discrimination on any grounds, such as sex, race, colour, language, religion, political or other opinion, national or social origin, affiliation with a national minority, property, birth, or other status. 2. No one shall face discrimination by any public authority based on any grounds mentioned in paragraph 1.

In order to analyse the significance that the non-discrimination principle establishes within the relevant legal context of this research, namely within the constitutional domain of Bosnia and Herzegovina, it is necessary to conduct a principled analysis and delineate the definition and boundaries of the term *discrimination* to fully comprehend its legal meaning, its implications and significance.

### II.3. 4 *Definition of Discrimination: a derivation of Equality*

The etymological derivation of the term *discrimination* from Latin, *discerno, discernis, discrevi, discretum, discernere* which signifies the action of *separating* or *distinguishing* indicates that the meaning of *discrimination* is axiologically neutral. In other words, it implies no evaluation and, therefore, it does not have a positive or negative connotation, or it can have either a positive or negative connotation. According to the philosopher Patrick Shin[244], it could be said that the term *discrimination* has a polysemic or polymorphic nature because it assumes different meanings depending on the context in which it is used: it can be direct or indirect, systemic or structural, individual or collective, it can manifest as affirmative action, and it can be multifaceted or intersectional.

The law appears to incorporate both the positive and negative connotations of the term *discrimination* because, in addition to rules prohibiting negative discrimination – *discrimination against*, it contains provisions for positive discrimination – *discrimination in favour of*, known as

[244] SHIN, P. S., *Is there a unitary concept of discrimination?*, in Oxford University Press, Oxford, 2013, pp. 163–181.

affirmative actions[245]. However, since this thesis research explores discrimination as a violation of the principle of equality, and thus as a negative discrimination, this sense of the word will be assumed in the following analysis. It is indeed

> widely accepted that equality and non-discrimination are positive and negative statements of the same principle. In other words, equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality[246].

The previous section indeed addressed the philosophical, historical, and formal development of the non-discrimination principle as an extension of the equality principle within a general legal context. The justification of the non-discrimination principle is consequently linked to the guarantee of equal treatment for all subjects under the law and the realization of equal opportunities. Discrimination therefore is seen as a violation of the principle of equality. Discrimination, however, can also be defined as, for instance, a violation of freedom[247] or a violation of human dignity. However, it is incontestable that the legal systems themselves are oriented towards the elimination of discrimination – understood as arbitrary, irrational, or unreasonable distinctions – and the promotion of equality. While it is true that every legal distinction, in a neutral sense, constitutes "discrimination", as the law, by definition, distinguishes, on the other hand, the legal systems of constitutional States aim to realise formal and substantial equality both as an internal legal value and as a social value.

The uncertainty about the semantic scope of the term *discrimination* is also due to the fact that legal texts do not clearly and unambiguously define it. Reviewing the principal international and European human rights instruments, it is possible to affirm that there is no legal definition of discrimination, except in some cases. The 1948 *Universal Declaration of Human Rights*, in affirming the principle of non-discrimination, it proclaims that all human beings are born free and equal in dignity and rights and recognises that everyone is entitled to all the rights and freedoms set forth in the *Declaration* without distinction[248]. From this formulation, it can be inferred that discrimination involves or may involve the denial or deprivation of the fundamental rights that belong to every human being.

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[245] See CONSIGLIO, E., *Che cosa è la discriminazione?,* Giappichelli Editore, Torino, 2020.
[246] WEIWEI, L., *Equality and Non-Discrimination Under International Human Rights Law*, in Research Notes, March 2004, Norwegian Centre for Human Rights, University of Oslo, Oslo, 2003.
[247] See MOREAU, S., *What is discrimination?,* in Philosophy & Public Affairs, 2010, Vol. 38, No. 2, pp. 143–179.
[248] Art. II, *Universal Declaration of Human Rights*, 1948.

Article XXVI of the *International Covenant on Civil and Political Rights* provides for a generalised prohibition of discrimination:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In light of this provision, it could be argued that there are specific factors or characteristics – *race*, *colour*, *sex*, *language*, *religion*, *political or other opinion*, *national or social origin*, *property*, *birth or other status* – on which discrimination cannot be based, grounded, or justified. Anti-discrimination law labels these features, factors, or traits as *protected characteristics*[249]. The provision in question contains an open clause that enumerates some of the protective factors but does not preclude the addition of others not previously identified. However, the definition of discrimination is still not yet clear.

Therefore, it is necessary to delve into the literal explicitation of the provisions concerning the principle of non-discrimination in other international Treaties. The 1979 *Convention on the Elimination of All Forms of Discrimination against Women*, in its Article I, defines "discrimination against women" as follows:

> […] the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition consents to identify a fundamental element in determining the definition of discrimination. Discrimination consists of a distinction, exclusion, or limitation, that is an unfavourable treatment whose result or purpose is the limitation or denial of the enjoyment or exercise of human rights and fundamental freedoms in all areas, on the basis of equality between women and men. It is, therefore, unfavourable treatment that can be caused by a provision (e.g., a law, rule, regulation, court decision), a criterion (e.g., a classification,

[249] See MALLESON, K., *Equality Law and the protected characteristics*, in The Modern Law Review, 2018, Vol. 81, Issue 4, pp. 598–621.

distinction, judgment), or a practice (e.g., a policy, action, omission) and is reserved for a person because she is a woman – i.e., part of a specific group – compared to a man, a subject who is part of the homologous group, identified by the provision on the basis of a protected characteristic (gender or sex), and in relation to a specific context, also identified by the provision (all areas)[250].

According to different homogeneous secondary law provisions of European Union law[251],

> discrimination occurs when a person is treated less favourably than other people in a comparable situation, only because they belong to or are perceived to belong to a particular group, and where such treatment cannot be objectively and reasonably justified.

Thus, European Union law, as well as the international law provision examined above (Article I, *Convention on the Elimination of All Forms of Discrimination against Women*), provides that the definition of *discrimination* includes the element of comparison.

The *European Convention on Human Rights* does not provide a specific definition of the term *discrimination*. Nonetheless, the *European Court of Human Rights* has strived to establish the parameters of discrimination within the framework of the Convention. The foundational interpretation of discrimination can be traced back to one of the first judgments of the *European Court of Human Rights*, known as the *Belgian Linguistic Case*[252], and this interpretation still constitutes the central understanding of discrimination according to the Convention.

In this case, the applicant contended that, based on the French version of the text – *sans distinction accune* – every differentiation grounded in the listed criteria was prohibited under the Convention. The Court, however, deemed such an interpretation to yield *absurd* results. Instead, it drew upon principles derived from the legal practices of numerous democratic States, emphasising that the principle of equal treatment is breached if differentiation lacks a reasonable and objective justification. Furthermore, the *European Court of Human Rights* clarified that mere pursuit of a legitimate aim was insufficient. According to their judgment, «Article XIV is likewise violated when it is clearly established that there is no reasonable

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[250] See CUSACK, S., & PUSEY, L., *"Cedaw" and the rights to non-discrimination and equality*, in Melbourne Journal of International Law, 2013, Vol. 14, Issue 1, pp. 2-39.

[251] See *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*; *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.*

[252] *Belgian Linguistic Cases*, Judgment of the *European Court of Human Rights*, 1968 Series A 6. Available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57525%22]}

relationship of proportionality between the means employed and the aim sought to be realised»[253].

Therefore, discrimination contrary to Article XVI encompasses differential treatment of comparable situations without reasonable and objective justification. Even if such justification exists, it would still constitute a violation if the consequences of discrimination were disproportionately excessive concerning the objective pursued by the respective State.

In conclusion, taking into consideration the aforementioned few examples and considering that the formulation of the European and international norms regarding discrimination frameworks follow the same legal reasoning and construction, it is possible to formulate a comprehensive definition of *discrimination* structured as follows: discrimination involves a treatment that results in a disadvantage (distinction, exclusion, restriction, or preference) within a particular context (enjoyment of human rights and fundamental freedoms) due to certain characteristics possessed by the discriminated individual (race, colour, language, or national or social origin, religious beliefs and practices). Discrimination in law is favourable or unfavourable treatment that lacks reasonable and sufficient justification.

> The commonality evident in global and European standards, as well as the interpretation of them afforded by international and regional tribunals, provides a clear indication as to what is required of the national law, both as to the scope of formal guarantees and the arrangements needed to give effect to them[254].

The most extensive enumeration of prohibited grounds for discrimination, encompassing both European and global treaties, can be found in the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* and in the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. These Conventions proscribe discrimination based on characteristics such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic, or social origin, nationality, age, economic position, property, marital status, birth, or other status. Numerous other legal instruments incorporate the majority of these criteria, and some include additional grounds

[253] *Belgian Linguistic Cases,* Judgment of the *European Court of Human Rights,* 1968 Series A 6, p. 34. Available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57525%22]}

[254] ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

not covered by this list, most notably disability, health, and association with a national minority.

Nevertheless, the following analysis will focus on the examination of the prohibited ground of ethnic discrimination in the context of political rights in Bosnia and Herzegovina, particularly concerning the equal entitlement to participate in elections and stand for all public positions. Therefore, this analysis aims to scrutinise the specific content and extent of the clauses related to safeguarding against ethnic discrimination. This includes an assessment of the applicability of non-discrimination principles outlined in human rights instruments to situations that could be categorised as ethnic discrimination within Bosnia and Herzegovina.

### II.4 *The non-discrimination principle within the Dayton constitutional provisions*

The Dayton Peace Agreement establishes a robust framework of provisions regarding non-discrimination. This section will be dedicated to listing the legal basis concerning this principle included in the constitutional framework and in the provisions provided by the Dayton Agreement, which have already been previously generally analysed.

First and foremost, the Preamble of the Constitution of Bosnia and Herzegovina, in its first line, highlights the commitment of the constitutional charter to the profound respect for human dignity, liberty, and *equality*.

Secondly, the Constitution of Bosnia and Herzegovina, in Article II (2), ensures the direct applicability of the rights and freedoms enshrined in the *European Convention on Human Rights*, notably Article XIV[255] and *Protocol No. 2*, prioritising them *over all other laws*.

Thirdly, Article II (4) of the Constitution incorporates and imports non-discrimination provisions from an extensive selection of international human rights and humanitarian law instruments. The rights and freedoms delineated in this provision encompass the standards outlined in the *European Convention on Human Rights* and its pertinent Protocols and the rights included in the «international Agreements listed in Annex 1»[256].

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[255] *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

[256] Annex I: Additional Human Rights Agreements to Be Applied in Bosnia and Herzegovina. *1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide. 2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto. 3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto. 4. 1957 Convention on the Nationality of Married Women. 5. 1961 Convention on the Reduction of Statelessness. 6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination. 7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto. 8. 1966 Covenant on Economic, Social and Cultural Rights. 9. 1979 Convention on the Elimination of All Forms of Discrimination against Women. 10. 1984 Convention*

The variation in phrasing between Article II (2) and (4) holds significance in this analysis. Article II (2) articulates that the rights and freedoms embodied in the *European Convention on Human Rights* and its Protocols «*shall apply directly* in Bosnia and Herzegovina». In contrast, Article II (4) states that the rights and freedoms outlined in

> this Article […] or in Annex 1 *shall be secured* to all persons in Bosnia and Herzegovina without discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Considering that ethnic discrimination played a significant role in instigating the conflict, there was a compelling need to establish a non-discrimination framework that exceeded the one stipulated in the *European Convention on Human Rights*. For this reason, it was deemed necessary to add references to numerous other international treaties. An additional rationale for adopting the approach of referencing lists of international instruments in the Constitution, rather than explicitly detailing their contents, was to prevent localised interpretations within Bosnia and Herzegovina. This strategy aimed to ensure that international standards would continue to be governed by international human rights law as construed by international bodies.

Corresponding non-discrimination clauses are also present in various sections of the Dayton Peace Agreement, particularly in *Annex* 6, the *Agreement on Human Rights*. Both the Constitution and the Human Rights Agreement make reference to numerous international human rights instruments.

### II.4. 1 *The interpretation of Article II (4) of the Constitution of Bosnia and Herzegovina*

The matter of interpreting the reference to the right to non-discrimination in Article II (4) has undergone examination by the *Human Rights Chamber* of Bosnia and Herzegovina. The *Human Rights Chamber* adopted a significant expansive interpretation in this regard. In the *Damjanovic* case[257], the Chamber unanimously determined that the execution of the death

*against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 12. 1989 Convention on the Rights of the Child. 13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. 14. 1992 European Charter for Regional or Minority Languages. 15. 1994 Framework Convention for the Protection of National Minorities.*

[257] The applicant, Sretko Damjanovic, was under a death sentence in Sarajevo, convicted in 1993 of genocide and crimes against the civilian population. Allegations include falsified evidence obtained by force. His sister, Ranka Djukic, acting as his representative, claimed that her brother's human rights were violated arrogantly

penalty on the applicant would have constituted a violation by the respondent party – Bosnia and Herzegovina – of its commitments under Article I[258] of *Protocol No. 6* to the *European Convention for the Protection of Human Rights*, thereby contravening its obligations under Article I of *Annex 6*[259] to the *General Framework Agreement for Peace in Bosnia and Herzegovina*.

Moreover, the Chamber unanimously concluded that the implementation of the death penalty on the applicant would have resulted in a breach by the respondent party of its responsibilities under Article II[260] of the *European Convention for the Protection of Human Rights*, leading to a violation of its obligations under Article I of *Annex* 6 to the *General Framework Agreement for Peace in Bosnia and Herzegovina*.

The *Human Rights Chamber* built its reasoning also on the consideration on whether an act permitting the implementation of the death penalty during peacetime aligns with the Constitution of Bosnia and Herzegovina, particularly in light of its nonconformity with the *Second Optional Protocol* to the *International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty.

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during the proceedings. She seeked provisional measures for his release or a stay of execution until a review was completed. Upon receiving the application in December 1996, the *Human Rights Chamber* ordered a stay of execution. The Minister of Justice responded, citing criminal procedure and amnesty laws. The *Human Rights Chamber*, during its session in February 1997, invited the respondent Party to comment on admissibility and merits. No response was received. Analysing the case, the Chamber found that the complaints related to events before December 14, 1995, were beyond its retroactive jurisdiction. However, concerns about the death penalty's execution fell within its purview. The Chamber noted that the respondent did not justify the execution under *Protocol No. 6* or address questions about the Army Court's independence in the applicant's conviction. Serious issues arose under *Protocol No. 6*, the Convention's Article II, and potential Article III violations given the extended period under a death sentence. The respondent Party did not propose an effective remedy, and the pending review's scope remains uncertain. Consequently, the Chamber declares the application admissible without prejudging the merits.

[258] *The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.*

[259] *The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex. These include: 1. The right to life. 2. The right not to be subjected to torture or to inhuman or degrading treatment or punishment. 3. The right not to be held in slavery or servitude or to perform forced or compulsory labor. 4. The rights to liberty and security of person. 5. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. 6. The right to private and family life, home, and correspondence. 7. Freedom of thought, conscience and religion. 8. Freedom of expression. 9. Freedom of peaceful assembly and freedom of association with others. 10. The right to marry and to found a family. 11. The right to property. 12. The right to education. 13. The right to liberty of movement and residence. 14. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in the Annex to this Constitution secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

[260] *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

In the *Human Rights Chamber*'s judgment, it is highlighted that the constitutional provisions do not explicitly stipulate the direct applicability of any human rights Agreements in Bosnia and Herzegovina, except for the *European Convention on Human Rights* and its Protocols. As outlined earlier, Article II (4) – titled *Non-Discrimination* – mandates that the rights and freedoms outlined in other human rights Agreements «*shall be secured* to all persons […] without discrimination». In the *Human Rights Chamber*'s interpretation, «this provision includes both an obligation to secure the rights in question to all persons and an obligation to do so *without discrimination*»[261]. According to the *Human Rights Chamber*'s view, Article II (4) represents one facet of the overarching obligation under Article II (1) of the Constitution «to secure the *highest level of internationally recognised human rights* […] ». This understanding is reaffirmed also by Article I of the *Annex* 6, where the general obligation encompasses securing the rights and freedoms guaranteed by all listed Agreements.

It is then reasonable to infer that Article II (4) of the Constitution of Bosnia and Herzegovina, along with Article I of the *Human Rights Agreement*, ensures protection against discrimination in the exercise of rights outlined in the annexed instruments. Specifically, the rights and freedoms delineated in the *European Convention on Human Rights* and its Protocols take precedence *over all other laws*, while the rights and freedoms specified in Article II (4) – encompassing the right to non-discrimination in exercising the rights in the annexed instruments – seem to hold an equivalent status to other provisions of the Constitution. Nevertheless, the prohibition against eliminating or diminishing any of the human rights provisions of the Constitution, articulated in Article X (2), implies a superior standing for human rights provisions compared to *all other laws*.

### II.5 *Provisions on ethnic differentiation in the Constitution of Bosnia and Herzegovina: a general overview starting from the principle of Constituency of peoples*

Upon examining the restrictions and the interpretations on discrimination within the framework of the Dayton constitutional provisions, the subsequent paragraph involves an analysis of potential conflicts with these prohibitions in the Preamble of the Constitution of Bosnia and Herzegovina.

[261]https://www.law.kuleuven.be/iir/nl/activiteiten/archief/documentatie/OldActivities/DeathPenalty/Damjanovic.pdf

### II.5. 1 *Line 10 of the Preamble: the paradigm of the Constituency of people*

Before delving into an analysis on the subsequent constitutional provisions, it is imperative to examine the concept of *Constituent peoples – Bosniacs, Croats, and Serbs (along with Others), and citizens of Bosnia and Herzegovina* – outlined in the Preamble of the Constitution, as its potential implications appear intricately linked to the idea of specific rights or privileges for particular groups of people. «The ethnic parity between the country's three constituent groups is the organising principle of Bosnia's byzantine political system»[262]. The consideration of such special rights prompted therefore the inclusion of constitutional provisions permitting distinct treatment based on ethnicity.

«Line 10 of the Constitution deals with the relation between ethnocracy and civil society, and thus perhaps the most important key for peace in Bosnia and Herzegovina»[263].

