Maja Sahadžić, Damir Banović, Dražen Barbarić, Goran Marković (eds.)

CITIZENS CONSTITUTION EUROPE

GLOSSARY OF ESSENTIAL CONSTITUTIONAL CONCEPTS IN BIH

GRAĐANI USTAV EUROPA

RJEČNIK OSNOVNIH USTAVNIH POJMOVA U BIH

CEI
CENTRAL EUROPEAN INITIATIVE

GLOSSARY

Naslov *GRAĐANI, УСТАВ, EUROPA rječnik osnovnih ustavnih pojmova у БиХ*
Title *CITIZENS, CONSTITUTION, EUROPE glossary of essential constitutional concepts in BiH*
Urednici/Editors *Maja Sahadžić, Damir Banović, Dražen Barbarić, Goran Marković*

Izdavač/Publisher *Univerzitet u Sarajevu – Pravni fakultet*
Za izdavača/For Publisher *prof.dr. Zinka Grbo*

Korica/Cover *Roberta Bertoldi*
Lektura za bosanski/hrvatski/srpski jezik/Proofreading for Bosnian/Croatian/Serbian language *Zenaida Karavdić*
Lektura za engleski jezik/Proofreading for English language *Anđelka Raguž*
Tehnička priprema/Print and e-book preparation *Rebus DTP*

342.9:321.013(497.6)

GRAĐANI, Ustav, Europa [Elektronski izvor] : rječnik osnovnih ustavnih pojmova u BiH = Citizens, Constitution, Europe : glossary of essential constitutional concepts in BiH / Maja Sahadžić ... [et al.](ur.). - El. knjiga. - Sarajevo : Pravni fakultet Univerziteta, 2023

Način pristupa (URL): https://www.pfsa.unsa.balpflbiblioteka/e-izdavastvo/. - Nasl. sa nasl. ekrana. - Opis izvora dana: 10. 10. 2023. - Lat. i ćir. - Bilješke uz tekst. - Bibliografija uz sve radove.

ISBN 978-9926-544-03-4

COBISS.BH-ID 56683014

Štampanje RJEČNIKA sufinansirano je kroz Know-How Exchange program u okviru sponzorstva Italije kroz CEI fond pri EBRD-u.
GLOSSARY is co-financed by the Know-how Exchange Programme sponsored by the CEI Fund at the EBRD contributed by Italy.

Maja Sahadžić, Damir Banović, Dražen Barbarić, Goran Marković (eds.)

CITIZENS, CONSTITUTION, EUROPE

glossary of essential constitutional concepts in BiH

Sarajevo, 2023.

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Prefazione

Costituzionalmente plasmata sugli Accordi di Dayton, la Bosnia ed Erzegovina (BiH) offre un modello di organizzazione statuale assolutamente sui generis che sfugge alla normale tassonomia del diritto costituzionale comparato. Le intese raggiunte il 21 novembre 1995 nella città dell'Ohio, negli Stati Uniti, hanno avuto l'indiscutibile merito di fermare la guerra che ha sconvolto questa tormentata terra balcanica nell'ambito del processo di dissoluzione dell'ex Jugoslavia, preservando l'unità statuale della Bosnia ed Erzegovina. L'architettura istituzionale che vi ha preso forma – in larga misura edificata su principi di rappresentanza etnica in combinazione con un assetto federale (di tipo, peraltro, asimmetrico) – ha tuttavia dato origine ad un sistema di governo di rara macchinosità, che in modo quasi fisiologico si espone a periodici ingolfamenti, rimanendo preda di crisi politiche e tensioni interetniche, amplificate dagli ancora involuti processi di riconciliazione.

Ciò ha sinora impedito alla Bosnia ed Erzegovina di fluidificare con la necessaria continuità ed efficacia lungo il percorso delle riforme e della crescita, concettualmente correlato anche alle sue legittime aspirazioni di adesione all'Unione europea. L'agognato riconoscimento alla BiH dello status di Paese candidato all'ingresso nell'UE, concesso sul finire del 2022 dal Consiglio Europeo – e reso possibile anche grazie all'incisiva azione dell'Italia, in piena armonia con la nostra politica di sostegno alle prospettive di integrazione europea dei Balcani occidentali – ha voluto imprimere una "scossa" al cammino riformatore del Paese allo scopo di propiziarne reali progressi nell'implementazione delle "Quattordici Priorità" indicate dalla Commissione Europea nel 2019. L'auspicio è che, sulla scia di questa storica decisione, i principali attori politici antepongano responsabilmente l'interesse generale della popolazione – con riferimento soprattutto alle fasce giovanili, sempre più votate ad abbandonare un Paese di cui non percepiscono orizzonti di stabilità – alle ataviche diatribe che hanno sinora inibito un clima di costruttiva collaborazione sulla scena locale.

In un ambiente politico marcatamente complesso e frammentato, quale quello bosniaco-erzegovese, l'Ambasciata d'Italia a Sarajevo ha guardato sempre con particolare favore alla nascita e allo sviluppo di una "piattaforma accademica" – comprendente esperti costituzionalisti da tutta Europa, in particolare proprio dall'Italia e dalla Bosnia ed Erzegovina – che potesse approfondire con vivacità, rigore ed indipendenza intellettuale il tema delle riforme istituzionali nel Paese. Un nucleo di autorevoli studiosi in grado di fornire un contributo di alta qualità a un dibattito di cruciale rilevanza per il futuro della BiH, anche in chiave europea, attraverso dunque un canale autonomo e parallelo rispetto a quello politico-istituzionale: proprio come accade in tutte le democrazie avanzate.

Punto di partenza di questo percorso è stata la Conferenza organizzata dall'Ambasciata nel dicembre del 2020 in coincidenza con il 25esimo anniversario degli Accordi di Dayton, appuntamento che ha dato vita ad uno stimolante dibattito accademico-scientifico. L'impegno da parte dell'Ambasciata di continuare ad incoraggiare e sostenere un tale dialogo ha

permesso di strutturare sempre meglio tale rete di esperti ed accademici, così che la stessa ha potuto beneficiare di un contributo del Governo italiano attraverso il "Know-how Exchange Programme" (KEP), il principale strumento di cooperazione dell'Iniziativa Centro Europea (INCE) che mira ad assecondare gli sforzi di integrazione europea dei Paesi della regione non membri dell'UE, attraverso scambi di esperienze e conoscenze con istituzioni analoghe nei Paesi membri UE.

Il progetto è stato presentato dall'Università di Milano Bicocca, in qualità di capo-fila di un gruppo di istituti universitari che comprende anche l'Università di Trento, l'Università di Sarajevo, l'Università di Banja Luka, l'Università di Sarajevo Est, l'Università di Mostar, l'Istituto di Studi Federali Comparati (EURAC Research) oltre all'Osservatorio Balcani Caucaso TransEuropa (OBCT). Esperti e professori provenienti da numerose altre realtà accademiche europee, in particolare le università di Utrecht e Graz, hanno egualmente preso parte alle attività progettuali. È nata in tal modo una rete di studiosi: "Bosnia Erzegovina, la Costituzione e l'adesione all'UE. Una piattaforma accademica per discutere delle opzioni".

Il presente Glossario ne rappresenta uno dei prodotti maggiormente qualificanti, ispirato all'obiettivo – devo dire, brillantemente raggiunto – di presentare in modo chiaro e sintetico i concetti-chiave del diritto e della politica costituzionale della Bosnia ed Erzegovina. Una guida estremamente utile e meticolosa, che vuole far conoscere al più vasto pubblico – non solo, dunque, ad una platea di addetti ai lavori – le specificità di un Paese complesso, interessante e di straordinaria importanza per i complessivi equilibri della regione balcanica. Dal mio punto di vista, il Glossario e, più in generale, il prezioso lavoro svolto dalla "piattaforma" costituiscono ulteriore eloquente testimonianza dell'attenzione con cui da parte italiana si guarda alla Bosnia ed Erzegovina, Paese cui siamo legati da sempre vivi rapporti di amicizia, collaborazione e solidarietà.

Marco Di Ruzza
Ambasciatore d'Italia in Bosnia-Erzegovina

Preface

Constitutionally shaped by the Dayton Peace Accords, Bosnia and Herzegovina (BiH) offers a sui generis model of state organisation that escapes the usual taxonomy of comparative constitutional law. The agreements reached on 21 November 1995 in Dayton (Ohio), USA, had the unquestionable merit of halting the war that had ravaged this troubled Balkan land in the frame of the dissolution process of the former Yugoslavia, while preserving Bosnia and Herzegovina as a state. The institutional architecture that took shape there – largely built on principles of ethnic representation in combination with a federal arrangements (of asymmetrical design) – has, however, given rise to a system of government of rare complication and cumbersomeness, which almost physiologically creates periodic bottlenecks, falling prey to political crises and inter-ethnic tensions, amplified by the still undeveloped reconciliation processes.

This has so far prevented Bosnia and Herzegovina from advancing with the necessary continuity and effectiveness along the path of reform and growth, conceptually also related to its legitimate objective of membership in the European Union. The coveted recognition of BiH's status as an EU candidate country, granted at the end of 2022 by the European Council - and made possible also thanks to Italy's incisive action, in full harmony with our policy of support for the prospects of European integration of the Western Balkans - was intended to give a "push" to the country's path of reform in order to nudge real progress in the implementation of the "Fourteen Priorities" indicated by the European Commission in 2019. The hope is that, in the wake of this historic decision, the main political players will responsibly put the general interest of the population – especially the young, who are increasingly inclined to leave a country whose horizons of stability they do not perceive – before the atavistic diatribes that have so far inhibited a climate of constructive cooperation on the local scene.

In a markedly complex and fragmented political environment, such as the Bosnian-Herzegovinian one, the Italian Embassy in Sarajevo has always looked with particular favour at the birth and development of an "academic platform" – comprising constitutional experts from all over Europe, particularly from Italy and Bosnia and Herzegovina – that could investigate with vivacity, rigour and intellectual independence the theme of institutional reforms in the country. The platform is a nucleus of authoritative scholars capable of providing a high-quality contribution to a debate of crucial importance for the future of BiH, also from a European perspective, through an autonomous and parallel channel with respect to the political-institutional one: just as it happens in all advanced democracies.

The starting point of this path was the Conference organised by the Embassy in December 2020 in occasion of the 25th anniversary of the Dayton Accords, an event that gave rise to a stimulating academic-scientific debate. The Embassy's commitment to continue to stimulate and support such a dialogue has allowed this network of experts and academics to become increasingly structured. Thus, it has been able to benefit from a contribution from the Italian

government through the 'Know-how Exchange Programme' (KEP), the main instrument of cooperation of the Central European Initiative (CEI), which aims to support the European integration efforts of non-EU countries in the region through exchanges of experience and knowledge with similar institutions in the EU member states.

The project was presented by the University of Milan Bicocca, as the lead partner of a group of universities and institutes that includes the University of Trento, the University of Sarajevo, the University of Banja Luka, the University of East Sarajevo, the University of Mostar, the Institute of Comparative Federal Studies (EURAC Research) as well as the Balkans Caucasus Trans-European Observatory (OBCT). In addition, experts and professors from numerous other European academic institutions, in particular the universities of Utrecht and Graz, took part in the project activities. Thus, a network was born: 'Bosnia and Herzegovina, the Constitution and EU Accession. An Academic Platform for Discussing the Options'.

This Glossary is one of its most qualifying products, inspired by the goal – I must say, brilliantly achieved – of presenting the key concepts of Bosnia and Herzegovina's constitutional law and politics in a clear and concise manner. It is an extremely useful and accurate guide, which aims to acquaint the broader public – not only, therefore, an audience of experts or academics – with the specificities of a complex, interesting country of extraordinary importance for the overall balance of the Balkan region. From my point of view, the Glossary and, more in general, the valuable work carried out by the "platform" constitute further eloquent evidence of the attention with which Italy looks at Bosnia and Herzegovina, a country to which we have always been bound by lively relations of friendship, cooperation, and solidarity.

Marco Di Ruzza
Ambassador of Italy to Bosnia and Herzegovina

Acknowledgments

More than 25 years after the conclusion of the Dayton Agreement there are still hot debates in public discourse and academic debates about what the designation of Bosnia and Herzegovina as a "complex state" can or shall mean after all these years. The members of the editorial board were thus inspired to test the wisdoms of both domestic and international participants in Dayton in light of the experience of implementation of this so-called Peace Agreement. They brought a host of scholars together to discuss the basic constitutional principles and institutional mechanisms of the Dayton constitutional system not in light of day-to-day politics, but from the perspective of comparative constitutional law and comparative government. The result in form of this glossary will thus bring to the fore, hopefully, not only basic knowledge too often missing in public debate, but also basic alternatives for political and legal decision-making which the authors of this publication openly discuss.

This extensive academic platform would not have been possible without the Embassy of Italy in Sarajevo which gently steered the process where needed. Our thank you especially extends to the former Ambassador of Italy to Bosnia and Herzegovina Nicola Minasi who initiated the idea and kept inspiring us to continue, and to his successor, Ambassador Marco Di Ruzza who wholeheartedly embraced and continued to support the project together with their deputy Matteo Evangelista.

The Editorial Board is especially grateful for the support received from the Central European Initiative (CEI). With their financial assistance, we were able to meet in person to test the above-mentioned wisdoms.

Thanks are also reserved for the Osservatorio Balcani e Caucaso Transeuropa and their wonderful and patient team (Luka Zanoni, Luisa Chiodi, and Ivana Draganić) who supported the development of the Glossary with graphic solutions, translations, and everything in between.

The words of appreciation go to the Rectors of the Universities of Banja Luka, Istočno Sarajevo, Mostar, and Sarajevo for supporting the initiative and for hosting three workshops and the final conference.

Finally, thanks are due to all authors. Their contribution to the Glossary has been truly invaluable, their engagement remarkable, and the dialogical method most definitely worthwhile. We all might have to work a little harder to come closer opinion-wise, however, collegially and personally we are closer (to be continued!).

Instead of Introduction: A Brief Methodological Note

Constitutions are usually written to be clear and precise. Customarily, they clearly and precisely mirror the intentions of the constitution-maker. Yet, this hardly applies to the Constitution of Bosnia and Herzegovina (BiH) – a product of a framework peace agreement adopted as a result of international intervention and assistance: As such, the Constitution represents a framework document of unknown constitution-makers. This has specific consequences for the understanding of the constitutional and political system of BiH. Since the academic community struggles to come to terms with the intricacies of the system, the extent of this struggle for ordinary citizens can only be assumed. This is also the underlying reason for this Glossary: The objective of the Glossary was to create a systematic but brief illustration of the main concepts of constitutional law in BiH related to citizens, the so-called Dayton Constitution, and the potential pathway of BiH toward the European Union (EU). The Glossary shall explain the essential constitutional concepts not only to academics from different fields but also to citizens.

One of the challenges was targeting the audience beyond the academic community, in other words, the wider public. For texts of academic quality that are comprehensible to the wider public, it was necessary to enable drafting entries in such a way that the entries would be consumable by an expert and non-expert public. This included: (1) simplifying structure, (2) making the language more accessible, and (3) adjusting methodology. To do so, the Editorial Board adopted specific methodological and technical rules.

Another important challenge was the acknowledgment that the academic approaches in the academic community of BiH from time to time tend to be very different. Clearly, differences in theoretical approaches could lead to different conclusions and risk the coherence of work on the glossary. Importantly, some topics remain scientifically but also politically extremely sensitive. In this sense, the political reality could have an impact on the research outcomes. To balance the approaches, scientifically and politically, it was necessary to create as neutral environment as possible (1) in terms of working together as checks and balances, (2) in terms of finding neutral definitions and explanations, and (3) in flagging and exchanging thoughts about controversies and specific positions authors took while writing the entries.

To address these challenges, the Editorial Board adopted a pluralistic approach as well as an internal check-and-balance mechanism. To do so, the Editorial Board centered their discussion around logically organizing entries to reflect the complex constitutional and political structure of BiH as well as around whether case law should be actively used in writing the entries due to its, sometimes, contentious nature. A neutral environment was especially supported by the methodology chosen to direct the process of writing the entries. The methodology included a team debate and deliberation on a number of terms recorded in the Glossary. This resulted in 35 concepts that included, for example, constituent peoples, entities, cantons, power-sharing, federalism, veto, European integration, a form of government, fundamental

rights, etc. These concepts were then translated into the terms in this Glossary. After that, the larger team was split into smaller teams of two or more academics who volunteered to write the entry together to explain the terms together. Academics in smaller teams were matched by opting in for specific terms. The teams wrote and elaborated on an entry together, and worked on reaching a consensus about contentious issues.

Besides the Glossary in local languages, an important result is the translation of the Glossary to the English language to make the basic constitutional concepts accessible to foreigners as well. For example, the Glossary can be a useful tool and the first starting point for an international human rights activist, a new diplomat appointed in BiH, or just an enthusiast interested in domestic constitutional law.

Importantly, the authors used all three official languages in BiH (Bosnian, Croatian, and Serbian - in alphabetical order) and two scripts (Cyrillic and Latin) – or simply bhs. In English, there were preferences between British and American English and that was also respected.

Other than that, some terms that were used in the Glossary from time to time do not entirely reflect the theoretical correctness and purity but are specific to the local context, such as using the term "state level" which in BiH describes the highest level of government unlike, e.g., in the United States of America (USA) where it simply refers to the level of states.

Sometimes, the authors had their own academic preferences. For example, some authors opted to use the term "the Entities" (as stated in the Constitution of BiH) while some opted to use simply "entities" (as a generic term) to describe the Federation of BiH (FBiH) and the Republic of Srpska (RS) together. Some used the bhs term "Republika Srpska" in the English version of the Glossary while others used the anglicized version "the Republic of Srpska". The list goes on, but, importantly, this should be understood as a matter of preference or style and subscribes to academic freedom and autonomy. It should simply be understood like that – nothing more, nothing less.

Finally, the Editorial Board of the Glossary made some less than elegant but purposeful decisions. For example, deviating from the usual standard, the last section of the Glossary titled "Constitutional Changes" contains only one entry on constitutional amendments in BiH to indicate the long-standing state of affairs.

Editorial Board:

Maja Sahadžić, Utrecht
Damir Banović, Sarajevo
Dražen Barbarić, Mostar
Goran Marković, Istočno Sarajevo

Reviews

For scholars of the politics of Bosnia and Herzegovina in particular, and South-East Europe more generally, the *Glossary of Essential Constitutional Concepts in BiH, Citizens, Constitution, Europe* will prove an invaluable tool, offering at once a comprehensive and deep overview of the country's political institutions and constitutional practices. Indeed, the Glossary should be of great use to anyone interested in complex multinational and multiethnic states more broadly. The Glossary goes well beyond formal institutional rules that govern the politics of Bosnia and Herzegovina, demonstrating how they work in political and legal practice and how and why they have evolved as they have. Its readers will have a much better appreciation of the country's key constitutional controversies, including the frictions between different layers of the political system, as well as the tension inhering in the simultaneous institutionalization of collective and individual rights. The Glossary's entries bring Bosnia and Herzegovina's constitutional practice in conversation with scholarship on, *inter alia*, federalism and power-sharing, adding a valuable theoretical angle to a wealth of important empirical material.

Karlo Basta
Senior Lecturer of Politics and International Relations
Co-Director of Centre on Constitutional Change
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Edinburgh, July 2023

The book manuscript I was asked to review and endorse constitutes a very interesting and tremendously useful collection of succinct explanations of key concepts, institutions, and processes regarding the political system of Bosnia and Herzegovina. It is with great pleasure that I recommend it for publication, for the following more specific reasons: This is a great resource for people like me who work in comparative politics and want to quickly understand how a specific mechanism or institution works in the Bosnian case. It also introduces me to key legal debates in an accessible manner and provides me with a list of key works to consult further. The various entries are very well done in that they explain the origin and legal and political functions and operation of whatever concept or institution is explained therein. Where applicable, the authors also highlight tensions and current debates in line with international scholarship and/or case law. The various authors and co-authors are all well-established scholars in their fields with ample experience in scientific research and corresponding publications. That several entries are co-authored in different combinations increases the inclusivity and diversity aspect of this work and so also has symbolic traction. The selection of entries or chapters and their thematic arrangement reflects a wise choice between universally applicable and standard aspects (such as democracy types or the electoral system) and issues pertinent in the Bosnian case only (e.g. the cantons or "the others"). There is a nice overall balance in this.

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Lausanne, July 2023

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Rights and Freedoms

Damir Banović
Joseph Marko

Fundamental Rights and Freedoms
The European Court of Human Rights and Individual Complaints

What are fundamental rights (for)? The modern concept of human rights is based on the notion that every individual person enjoys "unalienable rights", as this was prominently expressed in the American Declaration of Independence in 1776. In the 19th and 20th century, through the ideological impact of liberalism and their constitutional rank on top of the hierarchy of the respective national legal systems, human rights became seen as *fundamental* freedoms to be protected as individual rights against interference by state authorities. However, in contrast to human rights catalogues of constitutions of authoritarian or totalitarian regimes in the 20th century, they need not only symbolically be given the form of constitutional law but must also be effectively guaranteed by politically independent courts and an appeal system to a Supreme or Constitutional Court exercising judicial review of all state activities (see: The Constitutional Court of Bosnia and Herzegovina, Individual Complaints).

After World War II and the atrocities committed by the totalitarian regimes of Nazi Germany and the Soviet Union, the newly developed international human rights regime was again based on the notion and *priority* of *individual* rights (see: Collective and Individual Rights). Thus the European Convention on Human Rights (ECHR)—signed in Rome in 1950 and entering into force in 1953—is a catalogue of generically called "liberal" individual human and political rights, and to this day—due to its extension through 15 Additional Protocols until 2021—the most important multi-lateral international human rights treaty within the framework of the Council of Europe and its member states. Moreover, with the establishment of the European Court of Human Rights (ECtHR) as a supra-national body composed of politically independent judges and with an individual complaints mechanism, it also became a model for an *effective judicial protection mechanism* beyond the national legal systems. Through this supra-national judicial review mechanism of all possible activities within the jurisdiction of the member states of the treaty, the case-law of the ECtHR makes the ECHR a—what is called in legal and political discourse—"living instrument." For Bosnia and Herzegovina, this can be seen, in particular, from a series of exemplary judgments concerning voting rights starting with *Sejdić and Finci v. BiH* (2009) to *Pudarić v. BiH* (2020).

Individual rights are not only a re-active mechanism to protect rights against interference by state authorities, then called *negative* freedoms. Taken all together, the so-called three generations of human rights—i.e. *liberal* and *political*, *socio-economic* and *third-generation* rights—form the "room of freedom" called "society", no longer in strict separation and subjection to the state and its institutions as was the case in monarchic absolutist regimes in history and still is in authoritarian regimes today, but as the basis for rule of law *and* democratic government.

Hence, liberal individual rights such as the right to private and family life, freedom of speech, freedom of religion and freedom of association, including the formation of political parties (Articles 8 through 11 ECHR), and political rights in the narrow sense such as the right to vote and to stand as candidate in elections (Article 3 1st Protocol ECHR), are the precondition for all forms of individual and/or commonly organised activities of human beings (see: Integration, Fragmentation, Coordination, and Accommodation). Moreover, as can be seen, for instance, from the wording of paragraphs 2 of Articles 8 through 11 ECHR, requiring that any limitations of the exercise of these rights and freedoms must be "in accordance with the law" and "necessary in a democratic society", it is not sufficient for the State parties of the ECHR to adopt the necessary legal regulations for the protection of human rights and freedoms, but in terms of *positive obligations* also to ensure their effective implementation in administrative and judicial proceedings. In particular, when state authorities have to provide socio-economic or other benefits according to law, such legal entitlements must be accomplished without discrimination, posing the problem whether, for instance, gender- or ethnicity-related *class* or *group-specific* benefits—also termed positive obligations or *affirmative action* in American constitutional law—amount to a violation of equality before the law (see: Minorities in Bosnia and Herzegovina).

In conclusion, what turns *subjects* into *citizens* is the *positive* function of all forms of individual rights. Thus, human rights build the *bridge* between *law* and *politics* in a broad sense and—through the inter-connectedness of rule of law and democracy—individual complaints before courts also perform the function of democratic political participation.

Human rights in the constitutional system of BiH. Following from case U 7/97 and U-5/98 of the Constitutional Court of Bosnia and Herzegovina (BiH), not only does Annex 4 of the Dayton Agreement—frequently named *the* Constitution of BiH—enjoy constitutional rank, but so do the other Annexes of the Dayton Agreement and, in particular, the Annexes to Annex 4 and Annex 6 including overlapping comprehensive lists of 16 international human rights treaties (see: Amendments to the Constitution of Bosnia and Herzegovina). In addition, the Constitution of the Federation of BiH (FBiH) and the Constitution of Republika Srpska (RS) had already included human rights provisions before the conclusion of the Dayton Agreement. Human rights and freedoms in what we must call the constitutional system of BiH are thus not concentrated in a single catalogue but incorporated in several legal sources of constitutional rank forming a *complex* constitutional system.

The rules for the application of human rights following from the text of legal sources through a systematic interpretation. The constitutionally guaranteed rights and freedoms following from Article II of Annex 4 and Article I of Annex 6, the "Agreement on Human Rights," have to be *applied directly* by all institutions of BiH on all territorial levels as this is also repeated in the constitutions of the cantons of FBiH. Moreover, Article II.2. of Annex 4 required that all rights and freedoms under the ECHR and its Protocols also had to be applied directly even before BiH became a state party to the ECHR and that "[T]hese shall have priority over all other law."