The meaning of the *Constituent Peoples*'s provision appears unclear first and foremost because of the blurred legal status of the *Constituent peoples* and, secondly, because it remains uncertain whether the formulation *along with Others*, in parenthesis, implies that *Others* are also considered *Constituent peoples*. The legal implications of the phrasing of the Preamble are not explicated throughout the Constitution of Bosnia and Herzegovina. Notably, the term *Constituent peoples* is not employed elsewhere in the constitutional provisions.

The term *Constituent peoples* has historical roots in Yugoslav constitutional language, specifically in the 1974 Constitution of the *Socialist Federal Republic of Yugoslavia*[264], where it appeared in the form of the term *nation – narod* distinct from *nationality – narodnosti*[265]. Six Constituent nations were identified in the Socialist Republic: Slovenes, Croats, Serbs, Bosnians, Macedonians, and Montenegrins. Each of these groups had a designated national Republic, except for Bosnia and Herzegovina, which included Bosniacs, Croats, and Serbs as *narod* or *Constituent peoples*. The designation of Muslims as a *nation* in Bosnia and Herzegovina was introduced just before the 1971[266] census to alleviate growing nationalist tensions between Serbs and Croats. *Nationality – narodnosti* referred to groups without national

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[262] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
[263] ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.
[264] See Article I of the Constitution of the *Socialist Federal Republic of Yugoslavia*, 1974.
[265] See HAYDEN, R. M., *Constitutional nationalism in the formerly Yugoslav Republics*, in Slavic Review, 1992, Vol. 51, No. 4, pp. 654–673.
[266] See BRINGA, T., *Nationality categories, national identification and identity formation in "multinational" Bosnia*, in The Anthropology of East Europe Review, 1993, Vol. 11, pp. 80–89.

origins in the six Republics, such as Yugoslavs, Hungarians, Albanians, Roma people, Slovaks, Romanians, Bulgarians, Ruthenians, Vlachs, Turks, Gypsies, and Others[267].

> The salience of these distinctions and the potency of popular fears of relegation to *minority* status were much increased by the 1992-95 war. In the course of massacring and expelling Bosniacs in the Drina valley town of Visegrad in 1992, Milan Lukic (subsequently indicted for war crimes by the International Criminal Tribunal in The Hague) explained to BBC journalist Allan Little that the Serbs' aim was to drive the non-Serb population down below 5 per cent, since a people who fell under that threshold could not be "constituent" according to Yugoslav law[268].

### II.5. 2 *Constituent Peoples case U/58 – Partial Decision III*

In July 2000, the Constitutional Court of Bosnia and Herzegovina issued a landmark decision[269] mandating the two *Entities*, the *Federation of Bosnia and Herzegovina* and *Republika Srpska*, to revise their Constitutions to guarantee the complete equality of the nation's three *Constituent peoples* across the entire territory. Alija Izetbegović, the Bosniac chair of the State Presidency at that time and leader of the *Party for Democratic Action* had initiated in 1998 a case before the Constitutional Court. He contended that fourteen provisions of the *Republika Srpska*'s Constitution and five provisions of the Federation Constitution contravened the Constitution of Bosnia and Herzegovina. Among these, the most contentious and potentially consequential challenge concerned the standing of Bosnia and Herzegovina's *Constituent peoples* in the Constitutions of both *Entities*.

The case presented to the Constitutional Court asserted that the *Federation of Bosnia and Herzegovina*'s Constitution denied equality to Serbs[270], while the Constitution of *Republika Srpska* discriminates against Bosniacs and Croats[271]. The provisions mentioned in the *Entities* Constitutions suggested that the respective constituent groups were considered *Constituent*

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[267] See DIMITRIJEVI, V., *Nationalities and minorities in the Yugoslav Federation*, in Israel Yearbook on Human Rights, 1991, Vol. 21, pp. 71-85.
[268] International Crisis Group, *The "Constituent Peoples" Decision in Bosnia & Herzegovina*, International Crisis Group Balkans Report No. 128, 2002.
[269] See BEGIĆ, Z., & DELIĆ, Z., *Constituency of peoples in the constitutional system of Bosnia and Herzegovina: Chasing fair solutions*, in International Journal of Constitutional Law, 2013, Vol. 11, Issue 2, pp. 447–465.
[270] Specifically, Article I (1) of the Federation Constitution explicitly designated Croats and Bosniacs as *Constituent peoples*, conspicuously omitting any reference to Serbs and their associated rights.
[271] The language under dispute within the *Republika Srpska* Constitution was identified in both its Preamble and Article I. The Preamble explicitly acknowledged the right of the Serb People to self-determination, «respecting their struggle for freedom and State independence», and expressing the intent to align their State with other States of the Serb people. Article I further detailed that *Republika Srpska* is a State specifically for the Serb people and all of its citizens.

*peoples* only within the relevant *Entity*. In other words, it implied that Bosniacs and Croats were recognised as *Constituent peoples* solely within the Federation, while Serbs held that status exclusively in *Republika Srpska*.

> Although the two *Entity* Constitutions and laws take different approaches to equality and participation in government structures at different levels, *de facto*, Serbs and *Others* are under-represented in the Federation, while Croats, Bosniacs and *Others*, are under-represented in *Republika Srpska*. This imbalance of power and lack of equal participation slows down, and in many cases prevents, so-called "minority returns", that is, the return of Bosniacs, Croats and Serbs, in particular, to *Entities*/areas where they would be numerically fewer[272].

The foundational meaning of the term *Constituent peoples* in the Constitution of Bosnia and Herzegovina and its legal implications are firmly rooted in the decision, particularly in part 3, handed down by the Constitutional Court of Bosnia and Herzegovina on June 30 and July 1, 2000[273]. In this ruling, the Constitutional Court deemed several provisions of the Constitution of *Republika Srpska* unconstitutional, including paragraphs 1, 2, 3, and 5 of the Preamble, and the phrase "State of the Serbian people" in Article I. Furthermore, the Court found Article I.1 (1) of the Constitution of the *Federation of Bosnia and Herzegovina* to be unconstitutional[274].

The Constitutional Court, while acknowledging the equivocal language employed in the Preamble of the Constitution of Bosnia and Herzegovina, particularly regarding the status of Bosniacs, Croats, and Serbs as *Constituent peoples*, emphasises that it unambiguously designates all three Peoples as Constituent. It concluded that that «the Constitution of Bosnia and Herzegovina determines that Bosniacs, Croats and Serbs are the architects-framers of the Constitution»[275].

A fundamental constitutional principle has emerged, derived from the Constitutional Court of Bosnia and Herzegovina's *Constituent peoples* Case U/58: the principle of collective equality among *Constituent peoples* entails the obligation of *Entities* to uphold a prohibition on

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[272] Minority Rights Group International, *The status of Constituent peoples and minorities in Bosnia and Herzegovina*. This workshop was part of Minority Rights Group International's Southeast Europe: Diversity and Democracy Partnership Programme, 2003.
[273] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court. Available at https://www.ustavnisud.ba/
[274] See GAMBINI, F., *Una (forse storica) sentenza della Corte costituzionale della Bosnia-Erzegovina*, in Quaderni Costituzionali, 2001, Fascicolo 2, pp. 471–474.
[275] ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.

the discrimination of any of the three *Constituent peoples*, particularly in those *Entities* where they are, in effect, a minority. Hence, the prohibition of discrimination, specified in Article II (3) and IV of the Constitution of Bosnia and Herzegovina, extends beyond individuals to groups.

> The constitutional principle of collective equality of *Constituent peoples* following from the designation of Bosniacs, Croats and Serbs as *Constituent peoples* prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation[276].

This principle further encompasses the prohibition of granting additional rights to members of one or two *Constituent peoples*, ensuring the recognition of special rights for *Constituent peoples* at the State and *Entity* level[277].

### II.5. 3 *Territorial and ethnic representation: a restrictive interpretation*

The reasoning of the Constitutional Court is particularly complex. This complexity arises not only concerning individual and collective equality among the *Constituent peoples* and the prohibition of ethnic segregation in the context of a multi-ethnic State but specifically concerning also the provisions related to the ethnic composition of political organs and institutions. This includes the political representation of groups. As previously examined, the Constitution of Bosnia and Herzegovina abounds in provisions regarding ethnic representation, assuming a factual coincidence between ethnic groups and territory in the composition of State institutions – House of Peoples, Art. IV (1), Presidency, Art. V, Council of Ministers, Art. V (4), Constitutional Court, Art. VI (1)., Central Bank, Art. VII (2).

The Constitutional Court, reading into the provisions on the composition of the Presidency, being composed by three members representing the Constituent ethnic groups, and the House of Peoples, including five members from each group, identifies a criterion of territorial representation.

In this interpretation by the Constitutional Court, there is a normative reference to a principle – the territorial representation – that transcends the textual phrasing of the Constitution, which continues to refer to ethnic representation. The interpretation based on

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[276] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 57.
[277] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 69.

territorial representation by the Constitutional Court acknowledges the right of all the groups to participate equally in the selection of *Entity* representatives in State organs. However, this representation remains ethnic in nature, with the sole exception of the House of Representatives, which is not elected on an ethnic basis but territorially according to Article IV (2) which does not mention ethnic groups.

While admitting this contradiction, the Court acknowledges that constitutional provisions that consider ethnicity as a factor in granting special collective rights of representation and political participation violate the non-discrimination principle. Still, these ethnic-based provisions, due to their constitutional status, must remain in force but they must be subject to restrictive interpretation. Therefore, constitutional provisions related to the ethnic composition of State institutions «cannot constitute a constitutional basis to justify the maintenance of territorial separation of *Constituent peoples* at the *Entity* level»[278].

The principle of non-discrimination, formally respected by the institutional structure of the *Entities* and the State (following the territorial interpretation just discussed and within the limits recognised by the Constitutional Court, given constitutional provisions violating the non-discrimination principle requiring restrictive interpretation), does not imply equality among groups.

### II.5. 4 *The unconstitutionality of the Constitution of Republika Srpska*

Regarding the *Republika Srpska*'s Constitution, provisions that defined *Republika Srpska* as the «State of the Serbian people and all its citizens» (Art. I), designated Serbian as the sole official language (Art. VII), or acknowledged the Orthodox Church as the church of the Serbian people (Art. XXVIII) placed Serbs in a privileged position compared to the other groups. These provisions are considered by the Court to be in contrast with the envisaged nature of the three *Constituent peoples* across the entire territory of Bosnia and Herzegovina.

Furthermore, the Constitutional Court has given its reasoning following the paradigmatical framework of *Annex* 7 to the Dayton Agreement concerning the return of refugees and displaced persons to their homes and the establishment of «political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group»[279].

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[278] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 69.
[279] Art. II, *Annex* 7 to the Dayton Peace Agreement.

The Court did explicitly rely upon the provisions of Articles I and II of Annex 7 for Refugees and Displaced Persons, from which resulted an obligation incumbent upon the *Entities* to protect *Others* as a standard of review[280].

Given that Article I (3), *Annex* 7, stipulates that the *Entities* «eliminate any legislative act or administrative practice that has discriminatory intent or effect», there remains the issue of how to ascertain discriminatory intent or effect. To address this, the Constitutional Court provides an enumeration of evaluation elements of certain interest from a comparative perspective. Drawing on the jurisprudence of the *European Court on Human Rights* and theories on the principle of proportionality, the Court deems discrimination – understood as differential treatment and a violation of the formal equality principle – justified only when it can be traced to a legitimate public purpose, when the instruments employed can achieve the intended effect, when such instruments are necessary, and when deviations from the principle of equality are proportionate to the intensity of the purpose. Apart from violating these criteria, discrimination can stem from administrative practice, the historical genesis of the norm, or the mere inaction of public authorities[281]. Consequently, all public authorities in Bosnia and Herzegovina have a positive obligation to create conditions for non-discrimination[282].

To demonstrate that *Republika Srpska* had not adhered to these obligations, that its public authorities had not eliminated the effects of past discrimination and ethnic cleansing, and therefore its legislation and practices had to be modified in light of this obligation, the Constitutional Court relies on statistical data. A demographic comparison between 1991 and 1997 demonstrated that in the territory of *Republika Srpska* before the war, 54.3 percent were Serbs, 28.77 percent Bosniacs, 9.3 percent Croats, and 7.53 percent *Others* (ethnic minorities – other peoples of the former Yugoslavia, Roma, Romanians, Albanians, etc. – or religious – Jews). At the moment of the Constitutional Court's judgment, there was evidence of an ethnically homogeneous *Entity*: 96.79 percent Serbs, 2.19 percent Bosniacs, 1.02 percent Croats, and 0 percent minorities. While 25 percent of the members of the *Republika Srpska*'s National Assembly were not Serbs, the government was entirely Serbian (twenty-one

[280] MARKO, J., *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, in European Diversity and Autonomy Papers, 2004, Vol. 7.
[281] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 69.
[282] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 80.

members out of twenty-one), as were the police forces (93.7 percent) and the Judiciary (97.6 percent). Regarding the return of refugees, as of January 31, 1999, 88,003 Serbs had returned, compared to only 9,212 Bosniacs and 751 Croats.

All of this demonstrated a clear difference in treatment between refugees and returnees based solely on their ethnicity and thus the presence of a *systematic, continuous, and conscious* discriminatory effect in the conduct of *Republika Srpska*'s public authorities[283]. Article I of the *Republika Srpska*'s Constitution was therefore recognised as unconstitutional insofar as it declared *Republika Srpska* the «State of the Serbian people», violating freedom of movement and residence, property rights, and religious freedom based on ethnicity and religion according to Articles II (3)(5) of the Constitution of Bosnia and Herzegovina.

### II.5. 5 *The unconstitutionality of the Constitution of the Federation of Bosnia and Herzegovina*

The same parameters used in assessing the constitutional legitimacy of Article I of the *Republika Srpska*'s Constitution are applied by the Constitutional Court to the analogous but more detailed provision in the Constitution of the *Federation of Bosnia and Herzegovina*. Article I of the Federation Constitution stipulated that «Bosniacs and Croats as *Constituent peoples*, along with *Others*, and the citizens of Bosnia and Herzegovina constitute the territory of the *Federation of Bosnia and Herzegovina*». Unlike the *Republika Srpska*'s Constitution, a distinction was made between peoples and citizens, and the term *Constituent peoples* is extended to include *Others*.

Furthermore, unlike the *Republika Srpska*'s Constitution, the Federation's Constitution provided for the proportional representation of Bosniacs, Croats, and *Others* in various bodies (Ombudsman, House of Peoples, Presidency of the House of Representatives) while reserving the power of veto over decision-making processes.

Observing that these provisions resulted in preferential treatment for Bosniacs and Croats, the Constitutional Court deems it necessary to apply strict scrutiny concerning the potential violation of both the collective equality principle and the principle of non-discriminatory voting based on ethnicity. Consequently, all provisions reserving a specific public office only for Bosniacs and Croats or recognising veto powers solely to these groups are found to violate the equality principle under Article V of the 1966 *UN Convention on the*

[283] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 69.

*Elimination of All Forms of Racial Discrimination* and the constitutional principle of collective equality among the three *Constituent peoples*.

The violation occurs through mechanisms that exclude political representation based on pre-established ethnic criteria. This is particularly relevant to the infringement of individual political rights, such as the right to a general and equal vote recognised by the *European Convention on Human Rights* – Article III of *Protocol No. 1* – and the case law of the *European Court of Human Rights – Mathieu-Mohin and Clerfayt v. Belgium*, 1987. This jurisprudence is directly applicable in Bosnia and Herzegovina as highlighted in paragraph II.1. It includes the right to participate in the government and have equal access to public offices guaranteed by Article V of the *UN Convention on the Elimination of All Forms of Racial Discrimination.*

Similar to the examination of the discriminatory effect of declaring the Serb people a Constituent people of the *Republika Srpska*, the Constitutional Court, after establishing the violation of the principle of collective equality, also focuses on its discriminatory effect regarding individual rights. This particularly involves the right of refugees to return, a key objective of the structure outlined by the Dayton Agreement. In this case, the Court examines again statistical data before and after the war to demonstrate discriminatory behaviours by the authorities of the *Federation of Bosnia and Herzegovina*. The statistics reveal a clear differentiation in treatment based on ethnic affiliation.

For instance, in 1991, in the territory of the Federation, Bosniacs constituted 52.09 percent of the population, Croats 22.13 percent, Serbs 17.62 percent, and *Others* 8.16 percent. In 1997, Bosniacs had become 72.61 percent, Croats 22.27 percent, Serbs 2.32 percent, and *Others* 2.38 percent. The region transitioned from a diverse area to a binational reality composed of two *Constituent peoples*. Concerning refugee returns, the situation mirrors that of the *Republika Srpska*: as of January 31, 1999, only 19,247 Serbs had returned to their homes in the Federation, compared to 380,165 Bosniacs and 74,849 Croats.

Similar disparities are evident in the Judiciary – 71.72 percent Bosniacs, 23.26 percent Croats, 5 percent Serbs – and the police force – 68.81 percent Bosniacs, 29.89 percent Croats, 1.22 percent Serbs, and 0.08 percent *Others*. Therefore, in the *Federation of Bosnia and Herzegovina*, following the entry into force of the Dayton Agreement, there has been a *systematic, continuous, and deliberate*[284] ethnic-based discrimination aimed at preventing the so-called *minority returns* which, in practice, refer to the return of Serb refugees. This violates the

[284] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 139.

obligation to create political, economic, and social conditions for a voluntary return and peaceful reintegration of refugees and displaced persons according to *Annex* 7 of the Dayton Peace Agreement regarding refugees and displaced persons.

Consequently, Article I (1) of the Federation Constitution, in parts declaring Bosniacs and Croats as «*Constituent peoples* […] along with *Others*» of the Federation and referring to the sovereign rights of the *Constituent peoples*, is declared unconstitutional. This declaration is based not only on the principle of collective equality derived from the text of the Constitution of Bosnia and Herzegovina but also because it contradicts the freedom of movement and residence, the right to property under Article II (3) (5) of the Constitution, and the individual equality principle under Article V.

### II.5. 6 *The Constituent People case: an eloquent illustration of the significance of the non-discrimination principle in an internationalist Constitution*

The principle of non-discrimination assumes a fundamental significance in the Constitutional Court's reasoning. Drawing on the connection between *Annex* 7 of the Dayton Peace Agreement regarding refugees and displaced persons and the obligation to ensure the equality of all citizens under Article II (4) of the Dayton Constitution, the Constitutional Court derives the prohibition of discrimination as follows[285]: the prohibition of *de iure* discrimination, the prohibition of *de facto* discrimination, the prohibition of perpetuating the effects of past *de iure* discrimination[286].

To conclude, the significance of the Constitutional Court's decisions for the purpose of this research is derived from the breadth and complexity of constitutional law issues addressed especially in the realm of the non-discrimination principle. The rulings of the Constitutional Court indeed delve into matters such as the normativity of the Constitution[287],

[285] *Constituent Peoples case*, U/58- III, 30 June and 1 July 2000, Bosnia and Herzegovina Constitutional Court, para. 80.
[286] See ADEMOVIĆ, N., STEINER, CH., MARKO, J. et al., *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung, Berlin, 2010.
[287] On the normativity of the Preamble of the Constitutions, the Constitutional Court fundamentally relies on the international nature of the Dayton Constitution. The Court argues that, as the Constitution is an integral part of an international Agreement, its interpretation should follow the principle enshrined in Article XXXI of the *Vienna Convention on the Law of Treaties*, which states that, for the interpretation of a Treaty, the normativity of a constitution should also extend to «the Preamble and Annexes». Since the general principles of international law (including rules on interpretation) are integral parts of the Constitution of Bosnia and Herzegovina (Article III. 3.b of the Constitution of Bosnia and Herzegovina), the preambles of the State Constitution and those of the *Entities*, containing such principles, are integral parts of constitutional texts, have normative force, and can thus respectively serve as benchmarks and be subject to constitutional scrutiny.

the concept of a Constituent people, the right to self-determination, minority membership, principles of a Federal and multi-national State, and political representation.

Moreover, the analysis of the *Constituent peoples* case U/58 in its third Partial Decision reveals a marked reliance on international sources and comparative approaches as evaluation parameters. This method is undoubtedly a manifestation of the specific Bosnian constitutional context, particularly the constitutional imposition of international law, especially in the realm of human rights, as a superior source to *all other laws*.

Notably, the *internationalist* element is clearly evident due to the prevalence of the *European Convention on Human Rights*, over *all other laws* in the legal framework of Bosnia and Herzegovina.

### II.6 *The application of the Constituency of people's principle in the constitutional system of Bosnia and Herzegovina: the "ethnic sovereignty"*[288]

> The Bosnians never comprised a single nation, nor have they ever comprised three wholly separate nations[289].

Having already addressed in Chapter I the State and government structure of Bosnia and Herzegovina, as well as the specific constitutional provisions regarding State institutions, it will be subsequently outlined the significance of the principle of the Constituency of peoples in the constitutional text.

> Based on this constitutionally recognized ethnic "pillarization" of State and society, State institutions were obviously formed according to the concept of […] proportional ethnic representation and mutual veto powers, foundations that exemplify ethnic power-sharing between the three *Constituent peoples* identified in the Preamble of the Constitution, i.e., Bosniacs, Croats, and Serbs[290].

The Presidency of Bosnia and Herzegovina is collegial and consists of three members belonging to the three *Constituent peoples*: a Serb elected in the *Republika Srpska*, and a Croat

[288] See YEE, S., *The new Constitution of Bosnia and Herzegovina*, in European Journal of International Law, 1996, Vol. 7, Issue 2, pp. 176–192.
[289] See KEIL, S., *Multinational federalism in Bosnia and Herzegovina*, Routledge, London, 2016 and HOARE, M. A., *The history of Bosnia: From the Middle Ages to the Present Day*, Saqi Books, London, 2007.
[290] MARKO, J., *Problems of State- and Nation-Building in post-conflict situations: the case of Bosnia and Herzegovina*, in Vermont Law Review, 2016, Vol. 30, pp. 503-550.

and a Bosniac elected in the *Federation of Bosnia and Herzegovina*[291]. This provision carries several implications. Primarily, it establishes ethnic prerequisites; the three members must belong to the designated ethnic groups. Individuals not belonging to the three *Constituent peoples*, the so-called *Others*, are ineligible to the Presidency in Bosnia and Herzegovina. Secondarily, the provision associates ethnicity with territory: individuals who are not Serbs from *Republika Srpska* cannot vie for the Presidency, and those who are not Bosniacs or Croats in the Federation are excluded from Presidential candidacy. Additionally, citizens in the Federation cannot vote for a Serb presidential candidate, and residents in *Republika Srpska* cannot vote for Croat or Bosniac presidential candidates.

Regarding the Parliamentary Assembly, consisting in two Houses, it should be noted that the House of Peoples has fifteen members, five for each *Constituent people*, two thirds belonging to the *Federation of Bosnia and Herzegovina* and one third to *Republika Srpska*[292]. The criteria for appointment to the House of Peoples stipulate consequently specific ethnic requisites. Individuals categorised as *Others*, referring to those not affiliated with any of the three *Constituent peoples*, are ineligible for selection. Additionally, Bosniacs and Croats registered in *Republika Srpska*, as well as Serbs registered in the *Federation of Bosnia and Herzegovina*, are also excluded from consideration.

Ethnic division remains prevalent for other State organs as well. The Constitutional Court is composed of nine members[293], three of whom are international judges appointed by the President of the *European Court of Human Rights*. The other six are elected from the *Entities*, two in *Republika Srpska* and four in the *Federation of Bosnia and Herzegovina*. While the Constitution does not specify the ethnic affiliation of judges, since its establishment, the Court has consistently had the presence of two Serbs, two Croats, and two Bosniacs, chosen from their respective *Entities*.

Moreover, mutual veto powers play a substantial role in the decision-making processes of both the Presidency and the Parliament. Consequently, Bosniac, Croat, or Serb delegates in the House of Peoples have the authority to deem a proposed decision of the Parliamentary Assembly as «destructive of a vital interest»[294] of their respective *Constituent peoples*. Similarly,

[291] Art. V, Constitution of Bosnia and Herzegovina.
[292] Art. IV (1), Constitution of Bosnia and Herzegovina.
[293] Art. VI, Constitution of Bosnia and Herzegovina
[294] Art. IV (3)(e), Constitution of Bosnia and Herzegovina.

each member of the Presidency holds the right to declare a proposed decision as «destructive of a vital interest of the *Entity* from the territory from which he was elected»[295].

In summary, the principle of Constituency of peoples entails the collective entitlement of three Constituent ethnic groups to representation within governmental involvement, in the decision-making process, and the authority to exercise a veto when the vital national interest of any Constituent people is detrimentally impacted.

### II.6. 1 *Implications of the Constitution's ethnicity provisions: repercussions on Others and on individuals in the "wrong" Entity*

For the purpose of this thesis research, it is crucial to examine the repercussions of these constitutional provisions[296] to assess whether the principle of non-discrimination has been called into question within the context of post-Dayton Bosnia and Herzegovina.

First, it is undisputable that the Constitution of Bosnia and Herzegovina establishes a framework that puts individuals not affiliated with any of the three *Constituent peoples* at a distinct disadvantage. Those categorised as *Others* are barred from running for the Presidency in Bosnia and Herzegovina, and they are also ineligible for selection to the House of Peoples of Bosnia and Herzegovina.

Secondly, the aforementioned constitutional provisions governing the House of Peoples and the Presidency not only prevent *Others* from engaging in the selection process or standing as candidates for these institutions but also exclude individuals belonging to one of the three *Constituent peoples* if they are registered to vote in the *wrong*[297] *Entity*. According to the framework outlined in the Constitution of Bosnia and Herzegovina, a Serb, even if a member of the Federation Parliamentary Assembly, cannot partake in the selection of a Croat or Bosniac representative to the House of Peoples. Similarly, a Croat cannot participate in the selection of a Bosniac, and vice versa. In *Republika Srpska*, however, the Constitutional Court has determined that the Constitution permits non-Serbs to be involved in the selection of Serb representatives to the House of Peoples, provided they are deputies to the National Assembly of *Republika Srpska*.

Concerning the Presidency, only individuals meeting the specified ethnic criteria from the respective *Entity* are eligible to be candidates and participate in Presidential elections. The

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[295] Art. V(2)(d), Constitution of Bosnia and Herzegovina.
[296] See MONTANARI, L., *Le minoranze: il caso della Bosnia ed Erzegovina*, in Diritto Pubblico Comparato ed Europeo online, 2021.
[297] *Ibid.*

Serb member of the Presidency must be elected directly from the *Republika Srpska* territory, while the Bosniac and Croat members must undergo direct elections within the Federation's territory. Consequently, a Serb residing in the Federation is not permitted to vote for a Serb candidate for the Presidency of Bosnia and Herzegovina. Similarly, Bosniacs or Croats residing in *Republika Srpska* are ineligible to vote for any of the Bosnia and Herzegovina presidential candidates from the Federation.

The provisions governing the House of Peoples and the Presidency extend their influence beyond territorial considerations to encompass ethnic classifications. This introduces a systematic interconnection of territorial prerequisites intertwined with ethnic criteria, effectively excluding a significant number of citizens from full participation in regular electoral processes.

### II.6. 2 *The legal and constitutional undefined status of Others and national minorities*

In this context, it is important to define the legal status of the minorities[298] which reflect the (non) entitlement of political rights of the so-called *Others*. The subject of the involvement of national minority members, classified constitutionally as *Others* in the political and public spheres of Bosnia and Herzegovina has consistently raised concerns among international organizations and institutions[299]. As emphasised by numerous international actors, the ethnic power-sharing arrangements tied to the mechanisms of *collective equality* among the three predominant ethnic groups in the State have posed a significant hindrance to the equitable engagement of national minority members and individuals not affiliated with *Constituent peoples* in public affairs.

Notably, the Constitution of Bosnia and Herzegovina does not explicitly define the concept of a *minority*: «The group of *Others* is a catch-all constitutional category that includes everyone who does not belong to a Constituent people – such as persons belonging to

[298] See BANOVIĆ, D., *Collective Rights of Constituent Peoples and National Minorities in the Legal System of Bosnia and Herzegovina*, Faculty of Law, University of Sarajevo, Sarajevo, 2014.

[299] See the 2006 Consideration of reports submitted by States parties under article IX of the Convention. Concluding observations of the *Committee on the Elimination of Racial Discrimination*: Bosnia and Herzegovina by the *UN Committee on the Elimination of Racial Discrimination*; the *2008 Advisory Committee on the Framework Convention for the Protection of National Minorities*. Moreover, the Venice Commission thoroughly foresaw and addressed the judgment of the *European Court of Human Rights* in the *Sejdic and Finci case* in its *Amicus Curiae Brief* No. 483/2008. It highlighted discrepancies in the constitutional system and jurisprudence in Bosnia and Herzegovina compared to the *European Convention on Human Rights* and stressed the necessity of aligning the election of the President of Bosnia and Herzegovina and the House of Peoples with the prohibition of discrimination in Article XIV of the *European Convention on Human Rights* and the general prohibition of discrimination in *Protocol No. 12* of the Convention.

minorities according to Bosnian law»[300]. It is only with the promulgation of the 2003 *Law on the Protection of Rights of Members of National Minorities*[301] that a national minority in Bosnia and Herzegovina has assumed a legal significance. A national minority, according to this Law, consists of citizens who do not belong to any of the three *Constituent peoples*. It includes individuals sharing similar ethnic origin, traditions, customs, religion, language, culture, spirituality, and a closely related history[302]. The State of Bosnia and Herzegovina is obligated to safeguard the status, equality, and rights of specific national minorities, such as Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, Ukrainians, and Others meeting the criteria outlined in Article III, paragraph 1 of the *Law on the Protection of Rights of Members of National Minorities.*

Similar definitions and classifications of members of national minorities can be found in the *Law on the Protection of Members of National Minorities* in the *Federation of Bosnia and Herzegovina* (Article III, paragraph 2) and the *Law on Protection of Persons Belonging to National Minorities* in *Republika Srpska* (Article II, paragraph 2). These uniform definitions result from the necessity to align laws at the State, *Entity*, and cantonal levels with the *Law on the Rights of Members of National Minorities* in Bosnia and Herzegovina.

The mentioned *Law on the Protection of Members of National Minorities* therefore comprehensively regulates the status and rights of members of national minorities. Unfortunately, reliable data on the number and distribution of national minorities are outdated due to the last population census in 1991 and the subsequent war between 1992 and 1995, which led to significant population displacement. It is estimated that approximately 70-75 percent of national minorities became refugees or displaced persons during the war[303], making it challenging to provide accurate figures. Similarly, the number of members of national minorities who returned to their original residences after being refugees or displaced persons lacks reliable data.

### II.6. 3 *Electoral law in Bosnia and Herzegovina and the substantive discrimination of Others*

[300] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
[301] *Law on the Protection of National Minorities Rights*, Official Gazette of Bosnia and Herzegovina, Nos. 24/03 and 76/05.
[302] Article III (1), *Law on the Protection of National Minorities Rights*, Official Gazette of Bosnia and Herzegovina, Nos. 24/03 and 76/05.
[303] See BOSCO, D., *Reintegrating Bosnia: A progress report*, in The Washington Quarterly, 1998, Vol. 21, Issue 2, pp. 65–81.

The rules for elections and the electoral system in Bosnia and Herzegovina have been established through the *Annex* 3 of the Dayton Peace Agreement and the 2001 *Election Act* of Bosnia and Herzegovina.

The application of fundamental electoral principles outlined in *Annex* 3 of the Dayton Peace Agreement was confined to the initial post-war elections for the House of Representatives and the Presidency[304]. Therefore, the Parliamentary Assembly enacted the *Election Act* in 2001, undergoing several subsequent amendments. It is noteworthy to highlight that the enactment of this legislation was a precondition for accession to the Council of Europe.

Concerning elections for the Presidency and the House of Peoples, a key requirement highlighted in the *Election Act* is for candidates to declare an affiliation with a specific *Constituent people* or the category of *Others*[305]. Such an affiliation declaration is a prerequisite for exercising the right to candidacy or appointment to the House of Peoples and the Presidency. Notably, candidates possess the right to abstain from declaring such an affiliation, but the omission is construed as a renunciation of the right to assume the respective elected or appointed position.

The Electoral Law promulgated in 2001 did not, therefore, bring about a substantive change regarding the requirement to declare one's affiliation with one of the *Constituent peoples* in order to exercise the right to run for the House of People and the Presidency of Bosnia and Herzegovina.

The constitutional provisions and the electoral law, therefore, deny access to such public offices to approximately 8 percent of the population represented by the so-called *Others*, based on ethnic and religious affiliation. It is manifest that the electoral law confirms the obligation to indicate affiliation with one of the three *Constituent peoples* for the inclusion in the passive electorate.

The following Chapter aims to place the aforementioned normative conflicts concerning the entitlement of political rights within the framework of the jurisprudence of the *European Court of Human Rights*, providing insightful perspectives on reflection and interpretation

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[304] See ARDUTZKY, S., *The Strasbourg Court on the Dayton Constitution: Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009*, in European Constitutional Law Review, 2010, Vol. 6, No. 2, pp. 309–333.

[305] Integral to grasping the central issue of the provision is indeed the content of Section 4.19 (5-7) of the *Election Act*, which underscores the requirement to declare one's affiliation with one of the *Constituent peoples* or *Others* in order to exercise the right to hold an elective or appointive office for which such declaration is mandated.

concerning the protection of fundamental rights, particularly the right to non-discrimination. The decisions from the Strasbourg Court can be categorised into three distinct scenarios: the cases addressed pertain to the category of *Others*, to the category of individuals located in the *wrong Entity*, and, for the third scenario, violations of the political rights of the category of citizens identifying themselves as *citizens* of Bosnia and Herzegovina without asserting any ethnic affiliation, these are by no means isolated cases, especially given the occurrence of mixed marriages[306].

[306] See MILIKIĆ, S., *Bosnia and Herzegovina*. In *European Integration and its Effects on Minority Protection in South Eastern Europe*, in Nomos Verlagsgesellschaft mbH & Co. KG, 2008, pp. 297-341.

# CHAPTER THREE

# III. The Bosnian cases before the European Court of Human Rights: "Opening Pandora's Box?"

## III.1 *The significance of the judgments of the European Court of Human Rights in the context of the Bosnian "internationalised" constitutionalism: a methodological clarification*

The preceding Chapter addressed the primary issue of the constitutional discrimination against *Others* and their exclusion from political representation, stemming from the emphasis on the *Constituent peoples*'s structure of the State of Bosnia and Herzegovina. This section now shifts focus to the jurisprudence of the *European Court of Human Rights*, particularly within the domain of electoral rights and infringements upon the non-discrimination principle. The following analysis therefore explores the jurisprudential developments and the doctrine of the *European Court of Human Rights*, specifically highlighting efforts to bolster individual rights as a countermeasure to the notion of ethnic democracy in the perspective of the consolidation of constitutional democracy.

The judgments of the *European Court of Human Rights* indeed prompt reflection on democratic and constitutional transitions steered by the international community and organs. These phenomena raise questions about the practicability of *exporting* constitutional models in the context of constitution-building processes and the direct responsibilities of supranational institutions.

With the analysis of judgments from the *European Court of Human Rights*, the present research aims to highlight a specific trend in constitution-building and transition processes within contemporary constitutionalism: the transnational development of law in the dual manifestations of the internationalisation of constitutional law and the constitutionalisation of international law[307]. As stated in the first Chapter, this trajectory in contemporary constitutionalism has gained significant prominence, particularly in light of the increasing impact of international Conventions. This impact is especially notable in the drafting of

[307] See BIFULCO, R., *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, in Rivista Associazione Italiana Costituzionalista, 2014, No. 4 and MAZIAU, N., *Le costituzioni internazionalizzate. Aspetti teorici e tentativi di classificazione*, in Diritto pubblico comparato ed europeo, 2002, pp. 1397-1420.

charters and instruments safeguarding fundamental rights and, in the jurisprudence of the *European Court of Human Rights* related to the Bosnian context, in the enforcement of individual rights in the face of a system structuring collective rights.

From this perspective, the constitution-making process in Bosnia and Herzegovina has undoubtedly been a fertile ground for the development of constitutional jurisprudence at the Strasbourg Court. At the same time in the context of both the internationalisation of constitutional law and the constitutionalisation of international law, Bosnia and Herzegovina has been equipped, having a constitution externally imposed, with protective instruments derived from international law and particularly from the juridical prevalence of the *European Convention on Human Rights over all other laws*.