This raises the question: what happens in case of *conflict* between *human rights provisions* in the Annexes of the Dayton Agreement and the Entity constitutions? Generally speaking, the "supremacy clause" of Article III.3. (b) of Annex 4 requires the Entities and any subdivisions thereof to "comply fully with this Constitution, which supersedes inconsistent provisions ... of the constitutions and the laws of the Entities ..." so that human rights provisions of the Entities can be declared unconstitutional and derogated by the Constitutional Court of BiH. However, there is one clear exception from this rule as can be seen from the text of Article 49 of the RS Constitution and the case law of the BiH Constitutional Court following international standards: "In case there are differences between the provisions on rights and freedoms of the Constitution of RS and those of the Constitution of BiH, the provisions which are more favourable for the individual shall be applied."

Following from the text of Article II.2., the last sentence quoted above, the problem was raised before the BiH Constitutional Court what *rank* the *ECHR* enjoys in the *legal* or even *constitutional hierarchy*? In cases U 5/04 und U 13/05, both decided in 2006, the Court, however, rejected the "supremacy" of the ECHR over the Dayton constitution despite the fact that the text in the authentic English version reads "...priority over all other law." This was and is, however, wrongly translated in all unofficial translations in the BCS language(s) as "prioritet nad svakim drugim zakonom." Insofar the authentic text reads "law" in the singular, "*all other"* law must literally and linguistically be interpreted to also include the Dayton constitution itself'.

Finally, according to Article X of Annex 4, any *constitutional amendment* of the Dayton constitutional system has to observe the rule that no amendment "may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph," hence also the rights and freedoms under the ECHR its Protocols (see: Amendments to the Constitution of Bosnia and Herzegovina).

Bosnian-Herzegovinian case-law before the ECtHR. When BiH became a state party to the ECHR in 2002, the *individual complaint mechanism* was also put into effect. Article 25 ECHR provides that "any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention..." may bring a complaint before the ECtHR "after all domestic remedies have been exhausted" (Article 26). The first judgment under the supervision of its execution by the Council of Ministers was the case of *Jeličić v. BiH* which became final on 31 January 2007. In this case, Jeličić had complained that a binding and final decision of a BiH court concerning "old" foreign-currency savings which had not been implemented violated the principle of rule of law. The ECtHR agreed and found a violation of Article 6 ECHR, that is, that any claim relating to a civil right which can be brought before a court or tribunal must also include the execution of a judgment as an "integral part of the trial for the purposes of Article 6."

Finally, the already mentioned series of cases from *Sejdić and Finci v. BiH* (2009), *Zornić v. BiH* (2014) to *Pudarić v. BiH* (2020) demonstrates the importance of this individual

complaint mechanism also for constitutional reform issues and thus its *political function* for the principle of *democracy* as not only one of the basic values of the Council of Europe and the European Union, but also the Dayton constitutional system. This system is not only based on individual human rights, but also guarantees group rights in terms of political representation for "constituent peoples", that is Bosniaks, Croats, and Serbs, and for so-called "Others." These are persons declaring themselves to be members of one of the 17 legally recognised national minorities and those who refuse a declaration of their ethnic affiliation such as Zornić who simply wanted to stand as a candidate in the Presidential elections as a "citizen" (see: Citizenship and The Others). It remains, therefore, one of the most important political and constitutional questions *how to reconcile individual human rights with group rights* without ethnically discriminating against either individuals or groups (see: Collective and Individual Rights). The implementation of these judgments of the ECtHR which require an amendment of the Dayton constitution as far as the ethnic keys for Bosniaks, Croats and Serbs in the composition of the Presidency and the House of Peoples are concerned, is made one of the conditions for further *European integration* (see: Bosnia and Herzegovina and the European Union Integration, The Constitutional Impact of the European Union Accession).

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Collective and Individual Rights

The Preamble of the Constitution of Bosnia and Herzegovina reads that Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina (BiH) determine the Constitution of BiH. When interpreting these provisions, we come to the conclusion that there are the following ***three categories of population***: (1) constituent peoples – Bosniaks, Croats and Serbs; (2) national minorities and (3) nationally undetermined persons (see: Constituent Peoples, Minorities in Bosnia and Herzegovina, and The Others). A national minority, in terms of the Law, is a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it includes people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics (Article 3 (1) of the Law). The Law lists Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks and Ukrainians as examples of national minorities.

Given the constitutional recognition of the collectives in terms of legal categories or groups, the legal and political system of BiH consequently introduced the following ***collective rights***: (1) the right to political representation of ethnic groups, not just citizens; (2) consensual decision-making process (see: Veto Rights); (3) territorial autonomy and the right to self-government; (4) cultural autonomy; (5) mechanisms for protecting the so-called "vital national interest"; (6) entity voting; (7) symbolic requirements such as, for example, the right of members of national minorities and their institutions to freely display and bear insignia and symbols; (8) the right to use the mother tongue and script in private and public life; (9) the right to education; and (10) the right to information in the mother tongue.

Based on these collective rights or, rather, the rights of ethnic groups, the *Constitutional Court of BiH has confirmed the multi-ethnic character of BiH in several decisions*. This was particularly evident in the 2000 Decision on the Constituency of Peoples (U 5/98 – handed down in three partial decisions). In case U 4/05, the Constitutional Court of BiH concluded that the principle of a multi-ethnic state is one of the basic constitutional principles. The consequence of the determination of three ethnic groups as constituent is that none of these groups has been declared a majority by virtue of the Constitution (see: Majoritarian Democracy). In other words, the constituent peoples are equal groups, and privileging one or the other is prohibited. Furthermore, ethnic homogenisation is inadmissible either through assimilation or territorial or institutional segregation. Therefore, based on the decisions of the Constitutional Court, the following principles can be derived as bases for collective rights and protection of the collective:

(1) The principle of multi-ethnicity;
(2) The principle of collective equality of constituent peoples; and
(3) The system of prohibition of discrimination.

In addition to special rights of the collective, i.e., protecting the constituent peoples in different capacities and, to a limited extent, the rights of national minorities, the legal system of BiH also lists a number of ***individual rights*** protecting individuals as citizens equal before the law. The concept of individual rights in the legal system of BiH was introduced through Annex 4, "the" Constitution of BiH, Annex I to the Constitution of BiH and Annex VI to the Dayton Agreement which contain a list of 16 international human rights treaties. These treaties and the European Convention on Human Rights (ECHR) with all its Protocols have to be directly applied in Bosnia and Herzegovina in order to ensure the highest level of internationally recognised human rights and fundamental freedoms. Individual rights that are guaranteed to all persons are: (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 labour; (4) the rights to liberty and security of person; (4) the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings; (5) the right to private and family life, home, and correspondence; (6) freedom of thought, conscience, and religion; (7) freedom of expression; (8) freedom of peaceful assembly and freedom of association with others, (9) the right to marry and to found a family; (10) the right to property; (11) the right to education, and (12) the right of all citizens to liberty of movement and residence.

In a multi-ethnic state, prohibition of discrimination are of particular importance, which protect not only the rights of the collective, but also the rights of individuals. The ***principle of non-discrimination*** of individuals entails that the rights and freedoms provided for in Article II of the Constitution or in international agreements are secured to all persons in BiH without discrimination on any ground such as sex, race, colour, language, religion, political and other opinion, national or social origin, association with a national minority, property, birth or other status (Article II.4 of the Constitution of BiH and Article 14 of the ECHR). Further elaboration of the concept and form of protection against discrimination is established in the Law on Prohibition of Discrimination.

Academic literature often criticises that the political system of BiH, as a classic example of multicultural politics through the consociational model, represents the dominance of ethno-nationalist, collectivist ideology and its collective rights (see: "Power-Sharing", "Power-Dividing" and Consociational Democracy). According to critics, ultimately the collective rights always take priority over individual rights, because there is a structural opposition between the civil and ethnic principles. However, a distinction must be made between political and constitutional-legal systems. Due to the mono-ethnic party system in BiH, the parties representing the constituent peoples in all state bodies truly exercise political dominance. In this sense, we speak of a "captured state" (see: Citizenship). However, not only citizens, but also the members of national minorities are both as individuals and groups politically completely excluded and very often also marginalised in socio-economic terms.

But there is no "natural" dichotomy between individual and collective rights as this is often assumed or postulated. Already a comparative analysis of so-called collective rights laid down in various constitutions and laws of European countries provides three types of rights that refer to the relationship between individuals and groups. These are (1) individual rights that presuppose the existence of groups; (2) collective rights in the broader sense which indicate legal categories (such as consumers) or ethnic groups as "object" of legal regulation in need of protection of their interests, but not granting them legal personality with the right of standing before courts; and (3) collective rights in the narrow sense – so-called corporate rights that regulate the formation of public law institutions with legal personality in order to secure their autonomy and foster their integration into the legal and political system (see: Integration, Fragmentation, Coordination, and Accommodation).

Finally, also the case law of the CC BiH and the European Court of Human Rights (EctHR) demonstrate through their case law that a legal conflict between individual and collective rights must be resolved according to the *principle of proportionality* as a standard for judicial assessment of constitutionality. The CC BiH demonstrated in case U 5/98, Partial Decision III, that the substantive balancing of individual and collective rights according to this principle leads to *the priority of individual rights*. This can also be seen from a range of ECtHR decisions regarding the right to elect representatives to the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH. The automatic and absolute exclusion of citizens who are not willing to declare their ethnicity or do not want to declare themselves as members of one of the constituent peoples; violates the right to free elections according to Article 3 of Protocol 1 to the ECHR, based on the principle of representation of all citizens. Therefore, the legitimacy of collective rights is always an exception to the priority of individual rights.

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Citizenship

The word *citizenship* is quite difficult to translate into the languages spoken in Bosnia and Herzegovina (BiH), Croatia, Serbia and Montenegro, especially when it comes to its meaning related to belonging to a certain national state. The English word "citizenship", the Italian "cittadinanza", the French "citoyenneté" and the Spanish "ciudadanía" directly refer to the aforementioned meaning, and are often used alongside the words "nationality", "nazionalità", "nationalité" and "nacionalidad". The last four word more easily translate as "nacionalnost" into the languages of the former Yugoslavia. However, while, on the one hand, we can easily assert that in countries where English, Italian, French, and Spanish are spoken, the two aforementioned terms can be used as a kind of synonym even in official documents, in languages of Slavic origin, very close to each other, spoken in the Western Balkans, "citizenship" actually means *državljanstvo*, "Statehood," while the word *nacionalnost* is related to the concept of (ethno)national identity and in terms of its meaning is more similar to the word "Nationhood." When translating the term "citizenship" understood as statehood, a whole series of aspects related to the original and complex meaning of the word citizen is lost. The word citizen means an equal member of a democratic political community who has a number of rights and freedoms, but also obligations defined, guaranteed and protected by the Constitution of the same country as well as by an increasing number of international charters and laws.

For this reason, in this entry of the Glossary, we will most often use the word citizenship in its original English version without translating it with different terms in relation to the context in which it is found in the text. As for the word "citizen", we will use it in the translated version as *građanin*.

The notion of citizenship. The notion of citizenship has a double meaning. On the one hand, it refers to the *legal status* of an individual's belonging to a state. Possessing the citizenship of BiH, for example, means having a passport of that country and enjoying all the rights and freedoms that this membership guarantees and protects, both on the internal level of institutions and mutual relations of individuals and groups, and outside the country's borders. The status of citizenship is related to the territory of a state, but at the same time it has a global value, considering that the individuals retain this status outside the borders of the given state. In other words, they retain the right to have rights. On the other hand, being a citizen of a country goes beyond an abstract legal status, given that we can talk not only about the *political rights* of citizens, but also about the *social and civic* ones that effectively enable an individual to access and participate in the freedoms, rights and duties of their national, but also supranational - regional, European, planetary, cosmopolitan community (see: Fundamental Rights and Freedoms, The European Court of Human Rights and Individual Complaints*)*. Here, we

refer, first of all, to the theory developed by H. Marshall in the early fifties of the 20th century, analysing the concept of citizenship in its three basic dimensions: political, social, and civic. On the basis of this fundamental theory, very important academic and political debates have developed, which today, in the age of the globalisation crisis, have perhaps even greater significance than before.

Acquiring the status of a citizen. If we are talking about the notion of citizenship as a status, that is, membership in a nation-state – whether it is a centralised state dominated by one (ethno)national group or a federal state with a complex national and/or political structure - it is important to briefly explain how this status is acquired and transmitted from generation to generation. The dominant principle of acquiring the right to the status of a citizen is the one related to blood descent - *ius sanguinis*. Thus, a child whose at least one parent is a citizen of Bosnia and Herzegovina, or any other internationally recognised country, becomes a citizen of that country upon birth and registration in the birth register. It is important to say that it is an non-territorial principle: the children of Italian parents inherit the status of an Italian citizen even if they were born in Japan or Namibia, to name just one example. The strength of this principle also lies in the possibility of applying the derived principle *iure sanguinis*: for example, descendants of Italian emigrants born in South American countries can request Italian citizenship, and very easily obtain it, based on proof of the origin of their Italian ancestors.

The principle of soil, *ius soli*, is second in importance and is applied in many countries under very different conditions. Namely, the children born on the soil of a country different from the country of origin of their parents (who have retained the status of citizens of the country of origin by their own will or due to the impossibility of acquiring a new citizenship), can, under certain conditions, become citizens of the country in which they were born and in which they actually live. In countries such as France and the United States of America (USA), *ius soli* is extremely important because it underlines the political basis of the constitutionality of the state. In order for an individual to become the President of the USA, they must meet the basic requirement of being born on the soil of this federal state, regardless of the origin of the parents and their citizenship status. Italy, on the other hand, provides access to the acquisition of citizenship according to the principle of *ius soli* to children born on Italian soil only when they reach the age of eighteen: a formal request for acquiring status can be submitted within 12 months from the eighteenth birthday, after which it is possible to resort to the third principle, *ius domicilii* (*status residentia*).

Ius domicilii is interpreted as the process of naturalisation of migrants with a permanent residence permit on the territory of a certain state. The only exception to this rule are children born on Italian soil of unknown parents, i.e., children whose blood origin is impossible to determine and who are legally registered in the birth register as Italian citizens. Innovative principles of inclusion of the so-called "second generations" – children of migrants with a permanent residence in the country of immigration – such as those discussed in the Italian Parliament (*ius culturae*, *ius scholae*), are still applied only as supplementary elements related primarily to the principle of *ius domicilii*, i.e., to the integration of adults of immigrant

origin and status and their children, who increasingly have to pass a test of knowledge of the language, history, and basic legislation of the country to which they apply for a new status.

Based on this brief overview of the principles that determine the acquisition of the status of citizens of a nation-state, we can conclude that citizenship, understood as a status, is both inclusive – when it comes to the status reproduction and re-generation of the population of a state related to a common (ethno)national origin according to the principle of *ius sanguinis*, and exclusive – when it comes to the structural and normative mechanisms by which the "imaginary community" of the nation is maintained in time and space through the control of access to the full status of a citizen. According to Rogers Brubaker, this duality implies a real paradox related to the tension between the political identity of the citizen, as an individual who participates in the life of a democratically based community (*politeia*), and the (ethno) national and cultural identity of the individual, as part of the dominant national corpus.

Multiple citizenships. Citizenship as a status under certain conditions may apply to more than one country. First of all, if there is a principled normative agreement of one state that its citizens can also possess the status of citizens of another national state, we can talk about the principle of dual citizenship. Many European countries, especially those with a long tradition of multiculturalism (Great Britain, France, Scandinavian countries, and recently Italy), enable their citizens to access dual citizenship. This is not the case with Germany, whichh still retains the exclusivity of national sovereignty on this question.

At the same time, the citizens of each of the member states of the European Union (EU) are also citizens of the EU, by derived law based on the Lisbon and previously Maastricht Agreements, with civil and social rights throughout the entire EU and partially guaranteed political rights mainly related to the right to vote in local elections, guaranteed in case of long-term stay on the soil of one of the EU countries. This new principle of extension of political, civil and social rights could be defined as *sui generis*, that is, as a unique innovative principle that is still in the phase of normative definition.

Rethinking citizenship. This short presentation of the status dimension of the concept of citizenship, its historical concretisation through a series of examples and its dynamic and procedural nature – which indicates the necessity of revision and change of normative acts at the level of national states, but also of supranational entities such as EU and international organisations and institutions – leads us to the second dimension related to the essential issue of effective access to rights and freedoms which is formally and legally ensured by the possession of a passport of the country in question.

First of all, the status of a citizen is not related to the nature of the political regime of any particular country: authoritarian and other non-democratic regimes are also structured within the framework of the basic historical form of the world order – the nation-state. Being a citizen in the original sense, which has its roots in the ancient democratic systems of old Greece, but was configured in a modern sense only with the French Revolution in 1789, is based on the

original principles of freedom, equality, fraternity (liberté, egalité, fraternité). Starting from these principles, over time, the increasingly inclusive question of fundamental human rights and freedoms that transcend the boundaries of nation-states has emerged. At the same time, these rights and freedoms are becoming an integral part of the constitutional order of an increasing number of countries. In this sense, the concept of citizen is inextricably linked to the democratic organisation of the nation-state, in which the political, social and civil rights and freedoms of each individual will be guaranteed and protected by law (see: Fundamental Rights and Freedoms, The European Court of Human Rights and Individual Complaints).

The first problem that arises here concerns complex nation-states in which several peoples/nations establish a democratic political community – such as Switzerland, Belgium, or Bosnia and Herzegovina, and where we perceive the concept of *demoi-cracy*, the rule of more than one *demos*. At the same time, the question of true equality of individuals and groups arises, especially members of those collectives that are based on particular identities related to gender, ethnicity, national minority, religion, language, sexual orientation. We are talking here about women, minority ethno-national groups, religious and linguistic cultural communities, LGBTQ+ groups, who legitimately demand the recognition and protection of their own special collective rights and interests (see: Collective and Individual Rights).

From the perspective of these two complex problems, we can more easily understand the difference in the meaning of the notion of citizen in terms of the legal status of belonging to a nation-state, and the notion of citizen in terms of the essential opportunity for participation of a concrete individuum as a social being in the life of a socio-political community, based on the principles of freedom, rights and equality, which then become concrete rights to education, work, freedom of opinion and public participation, freedom of association, freedom of choice in the sphere of intimacy, and others.

The concept of citizenship in BiH. How can this tension between the legal status of citizenship and the essential participation, rights and freedoms of citizens be interpreted in the case of the complex post-Dayton state of BiH? The statehood status of the Bosnian-Herzegovinian citizens stems from the constitutional order of the SFR Yugoslavia (SFRY, the Federation), according to which all the Socialist Republics united in the Federation were defined as "socialist democratic states and socialist self-governing communities of working people and citizens – the peoples of Bosnia and Herzegovina..." (Constitution of the SR BiH, 1985, Part I, Article 3, paragraph 40). The citizenship of each of the federal units in SFRY was inseparable from the citizenship of the Federation and based on identical principles and institutions within the one-party political system. However, each federal unit had the right, guaranteed by the Constitution, to secede from SFRY. Passports of SFRY citizens contained the alphabetical code of affiliation to one of the federal republics, but no designation of national affiliation. The Constitution of SFRY was ambivalent on the issue of sovereignty: were the constituent peoples and "their" Republics sovereign, or were the Republics, as state-organised territorial units, bearers of sovereignty? This issue is very complex, and we cannot consider it within the scope of this text.

During the 1992-1995 war, the legitimacy of BiH statehood was preserved by the recognition of independence by the United Nations in May 1992 (UN Resolution 757). The General Framework Agreement for Peace in BiH (see: General Framework Agreement for Peace in BiH – Dayton Peace Agreement), established peace on the territory of BiH, but also a new state structure which, among other things, recognised the political, social and demographic consequences of the war. Annex 4 of the Peace Agreement became the first Constitution of post-Dayton BiH, which was constituted as a state made up of two entities - the Federation of Bosnia and Herzegovina (FBiH) and the Republic of Srpska (RS); and the Brčko District (BD), whereby FBiH is territorially and politically organised into ten cantons according to the ethno-national principle (see entries on: Sub-State Entities). The issue of citizenship is regulated in Article 1 of Annex 4. BiH lost the constitutional designation as republic, but remained a sovereign state within internationally recognised borders, based on democratic principles. BiH citizenship is derived from the citizenship related to the two entities and Brčko District. All citizens of the former Socialist Republic of BiH retained their status in the new organisation. The Parliament of BiH decides on the citizenship of persons "naturalised" after 6 April 1992 due to forced war migrations within BiH, but also in the entire region. Annex 4 also regulates the status of dual citizenship, as well as the issue of refugees and displaced persons and asylum seekers from other countries. Duties, rights and freedoms of all citizens and persons living in BiHare guaranteed regardless of gender, race, colour, language, religion, political and other opinion, national or social origin, connection with a national minority through property, birth or other status" (Constitution of BiH, Article 2, Paragraph 4).

Therefore, regardless of the nature of its creation, the "Dayton Constitution" guarantees and protects the legal status of citizenship to all persons who possess it, on the entire state territory, as well as outside its borders. This constitutional act establishes the state on the high principles of liberal democracy, striving to take into account the complex national structure of the political community, in a context deeply marked by war destruction and serious crimes committed on the whole territory of BiH, especially against part of the population belonging to the Bosniak national group. The Bosnian-Herzegovinian society came out of the war deeply devastated, especially in terms of the traditional strong social connection of national groups and mutual trust between individuals and groups (see: Stability of Constitutional Systems, The Concept based on Cohesion, Solidarity, and Trust).

The consequences of the post-Dayton organization on the concept of citizenship in BiH. What are the consequences of the new organisation of the BiH state when it comes to the concept of citizenship, that is, the true possibility of participation in the political, social and cultural life of the political community? The first question that arises here is related to the concept of community. In the case of BiH, it is difficult to talk about the community in the sense of a single political space, given the deep structural division between the two entities and three constituent peoples, but also the gap created by the lack of political will and insufficiently effective reconciliation processes (see: Constituent Peoples, The Entities in Bosnia and Herzegovina, and Consociational Democracy) . The limited possibilities of establishing a single political community, in the sense of a public space in which opinions

different from those related to ethno-national bodies are configured, reduces the space for civil activism and participation that could lead to overcoming barriers and divisions between ethno-nationally defined political communities of constituent peoples, whose members, as citizens, are also denied the opportunity to exercise their status rights and freedoms throughout the territory and in all structures of the state. The socialisation of new generations takes place within entity and cantonal borders, based on different institutionalising narratives in the family, school textbooks, through the media, in a context marked by scarce opportunities and occasions for mutual meetings and communication. Members of recognised minority groups do not have the right to participate in certain segments of government (see: Minorities in Bosnia and Herzegovina). The economic crisis and the high unemployment rate among young people and women disable independent political activism, given that employment is often conditioned by providing support to dominant political parties. In this context, we are talking about a "captured state" but also about "captured citizens", for whom the existing state structure does not provide the opportunity, guaranteed by the constitution, to exercise full rights and freedoms within the framework of their political/state community.

Finally, the question arises to what extent the actors and the processes of EU integration, within which BiH acquired the status of a candidate for membership in December 2022, will be able to support those civic forces of BiH who already engaged themselves in the search for alternative and better models of state organisation (see: Citizens' Assemblies in Bosnia and Herzegovina). This question remains open, in the hope that the principles and values of solidarity, inclusivity, and integration (see: Integration, Fragmentation, Coordination, and Accommodation) will be increasingly recognised as permanent values of the "World Society" by political actors and civil society in BiH.

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Constituent Peoples, Others, Citizens

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Constituent Peoples

Constituency of peoples is a constitutional principle on which a significant part of the political system of Bosnia and Herzegovina (BiH) is founded. In contrast to the standard constitutional practice of naming citizens or a single people as subjects with a constitution-making function, the BiH constitutional framework specifically emphasises the three constituent peoples together with the Others and citizens as the *collective bearers of sovereignty*. Nevertheless, the wording leaves open the possibility of interpreting the constituent peoples as *exclusive subjects* with a state and legal attribute, and the Others and citizens as subjects without this attribute. The reasoning behind the wording can be found in the so-called "compromise formula" that reflects the social reality shaped by history, namely the multi-ethnicity expressed in the Constitution of the Federal Republic of BiH from 1974, which stipulates "the working class and citizens, the people of BiH – Muslims, Serbs and Croats and members of other nations and nationalities who live there," and also by the violent conflicts in the war in BiH in the period 1992–1995, which the signing of the Dayton Peace Agreement (DPA) ended in late 1995, and in the context of making the constitution.

The creation of the constitution meant that the citizens never declared themselves with respect to the transfer of the shares of sovereignty to the common framework of statehood. Instead, representatives of the three political communities signed the DPA, thereby ending the conflict and adopting the new constitutional framework, namely Annex IV of the DPA or Constitution of BiH. Thus, the sovereignty of BiH may be considered as *shared by three constituent peoples* or as three-segmented at its core and, *in combination with* the share of sovereignty of *Others and citizens*, this constitutes a specific hybrid form on which the political system and its composite sovereignty were founded. All of BiH's historical forms of statehood or political subjectivity bear little relevance for the retroactive insertion of popular sovereignty because of the undemocratic nature of the regimes from which they emerged.

The *decision of the Constitutional Court of BiH (CC) U 5/98* postulates an inextricable connection between composite sovereignty and constituent peoples as its primal bearers, and partial decision III – also known in the general public as the "constituent peoples" decision – introduces three basic principles that regulate this relation: multi-ethnicity, equality of the constituent peoples, and prohibition of discrimination, thereby effectively imposing limitations on their respective autonomies in terms of determination and regulation of the state's political-territorial structure, thus postulating a balance between the ethnic and civil components or a balance between autonomy and integration.

This decision "disempowered the entities," as federal units between whom state sovereignty is divided, through the introduction of territorial instead of ethnic federalism, and it confirmed the superordination of the three constituent peoples as its bearers. As mentioned above, this superordination should not be exercised in a manner that would be detrimental to the collective rights of constituent peoples, the Others and the individual right of political participation as maintained by the three basic principles, or rather, the principle prohibiting discrimination. In the aforementioned decision, CC explains that the principle of the constituency of peoples "is the overarching principle of the Constitution of BiH with which the entities must fully comply."

Although the principle of constituency was first incorporated into the constitutional order in Annex IV of the DPA, it reflects BiH's *political and social reality* in a twofold sense. First, it respects the historical tradition and complexity of BiH society, which has maintained some form of articulation and exercise of collective political rights throughout history. From the Ottoman millet system via the State Anti-fascist Council for the National Liberation of Bosnia and Herzegovina (ZAVNOBiH) formulation to the Dayton order, collective identities have undergone the process from ethno-confessional to national autonomy in various forms. Only the periods of the Kingdom of Yugoslavia and Independent State of Croatia (NDH) did not recognise any form of collective subjectivities nor any specific model of their political autonomy. Second, the principle of constituency is also a reflection of the social structure in which it emerges. It acknowledges a divided society with deep traumas from the mutual conflict in the recent past.

It is important to emphasise that the principle of the constituency of peoples always appears in the plural; nowhere has it been written down, interpreted, or operationalised in the singular as a collective right of only one people. The assumption is that the constitutional concept of constituency would dissolve if one of the three recognised political communities were exempted from this framework or if it postulated the privileging of one community via the recognition of special rights to the detriment of the other communities and individuals. This is why there is no trace of the possibility of the right to self-determination of one constituent people anywhere; nor is there the possibility of partial referendums (in entities or cantons) because that would *de facto* signify partial constituency. In other words, the overarching principle of our constitution in its normative and applied form acquires the form of co-constituency.

Considering the relatively short tradition of democratic statehood and the absence of a more robust interpretation and application of the principle of constituency of peoples by the CC and legislative bodies at different levels, problems often arise when this principle needs to be operationalised in the political system. However, there is no doubt that *constituency, in its application, comprises at least three key dimensions*: political representation, equality and protection mechanisms, and territorial autonomy. The situation is further complicated by the fact that these three dimensions are jointly implemented by consociational and federal mechanisms.

When it comes to *political representation* as the highest form of expression of the democratic will of the constituent peoples and their effective as well as symbolic representation in legislative and executive bodies, the constitutional framework reserves a part of the political system for this purpose. At the level of the symbolic head of state (see: Executive Power in Bosnia and Herzegovina), the Constitution provides for the representation of the constituent peoples in the three-member Presidency of BiH, while at legislative level, the same purpose is performed by The Council of Peoples at the level of Republic of Srpska (RS), the House of Peoples at the level of Federation of BiH (FBiH) and House of Peoples at state level as well. The constitution maker resolved the vagueness of the constitutionality of the system through symmetrical bicameralism, in which the constituent peoples are represented in the legislative part of the system, which must represent their will as authentically as possible, while the first houses are reserved for the classic concept of civic representation. The CC, in verdict U 23/14, confirmed such a position in its judgment and explanation: "the right to democratic decision-making, which is realised through legitimate political representation, must be based on the democratic election of delegates to the House of Peoples of FBiH by the constituent people they represent and whose interests they represent." In other words, the constituency of the peoples in terms of representation can be operationalised in accordance with the constitution if mechanisms are created that will ensure that, for strictly defined parts of the system (the Presidency, the Council of Peoples and the Houses of Peoples), political representatives "bear" the legitimate will of the demos to which they belong, i.e., the constituent peoples they represent. Otherwise, the CC would consider it "inadequate political representation" which violates the principle of constituency. In short, the general and legally valid application of the principle of the constituency of peoples in the political representation process implies a representative, rather than a membership, democracy.

The second operative level of constituency is *equality with mechanisms for the protection of the interests* of the constituent peoples. They are realised through the mechanisms of consociational democracy, such as adequate representation in government institutions and administration, mechanisms of rotation and quotas in executive bodies, decision-making procedures in which consensus or a qualified majority is required, veto mechanisms, etc. Especially significant among all these mechanisms is protection of vital national interests, by means of which the constituent peoples, in the institutions provided for this (Presidency and Houses of Peoples), have the option of vetoing all proposed decisions that they consider harmful to the vital interests of the constituent people they represent. In addition to vital national interest, there is an entity veto/majority institute which even exists in the House of Representatives of the Parliamentary Assembly of BiH. The fact that a member of the Presidency of BiH can impose an entity veto on a proposal of a decision with which s/he does not agree – with the Serbian member sending the decision to the National Assembly of the RS for consideration; the Bosniak member sending it to the Bosniak club in the House of Peoples, and the Croatian member sending it to the Croatian club in the House of Peoples – speaks of the inextricable connection between legitimate political representation and executive power. This clearly shows the intention of the creator of the constitution to build a vertical equality of constituent peoples and efficient mechanisms for the protection

of their national interests. These mechanisms serve to extend the scope of collective rights through protection, and thereby to affirm the political subjectivity of the constituent peoples within the political system which strives to ensure their mutual equality.

The last level is of a territorial character, expressed through entities and cantons, and can be considered as a kind of expression of the *territorial autonomy* of the constituent peoples. After the CC decision in 2000, the principle of constituency was separated from associated entities as their original institutional structure and the constituent peoples became equal on the entire territory of BiH; nevertheless, all levels of the system still maintain a certain autonomy of the constituent peoples. For example, RS ensures significant political autonomy for the Serbian people in Bosnia and Herzegovina, given the concentration of the population in this entity. The same applies at cantonal level, where there is a distinct majority of Croat or Bosniak people in certain cantons. Although the models of classical majority democracy are predominantly used in the latter, the cantonal and entity constitutions nevertheless foresee mechanisms for participation in political processes and protection of constituent peoples who are in a minority position. Even at the level of local self-government, there are mechanisms of consociational democracy and power-sharing among the constituent peoples, as well as protection of vital national interests; the best example being most definitely the City of Mostar.

It should be clearly pointed out that constituency as a constitutional principle was really an *expression of the context of the time in which the constitutional framework embedded in the DPA (Annex IV) was created*, and that the creator of the constitution could not foresee all the difficulties and shortcomings that would arise while operationalising the constitutional principles. Thus, in the light of the rulings of the European Court of Human Rights (ECtHR), brought before it by citizens of Bosnia and Herzegovina whose personal rights were jeopardised, a false impression was often created that the principle of constituency directly threatened the political rights (especially the passive right to vote) of all those citizens who do not declare themselves to be members of one of the three defined constituent peoples. However, the principle itself is very general, and so far, the practice of the CC has not provided precise criteria for determining the content of the principle of constituency, with the exception of the two aforementioned decisions (U 5/98 and U 23/14). The problem with the violation of certain voting rights for part of the population lies in a segment of the political system, first of all, in the election law which must be harmonised with the constitution. The electoral system of BiH has reached a stage where full inclusion of voting rights should be enabled, i.e., mechanisms for passive and active voting rights should be incorporated for all citizens who do not belong to the constituent peoples, as well as members of the constituent peoples who cannot participate in the elections for a member of the Presidency due to their place of residence. The rulings of the ECtHR pointed to the shortcomings of election procedures that discriminate not only against non-members of the constituent peoples but also the constituent peoples themselves (the most obvious example is the election of Željko Komšić as the Croat member of the Presidency). In paragraph 48 of *Sejdić and Finci v. BiH*, the Court explains: "In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms

peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (see paragraph 22 in the text) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of other communities. In this connection, it is noted that the possibility of alternate means achieving the same end is an important factor in this sphere." Therefore, the spirit of Annex IV should be interpreted the way it dictates, bearing in mind the composite nature of our country's sovereignty, the representative institutions should as faithfully as possible fulfil and reflect the interests and will of the specific demos for whom they are intended. In the case of the House of Peoples and the Presidency, they must be holders of the legitimacy of their own constituent peoples, and in the case of the Houses of Representatives, the legitimacy of citizens and the constituency in which they are running. Membership democracy must be replaced by representative democracy.

In summary, the creator of the constitution created a system in which the principle of constituency represents the minimum common denominator to prevent the hegemony of one constituent people and to gradually heal the traumas of war. It recognises the fact that BiH society consists primarily of different national segments and that their equality is the key to the survival and development of statehood, but without the exclusion of those members of the population whose membership is not exclusively affiliated with those segments. In this perspective, constituency is a constitutional expression of the political self-awareness and subjectivity of the national communities in BiH; it has no *a priori* cultural, ethnic, religious or sociological content, but exclusively political and legal, which is articulated using the three mentioned dimensions of its operationalisation. It enables a segmented society to form a common framework of statehood in which their political will would be fulfilled, and at the same time, achieve mutual equality and respect for their specificities. Still, given the importance of the three basic principles postulated by the "constituency of peoples" decision, the common framework of statehood was prescribed with the aim of constructing a multi-ethnic society as had existed before the war, and with the aim of functional harmony between the ethnic and civic component, collective and individual rights, and autonomy and integration

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Minorities in Bosnia and Herzegovina

The constitution of Bosnia and Herzegovina (BiH) does not define the word "minorities," nor does the term have a generally accepted international definition. However, many national legislators refer to a minority as a group within society that, by its characteristics, differs from the rest of society or from the majority of society and is willing to preserve its characteristics . Belonging to a minority is most often determined by language, nationality, racial and religious affiliation, but also by opinions, beliefs, and behavioural styles, including sexual preferences, that is, sexual orientation, gender and gender identity, and intersex characteristics. Women can also be considered a minority compared to men, primarily due to their less favourable factual position in society. Therefore, the concept of minority is not only related to numbers, but often also to social power. So, who are minorities in BiH? We will try to answer this question by focusing on national minorities on the one hand, and sexual, and gender minorities on the other.

In its Preamble, the Constitution of BiH stipulates that Bosniaks, Croats, and Serbs, as constituent peoples (along with Others) and citizens of BiHdetermine the Constitution. Given that the constituent peoples are not considered minorities in the formal and legal sense, the question arises as to who the *national minorities* in BiH are. The Law on the Protection of the Rights of Members of National Minorities in BiH defines a national minority as part of the population, i.e. citizens of BiH who do not belong to any of the three constituent peoples, and is made up of persons of the same or similar ethnic origin, traditions, customs, beliefs, language, culture and spirituality, and close or related history and other characteristics (Article III 1). The Law on national minorities lists the following groups: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma (by far the most numerous group), Romanians, Russians, Ruthenians, Slovaks, Slovenes, Turks and Ukrainians, and all those who meet the conditions envisaged by law. Every member of a national minority has the right to choose whether or not to be treated as such and must not be disadvantaged or discriminated against in any way because of that choice (Article IV 1.). In addition, assimilation of members of national minorities against their will is prohibited (Article IV 2). Members of national minorities have the right to freely organise and gather for the purpose of expressing and protecting their cultural, religious, educational, social, economic and political freedoms, rights, interests, needs, and identity (Article V). BiH undertook to enable and financially support the development and maintenance of relations between members of national minorities in BiH, and members of the same minorities in other countries, and with other peoples in the home countries of these minorities (Article VI). The rights and freedoms enjoyed by national minorities include: the right to use and display signs and symbols, the right to use language, the right to education in the language of

the minority, the right to information in the language of the minority, the right to preserve cultural identity, and the right to participate in public government bodies.

It is also important to point out that the clubs of the *Others* (see: The Others), as forms of political representation and participation in making political decisions, have been established in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (FBiH) and in the Council of Peoples of the National Assembly of the Republic of Srpska (RS). The club of the Others in the House of Peoples of FBiH has eleven delegates, and in the Council of Peoples of RS four delegates. So, there is also a framework for the *protection of collective rights of national minorities* (see: Collective and Individual Rights).

Finally, it should be noted that Annex 1 of the Constitution of BiH, in addition to the conventions that *protect individual human rights* (see: Collective and Individual Rights), mentions two conventions dedicated to the rights of national minorities: the European Charter for Regional or Minority Languages (1992) and the Framework Convention for the Protection of National Minorities (1994). The Law on the Protection of the Rights of Members of National Minorities also states that the Framework Convention for the Protection of National Minorities of the Council of Europe is directly applicable and constitutes an integral part of the legal system of BiH and its two entities.

As for *sexual and gender minorities*, there is no legal regulation that recognises these minorities as such in the legal system of BiH. Sole protection is provided for by the Law on Prohibition of Discrimination through the rules that prohibit adverse distinction. Of course, the prohibition of discrimination does not apply only to sexual and gender minorities, but also to national minorities. According to legal provisions, discrimination or adverse distinction means any different treatment (such as exclusion, restriction or giving preference) based on real or assumed grounds towards any person or group of persons, and those who are related to them by family or other ties, on the basis of their race, colour, language, religion, ethnicity, disability, age, national or other beliefs, property status, membership in trade unions or other associations, education, social position, gender, sexual orientation, gender identity, sexual characteristics, as well as any other circumstance that has the purpose or consequence of preventing or endangering the equal recognition, enjoyment and exercise of rights and freedoms in all areas of life for any person (Article II).

To summarise, the legal system of BiH envisages dual protection of national minorities, through the corpus of collective rights, which protect minorities as communities, and through the system of prohibition of discrimination, which protects members of national minorities primarily as individuals. Furthermore, as is the case with the legal systems of other countries, gender minorities in BiH are not protected through the mechanism of collective rights, but exclusively through the mechanism of prohibition of adverse distinction, i.e., the prohibition of discrimination. In addition to the state law, there are also laws at the entity level: the Law on the Protection of the Rights of Members of National Minorities in FBiH (Official Gazette of FBiH No. 65/08) and the Law on the Protection of the Rights of Members of

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The Others

The Others are a constitutional and social category whose numerous and often disputed meanings are the result of the vaguely defined content and scope of the concept of "Others". The controversy and contradiction that characterize the definition of the term "Others" in BiH (BiH) are manifested through various dichotomies that are at the basis of essential disagreements regarding the nature of BiH society: autonomy/integration, ethnic/civil, collective/individual rights, and form/substance. These dichotomies are resolved within two principal discourses: (1) the legal (judicial) discourse, which is based on the jurisprudence of the Constitutional Court of BiH (CC BiH) and of the European Court of Human Rights (ECtHR), and (2) the socio-political discourse, which is dominated by two opposing approaches, conservative (ethnopolitical) and progressive (liberal-democratic). It is important to keep in mind that these discourses represent a frame of reference for understanding the term "Others" in BiH's constitutional and socio-political context.

Before presenting the above-mentioned discourses, it is important to recall some more general ***meanings of the term "Others"*** and explain the mechanisms through which they have been incorporated into the institutional system of BiH. Given that the method of exercising collective rights depends on the individual declaring their identity (primarily in the sense of belonging to the constituent peoples), the Others are all citizens of BiH who do not declare themselves as members of one of the three constituent peoples. According to the 2013 population census, Others make up 3.7% of the BiH population (130,054 people).

As for ***institutional representation and participation***, two key principles stand out: the principle of proportional representation and the prohibition of discrimination. At the *state level* (which refers to the highest level of government in BiH) the Others are guaranteed one seat in the Council of Ministers or, alternatively, the position of Secretary General of this government body. At the *level of the Entities*, the Constitutions of Republika Srpska (RS) and the Federation of BiH (FBiH) guarantee institutional representation to all citizens of BiH including members of the constituent peoples and the Others based on the principles of proportional representation and without discrimination. Both Constitutions provide that a maximum of two out of six key functions may be filled by representatives of constituent peoples and the Others but their positioning within the system remains under construction.

The People's Council of the National Assembly of the RS is composed of eight representatives of each of the three constituent peoples and four representatives of the Others who have the right to equal participation in the majority voting process. The Others are also guaranteed

one seat in the government of the RS and one (out of seven) in the Council for the Protection of Vital Interests at the Constitutional Court of the RS. The Constitution of the RS defines the principle of equal representation of constituent peoples and the Others in the public institutions of this entity.

The House of Peoples of FBiH is made up of 23 representatives of each of the constituent peoples and 11 representatives of the Others, whereby at least one representative of the Others is delegated from those cantons that have at least one representative of the Others in their legislative bodies. The Others do not have a guaranteed place in the government of the FBiH, but the principle of proportional representation in the public institutions of this entity is generally standardized, including the entity government, cantonal ministries, cantonal and municipal courts, municipal authorities, and city administrations. The Others are guaranteed one seat (out of seven) in the Council for the Protection of Vital Interests at the FBiH Constitutional Court.

The Others enjoy *broader collective rights in the matter of institutional representation than in the matter of protection of vital interests*. The representation of the Others in the councils for the protection of vital interests at the Entity's constitutional courts meets the minimum standard, which is, however, too narrow to be able to speak of effective protection. The only exception is the Canton of Sarajevo, whose Constitution foresees a mechanism for the protection of vital interests within the clubs of constituent peoples and the club of Others in the cantonal Assembly.

The effective predominance of collective over individual rights, along with the problem of the extension of the collective rights of Others (especially regarding the protection of vital interests), and in general the place of the "citizen" (see: Citizenship) as a constitutional category in the constitutional system of BiH, is at the basis of numerous discussions within the academic community and public opinion. As previously mentioned, these discussions concern some essential dichotomies that are resolved in different ways in *different discourses*, among which the legal discourse and the socio-political one stand out as the most important.

In the *legal (judicial) discourse*, the Others represent a constitutional category that derives its formal and legal existence from the so-called "compromise formula" (see: Constituent Peoples) contained in the Preamble of the Constitution of BiH (paragraph 10) which reads: "Bosniacs, Serbs, and Croats (along with Others), and citizens of BiH hereby establish the Constitution of BiH." This wording represents an exception to the European standard of naming subjects with a constitution-making function and leaves open the possibility of interpreting the constituent peoples as exclusive subjects with a state-law attribute, and the Others and citizens as subjects without this attribute.

Ademović believes that the term "citizens" in the above-mentioned sentence should be interpreted in the context of general constitutional inclusion typical of modern constitutions, i.e., as an expression of a fictitious constitution-maker that includes all citizens of BiH, regardless of

their willingness or lack of willingness to declare their identity. Ademović points out that such a formulation is not new and compares it with the definition present in the Constitution of the Federal Republic of BiH from 1974, which lists "working people and citizens" as fictitious constitution-makers, and "the people of BiH - Muslims, Serbs and Croats and members of other nations and nationalities who live there" as real constitution-makers. Both definitions are an expression of the basic "compromise formula" that expresses the "multi-identity of BiH citizens", that is, "compromise and harmony between the ethnic and civil modes of the constitutional system, a compromise between ethnocracy and civil society."

Harmony and compromise also form the *ratio iuris* of the third partial decision of the CC BiH from 2000 in case U 5/98, better known to the public as the "constituent peoples" decision, which is based on the functionalist method of interpreting the constitutional text. The fundamental constitutive principles shaped by constitutional jurisprudence in case U 5/98 are: multiethnicity, equality of the constituent peoples, and prohibition of discrimination.

Essentially, the stated principles define BiH as a democratic state and a pluralistic society, setting as a constitutional goal the construction of a multi-ethnic society like the one that existed in BiH before the 1992-1995 war. Furthermore, they oblige the Entities to respect the prohibition of discrimination against members of any of the constituent peoples, especially if the latter are *de facto* in the position of a minority (as repeatedly stated in the opinions on BiH issued by the Advisory Committee on the Framework Convention for the Protection of National Minorities), and prohibit the privileging of one group through the recognition of special rights to the detriment of the rights of other groups and individuals; introduce the principle of pluralism in terms of participation in government bodies and prohibit ethnic homogenization through assimilation or territorial segregation; introduce territorial versus ethnic federalism, make ethnic parity in state institutions an exception, and indicate the introduction of Others into the system of representation in order to prevent the complete exclusion of the individual right to participate in government, thus guaranteeing a balance between collective and individual rights, that is, between ethnic and civil concepts. While this was the aim, the reality proved to be different. For example, ethno-territorial representation is still visible in legislative and executive branches, and it reflects on decision-making, especially at the state level, while ethnic parity (although not constitutionally defined) continues to exist even in the CC BiH as constitutional custom - in the very Court that introduced the decision itself.

The balance of collective and individual rights is fundamentally linked to the principle of prohibition of discrimination established in Article II/2 of the Constitution of BiH. This principle is particularly important for the ruling of the ECtHRin the case "Sejdić and Finci v. BiH" from 2009. This ruling, as well as the aforementioned partial decision of the CC BiH, concerns the rights of the Others, more precisely the right to be elected to the House of Peoples of the Parliamentary Assembly of BiH and the Presidency of BiH. However, it also has wider implications regarding the balance between collective and individual rights. The ruling established that the Constitution of BiH is discriminatory towards the Others,

considering that depriving the Others of the passive right to vote cannot be justified by arguments about the balance of power between the three dominant social groups in the wider social community, i.e., the constituent peoples bearing in mind that the country has progressed since the adoption of the Dayton Peace Accords in 1995. Although the assumption of obligations from Protocol III of the European Convention on Human Rights and Fundamental Freedoms (ECHR) is stated as a formal indicator of progress, the application of the teleological interpretation of law and *ratio iuris* characterizes the constitutional jurisprudence of the ECtHR in a way that makes it close to the practice of the CC BiH itself. In this sense, Joseph Marko points out that the aforementioned constitutional jurisprudence aims to end the strict ethnic proportionalization of the entire state organization. Furthermore, this practice tends to establish a balance within the "compromise formula" defined in paragraph 10 of the Preamble to the Constitution of BiH. Namely, this formula incorporates, on the one hand, the ethnic principle, which is expressed through the category of constituent peoples and the category of the Others (defined "*a contrario*" from ethnic categories), and on the other hand, the principle of individual equality of all citizens. Marko also discussed the wider implications of the constitutional jurisprudence of the ECtHR, and pointed out that the above-mentioned ruling contains two key minimum standards: a) multiculturalism, as the essence of democracy, which implies the necessity of establishing diversity within the authorities; and b) the right to identity, which includes the decision to belong or not to belong to a certain social group, and must not have legal consequences regarding the prohibition of discrimination. In other words, combining these standards and transferring them into institutional engineering "means combining, on the one hand, the organizational structure of the state and its institutions in accordance with the stated standards, and the rights and freedoms of individuals, on the other hand," which should lead to the creation of a unique and comprehensive system in which the dichotomy between autonomy and integration will be resolved.

As mentioned above, the *socio-political discourse* treats the issue of the Others on two key premises: conservative or ethnopolitical and progressive or liberal-democratic. The most important differences between the two approaches concern the internal identity composition of the Others, their instrumental role in the political-legal and socio-cultural systems, and the positioning of citizens as a special constitutional category in relation to the category of the Others.

In a conservative or ethnopolitical perspective, the Others are defined primarily on the basis of the ethnic criterion according to which the internal identity composition of the Others group is made up of 17 legally recognized minorities in BiH (Law on the Protection of Rights of Members of National Minoritizes from 2003). The supplementary criterion concerns the subjective declaration, which represents the general way of realizing collective rights, thus including all those who, for any reason, declare themselves as Others. This approach was adopted in Sarajevo Canton, where it is stipulated that the caucus of the Others forms on the condition that there is at least one representative who declares themself as Other or a member of a national minority.

In the instrumental sense, the Others are seen as a fourth or supplementary element of the existing ethnic structure made up of three constituent peoples, which ultimately legitimizes but also reproduces a multi-ethnic and plural society made up of segments or collectivities. Citizens are viewed as an all-inclusive but also nominal constitutional category (fictitious constitution-maker) which is interpellated by socio-legal mechanisms in the form of one of two real constitutional categories: constituent peoples and Others. Hence, Šarčević claims that the "abstract citizen is only a supplementary element of the constitutional system that corrects the empty spaces of ethnically oriented management of state affairs." The consequence of the application of this model is the predominance of collective over individual rights if not even an arrangement according to which the realization of basic political individual rights is conditioned by the prior realization of collective rights.

The progressive or liberal-democratic perspective is alternative and critical to the conservative one. The Others are defined on the basis of a broader cultural criterion - which includes all social groups that are culturally different from ethnonational groups (subcultural groups) - or on the basis of the broadest political and class criterion, which includes all non-privileged members of society, i.e., all those who are not part of "acquisition ethno-entrepreneurial classes" as Mujkić discusses. In this sense, the Others are all those who are marginalized or instrumentalized by the current ethnopolitical order to realize their particularistic interests. In this perspective, the Others and citizens are seen, often erasing the boundary between the two categories, as agents of emancipation and struggle against the existing ethnopolitical order.

Therefore, the Others and citizens are not perceived as separate constitutional and social categories, but as a unique group that includes all those who are forced by the existing ethnopolitical system to declare or not declare their affiliation. It is precisely the exclusion of the Others and citizens from the (power-sharing) system and their external definition as a heterogeneous category that confers internal unity to this group.

The group of Others and citizens articulates its interests primarily as a desire for change, referring to the following values: individual human rights and freedoms, human dignity, a democratic form of government based on individual political subjectivity, and civil society as the institutional framework of a plural or multicultural society. The principle of collective representation and protection of collective interests, in this sense, is considered secondary to the prohibition of discrimination and the principle of equality. In this context, Ždralović points out that "the qualitatively different way of grouping the Others in relation to the constitutive peoples can also be interpreted as an emancipatory potential which, precisely thanks to the pluralism of interests and attitudes it brings together, recognizes individual rights and freedoms as a fundamental political value whose significance has been diminished and even denied in the spirit of the hitherto dominant ethno-political collectivist forces". From the above considerations, it follows that the Others do not represent the fourth or supplementary element. Instead, (together with the citizens) they are the second element of the constitutional order that strives to change the existing order to a radically different one.