Essentially, it has involved constructing an institutional framework to implant values and rights characteristic of European constitutionalism.

It can be asserted that, in the constitutional transition process of Bosnia and Herzegovina, the consolidation of fundamental rights, particularly those of minorities, is occurring on multiple levels and, in this context, the jurisprudence of the *European Court of Human Rights* has gained a fundamental importance.

The constitution-making process during the Dayton Agreements marked the transition from a socialist to a democratic State, confirming Bosnia and Herzegovina's sovereignty, organising the constitutional order of the State, and structuring a comprehensive catalogue of fundamental rights with an internationalist and European imprint. However, the intervention of the *European Court of Human Rights* signifies the attempt to fully integrate Bosnia and Herzegovina into the European system of values and institutions.

Protection through the *European Convention on Human Rights* is thus realised, specifically in the case of Bosnia and Herzegovina, concerning the need to neutralise the infringement of the rights and prerogatives of the three *Constituent peoples* over citizens of other ethnic affiliation or over those who do not identify with any of the three *Constituent peoples*.

The realisation of the process of constitutional adjustment and, simultaneously, constitutional development in Bosnia and Herzegovina, is to be sought precisely in the jurisprudence of the *European Court of Human Rights*, which has addressed the crucial relevance of the coexistence of diverse minorities and ethnic groups in the Bosnian legal system. In the profound interrelation between constitutional democracy and fundamental rights, it can be asserted that the protection of minorities is one of the most significant challenges for the resilience of the legal system of Bosnia and Herzegovina. In this sense, the principle of non-

discrimination is paradigmatic in defining this process of adjustment, consolidation, or constitutional transition.

It is essential to highlight that the following Chapter does not delve into the description and analysis of the role, the impact and case law of the Constitutional Court of Bosnia and Herzegovina regarding electoral rights and non-discrimination. In this research, the methodological approach is confined to the examination of the jurisprudence of the *European Court of Human Rights* due to its prominence in the context of an analysis centred on the *heteronomous* constitutional building of Bosnia and Herzegovina. This *hetero-imposed* constitutional building serves as a fundamental interpretative key in contextualising the distinctive mechanism for safeguarding constitutional rights derived from both European and international sources. Indeed,

> the attempt to alleviate the political-institutional dynamics of Bosnia and Herzegovina from ethnic pressures resulted in an *experiment by the foreign constituent to internationalise Bosnian constitutionalism*, entailing a contamination of domestic law with international law[308].

This methodological premise consents to postulate that the jurisprudence of the *European Court of Human Rights* holds primary significance within the scope of an examination focused on this "new" constitutionalism.

### III.1. 1 *The Strasbourg Court and the evolution of the non-discrimination jurisprudence: the prelude to the Sejdić and Finci v. Bosnia and Herzegovina judgment*

The following section delineates the notable advancements in the realm of non-discrimination in the jurisprudence and doctrine of the *European Court of Human Rights*, spanning from the initial *Belgian Linguistic cases*[309] to the emergence of the first cases addressing discrimination in Bosnia and Herzegovina, specifically the 2009 *Sejdić and Finci* case. It can be posited that there has been a discernible evolution toward a more robust approach to discrimination and minority rights by the Council of Europe, the *European Court of Human Rights*[310] and other bodies. This evolution is accompanied by academic, juridical and political specific interpretations and perspectives of the conflict in Bosnia and Herzegovina,

[308] ROSSI, F., *Gruppi e minoranze nelle transizioni costituzionali degli ordinamenti della ex Jugoslavia: un'analisi comparata dei modelli a partire dal caso della Bosnia ed Erzegovina*, Sapienza Università di Roma, 2023.
[309] See n. 252.
[310] See MCCRUDDEN, C. & O'LEARY, B., *Courts and consociations: Human Rights versus Power-Sharing*, in Oxford University Press, Oxford, 2013.

concomitant with Bosnia and Herzegovina's subsequent commitments to both the Council of Europe and the European Union.

First and foremost, it is crucial to specify that the purpose of the Council of Europe's provisions on non-discrimination, originally limited to Article XIV of the *European Convention on Human Rights*, underwent a decisive evolution concurrently with the adoption of *Protocol No. 12* in 2000.

> The minority-friendly case law unfolded against the backdrop of an evolutive interpretation of Article XIV, widely known as the Convention's "Cinderella provision". Article XIV has no autonomous standing and can be invoked only if it falls within the ambit of another Convention provision. […] just as Cinderella finally made it to the ball against the will of her stepmother and without being noticed by the guests, the Court increasingly inserted Article XIV into its case law by relaxing the "ambit requirement". In addition, Article XIV serves as a standard for interpreting *Protocol No. 12*, the Convention's free-standing equality right[311].

This *Protocol* enhanced the scope of Article XIV of the *European Convention on Human Rights*, extending the ambit of non-discrimination not only to the provisions highlighted by the *European Convention on Human Rights* but also to every individual right stipulated by the laws of a State adhering to the Convention. The *Protocol* came into effect on April 1, 2005, and this development undoubtedly spurred the applicants Dervo Sejdić and Jacob Finci to bring their case before the *European Court of Human Rights*, the first important application before the Strasbourg Court regarding the non-discrimination in Bosnia and Herzegovina. The specific category of right invoked by the applicants, namely, the right to stand for election to the Presidency of Bosnia and Herzegovina, was indeed encompassed by the new extension of the right to non-discrimination guaranteed by *Protocol No. 12*.

Furthermore, the protective purpose of non-discrimination has undergone significant developments also in the interpretation of discrimination under Article III of the *European Convention of Human Rights*, concerning the prohibition of torture, inhuman and degrading treatment, and punishment[312]. This extensive approach was adopted, for instance, in the

[311] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
[312] The Court had affirmed that, under specific circumstances, Article III could be violated by acts of discrimination.

notably impactful cases of *Abdulaziz v. United Kingdom*[313] and *Smith and Grady v. United Kingdom*[314].

Another significant evolution in the jurisprudence of the Strasbourg Court pertains to the protection of the right to stand for election, specifically relevant in the Bosnian context, as provided by Article III of *Protocol No. 1* of the *European Convention on Human Rights*. The pioneering case in this regard was the *Mathieu-Mohin* case[315]. Subsequently, in the *Zdanoka v. Latvia*[316] case, the Court reiterated the importance of urging States adhering to the *European Convention on Human Rights* to review their legislation to safeguard electoral rights. The Court

[313] In this case, the *European Court of Human Rights* determined that the 1980 United Kingdom Immigration Rules contravened Articles XIV and VIII of the *European Convention on Human Rights*. The rules were deemed discriminatory based on gender against three female applicants residing in United Kingdom who sought to be reunited with their spouses. However, while acknowledging that racial discrimination could constitute a violation of Article III, the Court determined that no such violation occurred in this instance. This decision was based on the assertion that the differential treatment, allegedly rooted in race, did not indicate any contempt or lack of respect for the personality of the applicants and was not intended to, nor did it, humiliate or debase them. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57416%22]}

[314] It was a landmark ruling by the *European Court of Human Rights* concluded unanimously that the investigation into and subsequent discharge of individuals from the United Kingdom Armed Forces on the grounds of their homosexuality constituted a violation of their right to a private life, as enshrined in Article VIII of the *European Convention on Human Rights*. This decision, generating considerable controversy at the time, prompted the United Kingdom to adopt a revised Armed Forces Code of Social Conduct in January 2000, eliminating discrimination based on sexual orientation.
In this instance, the Court demonstrated a willingness to expand the scope of Article III to proscribe discrimination based on sexual orientation. Nevertheless, the Court maintained that such discrimination must reach a minimum threshold of severity, a determination that considers all circumstances of the case, including the duration of the treatment and its physical or mental effects. The judgment is available at https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-59023%22]}

[315] The case of *Mathieu-Mohin and Clerfayt v. Belgium* focused on electoral rights, particularly the right to free elections and the right to stand for parliament. The appellants contended that the electoral system in Belgium, specifically in the Halle-Vilvoorde district, violated the rights of French-speaking voters. The Court's judgment addressed the implications of these electoral rights and the specific restrictions imposed on French-speaking voters in the Halle-Vilvoorde district, in connection with Article III of *Protocol No. 1* of the *European Convention on Human Rights*. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57536%22]}
See GRAZIADEI, S., *Democracy v. human rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, vol. 12, Issue 1, pp. 54-84.

[316] The case originated from the appeal of a Latvian citizen, Ms. Tatjana Ždanoka, who, as a member of the European Parliament, approached the Court challenging the judgments of the Regional Court of Riga and the Civil Division of the Latvian Supreme Court. She contended that these decisions, confirming her disqualification from the 1997 Riga municipal elections and the 1998 Latvian parliamentary constituted a violation of Article III of *Protocol No. 1* regarding the right to free elections, as well as Articles X and XI of the Convention pertaining to freedom of expression and freedom of assembly and association. The judicial measures taken by the Latvian authorities were instituted due to Ms. Ždanoka's affiliation with the Communist Party of Latvia. The judgment is available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61827%22]}
See HOOGERS, H.G., *Ždanoka v. Latvia – European Court of Human Rights: The boundaries of the right to be elected under Article III of the first Protocol to the European Convention on Human Rights. Judgment of 16 March 2006, Ždanoka v. Latvia, Application No. 58278/00*, in European Constitutional Law Review, 2007, vol. 3, Issue 2, pp. 307-323.

had considered a broad *margin of appreciation*[317], taking into account the diversity of provisions and differences among the electoral systems of the various States party to the Convention.

The jurisprudence was later refined by narrowing the margin of appreciation when the right to vote is effectively restricted on ethnic grounds. The most emblematic case in this regard is *Aziz v. Cyprus*[318].

Another development of particular interest in the present research concerns the significant influence of other organs instituted by the Council of Europe distinct from the *European Court of Human Rights*. Consociational systems similar to the Bosnian one such as those of Cyprus, Belgium, South Tyrol and Northern Ireland have indeed been the subject of scrutiny by the *Advisory Committee* overseeing the implementation of the Council of Europe *Framework Convention for the Protection of National Minorities* and by the *European Commission for Democracy through Law*, commonly known as the *Venice Commission*.

Regarding the status of *Others* compared to the status of the *Constituent peoples* in the right to stand for elections in Bosnia and Herzegovina, the *Advisory Committee* had issued an opinion in 2008[319], emphasising that:

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[317] The *margin of appreciation* in the context of the *European Court of Human Rights* represents an indication of the specificity of Court decisions. It must be considered within the specific circumstances of each case. The concept allows a State to select the most suitable measures to safeguard a right, tailored to the individual circumstances of each member State.
While the application of the *margin of appreciation* may be flexible, it is nevertheless binding. Notably, the *margin of appreciation* is not explicitly outlined in the text of the *European Convention on Human Rights*; rather, it has been acknowledged and endorsed by the Court's jurisprudence, legal doctrine, and various academic analyses dedicated to its understanding. The *margin of appreciation* is typically invoked in situations where there is a potential conflict between individual rights and the national public interest. See HUTCHINSON, M. R., *The margin of appreciation doctrine in the European Court of Human Rights*, in International & Comparative Law Quarterly, 1999, Vol. 48, No. 3, pp. 638-650.

[318] The case, originating from an application against the Republic of Cyprus, involved a Cypriot national, Mr Ibrahim Aziz, who complained under Article III of *Protocol No. 1*, alone or in conjunction with Article XIV of the Convention, about being prevented from exercising his voting rights based on national origin and association with a national minority. Born in 1938 and residing in Nicosia, Mr Aziz sought registration on the electoral roll for the parliamentary election of 27 May 2001. However, his application was denied by the Ministry of the Interior, citing constitutional provisions that excluded members of the Turkish-Cypriot community from the Greek-Cypriot electoral roll.
The *European Court of Human Rights* found a violation of Article III of *Protocol No. 1*, emphasising the impairment of the applicant's right to vote's essence due to the prolonged unresolved situation in Cyprus. Additionally, a violation of Article XIV in conjunction with Article III of *Protocol No. 1* was established, as the applicant, a Turkish Cypriot, suffered discrimination in voting rights. The judgment is available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61834%22]}

[319] Advisory Committee on the *Framework Convention for the Protection of National Minorities*. Second Opinion on Bosnia and Herzegovina, adopted on 9 October 2008. Available at https://rm.coe.int/168008c15a

> The legitimate objective of ensuring fair and balanced representation of the *Constituent peoples* should not result in excluding from political representation those who do not belong to the *Constituent peoples*, and in particular, persons belonging to national minorities.

Similarly, the Venice Commission was previously consulted by the *Legal Affairs Committee of the Parliamentary Assembly* of the Council of Europe in 2001, which had requested an opinion regarding the aforementioned *Election Act* discussed in the final part of Chapter Two. The opinion of the Venice Commission highlighted the incompatibility of the Election Act with international standards[320]. In 2005, the Venice Commission further solidified its stance, emphasising the need to reassess the constitutional system concerning provisions for the election of the Presidency and the House of Peoples: «Further constitutional reforms, changing the emphasis from a State based on the equality of three *Constituent peoples* to a State based on the equality of citizens, remain desirable in the medium and long term»[321].

In conclusion, these arguments collectively indicate that, prior to the 2009 *Sejdić and Finci* case, there has been a gradual implementation and an escalating discourse concerning the non-discrimination sphere within the Council of Europe. To summarise, the observed phenomena encompass the Council of Europe and the *European Court of Human Rights*'s transition towards a more solid approach to discrimination and the defence of minorities, a shift in the interpretation of the right to political participation by the *European Court of Human Rights* and the incorporation of liberal criticisms of consociations by various human rights organizations, notably the Venice Commission.

### III.2 *An examination of the Sejdić and Finci v. Bosnia and Herzegovina ruling*

On December 22, 2009, the *European Court of Human Rights* rendered its ruling in the *Sejdić and Finci v. Bosnia and Herzegovina* case. The judgment found specific provisions of the Constitution of Bosnia and Herzegovina (Article IV and Article V) to be in violation of the *European Convention on Human Rights*, as they imposed ethnically discriminatory requirements for certain political positions. The Court's willingness to address ethnic discrimination within

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320 *Opinion on the Electoral Law of Bosnia and Herzegovina* adopted by the Venice Commission at its 48th Plenary Meeting in Venice, 19-20 October 2001.
Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)021-e
See DE TORRES, A. Ú., *Between soft and hard law standards: The contribution of the Venice Commission in the electoral field*, in DICKSON, B. and HARDMAN, H. *Electoral Rights in Europe – Advances and Challenges*, Routledge, London, 2017, pp. 30-48.

321 *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative* adopted by the Venice Commission at its 62nd plenary session in Venice, 11-12 March 2005. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e

the constitutional framework of a post-conflict State, such as Bosnia and Herzegovina, marked a pioneering development in Europe's human rights landscape and in the debate concerning regarding constitutional theory[322].

The legal significance of the ruling is threefold[323]: firstly, it represented the inaugural application by the Court of the general prohibition of discrimination outlined in Article I of *Protocol No. 12* to the *European Convention on Human Rights*; secondly, it delved into intricate political considerations related to peace and stability while determining the compatibility with the *European Convention on Human Rights*; and thirdly, it confronted the delicate issue of the *European Convention on Human Right's* alignment with a member State's Constitution, an issue that has seldom been addressed by the Court.

Lastly, it is crucial to note that the *Sejdić and Finci v. Bosnia and Herzegovina* case has been the first among numerous cases addressing the infringement of the non-discrimination principle regarding passive electoral rights in Bosnia and Herzegovina[324] to reach the *European Court of Human Rights*, reopening the discussion on the Dayton Peace Agreement and the constitutional framework of Bosnia and Herzegovina.

### III.2. 1 *The applicants and the claim before the European Court of Human Rights*

The applicants, Dervo Sejdić, a member of the Roma minority, and Jacob Finci, of Jewish ethnicity, are Bosnian citizens who have held significant public positions[325]. The former, born in 1956, graduated from a police academy in socialist Yugoslavia, served as a member of the special police in Sarajevo during the city's siege[326], and later became an activist for Romani rights, symbolising the fight against discrimination in Bosnia and Herzegovina. Sejdić served

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322 «The Bosnian cases are significant because they raise some of the difficult questions that divide constitutional theory. As Ran Hirschl put it, both the *Lautsi* case (concerning crucifixes in public schools in Italy) and the Bosnian cases are some of the best examples to illustrate "the tension between cosmopolitan theory and the local traditions in comparative constitutional jurisprudence" ». GRAZIADEI, S., *The Strasbourg Court and Challenges to the Constitutional Architecture of Post-Conflict Federalism in Bosnia-Herzegovina and Beyond*, in Review of Central and East European Law, 2017, Vol. 42, pp. 169-2014.

323 See TRAN, C., *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdić and Finci v. Bosnia and Herzegovina*, in Human Rights Brief, 2011, Vol. 18, No. 2, pp. 3-8.

324 «Widely known, but nonetheless worth recalling, is that the Convention neither imposes a specific electoral system nor demands that all votes have equal weight. States enjoy a larger *margin of appreciation* in limiting passive voting rights compared to a narrower margin for restricting active voting rights». GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.

325 Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § I. 49 ILM 284. Strasbourg, 22 December 2009.

326 For a comprehensive overview of the history of the siege of Sarajevo, see MORRISON, K., & LOWE, P., *Reporting the siege of Sarajevo*, Bloomsbury Publishing, London, 2021.

as an observer of the Romani community's conditions in Bosnia and Herzegovina on behalf of the *Organization for Security and Co-operation in Europe* Mission. In July 2006, Mr. Sejdić filed a complaint with the Strasbourg Court. The latter, Jakob Finci, born in 1948, is a Sephardic Jew from Sarajevo, a former President of the *Inter-religious Council of Bosnia and Herzegovina*, and an ambassador for his country in Switzerland. He also filed a complaint with the same grounds two weeks later[327].

«The applicants originally brought their cases to the *European Court of Human Rights* individually but, as both cases were concerned with the same discriminatory provisions, the Court subsequently decided to consider them together»[328].