The legal (judicial) and the socio-political discourses presented here are the starting point for understanding the Others as an essential constitutional and social category, but at the same time, they thematize the Others in relation to the essential dichotomies of BiH society and the state. The implementation of the ECtHR ruling in the case *Sejdić-Finci v. BiH* has political and (international) legal significance both for the collective rights of the Others and individual rights of citizens. This is also related to the BiH's eventual path toward Euro-Atlantic alliances. In addition, it also has symbolic significance in terms of broader social changes and the concrete resolution of some of the fundamental dichotomies around which the BiH society continues to be ideologically polarized.

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Census
A Useful Tool without Practical Use in Bosnia and Herzegovina

The notion and purpose of the census. Population census is used as one of the primary sources of demographic data within a territorial unit, usually a country. Census, observed as a demographic measurement tool, mainly focuses on population growth or decline within a specific population. They are usually collected once every 10 years and the collected data are compared and evaluated against each other and the results obtained in other nationwide censuses (economic, housing, government, etc.). The results obtained serve as a "calibration standard," and further sample surveys are set up in similar ways so that the obtained data could best correspond to and resemble the real state of the society.

Census procedures and data collection are legal categories, and they have a significant impact on a number of public domains, not only within the state administration but also within the private sector, which benefits from an overview of public demands for specific services or goods. For many decades, important decisions on public finances and budget distribution, as well as the availability of public services, have been made based on data collected in a census, which is made available to everyone and free of charge. Such data are also essential for local and national development, as they provide insight into how people live, and reveal more information on which areas of life are "insufficiently" addressed or secured. Some data cannot be obtained in any other way than through censuses, such as data on real residence or data on where and how often people travel and what transportation means they use, which are crucial for planning the capacities of train or bus connections within specific regions.

For example, census can provide the best possible approximation overview of the population's age structure, which serves as a drive for urban planning, construction of neighbourhoods, development of public transportation systems, kindergartens, schools, elderly homes, hospitals, and nursing services or hospice care, barrier-free accessibility for the disabled, etc. The results of the census can be utilised as the foundation for the preparation of other relevant infrastructural and development plans, various housing programs, service networks, and industrial zone planning. The size, availability, and price of apartments and the number of people in a household can also indicate the living conditions of the population and highlight neighbourhoods in which it is problematic to find housing, and whether and why families are forced to live within one housing unit. Data on population density, character of buildings, heating systems, etc., can help to plan and design various emission maps, develop programs for improving air quality, and the development of energy networks. Census data can be used to estimate potential risks in advance and prepare decision-makers to opt for the most effective method of intervention; they also help in planning anti-flood and other emergency

operational measures. The obtained data can thus save human lives, help to develop services in less developed localities, and consequently raise the living standard of the local population and support specific business projects. Census data can also support employment by promoting specific occupational fields (like crafts or trades) that need to be enhanced within the labour market or by strengthening the existing educational or life-long learning courses, as well as adjusting educational system programmes with particular labour needs. The census data can also advance the prospects of successful integration of national minorities and foreigners within the larger society; for instance, through identifying the need for support of much-needed language and other skills-building courses, or design of specific tax reduction policies, or setting local minority councils (if minimum thresholds are surpassed). In other words, statistical data have a huge influence on public policies, as they shape topics for public discussion and help to regulate many areas of social activities.

The origins of census. Available historical records show that censuses were conducted in ancient times. The Babylonians had already developed a population registration system in 3,800 BC, followed by similar enumeration techniques established in China, Egypt, Greece, the Roman Empire, and Palestine. "Population inventories" were mainly used for military and tax purposes. During the Roman Republic, the census was carried out at five-year intervals to register all free male citizens and was combined with an inventory of property (including slaves) to divide the population into "*curiae*." The census results were used to elect officials and to collect taxes.

In the Middle Ages, at the time of feudal lordships, a monarch interested in conducting censuses predominantly for tax purposes often encountered resistance from the nobility. Records of these population censuses are missing, while accurate census results of estates have been preserved only in some cities. Reliable population censuses across Europe took place with the arrival of absolutism and the development of administrative apparatuses (state and church). The first such census was conducted in France in 1666, including the French colonies in North America. The first censuses of the entire population in Europe took place around the mid-18th century. The first reliable door-to-door census was carried out in 1748 in Sweden and Prussia, followed by Finland (1749), Austria (1754), Norway and Denmark (1769), Switzerland (1789), the United States and France (1790) and Great Britain (1801). The basic principles shaping the standardised census methodology began to take shape gradually.

The modern-day type of census-taking dates to the mid-19th century. The pioneer of the methodology was Quetelet, while his population counting principles were applied for the first time in Belgium in 1846. The practical experience of carrying out the census was beneficial for the development of statistical methodology, but there were also many endeavours to ascertain other relevant social and economic data. After the establishment of the International Statistical Institute (1885), the quality of census data collection and result analyses increased, and the principle of comparability of data on an international scale became a reality. Mechanical central processing of data (using punching machines) was introduced in the second half of the 19th century. The mechanical sorting schemes led to further enhancement and improvement of data classifications. The punched cards were later replaced by reading devices.

Census in the EU. Nowadays, all European Union (EU) member states are bound by European Parliament and European Council Regulation no. 763/2008 from 2008, to conduct regular censuses of the population, houses, and apartments. In individual EU member states, census methods differ depending on the national legislation. The development of IT technologies has influenced the way censuses are carried out, as they reduce the costs of implementation and increase the overall quality of data collection and analyses.

Many countries in the EU use a traditional census method. The enumerators record the data in enumeration sheets by writing down the respondents' answers, while some countries use the self-enumeration method, where enumerated persons make the entries themselves. In some countries, questionnaires are distributed by post and sent back in the same way. The shorter versions of questionnaires are used for a nationwide enumeration, while long versions of questionnaires are used only for a selected sample of residents, households, and apartments. The disadvantage of this method is its high cost and dependence on full information disclosure and cooperation of the population, and this is why it is carried out at wider time intervals and the results obtained can soon become outdated.

An alternative to classical census-taking is obtaining data from administrative sources. Population counting based on registers containing comprehensive data on a number of examined units is used in the Nordic countries (Iceland, Denmark, Finland, Norway, and Sweden), the Netherlands, and Austria. This method reduces the cost of conducting the nationwide population census; it is possible to carry it out within a shorter time interval and thus obtain more up-to-date data. The disadvantage is the constant need to update the existing data in the registers, the limited number of collected information that could be analysed, and the potential misuse of the recorded data. Some countries use an index census containing a sample survey on a selected sample of the population to supplement their missing data and provide additional information on certain relevant topics (for instance, the Netherlands). This method is cheaper than a classical nationwide census, but it is not possible to reliably obtain data, even for the smallest territorial units.

Another alternative to the classical census-taking model is the so-called rotating census, used in France. Only part of the population is counted gradually, data is collected over a longer period, and not just at a decisive moment. The advantage of this method is more frequent data updates, even if only for part of the territory, and a reduction of the burden placed on the public. The downside is the limited capacity for comparison since data are not obtained for the entire population at one point in time.

Census in BiH. The Institute for Statistics of the Socialist Republic of Bosnia and Herzegovina (BiH) carried out all population censuses in pre-Dayton BiH. During the Population Census in 1971, 1981, and 1991, the data collected on agriculture were limited. The latest Agricultural Census in BiH was conducted in 1960. These results were later used in the livestock surveys. This means that the latest full Agricultural Census in BiH was conducted over 50 years ago.

The most recent and the only post-Dayton Census of Population, Households, and Dwellings in BiH was carried out between 1 October and 15 October 2013, exactly 22 years after the last census carried out in 1991. It was carried out based on the Law on Census of Population, Households and Dwellings in BiH (Official Gazette of BiH, 10/12 and 18/13), Law on Organisation and Implementation of the Census of Population, Households and Dwellings in the Republic of Srpska (RS) (Official Gazette of RS, 70/12 and 39/13) and on the basis of the Methodology for Preparation, Organisation, and Implementation of the Census of Population, Households and Dwellings in BiH (2013). The 2013 Census of Population was carried out by the three statistical institutions, in cooperation with other legally authorised bodies and organisations, i.e., the Agency for Statistics of BiH (BHAS) for the territory of the Brčko District, the RS Institute of Statistics (RSIS) for the territory of the RS and the Federal Institute of Statistics (FSI) for the territory of the Federation of BiH (FBiH). The BHAS and the FSI published the Census results in June 2016. The results of the 2013 Census of Population, Households, and Dwellings are available online, and they cover the following areas: demography; education; economic activity; buildings, dwellings and living conditions, and household and family structure. Other data are available from other annual statistical surveys: vital statistics - births, deaths, marriages and divorced marriages; migration statistics - internal migration trends, as well as international migration.

The enumerators used a classical enumeration method (face-to-face interviews) and processed the obtained data in accordance with the International Standards for Population and Housing Censuses defined by UNECE and Eurostat, approved by the Conference of European Statisticians and Recommendations for Population and Housing Censuses 2010; Regulation (EC) 763/2008 on Population and Housing Censuses and Implementation Measures; Regulation (EC) 1201/2009), and other relevant standards defined by the Concil of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data. The Agency for Statistics of BiH has introduced a statistical register of spatial units for BiH, and its regular update is based on data obtained from the entities' authorities and BD, which are responsible for keeping a single register of spatial units within their specific competence.

The 2013 census proved to be a stumbling block in some important events in BiH, especially those related to elections and the Electoral Law of BiH. After prolonged ethnic confrontations, in the 2016 Ljubić case, the Constitutional Court of BiH (CCBiH) introduced the division of mandates based on the latest census from 2013, instead of the 1991 census, through an Instruction adopted by the Central Election Commission. Importantly, a comparison between the 1991 census and the 2013 census underlines the differences in ethnic composition before and after the 1992-1995 conflict. The comparison between the two censuses shows that ethnic affiliation has become territorially embedded which has consequences on the division of mandates. Apart from this, the census remains unused for any of the purposes stated above.

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Branches of Government

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Executive Power in Bosnia and Herzegovina

Executive power at the level of Bosnia and Herzegovina (BiH) is exercised by two political institutions: the Presidency of BiH and the Council of Ministers of BiH. The Presidency is the collective head of state and its role as an institution of executive power is marked by its constitutional and political role. It does not participate in the day-to-day execution of laws but shapes policies within the competence of BiH, represents the state, and makes policy in its areas of competence.

Although the *Presidency* is the head of state, its *competencies* are relatively wide, since, according to Article V 3 of the Constitution of BiH, it is authorised to shape the foreign policy of BiH, appoint ambassadors, represent BiH in international and European organisations and institutions, submit applications for membership in the same organisations and institutions, ratify international agreements, etc. Since the competences of the Presidency have not been listed in a single constitutional provision, which is not a good solution, it is necessary to analyse the whole text of the Constitution to ascertain them. Other constitutional provisions prescribe other competences, such as nominating the Chair of the Council of Ministers or drafting the budget of BiH. The Presidency acquired new competences after certain powers had been transferred from the entities to the state, as was the case with defence. Therefore, the competences of the Presidency are wider than one can conclude from the text of the Constitution.

The Presidency has important competences in the areas of foreign policy, defence, budget, however, its competences in other policy areas are not as strong. It can formulate its attitudes on different issues. However, it does not have the competence to enact legally binding acts which would entail the creation of a legal system. It has the right to initiate legislation, although it exercises it very rarely, while the execution of laws is in the hands of the Council of Ministers.

The *composition* of the Presidency reflects both the nature of the society and the tragic armed conflict in its recent past. Therefore, its character as a collective body composed of three members is not only quite natural but also indispensable. It is compatible with the political regime of consociation democracy, which has been constitutionalised in a segmented society and a fractured state. The constitutional solution, according to which one member, the Serb, has to be directly elected in Republika Srspka (RS), while the Bosniak and the Croat have to be directly elected in the Federation of BiH (FBiH), was a reflection of the nature of the constitutional systems of the entities, in that FBiH was the entity of the Croats and the Bosniaks, while RS was the entity of the Serbs.

The concept of entities as exclusively "ethnic" based was officially abolished through the decisions of the Constitutional Court of BiH on the constituency of peoples, according to which the concept of "constituency" was extended to the entire state territory. Several judgments of the European Court for Human Rights (ECtHR), starting with *Sejdić and Finci v. BiH* (2009), established the legal and political obligation for BiH to change its Constitution and Electoral Law in order to formally enable all citizens to be elected to the Presidency in both entities. According to these judgments, discrimination exists since not all citizens have the equal passive voting right in the Presidency elections. Despite political efforts, a constitutional solution has not yet been found.

A problem arises on the issue of the legitimacy of the Presidency members regarding the method of their election. Namely, the dilemma arises whether the members of the Presidency represent the citizens or their respective constituent peoples. According to one opinion, which is also advocated by the Constitutional Court of BiH, members of the Presidency represent all citizens since they are elected directly. According to the contrary opinion, they represent their respective constituent peoples. Both opinions have a logical basis. The first opinion is based on the fact that the members of the Presidency are elected by citizens, and it is not possible to prove whether they were elected by voters who belong to one or another constituent people or to the group of Others. The contrary opinion is not based merely on the fact that the members of the Presidency belong to three constituent peoples. It comes from: 1) historical, social and political reasons for the introduction of the three-member Presidency; 2) the fact that members of the Presidency have to belong to different peoples; and 3) the Presidency's decision-making process.

If the intention of the creators of the Constitution had not been the guarantee of legitimate representation of three constituent peoples in the Presidency, it would not have to be a collegial institution in the first place. On the other hand, if a Presidency member exercises the veto power on a particular decision, a decision on a controversial issue has to be made either by the National Assembly of RS or by the Bosniak or the Croat delegates in the House of Peoples of the Parliament of the FBiH. If a member of the Presidency represents all citizens, a controversial decision, vetoed by them, would not be decided only by the Bosniak or only the Croat delegates, but, at least, by the House of Peoples as a whole.

The Presidency has a Chairperson that is only *primus inter pares*. The members rotate every eight months to the post. The Presidency *decides* on all issues as a collegial body. Some decisions have to be brought by consensus and they are explicitly listed in the Constitution. If there is no consensus on these issues, decisions can be brought by majority vote, but in such cases, the member who voted against has the right to veto the decision. Their veto is a suspensive veto. The Presidency decides on all other issues by a majority vote (two to one). The reason for this solution is that another institution (the Parliamentary Assembly of BiH) will bring the final decision, so it will not be a serious political problem if a decision is made against the political will of one member of the Presidency. For example, the Presidency appoints the Chair of the Council of Ministers and adopts the

budget proposal by majority vote. However, both decisions have to be finally adopted by the Parliamentary Assembly (or one of its Chambers).

Another executive institution is the *Council of Ministers of BiH*. It has not been explicitly defined as the government in the Constitution but was entrusted with traditional governmental powers. The Council of Ministers Act defined it in Article 2 as an organ of executive power which exercises its rights and duties as governmental functions. Constitutional provisions on the Council are contained in Article V of the Constitution, which, for the most part, concerns the Presidency. The structure of the Constitution suggests that the creators of the Constitution intended to give the Presidency a more prominent role as the most important bearer of the executive function. Article V 4 of the Constitution prescribes that the Council is responsible for the execution of the policies and decisions of BiH, which means that it is not exclusively an executive organ of either the Parliamentary Assembly or the Presidency. Its *competencies and powers* have grown over the years. It has become the most important initiator of legislation at state level as an overwhelming majority of laws adopted by the Parliamentary Assembly have been initiated by the Council. Importantly, the execution of laws is also a responsibility of the Council since it has under its command a relatively developed system of administrative bodies.

The number of ministries has risen significantly over time. In the beginning, there were only three ministries. The number rose to six, then to eight, and, in the end, to nine. The reason for this lies in the fact that the state acquired new competences over time which led to the creation of new institutions at state level.

The Council of Ministers is *composed* of the Chair and nine ministers. Each minister has their deputy (only the minister of defence has two deputies, from two different constituent peoples). Deputy ministers are not members of the Council. Each deputy minister belongs to a different constituent people than the respective minister. The Constitution only contains a provision which prescribes that no more than two-thirds of all ministers will be from the FBiH. Article 6 of the Council of Ministers Act prescribes that the constituent peoples have to be equally represented in the composition of this institution. At least one post will be guaranteed to the Others or the secretary general of the Council will belong to this group.

The procedure for the appointment of the Council begins with the appointment of the Chair by the Presidency. The latter makes this appointment by a majority vote. The appointment has to be approved by the House of Representatives of the Parliamentary Assembly. The Chair appoints ministers and deputy ministers whose appointments have to be approved by the House of Representatives of the Parliamentary Assembly.

Although the Council is a grand coalition composed of political parties of all the constituent peoples, this appointment method could have as its outcome the situation where a political party or coalition which gains the majority vote of one constituent people is not represented in the Council. This outcome could to some extent or even decisively

influence the relationship between the Parliamentary Assembly and the Council since the Parliamentary Assembly could reject proposals made by the Council to a considerable extent (this is partly a consequence of the exclusion of the House of Peoples of the BiH Parliamentary Assembly from the appointment procedure of the Council of Ministers). Differences in the decision-making procedures in these institutions and the possibility that the Council includes a political elite that represents only the minority of a constituent people result in a relatively high percentage of bills drafted by the Council being rejected by the Parliamentary Assembly.

The Council is politically *responsible* to the Parliamentary Assembly which has the right to vote no confidence. The fact that the Council is responsible to both chambers indicates that the creators of the Constitution intended to stabilise the political position of the Council since it is not an easy task to convince members of both chambers to vote no confidence. The Presidency has the right to propose to the Parliamentary Assembly that the Chair of the Council be replaced. If the Parliamentary Assembly accepts the proposal, the Council resigns as a whole.

The Council makes *decisions* in two different ways depending on whether a decision is final or whether another institution has the right to make the final decision on a Council proposal. If the Council is introducing an act which has to be subsequently adopted by the Parliamentary Assembly, the act will be passed by the majority of present and voting members. As the Council is not adopting the final act, there is no reason to fear deciding by ordinary majority. However, it is different with final decisions, i.e., with those acts which have to be adopted solely by the Council. In these cases, decisions have to be adopted by consensus of the present and voting members. If it is not possible to reach a consensus, decisions have to be adopted by the majority of the present and voting members, under the condition that at least one member belonging to each constituent people votes in favour of the proposal. This decision-making method has to fulfil two aims: to enable relatively effective decision-making and to guarantee that decisions will not be made without the consent of at least the minimal number of ministers from each constituent people.

Executive power in the entities has been organised in completely different ways. Since the entities have the right to self-organisation, it is not unusual that their respective executive organisation has different features. This is particularly so with the executive government because RS has a semi-presidential system while the FBiH has a parliamentary system (although some authors think it also has the semi-presidential system).

Executive power is constituted by two political institutions in both entities: the President (and two Vice Presidents) and the Government. However, there are considerable differences. In RS, the President and two Vice Presidents are elected directly, while, in the FBiH, they are elected by the Parliament. This influences the competencies and responsibilities of the President in the respective entities. In both entities, the President and the Vice Presidents have to belong to three constituent peoples.

The *President of RS* is elected by a relative majority, as is the case with the members of the Presidency of BiH. So, there are no two-round elections. This simplifies the electoral system but simultaneously impacts the legitimacy of the elected President (and members of the Presidency) if they are elected by a small margin, particularly when 'abstention is high.

The *President and Vice Presidents of FBiH* are elected by both chambers of Parliament. A candidate can be nominated by a group of 11 deputies of the House of Peoples who belong to the same constituent people as the nominated candidate. The House of Representatives votes for a list composed of three candidates, each belonging to a different constituent people. After the House of Representatives has adopted a list, the House of Peoples has to adopt it. In both chambers, the list is adopted by the majority of present and voting members. The elected candidates decide which one of them will be President. If they cannot reach a consensus on this issue, the House of Representatives will elect the President.

Constitutional provisions on *responsibility* are different in the entities. While the President of RS is responsible to the voters and can be recalled directly by them, in FBiH, the President can be removed by the Constitutional Court of FBiH on the proposal of a two-thirds majority of members of each parliamentary chamber. In RS, the President can be recalled for any reason, which means that the voters can recall them for political or legal reasons. The recall procedure has to be prescribed by law, which has not been the case for the last twenty years. In the FBiH, the President can be removed for violation of the oath or if unfit to hold office.

In RS, the Vice Presidents do not have autonomous *competencies*. They only assist the President and one of them stands in for the President if they canno't exercise temporarily their office. It is different in FBiH. The President cannot exercise some of their most important competencies without the consent of both Vice Presidents, such as appointment of the Federal Government, removal of the Federal Government, proposals of amendments to the Federal Constitution, appointment of judges to the Constitutional Court of FBiH, dissolution of one or both chambers of the Federal Parliament.

The President of RS has wide competencies although the exercise of some of them depends on political circumstances. The President has the right to initiate legislation although they rarely use it. He/she also has the right to dissolve the National Assembly. Although they almost never use it, it happened once, in 1997, when the President of RS used this right for entirely political reasons, as the Constitution does not limit this right. The President also has the right to veto legislation. It is a suspensive veto, after which the National Assembly of RS can adopt a bill by the same majority (the absolute majority of all members) as it did when it voted on the bill for the first time. The President proposes the candidate for the post of President of the Government. Under specific and limited circumstances, the President of RS can remove the President of the Government which has the resignation of the Government as its consequence. The President of RS represents RS in international relations. They also propose candidates for judges of the Constitutional Court of RS to the National Assembly.

In FBiH, the President of FBiH has the right to initiate legislation although they do not have the right to veto laws. The President has the right to dissolve chambers of the Parliament only in a few precisely defined situations. They appoint and dismisse the Government and propose candidates for judges of the Constitutional Court of FBiH, although they need the consent of both Vice Presidents for these decisions. The appointment of the Government has limited political consequences since the House of Representatives has to approve this appointment.

The *Governments of both entities* have 17 members, and they are *composed* according to the "8+5+3 formula". In FBiH, eight ministers are Bosniaks, five are Croats, while three are Serbs. In RS, eight ministers are Serbs, five are Bosniaks, while three are Croats. One minister can belong to the Others, but in that case, the most numerous constituent people would have seven ministers. The election procedure for the entity governments are different to some extent. In RS, the President of RS nominates only the candidate for the post of President of the Government, while the latter proposes the list of candidates for the ministerial posts. The National Assembly of RS does not vote for each candidate but for the Government as a whole. In FBiH, the President of FBiH appoints the Government as a whole, with the consent of the Vice Presidents. After that, the House of Representatives has to approve this appointment.

In RS, the Government is politically *responsible* to the National Assembly which has the right to vote no confidence after which the Government has to resign. However, the President of the Republic can also influence the Government as they can remove the President of the Government in particular and relatively precisely defined circumstances. In FBiH, the Government has dual responsibility. It can be removed by the President of FBiH, with the consent of both Vice Presidents, or by both chambers of Parliament through a vote of no confidence.

Both entity constitutions prescribe not only collective political responsibility of governments but also individual political and legal responsibility of presidents of governments as well as the ministers.

Both entity governments essentially have the same *competencies*. They are the main architects of policy, and they have a monopoly on the exercise of the legislative function since almost all adopted laws have been drafted by respective governments. They also have the exclusive right to draft the budget. The governments execute laws, which is a more important competence than one can deduce at first glance. They also harmonise and coordinate the work of ministries and other administrative bodies, appoint and dismiss functionaries in the administrative bodies, etc. When it comes to the competences of the Government of FBiH of BiH, they are more complex compared to the competences of the Government of RS, due to the more complex internal organisation of FBiH of BiH, i.e., the existence of exclusive and divided competences between the Government of the FBiH and cantonal governments.

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Lejla Balić
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Legislative Power in Bosnia and Herzegovina[1]

In the broadest sense, legislature implies the adoption of general and imperative legal acts. In a narrower sense, this term refers to the enactment of laws by competent authorities. The legislature is also one of the three branches of state power. The term legislature also includes constitutional and legislative activity, given that in most contemporary democratic states the same representative body is responsible for adopting legal and constitutional provisions. As a rule, the adoption of legal and constitutional provisions implies different procedures, with stricter rules for constitutional norms in order to protect fundamental rules, rights, and values against frequent changes.

In a democratic system, popular sovereignty and representative democracy are the basic principles on which the entire state power is based and shaped. This is especially true for the constitutional and legislative power where representatives of citizens, directly elected in democratic multi-party elections, enter the legislative bodies. Constitutional and legislative activity represents the highest state activity and is considered a sovereign activity, and the state organ that performs it, i.e., the parliament, is considered a sovereign organ.

The representative body is an institution with one or two houses with a relatively large number of members. Its task is to make decisions about the main societal and political issues in the country. The structure and composition of the representative body should reflect the state system and the population of the country. In federal states, representative bodies are usually composed of two houses: the upper house represents the federal units, and the lower house represents the citizens of the federation (USA, Germany, Switzerland, etc.). A bicameral structure is sometimes the result of a specific form and development of a representative body (for example, the House of Lords in Great Britain) or differentiated in the electorate (the Senate in France and in Italy). In countries with a heterogeneous ethnic population structure, the federal state organisation may also include legislative bodies in which representatives of various ethnic groups are represented (Belgium).

The Parliamentary Assembly of Bosnia and Herzegovina (BiH) is the highest legislative body in the state. At the lower levels of government, two entity legislative bodies were established: the bicameral Parliament of the Federation of Bosnia and Herzegovina (FBiH) and the National Assembly of the Republic of Srpska (RS). In addition, there are ten cantonal assemblies within FBiH. The Assembly of the Brčko District (BD) also has legislative competence.

[1] Translated from the Bosnian and Serbian languages by Ivana Draganić.