As they did not profess allegiance to any of the *Constituent peoples*[329], they were disqualified from running for positions in the House of Peoples, according to Article IV of the Constitution of Bosnia and Herzegovina, and for the Presidency, according to Article V.

The complaints raised by the applicants pertained to the alleged violation of the combined provisions of Article XIV of the *European Convention on Human Rights* – highlighting the general prohibition of discrimination – and Article III of *Protocol No. 1* of the *European Convention on Human Rights* – providing the right to free elections, as well as Article I of *Protocol No. 12* of the Convention – guaranteeing the prohibition of discrimination in the enjoyment of rights provided by law.

### III.2. 2 *«Relevant international and domestic law and practice»: the second section of the Court's decision*

The subsequent analysis does not specifically delve into all the relevant international and domestic law and practice cited by the judgment of the *European Convention on Human Rights*. This omission is deliberate, as the examination of the Strasbourg Court' judgment comprehensively encompasses all contested or pertinent provisions outlined in the initial Chapter, which are subsequently expounded upon in the second Chapter.

In summary, this section of the decision meticulously scrutinises the regulations and the doctrine pertaining to the Dayton Peace Agreement, notably *Annex* 4 (the Constitution of

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[327] See BENEDETTI, E., *Il principio di "condizionalità" nei processi di allargamento dell'UE: la Bosnia-Erzegovina ed il caso Sejdic-Finci*, in Ordine internazionale e diritti umani, 2014, pp. 435-453.

[328] CLARIDGE, L., *Discrimination and political participation in Bosnia and Herzegovina Sejdic and Finci v. Bosnia and Herzegovina*, Minority Rights Group International, London, January 2010.

[329] In the second paragraph of the judgement, it is underlined that within the former Yugoslavia, an individual's ethnic identity was exclusively determined by the individual themselves, utilizing a self-classification system. Consequently, there were no stipulated objective criteria, such as language proficiency or adherence to a particular religion. Additionally, there existed no prerequisite for acknowledgment by other members of the respective ethnic group. The Constitution, notably, lacks provisions addressing the delineation of ethnic identity, presuming that the conventional self-classification method was satisfactory.

Bosnia and Herzegovina), with a specific focus on its Articles IV and V[330]. Additionally, it underscores the significance of Article II (2)[331], *Annex* 10 (the Agreement on Civilian Implementation), the 2001 *Election Act*, the *International Convention on the Eliminati on of All Forms of Racial Discrimination*[332], the *International Covenant on Civil and Political Rights*[333] and a report of the *Organisation for Security and Cooperation in Europe* concerning the general elections held in 2006[334].

[330] It is noteworthy to underline that the Court's decision highlights that the contested constitutional provisions about the exclusion of *Others* in the realm of passive electoral rights were not encompassed within the *Agreed Basic Principles*, which served as the fundamental framework for the subsequent Dayton Peace Agreement. Allegedly, the international mediators reluctantly endorsed these provisions at a subsequent stage due to persistent and forceful demands from certain parties involved in the conflict.

[331] The Court clarifies that Article II (2) of the Constitution was incorporated during the Dayton negotiations because «Fully aware that these arrangements regarding the House of Peoples and the Presidency were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide *for their possible phasing out*». Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 3. 49 ILM 284. Strasbourg, 22 December 2009.

Moreover, «The complex relationship between domestic sources and international sources has over the years become increasingly entrenched, particularly concerning the issue of ethnic discrimination, around which the entire political and institutional system of Bosnia has, in fact, been constructed, contravening all international norms referenced in the Constitution itself», see ROSSI, F., *Gruppi e minoranze nelle transizioni costituzionali degli ordinamenti della ex Jugoslavia: un'analisi comparata dei modelli a partire dal caso della Bosnia ed Erzegovina*, Sapienza Università di Roma, 2023.

[332] The Court mentions the relevant part of its Article I: «In this Convention, the term *racial discrimination* shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life».

It further cites the relevant part of Article V of the Convention: «In compliance with the fundamental obligations laid down in article II of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: […] (c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service; […]».

[333] The relevant provision mentioned by the Court are: Article II (1) reading as follows «Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status»; Article XXV, «Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article II and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country»; Article XXVI, «All persons are equal before the law and are entitled *without any discrimination* to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status».

[334] *International Election Observation Mission Bosnia and Herzegovina* – General Elections, 1 October 2006. Statement of preliminary findings and conclusions. Available at https://www.oscepa.org/en/documents/election-observation/election-observation-statements/bosnia/statements-6/1397-2006-general/file

Nevertheless, it is crucial to accurately report the relevant laws pertaining to the institutional and constitutional framework of Bosnia and Herzegovina issued by the Council of Europe and the European Union. This is essential to delineate the comprehensive context of the Court's judgment and a broader spectrum of opinions on the distortions of the Bosnian constitutional arrangement.

The Court indeed further highlights that Bosnia and Herzegovina, upon joining the Council of Europe in 2002, committed to reviewing and revising its electoral legislation within a year, with the assistance of the Venice Commission – the *European Commission for Democracy through Law*. Moreover, the Parliamentary Assembly of the Council of Europe had consistently emphasised this obligation to Bosnia and Herzegovina, urging the adoption of a new Constitution by October 2010 and advocating for a transition from ethnic to civic-based representation.

In this section it is reported that the Venice Commission, in its 2005 Opinion on the constitutional situation in Bosnia and Herzegovina[335], highlighted several equivocal constitutional issues, the majority of which pertain to the aim to protect the interests of *Constituent peoples* but hinder effective governance. According to the Venice Commission, the constitutional system, with mechanisms such as the vital interest veto, the bicameral system, and the collective Presidency on an ethnic basis, makes effective government difficult and matures the potential *discrimination* and, consequently, the need to overcome the dead-lock breaking mechanism. In this regard, the considerations put forth by Christopher McCrudden and Brendan O'Leary are reported:

> The specific options for change identified by the Venice Commission were complex and wide-ranging and a full discussion is beyond the bounds of this book. In essence, regarding the House of Peoples, the Commission identified three options: to abolish it and move the vital interests veto to the House of Representatives: to include representatives of the *Others* in the House of Peoples; or to retain the present composition, but restrict its powers solely to the exercise of the vital interests' veto. Regarding the Presidency, three options again were identified: to abolish the three-headed Presidency and have one President only; to remove the ethnic qualification for

[335] *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative* adopted by the Venice Commission at its 62nd plenary session in Venice, 11-12 March 2005. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e

standing as President; or to transfer most powers of the President to the House of Representatives and have an individual President elected by the Parliamentary Assembly[336].

Lastly, the *European Court of Human Rights* mentions that in 2008 Bosnia and Herzegovina entered into a *Stabilization and Association Agreement* (SAA) with the European Union, signalling its commitment to addressing the priorities outlined in the European Partnership. The crucial objective highlighted in 2008, anticipated to be fulfilled within one to two years, «was the revision of electoral legislation pertaining to members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure complete alignment with the *European Convention on Human Rights* and the post-accession commitments of the Council of Europe»[337].

III.2. 3 *The judgment of the Grand Chamber on the merits: an in-depth analysis*

Continuing with the examination of the reasoning of the Grand Chamber, in the *Admissibility* section of the judgment, the Court acknowledges that, although the respondent State, Bosnia and Herzegovina, did not raise any objection regarding the Court's competence *ratione personae*[338], this matter necessitates consideration *ex officio* by the *European Court of Human Rights*.

Upon evaluating whether the applicants may assert themselves as "victims" and determining whether the respondent State can be held accountable, the Court deems the applicants' principal complaints admissible.

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[336] MCCRUDDEN, C. & O'LEARY, B., *Courts and consociations: Human Rights versus Power-Sharing*, in Oxford University Press, Oxford, 2013.

[337] *Annex* of Council Decision 2008/211/EC, 18 February 2008, outlining the principles, priorities, and conditions of the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, Official Journal of the European Union L 80/21, 2008. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008D0211

[338] The competence *ratione personae* requires, firstly, that the respondent be a State and not an individual and/or legal entity. Subsequently, it is ascertained that the State being accused of a violation is among those obligated to comply with the *European Convention on Human Rights*: specifically, it is verified that the respondent State has ratified the Convention, becoming a party to it.
However, in the event that the violated right is not directly provided for in the text of the Convention itself but rather in one of its Additional Protocols, further verification is necessary. In such a case, it is imperative to confirm that the respondent State has also ratified that specific Protocol.

> While petitioners were not affected by an individual measure, they were nonetheless considered victims for purposes of admissibility because they were particularly at risk of being affected by the provisions in question[339].

Before proceeding with the substantive analysis of the Court's decision, it is pertinent to present the *Merits* of the submissions of the applicants, the preliminary objections of the government and the opinions of third parties, which are relevant for understanding the judgment.

The appellants' submissions focus on the denial of their right to stand as candidates in the elections for the House of Peoples and the Presidency based on their race and ethnic affiliation, despite being full-fledged citizens of Bosnia and Herzegovina. Moreover, they contend that the differential treatment solely based on ethnicity lacks adequate justification, thus constituting *direct discrimination*. In this regard, the appellants refer to other cases brought before the *European Court of Human Rights – Timishev v. Russia*[340], *D.H. and Others v. the Czech*

[339] TRAN, C., *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdić and Finci v. Bosnia and Herzegovina*, in Human Rights Brief, 2011, Vol. 18, No. 2, pp. 3-8.

[340] See Case of *Ilyas Timishev v. Russia*. Application nos. 55762/00 and 55974/00. Judgment *European Court of Human Rights*. Strasbourg, 13 December 2005. Available at https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2255762/00%22,%2255974/00%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-71627%22]}

The applicant, an ethnic Chechen residing in the Kabardino-Balkar Republic of the Russian Federation as a forced migrant, faced denial of entry into the Kabardino-Balkar Republic during his return from the Chechen Republic. The government asserted that oral orders to officers prohibited individual Chechen cars from entering the Kabardino-Balkar Republic due to security concerns. Mr. Timishev contended that the restriction on his right to freedom of movement discriminated against him based on his ethnic origin, constituting a violation of Article XIV of the *European Convention on Human Rights*. The Court found a clear disparity in the enjoyment of the right to freedom of movement based on ethnic origin. The applicant was denied entry into the Kabardino-Balkar Republic due to perceived Chechen origin, a treatment not applied to other ethnic groups. As the government failed to provide justification for differential treatment based on ethnic origin in restricting the right to freedom of movement, the Court concluded that the applicant's rights were restricted solely due to his ethnic origin. This differential treatment amounted to *racial discrimination* under Article XIV of the Convention.

*Republic*[341] and the legislation of the European Union[342]. Sejdić and Finci finally assert that the government has failed to demonstrate the justification for the differential treatment.

The government of Bosnia and Herzegovina, conversely, contends that the constitutional structure of the State resulted from a peace Treaty following «one of the most destructive conflicts in recent European history»[343]. The ultimate goal of the Dayton Peace Agreement was to «establish peace and dialogue among the three main ethnic groups – the *Constituent peoples*»[344]. Therefore, the government argues that measures excluding the applicants from electoral competition should be assessed in this context. Moreover, as per the respondent, the present circumstances are not advantageous to a transformation in the political system that merely aligns with *majority rule*. This is attributed to the «prominence of *mono-ethnic* political entities and the continued presence of international administration in Bosnia and Herzegovina»[345]. Furthermore, the government adds that all citizens of Bosnia and Herzegovina – including those belonging to the *Others* – can vote and be elected to the House of Representatives of Bosnia and Herzegovina, as well as in the legislatures of the *Entities*. In conclusion, they argue that the differential treatment is justified.

Lastly, the Venice Commission, the *Advice on Individual Rights in Europe Centre* and the *Open Society Justice Initiative*, participating as third parties, contend that the contested constitutional provisions infringe upon the prohibition of *discrimination*. They underscore the fundamental significance of political involvement for minority groups. According to their standpoint, imposing limitations on the right to vote, particularly predicated on racial and ethnic grounds,

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[341] See Case of *D.H. And Others v. the Czech Republic*. Application no. 57325/00. Judgment *European Court of Human Rights*. Strasbourg, 13 November 2007.
Available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-83256%22]}
The case involved eighteen Roma students from the Ostrava region in the Czech Republic. Between 1996 and 1999, all applicants were placed in special schools for children with learning difficulties, receiving an inferior education with a diluted curriculum. In 2000, the applicants lodged a complaint with the *European Court of Human Rights*, contending that their treatment constituted discrimination, violating Article XIV in conjunction with Article II of *Protocol No. 1* of the *European Convention on Human Rights*, as their right to education had been denied. The submissions included extensive research indicating that Roma children were systematically relegated to segregated schools based on their racial or ethnic identity rather than intellectual capacities.
In a decision issued in February 2006, the Court's acknowledged the seriousness of the arguments raised by the applicants but did not find a violation of the Convention. Following an appeal by the applicants, the Grand Chamber, in a landmark decision, ruled in favour of the applicants, determining that they had suffered *discrimination* when denied their *right to education*.
[342] Council Directive 2000/43/EC, 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0043
[343] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 3. 49 ILM 284. Strasbourg, 22 December 2009.
[344] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 3. 49 ILM 284. Strasbourg, 22 December 2009.
[345] *Ibid.*

not only constitutes an act of discrimination but also erodes the fundamental essence of citizenship. As per the intervening third parties «in most jurisdictions, the rights to vote, to be elected and to stand for office were what most clearly distinguished a citizen from an alien»[346].

Embarking upon the examination of the decision[347], the Court, in its final judgment, finds that the ineligibility preventing the applicants from participating as candidates in the House of Peoples lacks a valid and justifiable rationale. As a result, this is deemed a *breach of Article XIV* of the Convention, *concomitant with Article III* of *Protocol No. 1*. The Grand Chamber of the *European Court of Human Rights* emphasises that while the contested constitutional provisions (Article IV and Article V), challenged by Sejdić and Finci, were conceived to bring an end to a violent ethnic conflict and thus marked a necessary step for achieving peace, alternative power-sharing mechanisms could have been implemented without excluding political representation from other communities. «The Court decided to hold Bosnia and Herzegovina accountable not for the adoption of the constitutional provisions but for their maintenance»[348].

> When the impugned constitutional provisions were put in place a very fragile cease-fire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the *Constituent peoples* (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the *Constituent peoples* in the post-conflict society. It is nevertheless the case that the Court is only competent *ratione temporis* to examine the period after the ratification of the Convention and *Protocol No. 1* thereto by Bosnia and Herzegovina. The Court does not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system in any event does not satisfy the requirement of proportionality[349].

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[346] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 3. 49 ILM 284. Strasbourg, 22 December 2009.
[347] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 4. 49 ILM 284. Strasbourg, 22 December 2009.
[348] MILANO, E., *La Bosnia-Erzegovina a venti anni da Dayton: un sintetico bilancio*, in La Comunità internazionale, 2015, Vol. 70, No. 4, pp. 509-528.
[349] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 4. 49 ILM 284. Strasbourg, 22 December 2009.

The Court, at this point, enumerates various positive developments in Bosnia and Herzegovina to support its assertion that the State has witnessed substantial political progress since the Dayton Peace Agreement[350].

> For instance, it noted that in 2006, Bosnia and Herzegovina joined NATO's Partnership for Peace; […] in 2009, Bosnia and Herzegovina successfully amended its Constitution for the first time and was elected as a non-permanent member to the United Nations Security Council. Finally, the Court noted that the international administration of Bosnia and Herzegovina (the Office of the High Representative), which had been set up to oversee the implementation of the Dayton Peace Agreement, had begun to close.[351]

Moreover, upon joining the Council of Europe in 2002, Bosnia and Herzegovina committed to a timely review, facilitated by the Venice Commission, of its electoral legislation to align with Council of Europe standards. Similarly, the country, through ratifying the *Stabilisation and Association Agreement* (SAA) with the European Union in 2008, undertook to amend its electoral laws pertaining to the Presidency and House of Peoples delegates to ensure complete adherence to the *European Convention on Human Rights* and post-accession commitments to the Council of Europe within a two-year timeframe.

> The Court decided to strike the balance in favour of human rights but did not do so in complete disregard of wider peace and stability considerations. On the contrary, the Court carefully assessed the situation, taking into account various *amicus curiae* briefs, and concluded that Bosnia and Herzegovina was ready to move away from its post-conflict government structure without completely abolishing it. Specifically, the Court found that other minorities could be integrated into the government without jeopardizing the protection of the *Constituent peoples*' interests, which it recognized as paramount[352].

Regarding the Presidency, the Court asserts that the ineligibility for Presidency elections in Bosnia and Herzegovina should be regarded as discriminatory, constituting a violation of Article I of *Protocol No. 12* of the Convention. Nonetheless, the Court dismisses the appeal

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[350] This is the «aspect exemplifying the gap between the position of the Strasbourg Court and that of the Bosnian government concerns the *margin of appreciation*. Indeed, according to the Court, the state had a very narrow margin, precisely due to the ethnic (and thus racial) nature of discrimination. In contrast, the Sarajevo government argued that it was entitled to a broad margin of appreciation, given that the constitutional structure was established on the ashes of a violent conflict». See BONIFATI, L., *Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci*, in Forum di Quaderni Costituzionali, 2020, No.1, pp. 59-70.

[351] TRAN, C., *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdić and Finci v. Bosnia and Herzegovina*, in Human Rights Brief, 2011, Vol. 18, No. 2, pp. 3-8.

[352] *Ibid.*

based on Article III of the *European Convention on Human Rights*, affirming that the contested provisions do not constitute degrading treatment that infringes upon human dignity.

It is crucial to highlight that, in the judgment *Sejdić and Finci v. Bosnia and Herzegovina*, the Court has established a stringent criterion regarding *racial discrimination*[353]. In reference to preceding cases, the Court articulated that «racial discrimination is a particularly *egregious kind of discrimination* and, in view of its perilous consequences, requires from the authorities special *vigilance* and a vigorous *reaction*»[354]. Therefore, when differentiation in treatment is rooted in *race* or *ethnicity*, the «notion of objective and reasonable justification must be interpreted as strictly as possible»[355]. The Court further asserted that

> no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.[356]

Nevertheless, the Court acknowledged that *European Convention of Human Rights* member States may differentiate treatment among groups to rectify «factual inequalities»[357] between them.