Legislative power at the level of BiH. The *Parliamentary Assembly of BiH* is a bicameral body consisting of the House of Representatives (lower) and the House of Peoples (upper house). The name and structure of the two Houses indicate that they represent different interests and are elected in different ways.

The *House of Representatives* of the Parliamentary Assembly of BiH has 42 members who are directly elected by citizens: 28 members are elected from FBiH and 14 from RS (Article IV 2 of the Constitution of BiH). The Constitution stipulates that the majority of members (22 out of 42) of the House of Representatives constitute a quorum for the validity of sessions. The mandate of elected representatives lasts four years, and the Constitution does not provide for the temporary dissolution of the House of Representatives. Clubs within the House of Representatives are not organised on the basis of ethnicity, as is the case in the House of Peoples, but through political parties. The working bodies form the Collegium, which consists of the Chairman and two deputies from the three constituent peoples, as well as permanent and temporary commissions.

The *House of Peoples* consists of fifteen delegates, of which two thirds (five Bosniaks and five Croats) are elected from FBiH, and one third from RS (five Serbs). The Croat and Bosniak delegates from FBiHare elected by Croat and Bosniak delegates in the House of Peoples of the FBiH Parliament, while delegates from RS are elected by the National Assembly of RS. Nine members of the House of Peoples constitute a quorum, provided that at least three delegates from each constituent nation are present (Article IV 1b) of the Constitution of BiH). Delegates are elected for a term of four years. The working bodies of the House of Peoples constitute the Collegium, which is formed according to the same principles as the Collegium of the House of Representatives, as well as permanent and temporary commissions. In the House of Peoples, there are three clubs of constituent peoples that represent the main bearers of the legislative procedure and other responsibilities of this organ of legislative power. The House of Peoples can be dissolved by a decision of the Presidency of BiH or by its own decision, provided that the decision is passed by a majority of delegates, including a majority of delegates from at least two constituent peoples. The Presidency should bring the decision on the dissolution of the House of Peoples by consensus, otherwise it suffices for two members of the Presidency to vote for it.

In both Houses, *decisions* are made by the majority of votes of the delegates present and who vote (respecting the quorum), with a limitation related to the so-called entity vote (see: Veto rights). In the House of Peoples, in which the three constituent peoples are represented equally, a vital national interest can be protected by the so-called ethnic veto (see: Veto rights). The House of Representatives and the House of Peoples are equal when it comes to the exercise of legislative competence, and all laws have to be passed with the consent of both Houses.

The *competences* of the Parliamentary Assembly of BiH, which are defined in Article IV 2 of the Constitution of BiH, include: adoption of laws necessary for the implementation of the decisions of the Presidency of Bosnia and Herzegovina and for the performance of functions

according to the Constitution of Bosnia and Herzegovina (see: Distribution of Powers), deciding on the sources and amount of funds necessary for the work of BiH institutions and for the international duties of the state, approving the budget for the institutions of BiH, deciding on consent for treaty ratification, other issues necessary for the purpose of implementing the duties of the state, and issues the resolution of which was entrusted to it by the agreement of the two entities.

According to Article X of the Constitution of BiH, the Parliamentary Assembly is defined as the institution which is competent to amend the Constitution of BiH. Amendments to the Constitution are adopted by a decision of the Parliamentary Assembly, with a qualified majority in the House of Representatives, which needs to include a two-thirds majority of those present and voting.

In addition to these competences, the Parliamentary Assembly of BiH also has electoral and supervisory functions. As far as the electoral function is concerned, the approval of the appointment of the chairman of the Council of Ministers and of the Council of Ministers itself is the most important authority of the House of Representatives. In addition, the Parliamentary Assembly appoints the Ombudsman of BiH and members of the Central Election Commission of BiH. The supervisory function of the Parliamentary Assembly in relation to the Council of Ministers is reflected in the right of representatives to ask questions and initiate the interpellation process, and in the right to challenge the Council of Ministers with a no confidence motion. In addition, the Council of Ministers is obliged to submit a report on budget execution to the Parliamentary Assembly. The latter can either accept or reject the report.

Legislative power in the entities. In the FBiH, legislative power is exercised by the *Parliament of the FBiH*, a bicameral representative body consisting of the House of Representatives (lower house) and the House of Peoples (upper house). The House of Representatives has 98 deputies who are elected directly by citizens. The House of Peoples has 80 representatives, of which 23 come from each of the constituent peoples, and 11 from the Others. Delegates to the House of Peoples are elected by the cantonal assemblies from among their delegates, in proportion to the national structure of the population. Members of both Houses of the Parliamentary Assembly of FBiH are elected for a term of four years. The competences of the Parliamentary Assembly are defined in Article XX of the Constitution of FBiH and include the election of the president and two vice-presidents of FBiH, confirmation of the appointment of the government of FBiH, adoption of laws, adoption of the budget of FBiH, etc. Unless otherwise envisaged by the Constitution of FBiH, the decisions of the Parliamentary Assembly must be confirmed by both houses. The Constitution provides for a special procedure for the protection of vital national interests that is conducted in the House of Peoples.

Cantonal assemblies are unicameral representative bodies that are elected directly. The number of representatives in cantonal assemblies can vary from 20 to 30, depending on the number of voters registered in the Central Voters' Register in a given canton. Cantonal assemblies are responsible for adopting the cantonal constitution and laws, adopting the cantonal budget,

confirming and recalling cantonal governments. The clubs of the constituent peoples in the cantonal assemblies can initiate the procedure to protect their vital national interests in relation to acts adopted by the assembly.

Legislative power in RS is exercised by the *National Assembly of RS*, which has 83 deputies who are directly elected for four-year terms. The National Assembly of RS decides by a majority vote of the total number of deputies, unless the Constitution of RS provides for a special majority. The responsibilities of the National Assembly of RS are defined by Article 70 of the Constitution of RS and include: amending the Constitution, passing laws and other acts, adopting the development plan, regulatory plan, budget and final account, calling a referendum, appointing and dismissing public officials, controlling the work of the government of RS. The National Assembly of RS can decide to consult citizens on certain issues for which it is competent through a referendum. On 29 April 2003, according to the procedure prescribed by the Constitution of RS related to the protection of vital national interests, the Council of the Peoples of RS was constituted as a supplementary legislative body. The Council of Peoples has 28 delegates, eight from each constituent people and four representatives of the Others. Laws, regulations and other general acts adopted by the National Assembly enter into force according to the procedure established by the Constitution, provided that they do not threaten vital national interests.

In BD, legislative power is exercised by the *Assembly of BD*, which has 31 members (including two representatives of national minorities) who are directly elected for a four-year term. The Assembly has numerous responsibilities, such as adopting the District statute, passing laws, adopting the budget, electing and replacing the president and vice-president of the District Assembly and the mayor of Brčko, giving consent for the appointment of officials, supervising the work of the government and the entire administration of the District, especially when it comes to budget management. In principle, the decisions of the Assembly are adopted by a majority vote, while the District Statute defines the cases for which a qualified (three-fifths) majority is required and provides a mechanism to prevent overvoting, thus protecting the vital interests of the constituent peoples.

A few remarks. The structure of the Parliamentary Assembly of BiH differs somewhat from the standards in comparative constitutional law compared to most complex states. This is a consequence of the specific circumstances in which BiH federalism and the model of consociation democracy arose, which, as a rule, is a characteristic of federations with a heterogenous ethno-linguistic structure (Belgium). In comparative constitutional law, there are many different organisational models for the legislative body in a federal state, however, it is possible to distinguish two basic models. The Senate model is the one adopted by the United States of America (USA), where all federal units, regardless of size and population, are equally represented in the upper house of the legislative body. The second model is the German Ambassador model, in which the federal units have a different number of deputies in the upper house (between three and six) depending on the number of inhabitants.

Another difference concerns the correlation between the method of electing the representatives of the upper house and the powers they have. In countries where citizens directly elect members of both houses (USA), the houses are equal in the exercise of legislative functions. On the other hand, in countries where the members of the upper house are not directly elected but are delegated by the federal units, their legislative powers are limited and are mainly reduced to protecting the interests of the federal units (Germany). BiH represents a combination of these two models (the combined model was also adopted by South Africa and the Russia) given that both Houses of the Parliamentary Assembly are equal in performing the legislative function and at the same time, ensure the protection of the interests of federal units through entity voting. The House of Representatives of the Parliamentary Assembly represents citizens of BiH (because all citizens of BiH have active voting rights, i.e., the right to choose their representatives) who are also citizens of one of the two BiH entities (considering that elections take place in electoral districts established at entity level, and entity citizenship plays a significant role in exercising active voting rights). By contrast, the House of the Peoples firstly represents the constituent peoples (in the delegate clubs) but also entities (delegates are elected in entity parliaments).

The Venice Commission identified several problems related to the election and composition of the House of Peoples in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (CDL-AD (2005)004). The main problem concerns the discriminatory provisions that deny the passive right to vote for the House of Peoples to citizens who do not declare themselves as members of any of the constituent peoples, just like the passive vote is denied to Croats and Bosniaks in RS, and Serbs in FBiH. The limitation of passive voting rights results in the limitation of active voting rights when it comes to the election of delegates to the House of Peoples, given that Serbs from FBiH cannot participate in the election of delegates. The Venice Commission clearly established that these are discriminatory provisions that are contrary to Article 14 and Protocol 12 of the European Convention on Human Rights.

In 2009, the European Court of Human Rights found (with dissenting opinions of three judges) that the provisions of the BiH Constitution concerning the House of Peoples of the Parliamentary Assembly of BiH discriminate against Others (Sejdić-Finci judgement, applications 27996/06 and 34836/06).

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The Judiciary of Bosnia and Herzegovina

In a system of separation of powers into three branches – legislative, executive, and judicial – the existence of the judicial as a special branch of government is a prerequisite for the existence of the rule of law in every state. It is closely related to the establishment of autonomous and independent judicial authorities whose basic function is to resolve disputes between legal entities based on regulations. The judiciary, as a broader concept than the judicial authorities, also represents one of the functions of the government, which determines the law in dispute. In addition to the courts, the judiciary also includes prosecutor's offices, attorney general's offices, lawyers, notaries, ministries of justice, and the European Court of Human Rights (ECtHR).

The judiciary of Bosnia and Herzegovina (BiH) consists of four judicial systems that reflect the administrative-territorial organisation of BiH: judiciary at the level of the state, the judiciary of the entity Republic of Srpska (RS) and the Federation of BiH (FBiH), as well as the judiciary of Brčko District (BD). These four systems are governed by the state body called the High Judicial and Prosecutorial Council (HJPC/Council), which was established in 2004, by a law adopted by the Parliamentary Assembly of BiH (Law on the HJPC of BiH, "Official Gazette of BiH", no. 25/04), as part of the judicial reform carried out by the international community from 2000 to 2004. The Law on the HJPC of BiH is the result of the Agreement on the transfer of certain competencies of the entities through the establishment of the HJPC of BiH ("Official Gazette of the FBiH", no. 16/04), by which the entities (FBiH and RS) gave their consent, based on Article III 5.b) of the Constitution of BiH, to establish HJPC BiH as a state institution. At entity and BD level, complete court systems have been established within the hierarchy. However, there is no hierarchical relationship between these four court' systems and thus, the state courts are not hierarchically superior to the entity courts.

Judiciary at the state level of BiH. At BiH level, the judicial authority consists of the Constitutional Court of BiH, HJPC, the Court of BiH, the Prosecutor's Office of BiH, the Attorney General's Office of BiH, and the Ministry of Justice of BiH. The Council, as a judicial regulatory institution, has the task of ensuring an "independent, impartial and professional judiciary" (Law on the HJPC of BiH, "Official Gazette of BiH", no. 25/04, 93/05 and 48/07, Article 3). The Council appoints all judges and prosecutors in BiH, including court presidents and chief prosecutors, and participates in the process of electing judges to the entity's constitutional courts. It also has competencies over disciplinary responsibility of judges and prosecutors, professional training of judges and prosecutors, and evaluation of

judges and prosecutors. Additionally, the Council has powers over financing and the budget of judicial institutions. It adopts the ethical codes for judges and prosecutors, participates in the legislative process related to laws in the field of judiciary and manages judicial administration. The Council numbers 15 members, elected by the courts, prosecutor's offices, bar associations, the Parliamentary Assembly, and the Council of Ministers of BiH. The Office of the Disciplinary Prosecutor, which operates within the Council, brings disciplinary charges before the first and second instance disciplinary commissions. The Council also has six permanent commissions, while the technical, administrative, and financial tasks of the Council are performed by the Secretariat (Law on the HJPC of BiH, Article 15, Paragraph 1).

The *Court of BiH* is an ordinary court at the level of BiH, established by the Decision of the High Representative in 2000. It is not superior to entity courts, including supreme entity courts, and acts as a specialized court. The Constitutional Court of BiH has pointed out the need for entity courts, in cases of war crimes, to follow the case law of the Court of BiH as a state court to avoid breaching the principle of legal certainty and the rule of law (Decision on admissibility and merits in case no. AP-1785/06, para. 89). The Court of BiH has narrowly defined jurisdictions (criminal, administrative and appellate) and thus, three divisions: criminal, administrative, and appellate. The criminal division has three sections, namely: (I) for war crimes, (II) for organised crime, economic crime, and corruption, and (III) for all other criminal offenses falling under the Court's jurisdiction. Three sections operate within the Administrative Division: (I) for administrative disputes, (II) for civil procedure, and (III) for enforcement procedure. The Appellate Division, which also has three sections, decides on legal remedies against the decisions of the Criminal and Administrative Divisions, and complaints regarding election issues. There is also a Joint Secretariat and Registry Office at the Court. The Constitutional Court of BiH decided on the constitutionality of the establishment of the Court of BiH (case no. 26/01) and its jurisdiction (case no. 16/08). In both cases, it determined that the existence of the Court of BiH and how its jurisdiction is defined is in the line with the Constitution of BiH.

The Prosecutor's Office of BiH was established in 2003 by the Decision of the High Representative. It has two special divisions: (I) for war crimes and (II) for organised crime and corruption. As is the case with the Court of BiH, the Prosecutor's Office of BiH is not superior to the entity prosecutors' offices, and therefore cannot control the legality of their work or issue binding instructions.

The *Office of the Attorney General of BiH* was established to ensure the effective legal protection and representation of BiH before courts and administrative bodies as well as protection of its competencies, interests, and rights established by the Constitution (Law on the Office of the Attorney General of BiH, "Official Gazette of BiH", no. 8/02, Article 1).

The Ministry of Justice of BiH also has competencies in the area of judicial administration (prescribed by the Law on Ministries and other Administrative Bodies of BiH, "Official Gazette of BiH", no. 5/03, 42/03, 26/04, 42/04, 45/06, 88 /07, 35/09, 59/09, 103/09,

87/12, 6/13, 19/16 and 83/17, Article 13 and other special laws). The *Bar Association* and the *Notary Chamber* operate only at entity level.

The Constitutional Court of BiH is established by the Constitution which regulates the composition and election of judges, the decision-making procedure, the competence to adopt the Rules of the Court, the competence of the Constitutional Court, and the legal nature of its decisions. In addition to the Constitution, the work of the Constitutional Court is regulated by Amendment No. I to the Constitution of BiH ("Official Gazette of BiH", no. 25/09) and the Rules of the Constitutional Court (refined text available in "Official Gazette of BiH", no. 94/14). The framer of the Constitution did not envisage the adoption of a law which would enable the legislator to regulate the work and functioning of the Constitutional Court in detail but instead gave such competence to the Constitutional Court itself through the adoption of Rules. According to the Constitutional Court, "this shows the intent to secure the independence of the Constitutional Court by way of enabling the court to prescribe its own rules of procedure and thereby to prevent any interference with the exercise of its assigned responsibilities" (Decision on admissibility and merits in case no. U- 6/06, para. 24). The Constitutional Court makes decisions in three formats: Small Chamber, Grand Chamber, and Plenary Session. Within the Secretariat of the Court, there is also the Registry Office, headed by the Registrar. The Constitutional Court of BiH has a specific position in the judiciary of BiH, considering that it has prescribed appellate jurisdiction over issues under the BiH Constitution arising out of a judgment of any other court in BiH. In other words, this means that there is a possibility that the final judgment of all regular courts in BiH will be reviewed if it is in a violation of any provision of the Constitution of BiH (most often it is a provision that guarantees human rights as well as rule of law). However, due to the lack of a Supreme Court instance at state level, the Constitutional Court of BiH sometimes goes beyond the jurisdiction prescribed by the Constitution, particularly in the domain of decisions of regular courts and the application of substantive law. It happened in case no. AP-775/08, where the Constitutional Court decided on the way the courts interpreted and applied the laws. In addition, the Constitutional Court pointed out to the state legislator the need to establish the Supreme Court of BiH, to harmonise the war crimes case-law of all courts in BiH and contribute to the full expansion of the rule of law in BiH (Decision on admissibility and merits in case no. AP-1785/06, para. 90).

The judiciary of FBiH. The entity FBiH has a complex judicial system consisting of municipal courts, cantonal courts, the Supreme Court of FBiH, the Constitutional Court of FBiH, Federal and Cantonal Prosecutor's Offices, Federal General Attorney's Office, the Bar Association, the Notary Chamber and the Federal Ministry of Justice. The organisation and jurisdiction of courts is regulated by the Law on Courts of the FBiH ("Official Gazette of the FBiH", no. 8/05, 22/06, 63/10, 72/10, 7/13, 52/14, and 85/21).

There are 34 *municipal courts*, which have original criminal and civil jurisdiction, while some courts have departments with special jurisdiction. There are ten *cantonal courts*, which act as courts of first instance jurisdiction in matters that do not fall under the jurisdiction of municipal courts and as second instance courts when they decide on appeals against decisions

of municipal courts. Cantonal courts are based in Bihać, Orašje, Tuzla, Zenica, Goražde, Travnik, Mostar, Široki Brijeg, Sarajevo and Livno. *The Supreme Court of FBiH*, in addition to being the highest appellate court in FBiH (Article 18 of the Law on Courts of FBiH), may also have original extended jurisdiction determined by a special law (such as the Law on Suppression of Corruption and Organised Crime, "Official Gazette of the FBiH", no. 59/14). The *Supreme Court of FBiH* consists of five divisions: criminal, civil, administrative, a department for court records, and a special division for dealing with the crimes of corruption, organised and inter-cantonal crime.

In 2002, the High Representative issued a Decision on the establishment of a new *Federal Prosecutor's Office*. Within its competencies, the Federal Prosecutor's Office protects the exercise of human rights and civil liberties guaranteed by the Constitutions of BiH and FBiH, as well as the rights and interests of legal entities in accordance with the law and ensures constitutionality and legality (Law on the Federal Prosecutor's Office of FBiH of BiH, "Official Gazette of the FBiH", no. 19/03, Article 3). The Federal Prosecutor's Office is subordinated to ten cantonal prosecutor's offices. Thus, the Federal Prosecutor's Office supervises the work of the cantonal offices to ensure legality and efficiency in proceedings. The Law on Suppression of Corruption and Organised Crime established a Special Division of the Federal Prosecutor's Office for the suppression of corruption, organised and inter-cantonal crime (Article 3).

At FBiH level, there is also a *Federal General Attorney's Office*, established by law (Law on Federal General Attorney's Office, "Official Gazette of the FBiH", no. 2/95, 12/98, 18/00 and 61/06), to undertake measures and legal means for the legal protection of property and property interests of FBiH.

The Federal Ministry of Justice also has jurisdiction in the area of judicial administration, prescribed by the FBiH Law on Courts (Art. 61). The Law on Attorney's Profession of FBiH ("Official Gazette of the FBiH", no. 5/02, 40/02, 29/03, 18/05, 68/05 and 42/11) establishes the *Federal Bar Association* (Article 10), which gathers lawyers whose offices or companies are located on the territory of FBiH. The Federal Bar Association consists of five regional chambers with headquarters in Sarajevo, Mostar, Tuzla, Zenica, and Bihać. The Law on Notaries of the FBiH ("Official Gazette of the FBiH", no. 45/02 and 30/16) establishes the *Notary Chamber of the FBiH* (Art. 62), for the mandatory organisation of notaries. The Chamber represents notaries before the competent authorities, protects the reputation, honour, and rights of notaries, and makes sure that notaries perform notary services conscientiously and responsibly and in the line with the law (Art. 63 Paragraph 1). At FBiH level, there is a *Centre for the Education of Judges and Prosecutors* (established by the Law on the Centre for the Education of Judges and Prosecutors, "Official Gazette of the FBiH", no. 24/02, 40/02, 59/02 and 21/03). The Centre is an independent public institution that provides initial and professional training for judges and prosecutors of judicial bodies of FBiH.

The *Constitutional Court of FBiH* is listed among the courts in the FBiH Constitution. In addition to the FBiH Constitution (which regulates the composition, jurisdiction, procedure,

and legal nature of decisions), the work of the FBiH Constitutional Court is regulated by the Law on Procedure before the FBiH Constitutional Court ("Official Gazette of the FBiH", no. 6/95 and 37/03) and the Rules of Procedure of the Constitutional Court of the FBiH Court ("Official Gazette of the FBiH", no. 40/10 and 18/16). According to the FBiH Constitution, the basic function of the FBiH Constitutional Court is to resolve disputes between different levels of government and institutions or within the institutions of the federal government (FBiH Constitution, IV. C. 3. Article 10).

The judiciary of RS. The judiciary of RS consists of the Supreme Court and its subordinate courts of general and specialised jurisdiction, the Constitutional Court of RS, the Republic and District Public Prosecutor's Offices, the Attorney General's Office of RS, the Bar Association, the Notary Chamber and the Ministry of Justice of RS. Unlike the state and FBiH levels, in RS, there are also courts for a specific type of dispute, namely a commercial dispute. The organisation and jurisdiction of courts is regulated by the Law on Courts of the RS ("Official Gazette of the RS", no. 37/12, 14/14, 44/15, 39/16, and 100/17).

Courts of regular jurisdiction are *basic courts* (28 of them), with seven divisions outside the seat of the courts, and *district courts* (seven of them: in Banja Luka, Bijeljina, Doboj, Trebinje, East Sarajevo, Prijedor, and Zvornik), while the specialised courts are: *district commercial courts* (seven courts, which have their seats where the district courts are) and the *Higher Commercial Court*. Basic courts have first instance jurisdiction in criminal, civil, commercial, and other matters, while district courts act as the first instance in cases for which basic courts do not have jurisdiction and as appeal courts. The *Supreme Court of the RS* is the highest in RS (Law on the Courts of the RS, Article 22, Paragraph 1), with the task of ensuring uniform application of the law (Article 123 of the Constitution of the RS). The Supreme Court of RS has four divisions: criminal, civil, administration, and case-law division.

The Public Prosecutor's Office is an institution established by the Constitution of the RS. The Law on Public Prosecutor's Offices of RS ("Official Gazette of the RS", no. 69/16) recognises the Republic Public Prosecutor's Office as the highest public prosecutor's office in this entity, and six district public prosecutor's offices (headquarters in Banja Luka, Prijedor, Doboj, Bijeljina, Istočno Sarajevo and Trebinje). As in the case of the Federal Prosecutor's Office, the Republic Public Prosecutor's Office is superior to the district prosecutor's office and has instruments of control over their work. The Republic Public Prosecutor's Office consists of the General Department, which includes: Division for War Crimes, Division for General Crime, Division for Economic Crime, Division for Juveniles, and Special Division for Suppression of Corruption, Organised and the most serious forms of economic crime.

The *RS Attorney General's Office* was established by law (Law on the RS Attorney General's Office, "Official Gazette of the RS", no. 7/18) as an institution that undertakes legal means to protect the property rights and interests of entities, local self-government units and others financed from the RS budget. The Attorney General has nine deputies, whose headquarters are in nine different cities of the RS.

The *RS Ministry of Justice* has certain competencies in the area of judicial administration, prescribed by the Law on the Courts of the RS (Article 56). At RS level, there is a *Centre for the Education of Judges and Public Prosecutors* (established by the Law on the Centre for the Education of Judges and Public Prosecutors, "Official Gazette of the RS", no. 34/02, 49/02, 77/02, 30/07, 31/14 and 63/14). The Centre is an independent public institution that provides initial training and professional development for the judges and public prosecutors of judicial bodies of RS. The Law on Attorney's Profession of RS ("Official Gazette of the RS", no. 80/15) establishes the *Bar Association of the RS* (Art. 83), which organises lawyers whose offices or companies are located on the territory of RS. The Law on the Notary Service of the RS ("Official Gazette of the RS", no. 28/21) stipulates that notaries must be organised into the *Notary Chamber* (Art. 129, Paragraph 1). The Chamber represents notaries before the competent authorities, protects the reputation, honour, and rights of notaries and ensures that notaries perform notary services conscientiously and responsibly by the law (Art. 129 Paragraph 2).

The Constitution of RS entrusted the *Constitutional Court of RS* with the task of protecting the constitutionality of legality (Article 69, Paragraph 7 of the Constitution of the RS). In addition to the constitutional provisions (related to jurisdiction, composition, and legal nature of decisions), the work of the RS Constitutional Court is regulated by the Law on the Constitutional Court of the RS ("Official Gazette of the RS", no. 104/11 and 92/12) and the Rules of Procedure ("Official Gazette of the RS", no. 104/11 and 92/12).

The judiciary of BD. The judiciary of BD consists of the *basic court*, which is a court of universal jurisdiction, and the *appellate court*, which acts as an appeal court and, in addition, has jurisdiction similar to that of the constitutional courts. The organisation and jurisdiction of the courts are regulated by the Law on Courts of BD ("Official Gazette of the BD", no. 18/20).

The Prosecutor's Office, the Attorney General's Office, and the Judicial Commission are categories regulated by the highest act of the BD - the Statute of the BD ("Official Gazette of the BDV, no. 2/10). The *Prosecutor's Office of the BD* is defined as an autonomous and independent body that undertakes the prescribed measures and actions in the detection and prosecution of perpetrators of criminal offences and economic offences and performs other tasks specified by law (Law on the Prosecutor's Office of the BD, "Official Gazette of the BDV, no. 19/07). The Statute of BD stipulates that the *Attorney General's Office* has to ensure that the property of the District is used in line with the law and that the actions undertaken by the District as well as the affairs in which the District is one of the parties are legal (Article 68, Paragraph 2 of the Statute).

The *Judicial Commission* was established with the mandate to provide an independent and impartial judiciary, the Prosecutor's Office, the Attorney General's Office, and the Office for Legal Aid (Law on the Judicial Commission, "Official Gazette of the BD", no. 19/07, 20/07, 2/08 and 6/21, Article 1 paragraph 1). Among other competencies, the Commission is responsible for the professional training of judges and prosecutors (Law on the Judicial

Commission, Article 14 paragraph 1 point b)). At BD level, there is no bar association or notary chamber. Lawyers and notaries become members of one of the two entity notary chambers/bar associations (Law on Notaries of BD, "Official Gazette of the BD", no. 9/03 and 17/06, Article 41 paragraph 1 and Law on Attorney's Profession of BD, "Official Gazette of the BD", no. 4/19, Article 5 Paragraph 1).

After ratifying the European Convention on Human Rights (ECHR) in 2002, BiH accepted the jurisdiction of the ***ECtHR***. Until March 2023, the ECtHR Grand Chamber, which decides on the most complex issues and when there is a serious issue affecting the interpretation of the ECHR, has made four decisions in cases against BiH: *Sejdić and Finci* (applications no. 27996/06 and 34836/06), *Maktouf and Damjanović* (applications no. 2312/08 and 34179/08), *Medžlis Islamske zajednice u Brčkom and others* (application no. 17224/11) and *Ališić and others* (application no. 60642/08). By decision of the Council of Ministers of BiH ("Official Gazette of BiH", no. 1/03, 65/05, 22/19, and 36/21), there are three representatives of the Council of Ministers before the ECtHR. The Office of Representatives performs professional and administrative tasks for the needs of representatives. Three representatives rotate in the position of head of the Office. In addition to representing the Council of Ministers before the ECtHR, representatives communicate with the ECtHR, negotiate with the parties to conclude friendly settlements, take care of the execution of the judgments of the ECtHR and launch initiatives to harmonise national legislation with the European Convention on Human Rights.

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Constitutional Court(s) and Constitutional Review

Constitutional courts represent an important mechanism for realising the concept of the rule of law in the legal life of modern states. In short, the rule of law consists of the requirement that all state bodies, citizens and their organisations adhere to the constitution and laws that protect basic human rights and freedoms. In other words, the rule of law, which can also be denoted by the principles of constitutionality and legality, as a prerequisite for its realisation sets in place the existence of mechanisms that will control the observance of the constitution and laws by all actors of society. The principles of constitutionality and legality, as a rule, allow citizens to do everything that is not prohibited by the constitution, laws or by-laws, while, at the same time, they order state bodies to act exclusively within the framework of the constitution and law. In the narrower (legal) sense, the principle of constitutionality implies that laws, in accordance with the principle of separation of powers, are passed by the competent legislative body, respecting the legislative procedure provided for in the constitution (formal constitutionality), with the condition that the content of the laws (and other regulations) is in accordance with the provisions of the constitution (material constitutionality). On the other hand, the principle of legality requires that all by-laws (both general and individual, whether the latter are legal or material acts) must be in accordance with the law, both formally and substantively.

Constitutional judicial review by constitutional (or regular) courts is particularly important in complex states where it first arose, which is why, in literature, federalism is considered (see entries on: From Federal Ideas to Practice) to have undoubtedly contributed to the affirmation of the principle of constitutionality. This is because the federal constitution establishes a complex legal structure, composed of the constitutional order of the federation and the constitutional orders of the federal units. At the same time, all general legal acts of the federation and federal units must be in accordance with the federal constitution. Therefore, the review of constitutionality and legality in federal states has additional value compared to unitary states. This is best evidenced by the experience of Belgium, which by amending its 1980 Constitution and changing its state system from unitary to federal, formed the Court of Arbitration, which is called the Constitutional Court today. Constitutional courts in federal states aim not only to achieve the rule of law (protection of constitutionality and legality, in the sense of guaranteeing the hierarchy of legal acts), but also to ensure the existence of a federal state system (primarily in connection with the distribution of competencies between the federation and federal units). By maintaining the "federal balance" established by the constitution between the federation and the federal units, they shall prevent its transformation into a unitary or confederal state system. Finally, the key assumption for maintaining "federal balance" is ensuring the independence and impartiality of constitutional courts as

institutions, as well as the judges of these courts, who, like other subjects in the state, are bound by the federal constitution in the exercise of their functions. In this regard, constitutional and legal literature often points out that constitutional courts are negative legislators (they do not enact laws but eliminate them from the legal order). At the same time, constitutional courts are not constitution makers, and like other state bodies, they are obliged to adhere to constitutional norms and must not step into the sphere of the constitution maker with their interpretations. On the other hand, bearing in mind the character of constitutional norms, constitutional courts have at their disposal considerable "room for manoeuvre" to find different meanings of constitutional norms. In this respect, it is necessary that constitutional adjudication - that is the decisions of courts and their legitimacy – is transparent and open to critique by the professional and general democratic public. The goal of such a "control of the reviewer of constitutionality" should be to prevent (internal or external) political influence on the constitutional court and its judges so that the exercise of the constitutional-judicial function is within the limits of the law. The rule in the interpretation of legal norms whose constitutionality is assessed is that the unconstitutionality should be obvious, that it is not difficult to explain, and that the decision can be supported by appropriate arguments. In doing so, different methods of interpretation are used, such as linguistic (preferred if the language of the regulation is not clear), historical, teleological (purposive) and systematic interpretation. In case of doubt, as a rule, it is considered that the law or other regulation is not unconstitutional. Additionally, as a rule, the competencies of the level of government, in favour of which the presumption of competence is valid, are interpreted broadly, while the competencies determined by positive enumeration are interpreted narrowly (an exception to this exists in connection with the doctrine of "implied powers" arising from the nature of the powers explicitly given to the federation).

The Constitution of Bosnia and Herzegovina (BiH) in Article I/2 (b) establishes that BiH is "a democratic state, which functions on the principle of the rule of law and on the basis of free and democratic elections". Article III/3 of the Constitution of BiH stipulates that "Entities and their lower units shall fully respect this Constitution, which repeals the provisions of the law of Bosnia and Herzegovina and the provisions of the constitution and laws of the entities that are in conflict with it, as well as the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law represent an integral part of the legal order of BiH and its entities." For the purpose of constitutional judicial review, but also for the purpose of exercising other powers, the Constitution of BiH (Article VI) established the Constitutional Court of BiH. The Constitution of the Federation of BiH (FBiH) in Article V.1.4. stipulates that the constitutions of cantons must be in accordance with the Constitution of FBiH. In addition, the FBiH Constitution regulates the *ex ante* (prior) and *ex post* (subsequent) review of the constitutionality of laws and legality of other regulations enacted by the competent authorities of FBiH (Article IV.C.3.10. paragraph 2 points a) and c) of the FBiH Constitution). The Constitution of the Republic of Srpska (RS) contains Chapter VII entitled "Constitutionality and Legality," where Article 108 stipulates that "laws, statutes, other regulations and general acts must be in accordance with the Constitution," and "regulations and other acts must be in accordance with the law."

In the constitutional law of federal states, there are ***three systems of constitutional review*** of laws. The first is a *decentralised (diffuse) system* of constitutional judicial review by regular courts and was created in the United States of America (USA) in 1803. The decentralised system of constitutional review has two subvariants: 1) review by all regular courts (USA, Argentina, Australia) and 2) review by one, Supreme Court (Canada, India).

The second system is the *centralised (concentrated) system* of constitutional judicial review, created in Austria with the federal Constitution in 1920 (under the strong influence of Hans Kelsen). In this system, constitutional judicial review is carried out by special constitutional courts. The centralised (concentrated) system also has two subvariants: 1) constitutional judicial review by only one, federal constitutional court (e.g. in Austria and Belgium) and 2) constitutional judicial review by the federal constitutional court and by the constitutional courts of federal units with regard to their constitutions (e.g. in Germany, Russia, BiH, and partially in South Africa).

The third system can conditionally be called a *mixed system*. It is characterised by the fact that it partially adopts the characteristics of both decentralised and centralised systems. The mixed system consists of constitutional systems of countries that differ significantly from each other and was adopted in Switzerland, Brazil, Mexico and Venezuela.

The role of constitutional-judicial function holders (ordinary courts and special constitutional courts) in the development and functioning of federal states was reflected in two ways - in most federations, the constitutional judiciary sought to strengthen the powers of the federation with its decisions, while in other federations it supported the protection of the powers of federal units. Depending on the broader or narrower approach to the interpretation of constitutional norms, the constitutional courts of "complex" states - as BiH is characterized in domestic legal literature due to the mix of federalism and the political representation of ethnic groups - have influenced the relations between the federation and federal units in different ways, thus contributing to the evolution of federalism in those specific states.

Already in the cradle of federalism (and the "birthplace" of Bosnian-Herzegovinian federalism); the US Supreme Court played a significant role in expanding the jurisdiction of the federation by applying the doctrine of "implied powers." The doctrine developed from the famous decision *McCulloch v. Maryland*, 17 U.S. 316 (1819), relying on the clause from Article I, Section 8 of the US Constitution, according to which the US Congress is authorised "to make all laws necessary and proper for the execution of the powers given (...)", which allows the federal government to expand its powers. In this case, the famous judge Marshall (*John Marshall*) – who was considered "the second creator of the Constitution" because of the famous decision that established the supremacy of the US Constitution in ***Marbury v. Madison*** (1803) – developed two arguments for why the expansion of US jurisdiction could be concluded from the text of the Constitution itself.

First, he held that particular powers could be implied from the explicit grant of other powers specified in the constitution since "...[W]e must never forget that it is a constitution we are

expounding." He rejected the contention that "necessary" meant "absolutely necessary" and stated: "let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, ..., which are not prohibited, ... are constitutional." Second, unlike the US Constitution of 1787 and even the 10th Amendment that omits the word "expressly," the Articles of Confederation and Perpetual Union of 1777 had stipulated in Article II that "Each State retains its sovereignty, liberty, and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States assembled in Congress." Marshall, however, dismissed Maryland´s argument that the powers of the national government were delegated to it by the states, and that these powers must be exercised in subordination to the states. He concluded that the powers come directly from the people, not from the states qua states.

In a similar way, the Supreme Court of Australia, with its interpretations of the constitution, contributed to strengthening the position of the federation in relation to the federal units. On the other hand, the example of the Federal Constitutional Court of Germany testifies in favour of the opposite tendency, because this court interpreted the German Basic Law in a way that resulted in a more autonomous position of federal units compared to what was foreseen by legal norms (especially in cases of mergers of federal units, concordat and television). Furthermore, the Supreme Court of Canada, with its interpretations of the constitution, significantly influenced the expansion of the jurisdiction of federal units (provinces), even though the constitutional text gave them only limited powers.

Constitutional judicial review is only one of the ***competencies of constitutional courts*** in comparative constitutional law. The competencies of constitutional courts are prescribed by the constitution, as a rule, by the method of enumeration (taxative enumeration). In addition to checking the constitutionality of federal laws (with the exception of Switzerland), constitutional courts review the conformity of the constitution, laws and other regulations of federal units with the constitution of the federation. This constitutional-judicial function protects the principle of supremacy of the federal constitution. Constitutional courts also control disputes on the competencies of different state bodies (so-called disputes between governmental bodies), which are particularly significant in federal states when it comes to conflicts of competencies between bodies of the federation and bodies of federal units or conflicts of competencies between bodies of different federal units (federal disputes), ensuring respect for the distribution of competencies between the federation and the federal units. In some countries, the constitutional courts have the authority to dismiss certain officials under the conditions established by the constitution or to review the actions of political subjects, such as political parties. Another function of constitutional courts is to resolve disputes arising from the election process. At the end of the 20th century and with Article 93 of the German constitution as a model, individual constitutional complaints for the protection of constitutionally guaranteed human rights and freedoms were also adopted in the constitutions of the "new democracies" of Eastern and South-Eastern Europe.

The ***procedure before the constitutional courts*** is frequently regulated by so called Rules of Procedure in the form of a parliamentary statute or constitutional law. Performing constitutional

judicial review, constitutional courts can control laws and other general acts before their promulgation, i.e., their entry into force (*ex ante* review), or after their promulgation (*ex post* review). In addition, there are differences between what is called an abstract constitutional judicial review and concrete constitutional review. The subject matter of the dispute before the constitutional court in case of an abstract constitutional review, which is characteristic of a centralised system, is the question of the constitutionality of a law (or other general act) unrelated to a specific dispute between private parties before ordinary courts. Thus, the procedure is initiated by the request of an authorised entity, usually a legislative or executive body. In the case of a concrete constitutional review of a law (or other general act), characteristic of a decentralised system, the question of constitutionality arises as a preliminary question before a regular court through the objection of unconstitutionality of the act on whose application the decision on the merits would depend. In fact, the violation of human rights and freedoms could also be invoked from the very beginning in the US system of decentralised constitutional review through the appeals system ending before the US Supreme Court without a "special" competence for the Supreme Court or a "special" constitutional complaint procedure.

There is, however, a categorical *difference between centralised and decentralised systems* as far as the effects of the decisions of high courts in (constitutional) judicial review procedures are concerned. Constitutional courts in centralised systems "derogate," that is, annihilate individual or general legal acts which they find unconstitutional. Hence, such legal acts are put out of legal force and are no longer part of the valid legal system. To the extent that an *erga omnes* effect of constitutional court decisions will exist since no state authority can apply the unconstitutional act any longer in any other case. In the US-system of decentralised constitutional review, a judge who finds the legal act to be applied unconstitutional cannot annihilate it, but must "set aside" the respective legal act. Thus, he simply does not apply this legal act in order to decide on the merits and this can then be contested through appeals up to the US Supreme Court. Furthermore, even a legal act found unconstitutional by the US Supreme Court remains part of the valid legal system. In this sense, all court decisions, including a supreme court decision, will theoretically have effect only *inter partes,* that is, only on the parties involved in the proceedings. Nevertheless, decisions of the supreme court will serve as "precedents" on how to correctly resolve a specific legal dispute, and lower courts will orient themselves towards such precedents, so that these precedents will also have an *erga omnes* effect in practice in decentralised systems.

In conclusion, the decisions of constitutional courts are binding, and upon their publication they are enforceable. In this regard, they can remove all the consequences of unconstitutional laws (or other general acts) retroactively, i.e., backward (*ex tunc* effect), or for the future (*ex nunc* effect).

When it comes to the ***composition and selection of judges of constitutional courts***, comparative constitutional law provides various solutions which demonstrate the influence of political actors when they are elected by parliaments or are nominated and/or appointed by the executive powers, be it in parliamentary or presidential systems. The mix of election

and appointment procedures itself will diminish the influence of party politics. Moreover, over the past decades, the judiciary as a "professional" branch has also gained more and more rights to participate in the selection procedures. The establishment of High Judicial (and Prosecutorial) Councils composed of representatives of all three branches of state power in all South-Eastern European countries over the past decades should strengthen the political independence of judges in general.

The ***constitutional judiciary in BiH*** is organised according to a centralised (concentrated) system, according to which there is a Constitutional Court of BiH, which exercises jurisdiction over the territory of the entire state, and constitutional courts of the entities, which exercise their jurisdiction over the territories of the entities. From a historical point of view, the emergence of the constitutional judiciary in BiH relates to the period of SFR Yugoslavia, when the Constitution of 1963 established a constitutional judiciary in the federation (Constitutional Court of SFR Yugoslavia) and federal units (constitutional courts of the republics and autonomous provinces), which remained in place until the end of the Yugoslav federation. As one of the republic constitutional courts, the Constitutional Court of BiH was constituted on 15 February 1964. The Law on the Constitutional Court regulated the issues of organisation, jurisdiction and procedure before this body.

The new *Constitutional Court of BiH* was established on the basis of Article VI of the Constitution of BiH as part of the Dayton Peace Agreement (DPA) of 1995 (see: General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement), primarily with the aim of reviewing the constitutionality of individual and general legal acts. The Constitution of BiH regulates the composition, the quorum and the public nature of proceedings before the Court, its jurisdiction, and the final and binding nature of its decisions. The procedure before the Court, its financial and administrative independence, fundamentals of organisation and other issues that are important for the work of the Court are regulated by the Rules of the Constitutional Court of BiH. This solution deviates from the standards in comparative constitutional law, according to which the procedure and other significant constitutional-judicial issues are regulated by the constitution or parliamentary statute because the Rules of Procedure were elaborated by the newly elected and appointed judges themselves before the Court became operational in 1997.

The Constitutional Court of BiH is *composed* of nine members, of which four members are elected by the House of Representatives of the FBiH Parliament, two members are elected by the National Assembly of the RS, while the remaining three members (who cannot be citizens of BiH or any of the neighbouring countries) are appointed by the President of the European Court of Human Rights (ECtHR) after consultation with the Presidency of BiH. The Constitution of BiH authorised the Parliamentary Assembly of BiH to provide by law a different method of election for the three judges chosen by the President of the ECtHR. The composition of the Constitutional Court of Bosnia and Herzegovina, which includes foreign citizens, is atypical from the point of view of the organisation of the constitutional judiciary in comparative federalism. In this regard, the European Commission in its Opinion

on the Application of BiH for Membership in the European Union (EU) from 2019, took the position that it is necessary to "reform the Constitutional Court, including solving the issues of international judges, and ensure the implementation of its decisions" (key priority 4. D) of the Opinion of the European Commission). This key priority of BiH's European path can be realised by passing a "Law on the Constitutional Court of BiH."

According to Article VI 3 of the Constitution, the *competencies* of the Constitutional Court of BiH are: 1) abstract constitutional judicial review (includes review of conformity of the constitution and laws of the Entities, and of the laws of BiH with the Constitution of BiH); 2) settlement of disputes between governmental bodies (disputes between BiH institutions, between BiH institutions and Entities or between institutions of different Entities); 3) the resolution of federal disputes (disputes between Entities, between BiH and one or both Entities, as well as such disputes related to the protection of the established status and powers of Brčko District); 4) appellate jurisdiction over issues under this Constitution, which arise from the verdicts of every court in BiH following from appeals by natural or legal persons against the decisions of courts or administrative bodies after the exhaustion of all other effective legal remedies (see: The Constitutional Court of Bosnia and Herzegovina, Individual complaints); 5) a weak form of concrete constitutional review in matters referred to it by any court in BiH, whether the law on which its decision is based is in accordance with the Constitution, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its protocols, or with the laws of BiH; or with regard to the existence or scope of any general rule of international public law that is of importance for the decision of that court. However, the parties in the proceedings before the regular courts can only propose, but never request from the court to refer the constitutional question to the Constitutional Court because neither the supreme courts nor constitutional courts of the Entities are obliged to refer any case to the Constitutional Court of BiH. Moreover, the opinion of the Constitutional Court concerning the existence or scope of rules of public international law is not legally binding, but only an advisory opinion; 6) decide in an urgent procedure on the procedural regularity of an invocation of the vital national interest veto on behalf of any of the constituent peoples in legislative procedure before the Parliamentary Assembly of BiH (see: Legislative Power in Bosnia and Herzegovina); and 7) decide whether an Entity ′s agreement on the establishment of "special parallel relationships with a neighbouring state is consistent with this Constitution including provisions concerning the sovereignty and territorial integrity of BiH".

Proceedings before the Constitutional Court of BiH in cases of abstract constitutional review, the resolution of disputes between governmental bodies and federal disputes, and the evaluation of the constitutionality of agreements on special and parallel relationships may be *initiated* by: 1) any member of the Presidency of BiH; 2) the Chairman of the Council of Ministers of BiH; 3) the chairman or deputy chairman of any house of the Parliamentary Assembly of BiH; 4) a quarter of the members of any chamber of the BiH Parliamentary Assembly; and 5) a quarter of the members of any house of the entity's legislative body. Concrete constitutional review is carried out by the Constitutional Court of BiH at the initiative of any court in BiH that is resolving a specific case and through its appellate jurisdiction following from individual complaints.

The Constitutional Court of BiH *decides* in a plenary session and, since the amendment of the Rules of Procedure in 2003, in a Council of five judges and in a Small Council of three judges as well. At the plenary session, the Court decides on all issues within its competence (by majority of the total number of judges), while in the Council, it unanimously decides on issues concerning cases of appellate jurisdiction that were not put on the agenda of the plenary session. The Small Council decides on temporary measures and on the responsibilities and discharges of judge rapporteurs. Decisions of the Constitutional Court are final and binding. Since the constitution does not determine the effect of decisions, the Rules of the Constitutional Court of BiH have regulated that their effect (*ex tunc* or *ex nunc*) will be determined by the decision of the Constitutional Court, but from an analysis of the Rules, it appears that, as a rule, the effect of decisions is for the future (*ex nunc*).

The *Constitutional Court of FBiH* was established by the Constitution of FBiH as a single institution for the exercise of the constitutional judicial function, because the cantons do not have their own constitutional courts (Austrian model). In addition, the procedure before the Constitutional Court of FBiH is regulated by the Law on Procedure before the Constitutional Court of FBiH. The Constitutional Court of FBiH is composed of nine judges, of which at least two are from the constituent peoples, and one from other ethnic groups or citizens without ethnic affiliation (so called "Others"). Judges of the FBiH Constitutional Court are appointed by the majority of delegates present and voting in the House of Peoples of the Parliament of FBiH on the proposal of the President of FBiH with the consent of the Vice Presidents of FBiH (preceded by the proposal of the High Judicial and Prosecutorial Council of BiH). The peculiarity of the Constitutional Court of FBiH is that it has the authority to carry out *ex ante* (prior) and *ex post* (subsequent) constitutional review. Since FBiH is federally organised, in addition to reviewing the constitutionality of laws and other regulations (both federal and cantonal), the Constitutional Court of FBiH resolves federal disputes (between FBiH and cantons as well as between cantons) and disputes between or within institutions of FBiH, between cantons, between cities or municipalities and FBiH or cantons, and finally between cities and municipalities. Proceedings before the Constitutional Court of FBiH can be initiated by the president or vice-president of FBiH, the president or deputy presidents of the Government of FBiH, one third of the members of any house of the Parliament of FBiH, the president of a cantonal government, one third of the deputies of a cantonal assembly, and when it comes to the protection of the right to local self-government, the procedure can be initiated by the municipal or city council, the respective mayor of the municipality or city and the association of municipalities and cities. The procedure can also be initiated after the Supreme Court of FBiH or a cantonal court has referred the case, during court proceedings, to the Constitutional Court of FBiH for review of the constitutionality of the law regarding an issue related to a specific dispute before the court. However, like in the Austrian model, the Constitutional Court of FBiH has no appellate jurisdiction against judgments of the Supreme Court of FBiH nor has a constitutional complaint mechanism been foreseen for individuals for the protection of human rights and freedoms guaranteed under the FBiH Constitution which also enumerates socio-economic rights. The Constitutional Court of FBiH cannot initiate proceedings *ex officio*. The Constitutional Court of FBiH decides on

the constitutionality of laws and other regulations with judgments which are valid for the future (*ex nunc*).

The *Constitutional Court of the RS* was established on the basis of the Constitution of RS. In addition, the organisation of the Constitutional Court of RS, the proceedings before this Court and the effect of its decisions are regulated by the Law on the Constitutional Court of RS. As a legacy of the former socialist constitutional system, the Constitutional Court of RS monitors events of interest concerning the realisation of constitutionality and legality, informs the highest constitutional bodies of the Republic about the situation and problems in that area and gives them opinions and proposals for passing laws and undertaking other measures to ensure constitutionality and legality and to protect the freedoms and rights of citizens, organisations and the community. The Constitutional Court of RS has nine members, of which at least two members belong to the constituent peoples, and at least one comes from other ethnic groups or citizens without ethnic affiliation ("Others"). Judges are elected by the National Assembly of RS and the Council of Peoples of RS on the proposal of the President of RS (based on the list submitted to the President by the High Judicial and Prosecutorial Council). The basic task of the Constitutional Court of RS is to ensure the protection of constitutionality and legality (it examines the conformity of laws, other regulations and general acts with the constitution, the conformity of regulations and general acts with the law, and the conformity of programs, statutes and other general acts of political organisations with the Constitution and the law). In addition to this basic jurisdiction, the Constitutional Court of RS resolves conflicts of jurisdiction (between the bodies of the legislative, executive and judicial authorities, as well as between the bodies of RS, a city or municipality), decides on issues of immunity and decides on the protection of the vital interests of the constituent peoples. Proceedings before the Constitutional Court of RS can be initiated by the President of the Republic, the National Assembly and the Government, and other bodies, organisations and communities under the conditions established by law. Any natural or legal person can initiate the procedure for assessing constitutionality and legality so that the RS constitution foresees not only a constitutional complaint mechanism for the protection of human rights and freedoms, but an *actio popularis* in general so that individuals can also access the Constitutional Court of RS with the "abstract" argument that a legal regulation (including parliamentary laws) violates any constitutional provision. Such an instrument had also been foreseen in the Hungarian constitutional system but was abolished in 2012 because approximately 1,600 such actions had been brought annually before the Constitutional Court. Unlike the Constitutional Court of BiH and the Constitutional Court of FBiH, the Constitutional Court of RS can *ex officio* initiate a procedure for assessing constitutionality and legality. Decisions of the Constitutional Court are generally binding and enforceable on the territory of the Republic. The execution of the decisions of the Constitutional Court is ensured by the Government. When the Constitutional Court determines that a law is not in accordance with the Constitution or that another regulation or general act is not in accordance with the Constitution or the law, that law, other regulations or general act ceases to be valid on the date of publication of the decision of the Constitutional Court, with effect for the future (*ex nunc*) and towards all (*erga omnes*).