Therefore, the Grand Chamber concluded that there was a violation of Article XIV of the *European Convention on Human Rights* in conjunction with Article III of *Protocol No. 1*. The decision was reached with sixteen to one vote in favour regarding the ineligibility for the Presidency and fourteen to three votes in favour regarding the ineligibility for the House of Peoples.

The *European Court of Human Rights*' conclusion was welcomed by the international community and international organizations predominantly regarding the importance of the judgment in guaranteeing and extending the non-discrimination principle. However, there have been several criticisms, particularly regarding the legitimacy of the Court in wanting to intervene substantially in the constitutional reform process of a member State of the Council

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353 It is noteworthy to report the reasoning of the Court: «*Ethnicity* and *race* are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination».

354 Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. § 4. 49 ILM 284. Strasbourg, 22 December 2009.

355 *Ibid.*

356 *Ibid.*

357 *Ibid.*

of Europe. This is clearly reflected in the *dissenting opinion* of judge Giovanni Bonello[358], who observes that a supranational Court cannot arrogate to itself the right to bring about a change in a constitutional system born out of one of the most violent conflicts that Europe has ever witnessed.

> On principle and in the abstract, I cannot but share the reasoning of the majority as to the significance of non-discrimination in securing the enjoyment of electoral rights. […] There is nothing so obvious as finding damnable those provisions in a constitutional set-up that prevent Roma and Jews from standing for election. However, I believe the present judgment has divorced Bosnia and Herzegovina from the realities of its own recent past. After the extravagantly violent events of 1992 which witnessed horrific blood baths, ethnic massacre and vendettas without frontiers, the international community intervened: first in an attempt to achieve a truce between Bosniacs, Serbs and Croats, and later a more permanent settlement – the Dayton Peace Accords of 1995. […] It may not be perfect architecture, but it was the only one that induced the contenders to substitute dialogue for dynamite. The questions I ask myself is: does it fall within this Court's remit to behave as the uninvited guest in peace-keeping multilateral exercises and Treaties that have already been signed, ratified and executed? […] More specifically, does the Court have jurisdiction, by way of granting relief, to subvert the sovereign action of the European Union and of the United States of America, who together fathered the Dayton Accords, of which the Bosnia and Herzegovina Constitution – impugned before the Court – is a mere annex? […] Are the rights of the two applicants to stand for election so absolute and compelling as to nullify the peace, security and public order established for the entire population – including themselves? Is the Court aware of its responsibility in reopening the Dayton process, in order to bring it into line with its judgment? I do not identify with this. I cannot endorse a Court that sows ideals and harvests massacre.[359]

It is interesting to note how in this dissenting opinion, Judge Bonello does not take into account that the factual nature of an externally imposed consociative model had institutionalised ethnic differences and non-discrimination. It was precisely the Dayton Agreement that solidified an ethnically based constitutional framework, and in this regard, the dissenting opinion does not show an explicit criticism towards a constitutionalism that

[358] Case of *Sejdić and Finci v. Bosnia and Herzegovina*. Application nos. 27996/06 and 34836/06. Judgment *European Court of Human Rights*. Dissenting Opinion of judge Bonello. 49 ILM 284. Strasbourg, 22 December 2009.
[359] *Ibid.*

has completely shaped the division between collective rights held by *Constituent peoples* and individual rights held by minorities.

### III.2. 4 *Concluding remarks: collective and individual rights in consociational democracies*

In conclusion, the judgment in *Sejdić and Finci v. Bosnia and Herzegovina* has represented a *unicum* in the jurisprudence of the *European Court of Human Rights*[360] and has sparked an academic debate, started from the analysis of the judgment and the relationship between the Strasbourg Court and the peculiarities of consociational democracies[361]. From the examination of this judgment, it is evident that the relationship between human rights and power-sharing consociational democracies is rich in contradictions. The first incongruity regards one of the pillars of the consociational model: the provision of differentiated treatment for some groups compared to others (based on race, ethnicity, language, religion). This is in stark contrast to the principle of non-discrimination, which, on the contrary, prohibits differentiations on the same grounds[362]. In addition, there is an important and growing debate concerning the legal architecture of consociational democracies, which are based on group identity and *collective rights*, while human rights revolve around the individual and, therefore, *individual rights*.

Furthermore, it is interesting to note the role played by national and supranational Courts in cases involving consociational democracies. The case of *Sejdić and Finci v. Bosnia and Herzegovina* has set a new trajectory, declaring the consociational model in violation of human rights[363]. The analysis put forth by Christopher McCrudden and Brendan O'Leary[364] at the

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[360] «Remarkably, this was the first time the Court had found that a country's Constitution violated the Convention and the first time it applied *Protocol No. 12*. […] Furthermore, the Strasbourg decisions reverberate beyond Bosnia, as the principles developed by the Court could be applied to liberalise, but also potentially destabilise other power-sharing systems all over the world». See GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84. Moreover, according to GRAZIADEI, the *European Court of Human Rights* has been recurrently considered "prudent" in the realm of electoral rights.

[361] Giovanni Bonello, in a *dissenting opinion* in the case of *Sejdić and Finci v. Bosnia and Herzegovina,* contended that the Court has often been inclined in acknowledging a wide array of justifications for limiting the right to stand as a candidate in elections. Bonello listed numerous Strasbourg cases that highlight judicial caution in contesting power-sharing systems and autonomy regimes.

[362] See BONIFATI, L., *Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci*, in Forum di Quaderni Costituzionali, 2020, No.1, pp. 59-70.

[363] National Courts demonstrate a reluctance to deem consociational measures as conflicting with human rights. In most instances, they cautiously "defend" these mechanisms or even extend their underlying logic. Initially, the *European Court of Human Rights* aligned with this perspective, as demonstrated by its conclusions in the *Belgian Linguistics cases* and *Mathieu-Mohin and Carfayt v. Belgium*. See ISSACHAROFF, S., *Democracy and collective decision making*, in *International Journal of Constitutional Law*, 2008,vVol. 6, pp. 231-266.

[364] See MCCRUDDEN, C. & O'LEARY, B., *Courts and consociations: Human Rights versus Power-Sharing*, in Oxford University Press, Oxford, 2013.

beginning of the Chapter, after having examined the judgment, assumes full significance because it explains the new approach of the Court and how this new perspective stems from a gradual development. Indeed, McCrudden and O'Leary have identified four main features instigating an innovative point of view in the consideration of cases regarding non-discrimination, consociational settlements and electoral rights. The subsequent characteristics, after having scrutinised the Court's decision, are thus evident: a structured perspective concerning the discrimination of minorities by the Council of Europe and the *European Court of Human Rights*[365] has expanded; there has been an evolution of the Court's approach in interpreting rights to political participation and a growing critique of consociational democracies by international human rights organizations, such as the Venice Commission, and a specific interpretation of the Bosnian conflict has expanded along with the commitments made by Bosnia and Herzegovina towards the Council of Europe and the European Union.

### III.3 *The Zornić case and the "variations on a theme": a declination of minority exclusion based on non-affiliation with any Constituent People*

Having meticulously reconstructed and analysed the *Sejdić-Finci v. Bosnia and Herzegovina* case and the reasoning of the Court, it becomes clear that this judgment marked a turning point in the jurisprudence of the *European Court of Human Rights*. Indeed, the decision encapsulated numerous aspects that this research aims to scrutinise. The judgment carefully explored and foresightedly dissected the defects of consociational arrangements from the perspective of fundamental rights, specifically focusing on non-discrimination and the right to stand for election in Bosnia and Herzegovina. This is why considerable space has been dedicated to the analysis of the aforementioned judgment, which serves as a crucial lens for understanding the constitutional structure of a State characterised by a new constitutionalism derived from international negotiation and international imposition.

The subsequent section of this Chapter, however, seeks to delve into the second case concerning the discrimination of a minority within the constitutional framework of Bosnia and Herzegovina, brought before the *European Court of Human Rights* in 2014. The *Zornić v.*

[365] See GILBERT, G., *The burgeoning minority rights jurisprudence of the European Court of Human Rights*, in Human Rights Quarterly, 2002, Vol. 24, No. 3, pp. 736–780.

*Bosnia and Herzegovina* case[366] presents another facet of belonging to the *Others* category outlined in the Preamble of the Constitution. The applicant, simply identifying herself as *Bosnian*, therefore *refusing to declare affiliation* with one of the *Constituent peoples*, was denied the opportunity to run for the Presidency of Bosnia and Herzegovina and the House of Peoples because. Therefore, the 2014 *Zornić v. Bosnia and Herzegovina* case demonstrates how ineligibility can arise from another manifestation of non-affiliation – namely, «the rejection of self-classification into ethnically defined categories»[367].

> While *Sejdić-Finci v. Bosnia and Herzegovina* has sparked a vivid debate in the literature, the conceptual repercussions of the *Zornić v. Bosnia and Herzegovina* judgment have not yet been fully grasped. *Sejdić* is the landmark decision on *Protocol No. 12* and remains an important right to vote case. […] The later *Zornić* case raised many interesting substantive and conceptual questions but is yet untouched by the literature[368].

III.3.1 *General overview of the decision: the substantial significance and the wide legal inferences*

The applicant, Azra Zornić, born in Sarajevo in 1957 and politically active in the *Social Democratic Party* of Bosnia and Herzegovina, submitted her application before the *European Court of Human Rights* on December 19, 2005. She raised concerns about her impossibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. This ineligibility stemmed from her refusal to declare affiliation with any of the *Constituent people*, insisting solely on identifying herself as a *citizen* of Bosnia and Herzegovina. The applicant based her claim on Article III of *Protocol No. 1* to the Convention, both independently and in conjunction with Article XIV of the Convention, along with Article I of *Protocol No. 12*.

Proceeding with the analysis of the judgment, the *European Court of Human Rights* underlines that the pertinent national legal framework[369] of the case had already been delineated in the case of *Sejdić and Finci v. Bosnia and Herzegovina*.

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366 Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 15 July 2014. Available at https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%223681/06%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-145566%22]}

367 BONIFATI, L., *Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci*, in Forum di Quaderni Costituzionali, 2020, No.1, pp. 59-70.

368 GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.

369 Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, § 1, Strasbourg, 15 July 2014.

Hence, regarding the relevant international law provisions, the Court recounts the three interim resolutions[370] issued by the Committee of Ministers of the Council of Europe concerning the implementation of the *Sejdić and Finci* judgment. These resolutions urged the authorities of Bosnia and Herzegovina to take all necessary measures for the full execution of the judgment. Nevertheless, the *Sejdić and Finci* judgment has remained largely unimplemented. Furthermore, in the *Admissibility* section of the decision[371], the *European Court of Human Rights* assesses the *Compatibility ratione personae*, the *Victim status* and the *Exhaustion of domestic remedies*. Firstly, it held that while the respondent State may not be held accountable for initially implementing the disputed constitutional provisions, it could nonetheless be deemed responsible for their maintenance. Consequently, the Court dismisses the government's preliminary objection on this matter[372]. Concerning the second objection, the Court, in *Sejdić and Finci*, examined the *victim status* of the applicants and determined that, considering their active involvement in public affairs, they had grounds to assert victimhood in relation to the alleged discrimination. The *European Court of Human Rights* finds no justification to deviate from this determination in the current case, thus dismissing the government's second preliminary objection[373]. Lastly, the Court declares the application admissible.

In reference to the ineligibility in the House of Peoples[374], the *European Court of Human Rights* on July 15, 2014 determines that the current case mirrors *Sejdić and Finci*. Although the

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370 See Interim Resolution CM/ResDH(2012)233, Execution of the judgment of the *European Court of Human Rights Sejdić and Finci against Bosnia and Herzegovina*, adopted by the Committee of Ministers on 6 December 2012 at the 1157th meeting of the Ministers' Deputies; Interim Resolution CM/ResDH(2011)291, Execution of the judgment of the *European Court of Human Rights Sejdić and Finci against Bosnia and Herzegovina*, adopted by the Committee of Ministers on 2 December 2011 at the 1128th meeting of the Ministers' Deputies and Interim Resolution CM/ResDH(2013)259, Execution of the judgment of the *European Court of Human Rights Sejdić and Finci against Bosnia and Herzegovina*, adopted by the Committee of Ministers on 5 December 2013 at the 1186th meeting of the Ministers' Deputies.

371 Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, § 1, Strasbourg, 15 July 2014.

372 It is essential to underscore that the Bosnia and Herzegovina government asserted its non-liability for the challenged constitutional provisions based on the understanding that the Constitution of Bosnia and Herzegovina was integral to an international Treaty, the Dayton Peace Agreement. The government affirmed, therefore, that the responsibility for such electoral system did not lie with the State, as it was part of an externally imposed Constitution. Hence, the State government stated that Bosnia and Herzegovina had only ratified an international Treaty.

373 In its second preliminary objection, the government asserted that the applicant was not actively engaged in the political affairs of Bosnia and Herzegovina, contending that she participated in elections only once, in 2002, where she unsuccessfully ran for the Parliamentary Assembly of the *Federation of Bosnia and Herzegovina*. Consequently, according to the government, the applicant lacks grounds to assert *victim status* for the alleged violations.

374 Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, § 3, Strasbourg, 15 July 2014.

present applicant, unlike *Sejdić and Finci* who belonged to Roma and Jewish communities, does not assert affiliation with any specific group, the Court emphasises that various reasons, such as intermarriage, mixed parenthood, or a simple preference for identifying as a citizen of Bosnia and Herzegovina, might explain the absence of such an affiliation. Nonetheless, the Court asserts that «while it is not clear what the present applicant's reasons are, the Court considers them in any case irrelevant».

> Public bodies have no means of disputing what the citizen declares as his ethnic affiliation, as there are no criteria defining group membership. Bosnians could declare themselves as Martians or Eskimos and some have done so[375].

According to the Court's reasoning, the applicant should not be barred from participating in House of Peoples elections based on her personal *self-classification*. The Court reiterates that the identical constitutional provisions were previously deemed discriminatory, constituting a violation of Article XIV in conjunction with Article III of *Protocol No. 1* in the case of *Sejdić and Finci*. Consequently, and based on the detailed rationale presented in *Sejdić and Finci*, the Court concludes that there has been a violation of Article XIV in conjunction with Article III of *Protocol No. 1* and a violation of Article I of *Protocol No. 12* due to the continued ineligibility of the applicant to stand for election to the House of Peoples of Bosnia and Herzegovina.

Regarding the applicant's ineligibility to stand for election to the Presidency, the Court asserts that there has been a violation of Article I of *Protocol No. 12*. The Court emphasises that in *Sejdić and Finci*, it had already determined that the constitutional provisions, which rendered the *Sejdić and Finci* ineligible for the Presidency, were discriminatory and in violation of Article I of *Protocol No. 12*. Thus, the Court sees no reason to deviate from that jurisprudence in the present case. «In even stronger terms[376], the Court argued that Bosnia

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[375] GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.

[376] *Ibid.* «*Zornić* is the more problematic case, compared to *Sejdić*, with regard to its effect on power-sharing systems. Scholars have based a restrictive reading of *Sejdic* on the argument that Bosnia was a special case and that an ethnocratic implementation (through adding positions in the presidency and upper chamber for *Others*) would be compatible with the Convention. However, nowhere in the *Zornić* judgment is it mentioned that Bosnia was a special case. In addition, the Court's focus on self-classification, the absence of any mentioning of Convention compatible power sharing systems (such as in *Sejdić*) as well as the "unusually precise" wording point towards a broadening of the *Sejdić* principles».

must establish a political system without ethnic discrimination and without granting special rights to *Constituent peoples*»[377].

> […] now, more than eighteen years after the end of the tragic conflict, *there could no longer be any reason for the maintenance of the contested constitutional provisions*. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that *the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination* based on ethnic affiliation and without granting special rights for *Constituent people* to the exclusion of *minorities* or *citizens* of Bosnia and Herzegovina[378].

The *European Court of Human Rights* prompts a more comprehensive reflection: the non-discrimination in the realm of passive electoral rights must also extend beyond individuals expressing an affiliation distinct from the three *Constituent peoples*, as seen in the *Sejdić and Finci* case. It must also encompass *Bosnians* who identify themselves as *citizens of Bosnia and Herzegovina* who, due to this civic – rather than ethnic[379] – affiliation, encounter discriminatory treatment.

### III.4 *Pilav v. Bosnia Erzegovina: residency as a circumstance of discrimination*

On June 9, 2016, the Fifth Section of the *European Court of Human Rights*, ruling in the *Pilav v. Bosnia and Herzegovina* case[380], issued another significant judgment condemning Bosnia and Herzegovina. This decision added another circumstance of discrimination to what had already been established in the *Sejdić and Finci* and *Zornić* judgments previously analysed. The ruling delivered by the *European Court of Human Rights* aligns with the framework of the Court's jurisprudence regarding the "constitutional" discrimination of Bosnia and Herzegovina in an innovative manner. Indeed, the *Pilav* case concerns another shade of discrimination. The applicant, being a Bosniac citizen residing in *Republika Srpska* –

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377 GRAZIADEI, S., *Democracy v. Human Rights? The Strasbourg Court and the challenge of power sharing*, in European Constitutional Law Review, 2016, Vol. 12, Issue 1, pp. 54–84.
378 Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, § 4, Strasbourg, 15 July 2014.
379 See MONTANARI, L., *Le minoranze: il caso della Bosnia ed Erzegovina*, in Diritto Pubblico Comparato ed Europeo online, 2021.
380 Case of *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgment *European Court of Human Rights*, Fifth Section, Strasbourg, 9 June 2016.
Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163437%22]}

specifically in Srebrenica[381] – does not have the right to passive voting for the Presidency, nor can he vote for a Bosniac member for the same position according to Article V of the Constitution. Consequently, the Court has expressed that the residency requirement cannot compromise the right to vote[382].

Furthermore, it is significant to note that the judgment closely intertwines with the developments of Bosnia and Herzegovina in the European integration process. In fact, on February 15, 2016, less than a year after the entry into force of the *Stabilization and Association Agreement* (SAA) on June 1, 2015, Bosnia and Herzegovina officially submitted its application for European Union membership.

III.4. 1 *Brief summary of the judgment*

The Court briefly outlines the case, explaining that the applicant[383], a Bosniac actively engaged in the political life of the country as a member of the *Party for Bosnia and Herzegovina*, had submitted his candidacy for the elections to the Presidency of Bosnia and Herzegovina in 2006. However, on July 24, 2006, the *Central Election Commission of Bosnia and Herzegovina* had rejected his candidacy. The explanation provided was that the applicant could not be elected to the Presidency of Bosnia and Herzegovina from the territory of *Republika Srpska* because he declared affiliation with Bosniacs[384].

On September 20, 2006, the Party for Bosnia and Herzegovina and the applicant filed a constitutional appeal, invoking Article I of *Protocol No. 12* to the Convention. On September 29, 2006, the Constitutional Court of Bosnia and Herzegovina concluded that there had been no violation of that provision[385].

On September 24, 2007, the applicant brought his case before the *European Court of Human Rights*, alleging that a constitutional prohibition, specifically Article V, hindered him from running for the Presidency based on his ethnic origin. He further argued that he was even

[381] The city is historically marked by the Srebrenica Massacre, a genocide that occurred in July 1995, resulting in the tragic deaths of more than 8000 Bosniac Muslims. See HOARE, M.A., *The Bosnian Genocide and the Srebrenica massacre*, in Bosnian Studies: Journal for Research of Bosnian Thought and Culture, 2021, Vol. 5, Issue 1, pp. 40-52.
[382] See BRUNO, M.M., *La Corte europea dei diritti dell'uomo dichiara nuovamente il sistema elettorale della Bosnia-Erzegovina in contrasto con la CEDU. Quali prospettive per l'adesione all'Unione Europea?*, in Associazione italiana dei Costituzionalisti, 2016, Osservatorio Costituzionale, Fascicolo 2, pp. 1-10.
[383] Namely Ilijaz Pilav, surgeon during the Srebrenica genocide.
[384] Pursuant to Article V of the Constitution and Article 8(1) of the Election Act 2001 the presidential candidate from that Entity must be a Serb. Case of *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgment *European Court of Human Rights*, Fifth Section, Strasbourg, 9 June 2016.
[385] See Decision No. AP 2678/06, Constitutional Court of Bosnia and Herzegovina.

impeded from voting for a member of his own ethnic community for that office. The applicant invoked Article I of *Protocol No. 12* to the Convention.

Having given a short summary of the facts of the case, the *European Court of Human Rights*, in the second section of the decision, defines the relevant domestic and international legal framework pertinent to the analysis of the judgment mentioning the same legal basis invoked in the *Sejdić and Finci* case.

The Court further presents the preliminary objections of the government, which asserted that Bosnia and Herzegovina could not be held accountable for the disputed constitutional provisions because its Constitution was part of an international Treaty, the Dayton Peace Agreement. The government further contended that the applicant could not be considered a "victim" of the alleged violation because, in contrast to the applicants in *Sejdić and Finci*, the present applicant, being Bosniac, was not subjected to discriminatory treatment compared to members of other *Constituent peoples*. The government argued that the territorial restriction applied equally to Serbs and Croats[386] and Bosniac and Croat members of the Presidency were elected by voters in the *Federation of Bosnia and Herzegovina*, while a Serb member was elected by voters in the *Republika Srpska*. Consequently, the government asserted that if the applicant moved to the *Federation of Bosnia and Herzegovina*, he would enjoy the right to vote and stand for election without any restrictions. Moreover, «the government further submitted that the right to liberty of movement and residence was guaranteed under the Constitution of Bosnia and Herzegovina. Therefore, the applicant could change his residence at any time»[387].

In the assessment regarding the *Compatibility ratione personae*, the *European Court of Human Rights* rejects the government's objection and joins the question of the applicant's *victim status* to the Merits of the case.

In the section of the judgment concerning the submissions of the applicant, it is described that, according to Ilijaz Pilav, the complete exclusion of all Bosniacs living in the *Republika Srpska* from the opportunity to stand for election for the Presidency constituted a «complete impairment of the "very essence" of the right to do so, as the very essence of that right was inclusion»[388].

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386 Bosniac and Croat members of the Presidency were to be elected by voters in the *Federation of Bosnia and Herzegovina*, while a Serb member was to be elected by voters in the *Republika Srpska.*

387 Case of *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgment *European Court of Human Rights*, Fifth Section, § 2, Strasbourg, 9 June 2016.

388 *Ibid.*

The applicant strongly asserts that

> limiting the candidate pool on an election roll in a multiethnic territorial unit to members of a certain ethnic group or groups resulted in the deprivation of the effectiveness of the right, as no member of any other ethnic group residing in that unit would ever be in a position to exercise that right[389].

According to the applicant, the government's contention sustaining that he had not been *entirely excluded* from the political process, as he could participate in local, *Entity*, and State elections (for the House of Representatives of the State parliament), completely disregarded the *Sejdić and Finci* judgment. The applicant argued that there was no distinction between him and *Sejdić and Finci* concerning the exercise of those other political rights, as the exclusion in his case was also based on his ethnic origin. He sustains that he had been treated disparately compared to Serbs living in the *Republika Srpska*.

The applicant's position is supported by the third parties participating in the proceedings. These third parties assert that individuals should have the freedom to express their opinions and participate in the governance of the countries they live in through a non-discriminatory electoral system. They argue that there can be no justification for ethnic-based restrictions on the right to stand for elections. It is also emphasised that this right represents a fundamental pillar of international law, as per Articles XXV[390] and II (1)[391] of the *International Covenant on Civil and Political Rights* and Article V (c)[392] of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Furthermore, it is reiterated that the ability to freely exercise the right to vote is a cornerstone of the modern concept of citizenship in a democratic society. The third parties conclude their intervention by stating that the importance of this right, coupled with the prohibition of discrimination based on ethnic background, is recognised not only by the *European Convention on Human Rights* but also by

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[389] Case of *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgment *European Court of Human Rights*, Fifth Section, § 2, Strasbourg, 9 June 2016.

[390] *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.*

[391] *1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[392] *(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;*

various other international Agreements and Treaties, including the *Universal Declaration of Human Rights* and the *Charter of Fundamental Rights of the European Union*. Universal suffrage and fair and free elections are indeed a well-established principle of international law, forming the cornerstone of democracy based upon the consent of the people.

In conclusion, the *European Court of Human Rights* unanimously affirms a violation of Article I of *Protocol No. 12* to the Convention. It recognises that, despite differing factual conditions from those in *Sejdić and Finci*, the same legal conclusions apply. The Court rejects the government's argument[393] proposing that a legitimate residency requirement forms the basis for the difference in treatment, contending that the «combination of ethnic origin and place of residence»[394] violates the Convention's general principle of non-discrimination.

In summary, this ruling underscores how acts of discrimination within the constitutional framework of Bosnia and Herzegovina erode the equality also among citizens from the three *Constituent peoples*, primarily due to the intersection of territorial and ethnic elements. The electoral regulations in Bosnia reaffirm their adherence to the constitutional principle emphasising the precedence of the collective interests of the three primary ethnic communities. This principle inherently governs the practice of voting rights, encompassing both active and passive suffrage. Additionally, it mandates affiliation with one of the *Constituent peoples*, in conjunction with the addressed residency condition. The final prerequisite, pertaining to residency, introduces another dimension to the scenario, contributing an extra stratum of discrimination.

### III.5 *The Pudarić decision: does the Convention truly possess supremacy "over all other laws"?*

On December 8, 2022, the Fourth Section of the *European Court of Human Rights* once again condemned the electoral system of Bosnia and Herzegovina, citing a breach of the prohibition of discrimination as stipulated in Article I of *Protocol No. 12* to the *European Convention on Human Rights*. The verdict on the *Pudarić* case[395] aligns with the well-established jurisprudence of the Strasbourg Court about the infringement of the prohibition of discrimination in Bosnia and Herzegovina. However, the *Pudarić* judgment focuses on a paradigmatic feature within the Bosnian constitutional framework – specifically, the

[393] On this matter, the Court conducts a comprehensive analysis, citing pertinent case law, including *Hilbe v. Liechtenstein*, *Ali Erel, and Mustafa Damdelen v. Cyprus*.
[394] Case of *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgment *European Court of Human Rights*, Fifth Section, § 2, Strasbourg, 9 June 2016.
[395] Case of *Pudarić v. Bosnia and Herzegovina*. Application No. 55799/18. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 8 December 2020.

supremacy conferred upon the *European Convention on Human Rights over all other laws*. This constitutional paradigm solidified following Bosnia and Herzegovina's accession to the Council of Europe, serving as the commencement of a democratisation process complicatedly related to the progressive configuration of national legislation in light of the standards set forth by the *European Convention on Human Rights*. Hence, the heart of the *Pudarić* judgment revolves around the *supremacy* granted by the Bosnian Constitution to the rights enshrined in the Convention. Notably, the Court emphatically reiterates the imperative for Bosnian authorities to construct a democratic society founded on a judicious equilibrium between the individual rights safeguarded by the *European Convention on Human Rights* and the collective prerogatives of the *Constituent peoples*.

III.5. 1 *The case and the judgment*

The case originated from the appeal lodged by Mr. Svetozar Pudarić, a Bosnian Serb domiciled in the *Federation of Bosnia and Herzegovina*. He contested the incongruity arising from his exclusion from the opportunity to run for the Presidency of Bosnia and Herzegovina, thereby exercising his right to passive suffrage, with the prohibition of discrimination established by Article I of *Protocol No. 12* to the Convention. Specifically, the petitioner aimed to inspect the negation of his candidacy in the 2018 elections by the *Central Election Commission of Bosnia and Herzegovina*, a decision upheld by domestic tribunals[396].

As already discussed, the domestic legal framework of Bosnia and Herzegovina exclusively reserves the prerogative of designating the Serbian representative of the Presidency to the electorate of *Republika Srpska*, thereby excluding the electorate of the *Federation of Bosnia and Herzegovina*. This case substantially parallels the circumstances decided in the *Pilav* case and, for this reason, the Fourth Section briefly recalls the past jurisprudence, reaffirming the discriminatory structure of the Bosnian electoral system.

It is worth noting that the applicant did not provide any observations. However, the government asserted that the public domestic authorities and political leaders have consistently exerted extraordinary efforts to achieve a consensus on necessary amendments to the Constitution of Bosnia and Herzegovina and election legislation and to eliminate the

[396] Indeed, on June 6, 2018, the Bosnia and Herzegovina Court dismissed the applicant's appeal, and on July 17, 2018, the Constitutional Court of Bosnia and Herzegovina rejected the applicant's appeal as inadmissible. In this instance, the Constitutional Court acknowledged for the first time the responsibility of Bosnian authorities for failing to amend the Constitution and electoral law in compliance with the *European Convention on Human Rights* and the previous judgments of the Court. However, despite this recognition, the Court declared itself non-competent to intervene in the removal of these limitations and dismissed the application.

requirements related to ethnic affiliation and place of residence as conditions for candidacy in the elections for the Presidency of Bosnia and Herzegovina, aligning with the well-established case-law of the *European Court of Human Rights*. Despite these efforts, the government contended that the political environment in Bosnia and Herzegovina does not favour the adoption of such changes[397].

The Court's decision thus echoes the principles set forth in the judgments of *Sejdić and Finci*, *Zornić*, and *Pilav*. However, it is the *Pilav* case that almost accurately mirrors the *Pudarić* case. In its judgment, the *European Court of Human Rights* highlights and reaffirms how the linkage between territory and ethnicity *de facto* hinders the effective enjoyment of the petitioner's right to political participation, thus constituting discrimination. As such, this exclusion is considered incompatible with the standards of non-discrimination guaranteed by the *European Convention on Human Rights*. More specifically, the Court acknowledge that, although the electoral rationale finds its legal foundation in the Constitution of Bosnia and Herzegovina itself, the Constitution does not explicitly subordinate the exercise of passive electoral rights to residency requirements. According to the Court, this condition was introduced by the 2001 Elections Act, an ordinary law that should necessarily be interpreted and applied in accordance with the obligations undertaken by Bosnia and Herzegovina in relation to its accession to the *European Convention on Human Rights* and its prominent prohibition of discrimination outlined in Article I of *Protocol 12*. According to the Strasbourg Court, this fundamental obligation must be considered in light of the constitutional status expressly granted by the Constitution of Bosnia and Herzegovina to the *European Convention on Human Rights*, a legal standing *over all other laws*.

Therefore, the Court

> having regard to its case-law on the subject, considers that in the instant case the applicant was discriminated against on account of his ineligibility to stand for election to the Presidency. There has accordingly been a violation of Article I of *Protocol No. 12* to the Convention[398].

[397] In this case, in contrast to the previous cases, the government's position is different. Following the Constitutional Court's approach, the government appears to acknowledge the necessity of introducing substantial changes to the Constitution and electoral law but insists on highlighting the insurmountable difficulties in reaching a political agreement.

[398] Case of *Pudarić v. Bosnia and Herzegovina*. Application No. 55799/18. Judgment *European Court of Human Rights*, Fourth Section, § 4, Strasbourg, 8 December 2020.

Indeed, the *Pudarić* judgment affirms, for the fifth consecutive time[399], the incompatibility of the Bosnian electoral system with the general prohibition of discrimination postulated in Article I of *Protocol No. 12* to the Convention. In conclusion, the *Pudarić* finding, while not revolutionary, prompts an additional observation[400] concerning the priority given to the rights protected by the *European Convention on Human Rights* compared to the collective rights of the *Constituent peoples*.

### III.6 *The 2023 Kovačević case: the infringement of the active right to vote through dual discrimination*

Despite the extensive jurisprudence that emerged from all judgments just discussed, in 2023 the *European Court of Human Rights* encountered another case, *Kovačević v. Bosnia and Herzegovina*[401], highlighting discrimination related to the active voting right. The case involved an applicant contesting that he was unable to vote for the candidates of his choice in the legislative and presidential elections held in 2022. At the core of the judgment lies the complaint concerning the intersection of territorial and ethnic prerequisites which excluded Kovačević to cast his vote for chosen candidates during those elections. This purportedly curtailed his exercise of the active right to vote. The Court subsequently declared that there had been a violation of Article I of *Protocol No. 12* to the *European Convention on Human Rights*. This ruling, representing the latest facet of analysis in the jurisprudence of the *European Court of Human Rights* regarding the so-called Bosnian cases, despite referencing previously addressed case law, introduces distinct and significant analytical aspects to consider in light of the various nuances of discrimination present in the Bosnian constitutional framework[402].

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399 Before the Pilav judgment, the *European Court of Human Rights* pronounced its final decision in the case of *Šlaku v. Bosnia and Herzegovina* on May 26, 2016. The case revolved around the impossibility for a Bosnian citizen of Albanian ethnicity to run for the elections of the Presidency and the House of Peoples due to his non-affiliation with *Constituent peoples*. However, this particular judgment has not been included in the present research as it does not exhibit significant aspects in light of the primary purpose of this thesis inquiry. See Case of *Šlaku v. Bosnia and Herzegovina*. Application no. 56666/12. Judgment *European Court of Human Rights*, Fifth Section, Strasbourg, 26 May 2016. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163056%22]}

400 See PIROLA, F., *L'adesione della Bosnia-Erzegovina alla Cedu sotto osservazione: aspetti problematici e spunti di riflessione nel caso Pudarić*, in Rivista di Diritti Comparati, 2021, No. 2, pp. 184-197.

401 Case of *Kovačević v. Bosnia and Herzegovina*. Application No. 43651/22. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 29 August 2023. Available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-226386%22]}

402 The *Kovačević* case differs from all the preceding cases in that the applicant alleged violations of the active voting right, meaning the inability to vote in elections, whereas the applicants in the five previous cases reported violations of the passive voting right, namely the right to stand for election.

III.6. 1 *Examination of the ruling*

The applicant, Slaven Kovačević, a born citizen of Bosnia and Herzegovina in 1972, holds a professional background as a political scientist and serves as an adviser to a member of the Presidency of Bosnia and Herzegovina. He resides in Sarajevo – within the *Federation of Bosnia and Herzegovina* – and he does not declare affiliation with any of the *Constituent peoples*. Consequently, his voting right is limited to candidates of Bosniac and Croat affiliation standing for elections in the *Federation of Bosnia and Herzegovina*. This restriction hinders his ability to vote for candidates who might better represent his political beliefs but are standing for election in the other *Entity* or belong to a different ethnic origin, «he alleged that the candidates best representing his political views were not from the "right" *Entity* and/or of the "right" ethnic origin»[403].

The primary fundamental dispute of this judgment, presented by the applicant, is as follows: Bosnia and Herzegovina did not qualify as a true democracy but rather as an "ethnocracy" in which ethnicity rather than citizenship, served as the pivotal factor in obtaining power and resources. Moreover, Slaven Kovačević contends that the three *Constituent peoples* wield influence over State institutions to advance their interests, leaving individuals like him as "second-class citizens". Specifically, the applicant protests his lack of representation in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. Consequently, he alleges discrimination based on his place of residence and ethnicity, contravening Article I of *Protocol No. 12* and Article XIV of the Convention in conjunction with Article III of *Protocol No. 1*. The secondary aspect of his complaint is a direct consequence of the primary grievance. Indeed, his secondary complaint pertains to restrictions on the right to vote arising from the composition of the Presidency of Bosnia and Herzegovina.

In its submissions, the government mentioned the case of *Ždanoka v. Latvia*, wherein the Court reiterated that the member States had significant discretion in establishing rules within their constitutional framework to govern parliamentary elections and parliament composition. The criteria could vary based on historical and political factors peculiar to each State. The government reiterated arguments presented in previous cases before the *European Court of Human Rights*, asserting that the constitutional structure in Bosnia and Herzegovina was established through a peace Agreement following a destructive conflict and that the

[403] Case of *Kovačević v. Bosnia and Herzegovina*. Application No. 43651/22. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 29 August 2023.

primary objective, at the end of the war, was to foster peace and dialogue among the *Constituent peoples*. The government contended that the challenged constitutional provisions, excluding individuals not declaring affiliation with a *Constituent people* from the House of Peoples and the Presidency, «should be assessed against this background»[404].