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Ustav Bosne i Hercegovine.

Ustav Federacije Bosne i Hercegovine.

Ustav Republike Srpske.

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The Constitutional Court of Bosnia and Herzegovina Individual Complaints

In 1995, the jurisdiction of the Constitutional Court of Bosnia and Herzegovina (CC BiH or the Court) was expanded to appellate review over questions under the Constitution of BiH arising out of a judgment of any other court in Bosnia and Herzegovina (BiH) (Art. VI.3.b of the Constitution of BiH). In upholding the Constitution of BiH, the Court does not only provide for abstract review (viz. review of compatibility of laws with the Constitution of BiH), but also acts as the final national authority to remedy violations of human rights and fundamental freedoms guaranteed by the Constitution of BiH and international law. Thus, the appeal (in local languages: *apelacija*) represents a legal remedy allowing for individual access to the CC BiH.

Concept and scope of individual complaints to constitutional courts. Individual access to constitutional justice is regarded as an important milestone for the protection of human rights and fundamental freedoms at the national level. Historically, individual complaints against the violation of constitutionally guaranteed individual human rights in the United States of America (USA) and in the Austrian part of the Habsburg Empire with Article 3 (b) of the Fundamental Law on the Establishment of a Supreme Court (Reichsgericht) as part of the so-called "December Constitution" of 1867. The first organisationally separate Constitutional Court, called the Kelsenian "model" of constitutional judicial review, was established after World War I in Austria (see: Constitutional Court(s) and Constitutional Review). A recent report by the Venice Commission (2020) shows that the majority of European systems do foresee some type of individual constitutional complaint to the extent that nowadays they are considered common features of European constitutional justice for both centralized and de-centralized systems of judicial review (see: Constitutional Court(s) and Constitutional Review). Their purpose is twofold. In the first place, individual complaints provide a legal remedy at the national level against violation and unconstitutional interference with one's rights and freedoms by state authorities. In the second place, through individual complaints, constitutional courts can be understood as "filters" for cases appearing before the European Court of Human Rights (ECtHR) by relieving the burden on the docket of the latter.

An individual complaint is not regarded as an appeal understood as an ordinary legal remedy in the ordinary court system. In the first place, like the ECtHR, constitutional courts are not courts of the last instance. However, they are considered supplementary institutions that provide judicial protection in issues falling under the scope of constitutional review. For example, in the context of its appellate jurisdiction, the CC BiH only examines whether rights and

freedoms within the meaning of Arts. II.2 and II.3 of the Constitution of BiH were violated by actions and decisions of ordinary courts. It thus follows that the object of the appeal as the form of individual complaint to the CC BiH is to provide constitutional protection of human rights and fundamental freedoms from the unconstitutional interference of ordinary courts. In the second place, the legal possibility of individual access to constitutional justice can be understood as a form of respect for State sovereignty. This means that the responsibility of the State before international forums, most notably before the ECtHR, may be considered only after an opportunity to put matters right through their own legal system. In other words, if an individual from BiH would like to file an appeal before the ECtHR, all of the domestic legal remedies have to be exhausted first, including an individual complaint before the CC BiH.

Admissibility criteria. Art. 18 of the Rules of CC BiH provides for admissibility criteria of appeals within its meaning under Art. VI.3.b of the Constitution of BiH. In particular, an appeal can be submitted against a judgment or other court decisions only if all effective legal remedies have been exhausted and within the time limit of 60 days from the date on which the appellant received the decision in question. What constitutes an effective legal remedy is a factual question determined on a case-by-case basis. Whilst an appeal to the Court will generally be declared inadmissible if all ordinary legal remedies were not exhausted as the contested decision has not acquired the effect of res judicata, the assessment of the effectiveness of legal remedies is made taking into consideration whether the protection sought by such remedies is practical and effective, rather than illusory and theoretical. However, Art 18.2 of the Rules of CC of BiH provides for an exception by allowing the Court to examine an appeal in cases where there is no decision of an ordinary court, provided that the appeal alleges grave violations of human rights and freedoms guaranteed by the Constitution or international documents applicable in BiH. Such a situation relates to, for example, allegations of the excessive length of court proceedings as an element of the right to a fair trial under Art. II.3.e of the Constitution of BiH or Art. 6 ECHR, or the right to an effective remedy under Art. II.2 of the Constitution and Art. 13 ECHR. That exception relates to the examination of the constitutionality of imposed measures ensuring the presence of the suspect or accused in criminal proceedings pending before a competent court, provided that the procedural decision in question became final. Art. 18.3 of the Rules of CC BiH explicitly lists thirteen formal and substantive grounds for declaring an appeal inadmissible. In addition, the Rules of CC BiH provide for two separate grounds for dismissal of an appeal: (1) if there is no a justified claim or that the submitted facts cannot justify the allegation of the existence of violation nor the appellant has suffered a violation of any of the rights or freedoms protected by the Constitution of BiH (Art. 18.4. Rules of CC BiH); and (2) if it is determined that the appellant has not suffered a significant damage unless the respect for human rights requires the examination of the appeal on the merits (Art. 18.5 Rules of the CC BiH).

Effect of decisions on appeals. Pursuant to Art. VI.6 of the Constitution of BiH, the Court's decisions are final and binding. However, the question is what effect the decisions of the Court have on proceedings completed before the respective ordinary courts when finding a violation of human rights and freedoms protected by Arts. II.2 and II.3 of the Constitution of BiH

and the ECHR? As a rule, such decisions on an appeal in cassation have the effect that they will quash the judgment of the ordinary court, and, according to Art. 62.1 of the Rules of the CC refer the case back to that court for new proceedings. Nevertheless, in comparison to the Rules of the CC BiH (2005) previously in force, the present Rules of the CC BiH allow for an exception to this rule in situations when the consequence of a violation of constitutional rights and freedoms may be remedied in another manner. For example, codes of criminal procedure provide for an extraordinary legal remedy defined as the possibility of reopening of criminal proceedings for the benefit of the defendant. This is possible, if proceedings or the judgment of the court were based on a violation of human rights and fundamental freedoms established by the CC BiH, the Human Rights Chamber, or the ECtHR (see Arts 327.1.f. CPC BiH, 343.1.f CPC FBiH, 343.1.đ CPC RS, and 327.1.f CPC BD BiH). In its case law, the CC BiH did not consistently resort to the exception of appeal in cassation. In a number of cases the Court, in granting appeals, quashed the final judgment of the ordinary courts in criminal cases although legislation governing rules of criminal procedure explicitly provide for the possibility of remedying the violation by resorting to the rules for reopening criminal proceedings. In conclusion, whilst the cassation of the successfully impugned decision of the ordinary court remains as a rule, resorting to it may be avoided, provided that the applicable laws allow for the violation of constitutional rights and freedoms to be remedied in another way.

Appeal as an effective legal remedy? When upholding the appeal and quashing the impugned decision, the Court is obliged to specify which constitutional right or freedom was violated and provide reasons for such findings (Art. 62.3 of the Rules of the CC BiH). Further, the ordinary court or other authority is obliged to reach another decision and, in doing so, is bound by the opinion of the CC BiH concerning the violation in question (Art. 62.4 of the Rules of CC BiH). If the court fails to adhere to the legal stance of the CC BiH, the Court may itself decide on the merits of the case (Art. 62.5 of the Rules of the CC BiH). Whilst it is a question decided on a case-by-case basis, it is generally accepted that appeal to the Court is an effective legal remedy. For example, in the case of Mirazović v. Bosnia and Herzegovina, the ECtHR held that an appeal to the CC BiH is in principle an effective legal remedy for questions related to statutory prevention of the enforcement of judgments (App. no. 13628/03, Decision of 16 May 2006). On the opposite, in the case of Maktouf and Damjanović v. Bosnia and Herzegovina, the ECtHR held that, with respect to one of the applicants, the appeal to the Court was not considered as the effective remedy as, given the previous case law of CC BiH on nearly identical circumstances, provided no reasonable prospect of success (App. nos 2312/08 and 34179/08, Judgment of 18 July 2013, paras 59-60).

Limits of the appeal. As explained above, the Court's appellate jurisdiction extends to constitutional issues "...arising out of a judgment of any other court in [BiH]" (Art. VI.3.b of the Constitution of BiH). It follows that, unlike in comparative legal systems, constitutional protection against violations of rights by administrative authorities, either in form of general or individual administrative acts, falls outside the scope of the Court's appellate jurisdiction. Given that the existence of a judgment of an ordinary court is a formal requirement, prior

judicial review of such acts in the administrative dispute procedure constitutes a prerequisite to trigger the appellate jurisdiction of CC BiH. Such an approach was considered as a gap in the scope of the Court's judicial review and thus the subject of criticism in legal scholarship.

The final point relates to the question of the legal possibility of constitutional review of decisions of the High Representative (HR), the authority established under Annex 10 of the General Framework Agreement for Peace in BiH (GFAP) to oversee its civilian implementation (see: The High Representative and Annex 10 of the Dayton Peace Agreement). It is a matter of settled case law that the Court has no subject matter jurisdiction over decisions of the HR in relation to removal of individuals from public offices as this was even confirmed by the ECtHR in the case of Berić et.al. v. Bosnia and Herzegovina (App. Nos 36357/04 et.al., Judgment of 16 October 2007). Quite contrary, the CC BiH has established its jurisdiction to review legislative impositions by decisions of the HR already in cases U-9/00, U-16/00 and U-25/00 based on the constitutional doctrine of "functional duality" stemming from French legal thinking. According to this doctrine the HR is "substituting himself for the national authorities [...] and therefore acted as an authority of Bosnia and Herzegovina" so that "the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina. [...] The Parliamentary Assembly is free to modify in the future the whole text of part of the text of the Law[...]." Consequently, even the imposition of amendments to the constitution of the Entities are subject to review by the CC BiH. This doctrine was again upheld by the CC BiH in 2022 in case U-27/22 against the imposition of amendments to the Constitution of the Federation BiH and the BiH election law.

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Sub-State Entities

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The Entities in Bosnia and Herzegovina

Entities are constituent units of Bosnia and Herzegovina (BiH) as a complex state. According to Article I/3 of the Constitution of BiH, "BiH consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska." However, the text of the BiH Constitution does not contain a definition of an entity, nor is the legal nature of an entity explicitly determined by the constitution, which has left room for different interpretations. Etymologically, an entity (Latin: *ens*; medieval Latin: *entitas*) is defined as a being, i.e., that which exists by itself and is described by the verbs to be, to be present, and to exist. The vagueness of the term entity decisively influenced the acceptance of this term in the text of the BiH Constitution, since the signatories of the Dayton Peace Agreement (DPA) did not have a unified position on what should be the legal nature of BiH, and thus its constituent units. The term entity indicates that entities are independent units, but the degree and quality of their independence is determined by the interpretation of the Constitution of BiH.

In comparative federalism, different names are used for constituent units of complex states, such as: states, republics, cantons, countries, provinces, territories, regions, communities, etc. The number of federal units as constituent elements of federations in comparative federalism varies from 2 (in BiH and St. Kitts and Nevis) to 50 (in the USA). Federal units, as a rule, have equal status, although asymmetric constitutional arrangements (see entries on: Federal Ideas and Practice) can also be observed in comparative federalism. The position of federal units in the theory of federalism is determined based on various criteria, such as the distribution of competences between FBiH and federal units, the protection of the territorial integrity of federal units, the right to self-organisation of federal units, which includes the right to adopt their own constitution and organisation of government.

In federal states, there is a double division of power: 1) horizontally - between the legislature, the executive, and the judiciary, and 2) vertically - between federation and the federal units. The essential issue of every federation is the vertical distribution of power (jurisdiction) between the level of FBiH and the federal units, with the tendency of the constitution maker to adapt it to the needs of the specific society. At the same time, the quality and quantity of powers and responsibilities entrusted to each level, as well as the overall approach to the distribution of competences in comparative federalism, vary from case to case, confirming that there is no pure, ideal model. Since it is impossible to distribute competences precisely and without remainder, in comparative federalism the presumption of competence is established in favour of the federal units (rule) or in favour of the federation (exception). The territorial integrity of the federal units determines the essence of their position in federations, and depending on the degree of application of the federal principle, the federal units enjoy its protection in

accordance with the federal constitution and the constitutions of the federal units. In this regard, without the consent of the federal units, as a rule, their territory cannot be changed, nor can they be merged with other federal units or abolished. In connection with the right to self-organisation, the federal units are authorised by the federal constitutions to independently regulate the exercise of their competences, as well as the organisation and functioning of their own legislative, executive, and judicial bodies. As a rule, the right to self-organisation is realised by the adoption of the constitution of federal units, and exceptionally, it is realized by the adoption of other acts that have the character of a source of constitutional law in the material sense. At the same time, there is a relationship of legal hierarchy between the federal constitution and the constitutions of the federal units, according to which the constitutions of the federal units must be consistent with the federal constitution. Following the constitutions of the federal units, their legislative, executive and judicial bodies are formed, which exercise the powers entrusted to them under the constitution of the federation, in the scope and the manner determined by the constitution of the federal unit.

Federation of BiH (FBiH) and Republika Srpska (RS) are two equal entities, since the Constitution of BiH assigns an equal scope of competence to the entities (Article III/2 and Article III/3a of the Constitution of BiH), at the same time establishing equal obligations for them (e.g., in terms of freedom of movement of persons, goods, services, and capital, ensuring human rights and freedoms, and respecting the Constitution of BiH). Nevertheless, a more detailed analysis of the Constitution of BiH and the constitutions of the entities points to certain elements of constitutional asymmetry in the position of the entities (Bosnia and Herzegovina's Federal System, An (A)symmetrical "Twin State"). Thus, in the composition of both houses of the Parliamentary Assembly of BiH, it can be observed that two-thirds of the members are elected in FBiH, and one-third of the members in RS. This form of asymmetry is mitigated by the entity voting mechanism (see: Veto Rights). The same pattern was applied in the composition of the BiH Presidency and the Council of Ministers. Similarly, in the Constitutional Court of BiH, four members are elected by the House of Representatives of the Parliament of FBiH, and two members are elected by the National Assembly of RS.

The distribution of *competences* between BiH and the entities (see: Distribution of Powers) is determined by the Constitution of BiH in such a way that BiH is assigned the competences for regulating issues that are expressly stated in the Constitution of BiH (Article III/1 and Article III/3 of the Constitution of BiH, but also other competences established by the constitution - e.g., Article IV/4 and Article VI/1d), while all other issues are solely the responsibility of the entities. Exceptions to the rule are issues from mixed jurisdictions in which both BiH and entities are competent, such as in the field of citizenship (Article I/7 regulates the existence of citizenship of BiH, which is regulated by the Parliamentary Assembly of BiH, and the citizenship of each entity, which is regulated by the entities). The specificity of the competence distribution mechanism in the Constitution of BiH is represented by Article III/5, which is titled "Additional competences" and opens the possibility of transferring competences from the entities to BiH. From the content of that provision, it follows that, if we exclude Article X of the Constitution of BiH, which governs amendments to the constitution, there are four

different possibilities for the transfer of competences from the entities to BiH - BiH will take over the jurisdiction and: 1) for other tasks on which the entities agree; 2) for tasks provided for in Annexes 5 - 8 of the General Framework Agreement; 3) for tasks that are necessary to preserve the sovereignty, territorial integrity, political independence and international subjectivity of BiH, following the division of competences between the institutions of BiH, while 4) within six months from the entry into force of this Constitution, the entities will start negotiations to include other issues, including the use of energy resources and joint economic projects, within the jurisdiction of the institutions of BiH. The last sentence of Article III/5a) stipulates that "if necessary, additional institutions can be formed to carry out these responsibilities," from which it can be concluded that the transfer of competences under Article III/5a of the Constitution of BiH does not necessarily result in the establishment of additional institutions at the level of BiH if the specific competences can be successfully performed by the administrative bodies in the entities (similar to the models in Switzerland, Germany, and Austria) or already existing institutions at the level of BiH. From the aforementioned provisions, the conclusion emerges that the transfer of competences in all the aforementioned cases is one-way, from the entities (or special bodies, provided for in Annexes 5-8 of the Dayton Peace Agreement, the first of which included representatives of the so-called international community) to the institutions of BiH. The Constitution of BiH did not foresee the possibility of returning the transferred competences, so the only possibility for such a return is the transfer of competences from the institutions of BiH to the entities through amendments from Article X of the Constitution of BiH.

In the *territorial sense*, BiH is made up of the territory of the entities, with a territorial demarcation of 51% of the territory belonging to the FBiH and 49% of the territory belonging to RS (following the Geneva and New York Principles from September 1995 and Annex II of the Dayton Agreement), while the territory of Brčko District (BD), which exists under the sovereignty of BiH, is jointly owned (condominium) by the entities (following Amendment I to the Constitution of BiH). The territory of BiH is bounded by the state border to the neighbouring states, while the territory of the entity is bounded by the inter-entity border (Article I/4 of the Constitution of BiH). In this regard, the legal order of BiH, as a complex legal order, consists of the legal order of the state of BiH and the legal orders of the entities and they are implemented in the respective territories (on the territory of BiH as a whole or on the territories of each of the entities) depending on the distribution of competences established by the Constitution of BiH (with peculiarities in the BD area, following Amendment I to the Constitution of BiH). Article I of Annex II of the Dayton Agreement established that the inter-entity borderline can be adjusted only with mutual consent.

Regarding the *relationship between the legal systems of BiH and the entities*, there is no doubt that there is a plural legal order in BiH. In this regard, the legal order of BiH is in a hierarchical relationship with the legal orders of the entities, which results from Article III/3b of the Constitution of BiH, according to which the entities are obliged to comply with the Constitution of BiH, which is subject to constitutional-judicial control by the Constitutional Court of BiH. Further, Article III/2 protects the sovereignty and territorial integrity of BiH,

by regulating the framework in which entities can establish special and parallel relations with neighbouring states and conclude agreements with states and international organisations. Finally, Article XII/2 of the Constitution of BiH regulates the obligation of entities to harmonise their constitutions with the Constitution of BiH through amendments, within three months after it enters into force. Except for the limitations established by the Constitution of BiH (respect for the Constitution of BiH, protection of human rights, rule of law, and free and democratic elections), the entities have a broad right to self-organisation. The entities have the right to enact their constitutions and regulate the organisation of government in the entities, which FBiH and RS did even before the entry into force of the Constitution of BiH.

FBiH is a federally organised entity, which is obvious from the very name of this entity. The Constitution of FBiH was adopted on the 30 March 1994 as a result of the Washington Agreement on a cessation of armed conflict between the armed forces of the Republic of BiH (RBiH) and Herceg-Bosnia (HB), signed on the 18 March 1994 in Washington by representatives of RBiH, Croatia and HB. The FBiH consists of ten federal units called cantons (under Amendment I to the Constitution of FBiH, the federal law established the following cantons: Bosnian-Podrinje Canton, Herzegovina-Neretva Canton, Sarajevo Canton, Canton 10, Posavina Canton, Central Bosnia Canton, Tuzla Canton, Una-Sana Canton, West Herzegovina Canton, Zenica-Doboj Canton). The Constitution of FBiH distributes competences between FBiH and the cantons, in such a way as to regulate the exclusive competences of FBiH, the joint competences of FBiH and the cantons, and by example specifying individual competences of the cantons, whereby the presumption of competence is established in favour of the cantons. The structure of government in FBiH is based on the principle of division of power into legislative, executive, and judicial. Constitutional and legislative power is exercised by the Parliament of FBiH, which has two houses - the House of Representatives and the House of Peoples. The executive power is exercised by the president of FBiH, who has two vice presidents of FBiH, as well as the government of FBiH. Judicial power in FBiH is exercised by the Supreme Court of FBiH, cantonal courts, and municipal courts, while the constitutional-judicial function is performed by the Constitutional Court of FBiH. In parallel with the judicial system, there is also a prosecutorial system consisting of the Federal Prosecutor's Office of FBiH and the Cantonal Prosecutor's Offices (see entries on: Branches of Government). Cantons have the right to self-organisation, which includes the right to enact a cantonal constitution and, in accordance with it, the right to regulate the organisation of the cantonal legislative, executive, and judicial authorities. FBiH regulates the exercise of local self-government by municipalities and cities, with special constitutional provisions for the City of Sarajevo and the City of Mostar.

RS is a unitary entity, which results from the text of the Constitution of RS, which foresees the existence of a unified legal order. The Constitution of RS was adopted on 28 February 1992 as a result of the previous adoption of the Declaration on the Proclamation of the Republic of the Serbian People of BiH on 9 January 1992. In RS, constitutional power is exercised by the National Assembly of RS and the Council of the People of RS, while the legislative power is primarily exercised by the National Assembly of RS, with the action

of the Council of the People of RS in the domain of protection of vital national interests. RS is represented and its national unity is expressed by the President of the Republic. The executive power in RS is exercised by the Government, while the administrative function is exercised by the administration of the Republic. Judicial power is exercised by: 1) courts of general jurisdiction – the Supreme Court of RS, district courts and basic courts and 2) courts of special jurisdiction – the High Commercial Court and district commercial courts, while the protection of constitutionality and legality is ensured by the Constitutional Court of RS. In parallel with the court system, there is also a prosecutorial system, which consists of the Republic Public Prosecutor's Office of RS and the district public prosecutor's offices (see entries on: Branches of Government). Under the law, the RS regulates the exercise of local self-government in municipalities and cities, as well as the system of public services.

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Ustav Bosne i Hercegovine.

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Ustav Republike Srpske.

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Cantons
A (Non-Existent) Practical Role?

The division and basic organisation of cantons in the Federation of Bosnia and Herzegovina (FBiH) is determined by the Constitution of FBiH, which is defined by the 1994 Framework Agreement on the Creation of the FBiH known as the Washington Agreement. Subsequently, during the same year, an additional article of the Constitution was agreed upon related to the Special Regime for the Canton of Central Bosnia (the Special Regime) and the Neretva Canton and the Agreement on Criteria for Determining the Territory of FBiH (the Agreement on Criteria) together with the map of the cantons in FBiH. This constitutional and legal structure was also adopted by the 1995 Dayton Peace Agreement (DPA); in particular, in its Annex IV or the Constitution of Bosnia and Herzegovina (BiH). The detailed organisation of the cantons is determined by the constitution of each canton.

The cantons are the 10 territorial units of FBiH. According to Article I 2 of the Constitution of FBiH and the Law on Federal Units, cantons are federal units. To avoid the link between cantons and ethnic identification, the names of the cantons were determined exclusively according to the names of cities, seats of cantonal authorities, or regional-geographic characteristics (Bosnia-Podrinje, Herzegovina-Neretva, Livno – Canton 10, Posavina, Sarajevo, Central Bosnia, Tuzla, Una-Sana, West Herzegovina, and Zenica-Doboj). However, the Agreement on Criteria lists five cantons with a majority Muslim or Bosniak (the term Bosniak was introduced and recognised by the Washington Agreement in domestic and international law) population (Bosansko-Podrinjski, Sarajevo, Tuzla, Una-Sana, and Zenica-Doboj cantons), three cantons with a majority Croat population (Livno – Canton 10, Posavski, and West Herzegovina cantons) and two cantons with the so-called "mixed" population (Central Bosnia and Herzegovina-Neretva cantons). This indicates that the ethnic structure of the cantons was, indeed, a significant factor in establishing cantons. This is also confirmed in the Law on Federal Units, which states that cantons are formed taking into account ethnic, economic-functional, natural-geographic, and communication principles.

The ***division of competences*** (see: Distribution of Powers) in the FBiH is based on *the assumption of jurisdiction in favour of FBiH*. To that end, Article III 1 of the Constitution of FBiH lists *the exclusive powers and competences of FBiH*, such as citizenship of FBiH, economic policy, adoption of bills regarding finances, financial institutions, and fiscal policy in FBiH, allocation of electronic frequencies for radio and television, defining energy policies and maintenance of necessary infrastructure, etc. Further on, Article III 3 (1) establishes *parallel and concurrent powers and competences of FBiH and the cantons* that FBiH and the cantons can fulfil jointly or separately. This includes the guarantees and implementation of human

rights and freedoms, health care, environmental policies, communications and transport infrastructure, social policies, tourism, movement of foreigners, etc. Finally, *the exclusive powers and competences of cantons* refer to all competences that are not expressly assigned to FBiH. As exclusive powers and competences, Article III 4 of the Constitution of FBiH outlines the establishment and supervision of police forces, policies in the field of education, culture, housing, housing facilities, public services, radio and television stations, implementation of social policies, the establishment of social protection services, etc.

Each canton has its own constitution, which defines the institutional structure of the canton according to the principle of division of powers into legislative, executive, and judiciary. The legislative bodies consist of cantonal assemblies, executive of cantonal governments headed by the prime minister, and judicial of cantonal and municipal courts.

Cantonal assemblies are unicameral legislative bodies of government that perform the constitutional and legislative powers in the cantons. They are elected directly in general elections. Cantonal assemblies have the usual functions and powers of representative bodies in multilevel states. Thus, the cantonal assemblies in FBiH have constitutional and legislative functions, the budgetary function, the electoral function, and the checks and balances function, while other functions include concluding international agreements, adopting rules of procedure, conducting investigations, etc. The powers and competences of the cantonal assemblies include the powers and competences to adopt a constitution and laws, approve the cantonal budget, confirm the cantonal government, elect delegates to the House of Peoples of the Parliament of FBiH, transfer cantonal powers and competences to FBiH, cities, and municipalities (when necessary for the more effective and efficient exercise of powers and competences), etc.