Additionally, the government asserted that the applicant retained the right to vote in presidential and legislative elections at the State level as per domestic law. Notably, since citizens of Bosnia and Herzegovina have the right to choose their residence, the applicant, if desiring to vote for Serb candidates, could establish permanent residence in *Republika Srpska*. Therefore, his right to vote was not unduly restricted to the extent that it compromised its essence and effectiveness. The government emphasised that the applicant was in the same situation as all other citizens of Bosnia and Herzegovina, and as such, he was not subjected to discrimination based on any prohibited grounds.

The *European Court of Human Rights* asserted that «no one should be forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint»[405] thus deeming the applicant's right under Article I of *Protocol No. 12* violated. Consequently, the Court identified two forms of discrimination in this case. The initial discrimination pertained to the applicant's right to representation in the House of Peoples, while the second form related to his active voting rights regarding the Presidency of Bosnia and Herzegovina, where the eligible pool of candidates was limited to only Bosniac and Croat members in the last elections.

In this instance, the *European Court of Human Rights* adhered to its established case-law[406] regarding the composition of the House of Peoples of Bosnia and Herzegovina. The requirement specified by the Court concerning the composition of the House of Peoples in this case had already been articulated in all the previous judgments. This requirement emphasises that

> the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting

[404] Case of *Kovačević v. Bosnia and Herzegovina*. Application No. 43651/22. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 29 August 2023.
[405] Case of *Kovačević v. Bosnia and Herzegovina*. Application No. 43651/22. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 29 August 2023.
[406] Cases *Sejdić and Finci v. Bosnia and Herzegovina*; *Zornić v. Bosnia and Herzegovina*; *Pilav v. Bosnia and Herzegovina*; *Šlaku v. Bosnia and Herzegovina*; *Pudarić v. Bosnia and Herzegovina.*

special rights for *Constituent people* to the exclusion of minorities or citizens of Bosnia and Herzegovina[407].

However, in this specific case, the applicant's complaint did not concern his inability to stand for elections to the House of Peoples but rather the fact that he is not represented in the House of Peoples as a citizen who is not a member of the *Constituent peoples*. This, according to the reasoning of the Court, cannot be considered an active suffrage right realised because members of the House of Peoples are elected indirectly. More precisely, members of the House of Peoples are designated from the House of Peoples of the *Federation of Bosnia and Herzegovina* and from the National Assembly of the *Republika Srpska*. Thus, citizens are not directly involved in the process of electing members of the House of Peoples.

Nevertheless, the *European Court of Human Rights* emphasised that «all segments of society should be represented in the House of Peoples»[408]. Even though the Court did not specifically discuss the composition of the Presidency of Bosnia and Herzegovina in the Kovačević judgment, its prior rulings underscored that every citizen, irrespective of ethnic affiliation, should be eligible to run for the Presidency. In this case, the *European Court of Human Rights* applied the same rationale: if a governmental body impacts the lives of all citizens, then all citizens should have the opportunity to run for positions within that body.

In the *Kovačević v. Bosnia and Herzegovina* case, the *European Court of Human Rights*, for the first time, identified a breach of the active voting rights of Bosnian citizens. Specifically, residents of the *Federation of Bosnia and Herzegovina* cannot vote for the Serb member, and citizens of the *Republika Srpska* cannot vote for the Bosniac and Croat member of the Presidency of Bosnia and Herzegovina. The *European Court of Human Rights* deemed this combination of territorial and ethnic prerequisites as discriminatory against citizens of Bosnia and Herzegovina.

### III.7 *Concluding observations: constitutional "degradation" and the implementation of the European anti-discrimination principle*

In conclusion, it is imperative to incorporate the insights derived from the judgments of the *European Court of Human Rights* into a broader discussion on power-sharing in a

[407] Case of *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 15 July 2014.
[408] Case of *Kovačević v. Bosnia and Herzegovina*. Application No. 43651/22. Judgment *European Court of Human Rights*, Fourth Section, Strasbourg, 29 August 2023.

consociational democracy, coupled with considerations on equality and non-discrimination. More than twenty-five years after the Dayton Peace Agreement's ratification, the issue of equality remains crucial in the discourse surrounding the constitutional reform and power-sharing in Bosnia and Herzegovina. In essence, Bosnia and Herzegovina, as a multinational State, exemplifies the numerous dimensions inherent in questions of equality. «More attention should be devoted to the study of the "most complex constitutional right" – the right to vote – in one of the most complex political systems that exists – the consociational democracy»[409].

The five judgments examined underscore a paradigmatic aspect of the Bosnian legal and constitutional structure: beyond the three *Constituent peoples*, there are individuals in Bosnia who are constitutionally excluded from certain institutions, rendering them marginalised and discriminated. «The human rights problem of Bosnia's Constitution has always been the same: it ties the right to run for certain elected offices to ethnic labels»[410].

Therefore, striking a balance between granting rights and autonomy to territorially organised groups while simultaneously preventing discrimination against other groups remains a central challenge for power-sharing in this peculiar federal system. Implementing the judgments of the *European Court of Human Rights* is complex due to the intricacies of Bosnia and Herzegovina's system, which attempts to reconcile two conflicting principles – the protection of group rights and power-sharing among *Constituent peoples* on one side and the safeguarding of human rights and fundamental freedoms for all Bosnian citizens on the other.

To better address the following conclusion of the Chapter the present research aims to borrow the discourse on "constitutional degration"[411]. This interpretative key facilitates the formulation of appropriate reflections following the scrutiny of the judgments handed down by the *European Court of Human Rights*.

The notion of *constitutional degradation* signifies the decline of institutional and ideological foundations within constitutional democracies. It encompasses a gradual deterioration in the fundamental elements of democracy, such as competitive elections, liberal rights to speech and association, and the adherence to the rule of law. This phenomenon is observable in

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[409] GRAZIADEI, S., *The Strasbourg Court and Challenges to the Constitutional Architecture of Post-Conflict Federalism in Bosnia-Herzegovina and Beyond*, in Review of Central and East European Law, 2017, Vol. 42, pp. 169-2014.
[410] *Ibid.*
[411] See BONIFATI, L., *Constitutional design and the seeds of degradation in divided societies: the case of Bosnia-Herzegovina*, in European Constitutional Law Review, 2023, Vol. 19, Issue 2, pp. 223–248.

various constitutional democracies globally, sparking lively debates within both political and academic arenas. In the context of divided societies, particularly in the consociational system of Bosnia and Herzegovina, where the original constitutional framework and subsequent political actions play an essential role, the concept of constitutional degradation becomes particularly pertinent, contributing to the erosion of democratic institutions and principles, specifically the non-discrimination.

The analysis by Bonifati firstly explores the stages of constitutional transition in Bosnia and Herzegovina, an ongoing process since the Dayton Peace Agreement in 1995. «The process of constitutional transition in Bosnia and Herzegovina started with the signing with the Dayton Peace Agreement and unfolded in three phases: 'imposed', 'guided', and 'conditional' transitions»[412]. The initial phase (1995-1997), manifesting an "imposed constitutionalism", witnessed the implementation of the Dayton Peace Agreement and the establishment of political institutions outlined in the newly formed Constitution; it represented the predominance of the "static element"[413]. This phase solidified a logic of internal segregation, fostering a distinct separation based on ethnicity and territory. The subsequent phase (1997-2005) marked a shift toward the "dynamic element"[414] with constitutional corrections to the original Dayton constitutional settlement. The objective was to facilitate the reconstruction of a multi-ethnic society, emphasising the rights of refugees and displaced persons to return home and mitigating the ethnic segregation resulting from conflict-induced ethnic cleansing. The role of the Constitutional Court proved crucial in this regard[415]. In the ongoing third phase of the transition, emphasis has been on "local ownership" signalling a direct responsibility assumed by political actors in Bosnia and Herzegovina for the reform process.

> The third phase of the democratic transition (still ongoing) is oriented towards the emancipation of the constitutional system from the 'international protectorate' and towards the process of European integration.

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412 See WOELK, J., *La transizione costituzionale della Bosnia ed Erzegovina: dall'ordinamento imposto allo Stato multinazionale sostenibile?,* CEDAM, Padova, 2008 mentioned in BONIFATI, L., *Constitutional design and the seeds of degradation in divided societies: the case of Bosnia-Herzegovina*, in European Constitutional Law Review, 2023, Vol. 19, Issue 2, pp. 223–248.

413 According to BONIFATI it reflects the entrenched and resistant characteristics of the existing constitutional framework, which may hinder the adaptation and evolution necessary to address contemporary challenges and promote inclusivity within the political and social landscape.

414 This concept reflects the efforts to address and adapt to the changing social, political, and legal landscape, particularly in relation to the country's constitutional design and the pursuit of democratic reforms.

415 See the *Constituent peoples* case, 2000.

The perspective of European Union membership has spurred new developments, aiming for a sustainable and functional constitutional arrangement. Throughout the transition, tension persists between the static and dynamic elements of the constitutional system, navigating the balance between rigid ethnic and territorial separation and the aspiration to rebuild a multi-ethnic society.

It is important to highlight that in all the phases of constitutional transition and in the current process of "constitutional degradation" of Bosnia and Herzegovina, the non-discrimination paradigm has gained a fundamental significance in defining the «prospect of constitutional reforms overcoming Dayton's rigidity»[416].

Indeed, the most prominent example of this paradigm is the institutional discrimination that prevents national minorities from holding, and voting, the highest elected positions in the Presidency and in the House of Peoples, as evidenced by judgments of the *European Court of Human Rights*.

The *European Court of Human Rights*' delineation of constitutional discrimination has given rise to another significant ramification. Specifically, a recurring issue contributing to constitutional erosion involves the persistent non-compliance with Court judgments. The case law of the *European Court of Human Rights* has experienced substantial lapses in implementation, thereby exacerbating the erosion of respect for the principles of the rule of law.

> From a legal perspective, time seems ripe for change. Politically, the judgments require a U-turn from the current ethno-nationalist dominance and control to inclusion of all citizens and respect for their individual rights, with some specific collective guarantees for the three major groups. The essence of the judgments is that the Dayton Peace Accord needs to be substituted or profoundly amended to allow for such change. The only way to get there is by agreement. The first reactions to the judgments follow the usual pattern with divisive rhetoric and threats by ethno-national elites interested in closing Pandora's box. A concerted action of the EU, its Member States and the International Community is necessary to prevent this by creating a public space for debate. Advice can and should come from all sides, but any solution for the situation in Bosnia and Herzegovina must come from within the country. This would mark a fundamental departure from the current Dayton system[417].

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[416] BONIFATI, L., *Constitutional design and the seeds of degradation in divided societies: the case of Bosnia-Herzegovina*, in European Constitutional Law Review, 2023, Vol. 19, Issue 2, pp. 223–248.

[417] WOELK, J., *Opening Pandora's Box?: On the Kovačević Case and the European Court of Human Rights' fundamental criticism of the electoral system in Bosnia and Herzegovina,* in VerfBlog, 2023.

In conclusion, this research, through a meticulous analysis of significant judgments of the *European Court of Human Rights*, aimed to provide a detailed overview of various instances of violation of the non-discrimination principle within the constitutional framework of Bosnia and Herzegovina. These judgments undeniably have solidified the process of "constitutional degradation" initiated by the Dayton Peace Agreement. To sum up, it can be asserted that the decisions of the *European Court of Human Rights* may have re-opened the Pandora's box to the extent that they have been paradigmatic in attesting the substantial violation of the principle of non-discrimination as understood within European constitutionalism.

# CONCLUSIONS

In conclusion, the various key points addressed throughout the inspection of the present thesis will be critically reviewed. The pivotal focus of analysis has been the examination of the *hetero-imposed* process of drafting the Bosnian Constitution which constitutes *Annex* IV of the Dayton Peace Agreement, concluded in 1995 by the international community.

It was drafted by third-party diplomats with the aim of pacifying ethnic tensions. Thus, it was not formulated by local statisticians, nor did it involve popular participation. It was not conceived as the foundation of a functional and robust state and it is still written in English.

The context and the conditions under which the new Bosnian State came into being are undoubtedly exceptional and atypical. The constitutional process itself, as observed throughout the research, unfolded without the participation of the people belonging to the nation, who were afforded minimal space, and was guided by the international community. The primary aim of this international guidance was to put an end to the conflict that had persisted for over three years, with the secondary goal of establishing the foundations for a sustainable and democratic order. While formally the new Constitution of Bosnia may be comparable to a constitutional text, procedurally, it is problematic to categorise it as such because of the absence of the indispensable *pouvoir constituant*, which must reside within a nation and not external actors.

The manner in which the Constitution was drafted and subsequently came into effect fundamentally contradicts its content, precisely the Preamble. Indeed, the Preamble states that the three *Constituent peoples*, along with the *Others*, proclaimed the content of the text. However, the people of Bosnia and Herzegovina were in no way, except through an indirectly and undemocratically chosen representation, part of the constitutional process. From this perspective, the Constitution of Bosnia and Herzegovina qualifies totally as a *hetero-imposed* act, and not only as a *hetero-directed* constitutional process. Hence, it is a product of an external *pouvoir constituant* which did not have any connection to Bosnia and Herzegovina's legal tradition and culture.

Furthermore, another important peculiarity of the Dayton Constitution is the incorporation of the *European Convention on Human Rights* in the Constitution as a source superior to the law. Other international agreements related to the protection of human rights, mentioned in *Annex* I to the Constitution, have been likewise assigned a special position as they have direct application in the Bosnian legal system. This occurs despite Bosnia and

Herzegovina not being a party to the referenced Treaties; thus, these sources become part of the Bosnian legal system not through ratification but merely through their mention in the Constitution[418].

The constitutional case of Bosnia and Herzegovina, marked by this *constitutionalisation* of rights derived from the international framework, fits into the broader discourse of the *universalisation* of Western-rooted rights, giving rise to critical considerations regarding the protection of fundamental rights. Within the context of the *universalisation of fundamental rights*, it has been identified a substantial expansion of internationally derived rights, which have acquired an "iconographic presence"[419] in the legal sphere of the States. An eloquent outcome of this Western and *internationalist* expansion of rights, as exemplified by the constitutionalisation process in Bosnia and Herzegovina, is the emergence of a sort of an international "grammar of rights" detached from the political and cultural traditions of the State. Instead, it is linked to an "international" legal heritage presumed to be of universal human significance.

The *multilevel* protection of rights, and the resulting *jeopardisation* of the same, translates, in the case of Bosnia and Herzegovina, into a catalogue of *internationalist* rights, imposed from above. These rights are situated in a «rarefied sphere, neutral and detached»[420] from the specific historical and cultural characteristics of the country's recent past, which has been deeply scarred by a cruel war and ethnic tensions leading to genocide.

The externally imposed arrangement of Bosnia and Herzegovina reflects the international community's objective to halt a violent conflict and construct an ethnically federal State. On the institutional and organisational level, the constitutional framework appears highly problematic, marked by a series of federal bodies that are ethnically balanced and, consequently, fragile.

Indeed, Bosnia and Herzegovina is configured as a multinational State at two levels: in the Constitution, albeit only in the Preamble, the paradigmatic "definition" of the three *Constituent peoples* appears: this legally vague category comprises Bosniacs, Croats, and Serbs. At the second level of the constitutional order, there are the *Others*: individuals who do not belong to the three *Constituent peoples* or do not identify with them.

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418 See CALAMO SPECCHIA, M., CARLI, M., DI PLINIO, G., TONIATTI, R. (edited by), *I Balcani occidentali: le costituzioni della transizione*, Giappichelli Editore, Torino, 2008.
419 See CARTABIA, M. (edited by), *I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Il Mulino, Bologna, 2007.
420 *Ibid.*

Constitutionally, there is no "Bosnian" nationality: citizens residing in an Entity that does not reflect their ethnicity or who declare themselves as "Bosnians" or of other ethnicities are deprived of certain political rights, specifically the right to passive voting and thus the right to run for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina.

Seeking to end the war that began in 1992, the Dayton accord opted for stabilisation on an ethnic basis. This tripartite ethnic federalism of Bosnia and Herzegovina produces the constitutional discrimination towards *Others*, the individuals not belonging to the *Constituent peoples*.

The crucial relevance of the coexistence of diverse minorities and ethnic groups in the Bosnian legal system intersects, in the arguments of this research, with the constitutionalisation of the *European Convention on Human Rights*. Within the framework of the link between constitutional democracy and fundamental rights, the protection of minorities in Bosnia and Herzegovina represents one of the most important aspects for the sustainability of the Bosnian legal system itself. The complex relationship between domestic and international sources has become increasingly pronounced, particularly concerning the issue of ethnic discrimination against *Others* around which the entire political and institutional system of Bosnia and Herzegovina has effectively been built, contravening all international norms referenced in the Constitution. The contrast becomes immediately evident through the analysis of the Preamble provisions defining Serbs, Croats, and Bosniacs as *Constituent peoples* and Articles IV and V of the Constitution, according to which members of the House of Peoples and the Presidency can only be chosen from these three *Constituent peoples*.

In light of this inherent discrimination ingrained in the constitutional framework and considering the significance of the non-discrimination principle highlighted in the "imported" catalogue of rights of the Constitution, throughout the research, it has been observed that the *European Court of Human Rights* has issued numerous judgments addressing this conflict between constitutional non-discrimination and factual inequality. The Constitution, initially, and subsequently the electoral law, confirm the ethnic affiliation as a *conditio sine qua non* for participation in the passive electorate of the Presidency and the House of Peoples. The high level of protection for non-discrimination proclaimed in the Constitution, indeed, clashes with a legal reality of a markedly different connotation: the collective rights of *Constituent peoples* take precedence over the individual rights.

The ethnic federalism has resulted in distorted effects of profound discrimination. The notion of initiating the constitutional transition of Bosnia and Herzegovina through a federal

State structure and consociational democracy, in fact, has produced the effective discrimination against *non-constituent peoples*. This distortion, stemming from the externally imposed Constitution of Bosnia and Herzegovina, requires reflection on democratic and constitutional transitions guided by the international community and on the direct responsibilities of supranational institutions.

The ongoing violation of the non-discrimination principle, highlighted by the judgments of the *European Court of Human Rights*, demonstrates the malfunctioning of a constitutional framework established in 1995 with the sole objective of quelling ethnic conflict. The Dayton Constitution and its subsequent lack of internal implementation serve as a poignant illustration of a *constitution without constitutionalism*, representing an internationally crafted but shortsighted creation wherein Western-derived principles are not applied due to their forced imposition.

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