The ***cantonal governments*** are the executive bodies in the cantons. The cantonal government is confirmed by the cantonal assembly with a majority of votes, except in those cantons where, according to the last population census, each of two or more constituent peoples make up more than 30% of the population of the canton, and where the government is confirmed by a two-thirds majority of votes in the cantonal assembly. Although they have an independent position, they are accountable to the cantonal assemblies. For example, a cantonal prime minister is responsible to a cantonal assembly, while ministers are responsible to both a prime minister and a cantonal assembly. The cantonal government is responsible to a cantonal assembly for the implementation of laws and policies adopted by the cantonal assembly, as well as for harmonising the work of cantonal ministries and administrative bodies.

The ***role of the cantons***, which was the basis for the signing of the Washington Peace Agreement, can be understood precisely within that time and framework. However, under the contemporary framework, the role of cantons could be evaluated differently. Namely, the cantons do not represent federal units in the House of Peoples of the Parliament of FBiH, considering that the constituent peoples are represented in the House of Peoples. Furthermore, the powers and competences of cantons could be easily assigned to FBiH or local authorities. Finally,

cooperation in areas of common interest such as economic and infrastructural projects did not or hardly took place after the DPA. Therefore, the question of the practical role of cantons.

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Municipalities in Bosnia and Herzegovina

The municipality is a basic unit of local self-government. It is a territorial unit which encompasses the territory upon which a municipal government performs its responsibilities as defined by national or sub-national constitutional and legislative provisions. The general characteristics of a municipality, proposed in local government literature, are: 1. a municipality is the main, i.e., the most important form of local self-government; 2. it is established within the framework of historically formed local communities (which is why it is "recognised" and not "created" by the legislator); 3. it possesses self-governing status and capacity in accordance with local government legislation (Šmidovnik), i.e., local autonomy. It is an independent legal entity with its own property and budget. Municipalities can consist of sub-municipal units that bear different names.

The constitutional and legislative framework of local self-government. Local self-government regulation in Bosnia and Herzegovina (BiH) is the responsibility of the entities: the Republic of Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH). In RS, there are 54 municipalities and 10 cities (in 2022, Laktaši received the status of a city), in FBiH, 58 municipalities and 22 cities; the total number is 112 municipalities and 32 cities (compared to 109 municipalities in 1992). Brčko District (BD) has been ascribed a special district status as a local self-government unit that falls outside of the jurisdiction of the entities (Art. VI.4. Constitution BiH). The Constitution of BiH expressly enumerates the responsibilities of state institutions, while establishing the presumption of responsibility in favour of the entities. Since local self-government regulation is not mentioned among the competences of the BiH institutions, the organisation and competences of local self-government units are regulated by entity legislations (in FBiH, local self-government is considered a joint competence of FBIH and the cantons). The constitutions of both entities contain provisions on local self-government, in accordance with the requirement for a constitutional/legal foundation of local self-government prescribed by the European Charter of Local Self-Government (ratified by BiH in 2002).

The *Constitution of RS* regulates the organisation of local government in a separate chapter, entitled "Territorial Organisation" (Chapter VI: Articles 100-103). The aforementioned constitutional provisions define the competences of local authorities (Art. 102) and guarantee the incomes of cities and municipalities as established by law, as well as resources for performing delegated tasks (Art. 103). According to Article 66 para. 2 of the RS Constitution, the constitutional status and rights of local self-government units serve as the basis and the measure for the powers and responsibilities of entity bodies. Article 5 of the Constitution reinforces local self-government among fundamental social values, together with human rights and

freedoms and equality before the law, which represent the foundation of the constitutional order of the Republic. A new Law on Local Self-Government of RS came into force in 2016.

The *Constitution of FBiH* also contains provisions on local self-government. Due to its federal structure, it is necessary to clarify which level has the regulatory competence for municipalities. In fact, the Constitution recognises three types of competences: 1. the exclusive competences of FBiH; 2. the joint competences of FBiH and the cantons; and 3. the exclusive competences of the cantons. The competences of FBiH are expressly enumerated, as are the joint competences that are exercised by both government levels, while, according to Article 4 of the FBiH Constitution, the cantons have competence in all fields that are not explicitly granted to FBiH (the Constitution enumerates some of the exclusive responsibilities of the cantons, but this list is not exhaustive). Although the regulation of local self-government is neither among the exclusive competences of FBiH nor among the joint competences of the FBiH and the cantons, this field is regulated by the FBiH Constitution and federal legislation. Mirroring the RS Constitution, the Constitution of FBiH also dedicates a separate chapter to the organisation of local self-government (Chapter VI, entitled "Municipal Authorities"). It regulates the competences of the bodies of local self-government units, the method of election and the term of office of local officials, as well as the organisation and competences of cities. Local self-government organisation is also regulated by cantonal constitutions, whose provisions mostly follow the provisions of the FBiH constitution. Thus, the field of local self-government is regulated by both federal and cantonal local government legislation. The federal Law on Principles of Local Self-Government in FBiH, which was adopted in 2006, regulates the field of local self-government in a rather detailed manner; however, each of the ten cantons also has its own local government law.

Functions and structures of local self-government. Municipalities in both entities are vested with the power to conduct all public affairs not explicitly granted to another authority. This includes the power of organising local affairs autonomously as well as the duty of providing services for citizens and residents in the areas of housing, education, health, security, etc. Furthermore, budgetary policy and municipal property are protected under law. Against interference with these rights and powers, local authorities might seek protection from the constitutional courts of the entities. While judicial protection through the Constitutional Court of FBiH is not effective in many cases, as court decisions are often not implemented, it appears that the direct complaint to the Constitutional Court of RS is not used much by municipalities. *Municipalities in BiH* differ quite a lot in terms of population and size and with respect to economic and fiscal capacity. However, in legal terms, municipalities tend to be treated equally. In the RS, the model of one-level local self-government is established, with the municipality as the basic unit of local self-government. All municipalities have the same competences, regardless of the size of their territory, the number of inhabitants, and the degree of their economic development (the monotypic or uniform model of municipality). The Law on Local Self-Government foresees the possibility of establishing cities, whose legal status, for the most part, coincides with the status of a municipality. The exception is cities that consist of several municipalities: their competences are specifically regulated by the

Law (Art. 12). The city of East Sarajevo, which consists of six municipalities, is such a city. Additional competences can also be assigned by law to a city with only one municipality, which mitigates the monotypic character of municipalities in the RS (Article 11, Paragraph 3 RS Law on Local Self-Government). There are currently 54 municipalities and eight cities in RS. A similar system exists in FBiH, with 58 municipalities and 22 cities. Sarajevo is the only city in FBiH which has four municipalities. There is no special status foreseen for capital cities. City status is granted according to very similar criteria in both entities which refer to urban character and infrastructure (Art. 5 Law on Principles of Local Self-Government FBiH) and to appropriately developed urban areas which form a unit in geographical, social, economic, historical, and territorial terms (Art. 10 RS Law on Local Self-Government); in addition, a population of 50 000 inhabitants is the threshold in RS (in FBiH 30 000). The competencies are practically identical compared to those of municipalities, and overall, the concept of "city" has been rendered pointless. As in the Yugoslav system, the municipalities continue to be of rather large size; an exception are some municipalities situated at the Inter-Entity Boundary Line, which have simply been cut into two halves after the war and are thus fairly small.

The mayor, local democracy and internal organisation of municipalities. In both entities, a system of indirect (representative) local self-government exists, which implies that citizens participate in the governance of a local community mainly through elected representatives. According to the RS Law on Local Self-Government, the local self-government bodies are the municipal assembly and the mayor. The municipal assembly is the local authority's decision-making and policy-making body. This body is composed of members of the municipal assembly, which is elected by direct universal suffrage for a period of four years and led by a chairperson elected by the same assembly. The municipal assembly adopts the municipal statute as well as the budget and can appoint or dismiss staff of the municipality or city's permanent and temporary working bodies. According to the Law on Principles of Local Self-Government in the FBiH, the decision-making body of a local self-government unit is the municipal/city council (Article 13 para. 1).

The *mayor* is the (head of the) executive body of the local authority. During the last two decades, significant changes have been made in the structure of local authorities in RS and FBiH, especially concerning the organisation of local executive power. The trend of strengthening the local executive, which manifested itself in many European countries, also influenced the local government legislation in the BiH entities. In both entities, the model of the directly elected mayor was adopted, with relatively broad competences. In RS, it was introduced by the Law on Local Self-Government from 1999 and retained by later laws. The RS Law on Local Self-Government stipulates that the mayor is the holder of executive power at local level, manages the work of the municipal administration, and proposes heads of departments of the municipal administration, who are elected by the municipal assembly. The mayor represents the municipality, proposes general and individual legal acts of the municipal assembly, executes the local budget, and ensures the implementation of decisions and other acts of the municipal representative body. The mayor is elected by direct universal suffrage for a period of four years.

In FBiH, the model of a directly elected mayor was introduced in 2004, when the Law on Direct Election of Municipal Mayors in FBiH was adopted (preceded by Amendment CIV to the FBiH Constitution, since the election of local government bodies is also regulated by the Constitution). The mayor can put forward draft legislative proposals to the municipal assembly. They also implement local policy, proposes and executes the municipal budget, and enforces laws and regulations to be implemented at local level.

The strengthening of the mayor's competences raises the problem of their political accountability. To prevent abuses of the mayor's powers, and to secure their political accountability, a recall procedure was introduced in both entities. The recall procedure in the RS is regulated by the RS Election Law. In FBiH, the mayor's recall procedure is regulated by the Law on Election, Mandate Termination, Recall and Replacement of Mayors in FBiH. Since the introduction of the model of the directly elected mayor, a significant number of recall procedures has been initiated in both the RS and the FBiH.

The local government legislation of both entities prescribes forms of direct citizen' participation in the local decision-making process. The instruments of direct democracy prescribed by the RS Local Self-Government Law are referendum, assembly of citizens, citizens' initiative, local community, citizens' hours in assemblies, as well as other forms of participation that are in accordance with the law (Article 106). The Law on Principles of Local Self-Government in FBiH also provides for forms of direct participation of citizens in local decision-making: referendum, assembly of citizens, citizens' initiative, local community, citizens' hours in assemblies, as well as other forms of participation that are in accordance with the law (Article 43 para. 1).

Cooperation and association of municipalities; common challenges. The entity laws on local self-government provide the possibility for municipalities to cooperate with each other to improve the performance of local competences. Cases of such cooperation have been reported in practice, in the areas of water supply and waste disposal, but also to improve local economic development. However, in case of larger or more important projects, most of these are managed directly by the cantons (in FBiH) or by the RS government, respectively. In addition, cross-border cooperation among municipalities is also possible and has been realised in various forms, e.g., in a trilateral Interreg program (launched in 2007) and a number of projects with Serbia, Croatia and Montenegro, or in the Drina-river region, with secondary schools, hospitals and transportation as well as twinning agreements. The Herzegovina-Neretva Canton is one of the cofounders of the Adriatic-Ionic-Euregio (established in 2006). There are two independent Associations of Municipalities and Cities: one in and for FBiH and the other one in and for RS. They play a crucial role in advocating for changes in legislation and funding on behalf of municipalities, hold regular meetings and frequently organise discussions for their members and the public. They also provide professional services to municipalities primarily in the areas of legal and fiscal support and EU integration.

Although the two entities have separate and different systems of local government, "there are some serious common challenges: an ageing and falling population; the decline of secondary

cities and a growing urban-rural divide; the fragmented and often costly local government administration; burdens through external debt service; controversies over the horizontal allocation of resources (especially in FBiH); the often inefficient management and sharing of natural resources (which cannot develop into an important source of local government financing); no scope for aggregate tax increase (which could resolve local financing issues); and insufficient cooperation among various levels of government." The conclusion that both systems of local government need fundamental reforms, is shared by a large majority of leaders of local governments.

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The Brčko District[2]

The Brčko District of Bosnia and Herzegovina (BD) is the current official name of a particular level of government in Bosnia and Herzegovina (BiH), recognised by the Constitution of BiH from 2009. First of all, it is necessary to clarify the meaning of the term district at the linguistic, legal, and political level.

In *Rječnik stranih riječi* [Dictionary of Foreign Words in the Croatian language], the term *distrikt* (from the Latin *districtus*) has the following meanings: judicial district, county, territory and, in a broader sense, jurisdiction, and area of competence. *The Cambridge English Dictionary* explains the term *district* as follows: "an area of a country or town that has fixed borders that are used for official purposes, or that has a particular feature that makes it different from surrounding areas," then citing some examples such as: "the business district of New York, the Lake District/the Peak District, the City of Malden School District, South Cambridgeshire District Council." Finally, in the *Hrvatska enciklopedija* (Croatian Encyclopedia, 2022 edition) the meaning of the Latin terms *districtus* (district, county, territorial administrative unit) and *distringere* (clutch, distress) is explained.

From a legal point of view, a district is a part of the territory of a state that, for various reasons or special needs, is separated from the rest of the national territory, is distinguished by a particular legal regime, and usually enjoys a special legal status. Districts can be created to meet various needs regarding, for example, taxation, the electoral system, education, security, public administration, the judiciary, etc.

Politically speaking, the main feature of a district is a different and usually autonomous political system from the rest of the country. This is especially true for public policies. In this sense, the main purpose of creating a district is to guarantee citizens and their democratically elected representatives the freedom to autonomously administer their territory. This freedom is based on a high degree of decentralisation and democratisation of local authorities compared to those of the state. In the present case, the BD was created mainly for political reasons related to the failure to reach a compromise between the two constituent entities of BiH – the Republika Srpska (RS) and the Federation of BiH (FBiH) – on the governance of what was once the municipality of Brčko. With Amendment I to the Constitution of BiH, a solution was found as a compromise in the form of a condominium, that is, a territory that is jointly owned by the entities, but is under the sovereignty of BiH as a separate unit of local self-government with its own institutions, laws and regulations.

[2] Translated from the Serbian language by Ivana Draganić.

At the time of the Socialist Federal Republic of Yugoslavia, Brčko was a municipality in the Socialist Republic of BiH. In this multi-ethnic environment, the tragic war of 1992–95 erupted in all its cruelty. Many citizens of Brčko lost their lives during the conflict, some were injured, and others were forced to flee their homes. The war led to the destruction of the economy, infrastructure, private and collective assets. In 1991, according to census data collected that year, the municipality of Brčko numbered 87,627 inhabitants (of whom 38,617 were Muslims, 22,252 Serbs, 8,128 Croats, 5,731 Yugoslavs, and 2,899 others). In 2013, when the last census was carried out, Brčko District numbered 83,516 people (35,381 Bosniaks, 28,884 Serbs, 17,252 Croats, and 1,999 others).

Today, BD is a local self-government unit, i.e., a district covering an area of 493 km^2 which coincides with the territory of the municipality of Brčko from the pre-war period. Situated in the north-east of BiH, the Brčko district is an important junction of communication routes: it is connected to the European corridors by river, thanks to the port of Brčko and the navigability of the Sava river, while, at the same time, it is connected to western, central, and eastern Europe by a dense road and railway network. Brčko is only 200 km away from the three major cities of the region: Sarajevo, Zagreb, and Belgrade.

The Dayton Peace Agreement (DPA) did not bring a final solution to the *status* of this pre-war municipality, so Annexes II and V are devoted to issues of demarcation and arbitration. In 1996, an arbitration procedure was initiated, during which the first crucial issue was addressed ofwether the subject of the dispute between the two entities was only the demarcation line in the area of Brčko or the entire territory of this municipality. On 14 February 1997, the Chamber of Arbitration in Rome decided to launch a one-year international surveillance mission in the Brčko area. Then, with a verdict issued by the Arbitration Court of Vienna in March 1998 (that is, the chairman of the Arbitration Tribunal, because the other two members did not sign the decision), a decision was made on transitional international supervision in the area of Brčko for a period of one year. By the decision of the chairman of the Arbitration Tribunal, which was passed in Vienna in March 1998, the entire territory of Brčko was declared the subject of dispute. Finally, a year later (in March 1999), also in Vienna, instead of the Arbitral Tribunal which was authorised to make a decision, the Chairman of the Arbitral Tribunal, Roberts Owen, made the final arbitral decision on Brčko, according to which Brčko was exempted from entity authority and formed a separate entity (district). However, as specified in the verdict, this decision was revocable, meaning that Brčko could come under the jurisdiction of one of the two BiH entities should the other entity jeopardise the status of BD. There is no doubt that Amendment I to the Constitution of BiH made the final decision permanent.

The legal system of the BD is defined by the Constitution of BiH and the district statute. Concretely, Amendment I to the Constitution of BiH introduced the new Article VI.4. which reads as follows:

The Brcko District of Bosnia and Herzegovina, existing under the sovereignty of Bosnia and Herzegovina and falling under the responsibility of the institutions of Bosnia and Herzegovina

as arising from the Constitution, which territory is jointly owned by the Entities, shall be a local self-government unit with own institutions, laws and regulations, and powers and statute laid down finally in the decisions of the Arbitration Tribunal for the Dispute over the Inter-Entity Boundary Line in Brcko Area. Relations between the Brcko District of Bosnia and Herzegovina and the institutions of Bosnia and Herzegovina and the Entities may be additionally specified by law enacted by the Parliamentary Assembly of Bosnia and Herzegovina.

The Constitutional Court of Bosnia and Herzegovina shall have jurisdiction to decide any dispute in relation to the protection of the established status and powers of the Brcko District of Bosnia and Herzegovina that arises under this Constitution and decisions of the Arbitration Tribunal between an Entity or Entities and the Brcko District of Bosnia and Herzegovina or between Bosnia and Herzegovina and the Brcko District of Bosnia and Herzegovina.

Any such dispute may be referred by a majority of representatives of the Assembly of the Brcko District of Bosnia and Herzegovina including at least one fifth of the members elected from amongst each constituent people.

The cited amendment was adopted in 2009. Previously, Article 1 of the Statute of BD of BiH defined Brčko as an administrative unit of local self-government, placed under the sovereignty of BiH.

Although the Statute defines Brčko as a unit of local self-government, the BD is an asymmetrical and atypical self-government unit compared to other local administrations in BiH, firstly because it has its own legislative, executive, and judicial powers, which distinguish it from all other local self-government units both in FBiH and RS (see: Bosnia and Herzegovina's Federal System, An (A)symmetrical "Twin State").

In the BD, ***the legislative power*** is exercised by the parliament, the executive power by the mayor and the government, while the judicial power is exercised by a plurality of subjects. Parliament is the main body of the legislature which, in addition to passing laws, is responsible for the formulation of general policies, for adopting the budget, as well as for appointing the government and various district officials. The parliament is made up of 31 MPs who, according to the Electoral Law of BiH, are elected by direct suffrage for a four-year term. Representatives of national minorities present in the district are guaranteed two seats in parliament.

Executive power is exercised by the mayor and the government. The mayor is also the head of government; he represents the District and is responsible for implementing the laws passed by the district parliament and the Parliamentary Assembly of BiH. The mayor is elected by parliament for a four-year term which can be renewed.

The ***judicial system*** of BD consists of the following bodies: the Judicial Commission, the Court of First Instance, the Court of Appeal, the Prosecutor's Office and the Legal Aid Office. It should be noted that the judges and prosecutors of BD are appointed by the Supreme

Judicial Council of BiH. Hence, also in this respect, the position of the District is equated to that of the two constituent entities of BiH.

Although the constitutional and statutory provisions define the legal nature of BD, this issue still remains a subject of debate. The BD, other than as a local self-government unit, can be viewed as an autonomous territorial unit, but also as a quasi-federal unit. The fact that the BD appears as a signatory to international treaties, on a par with the state and the two entities of BiH, allows us to conclude that Brčko has the characteristics of a third entity.

If members of the Parliamentary Assembly of BiH of a subject have the task of making laws, then such an assembly cannot be considered a local representative body in the sense of what is deemed a local council. Thus, it emerges that the BD is a "hybrid autonomous territorial unit" which looks more like a federal unit (entity) than a local self-government unit. Michael Karnavas, on the other hand, is of the opposite opinion, arguing that the BD cannot be considered an entity because it does not have the same prerogatives as the two entities of BiH. The most important difference, according to Karnavas, concerns the fact that there is no citizenship of the BD, whose citizens can therefore choose whether to acquire the citizenship of FBiH or that of RS.

Reflecting on the legal nature of the BD, Marković believes that Brčko should be considered a federal unit and, at the same time, an autonomous territorial unit. Therefore, for Marković, it is a quasi-federal unit, i.e., an atypical autonomous territorial unit. The BD cannot be perceived as a typical federal unit because it is not represented in the House of Peoples of the Parliamentary Assembly of BiH, nor does it participate in the formation and exercise of power at state level. The fact that the Bosnian-Herzegovinian state does not exercise any control over the work of the government bodies of the BD and cannot affect the judicial system of the District, except as regards the constitutional legitimacy review, supports the thesis according to which the BD would be something more than a simple autonomous territorial unit.

Finally, it is necessary to dwell on the question of the institutional representation of BD at state level, another aspect which distinguishes the district, placing it in a position which implies a certain asymmetry with respect to the two entities of the country. The Office of the Brčko District Coordinator is a permanent body that represents the district in the BiH Cabinet of Ministers and is tasked with ensuring cooperation and coordination between the district and various BiH institutions, international organisations and foreign embassies, ensuring thus that the interests of the BD are recognised and respected. In the second part of this sentence, we note the powers of international cooperation that this Office can establish in the name and on behalf of the District.

Summarizing the above reflections, we can conclude that the BD of BiH is a local self-government unit that enjoys operational independence and prerogatives that make it similar to the two entities of post-Dayton BiH. Put simply, it is an atypical unit of local self-government, placed under the direct sovereignty of BiH, whose territory is jointly owned (condominium)

by the entities, and which has its own legal system on an organisational and functional level. As such, the BD enjoys direct constitutional and legal protection, guaranteed by the Constitutional Court of BiH, as well as an equal position with the two entities of the country, both vertically, as regards the relations between the district and the Bosnian-Herzegovinian state, and horizontally, with regard to relations with the two entities.

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Federal Ideas and Practice

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Federal Principles

The federal principle is an overarching principle that strives to preserve and improve societal, cultural, political, nonterritorial and territorial pluralism. It is a systemic idea that permeates all spheres of the multilevel socio-political system. As such, it is present in political practices, the manner of functioning and conducting politics (Riker), the constitutional-legal order, and the organisation of state power (Wheare). A political culture dedicated to the federal principle is characterised by various accommodative practices (Burgess), even in societal relations (Livingston). In other words, the federal principle has different theoretical and practical dimensions that are equally significant and complement each other. For that reason, it arises as part of the historical socio-political process, and the systemic effort and engagement of the elites, institutions, and broader society in multiple areas: constitutional, legal, political, public, societal, and educational. It also reflects the level of public political culture, shared by the elites and deeper by citizens, constituent communities, and in the realm of their interactions.

Federal theory and theoretical foundations of federalism. The versatility of possible approaches makes it challenging to postulate a unique definition via an overarching theory of federalism, which would include a universal federal principle as a basis to explain various forms of federal systems. However, it suffices here to recollect some of the definitions, which formulate federal principles differently, most of which are centered around two pillars of federalism: "self-" and "shared" rule. In that respect "...federal political system is a descriptive catchall term for all political organizations that combine what Daniel Elazar called shared rule and self-rule"'. Indeed, Elazar was one of the most influential authors who pioneered federalism as a system that involves both "shared governance/rule" and "self-governance/rule." Ronald Watts also acknowledged that federalism "refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule," and that a federal political system is a "descriptive term referring to the genus of political organization that is marked by the combination of shared rule and self-rule". He stressed the existence of the two levels of governance that are directly elected and accountable to their citizens with the formal constitutional division of legislative and executive powers. Furthermore, Kenneth Wheare defined the federal principle as "the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent". Other definitions emphasized the autonomy of both spheres, such as the one offered by King, "the key to federation [that] is its universal constitutional attribution of entrenched powers at the center to constitutive and non-sovereign territorial units". In the end, as Elazar puts it, "[w]hen all is said and done, federalism involves the combination of self-rule and shared-rule, an arrangement where two or more peoples or polities find it necessary and desirable to live

together within some kind of constitutional framework that allows all parties to preserve their respective integrities while securing peace and stability through power-sharing in those spheres where it is necessary".

Federal principles. Federalism is an idea that encompasses a set of principles, but there is a variety of possible ways of defining their versatile outcomes in terms of design, organisation, and functioning. On the theoretical level, there are proper federal principles as well as other principles with which modern federalism naturally interacts, such as constitutionalism, democracy, the rule of law, human and minority rights, etc. In fact, as shown by Michael Burgess in his seminal book *In Search of the Federal Spirit*, federal values are related to parallel principles by which they are brought to reality: Human dignity - Autonomy; Equality - Partnership; Freedom - Self-determination; Justice - Comity; Empathy - Loyalty; Tolerance - Unity in Diversity; Recognition - Contractual origins; and Respect - Reciprocity or mutuality. Additionally, several concrete elements are common as well as critical for the understanding of federalism, such as the propensity for a *polycentric* constitutional order, which acknowledges "equal" (as understood and qualified under the societal and political conception of justice) representation of different constitutional subjects that meet each other and interact in the shared loci of decision-making. The other related principle is *non-domination,* as a key hallmark of federal society, which annuls hegemony or monopolisation of public authority, property, goods, and resources by any party to the agreement or simple national majority.

Yet another principle that leads to the establishment of a polycentric order is *non-centralisation*, as the organisational principle that works through a clear division of powers between different constitutional orders, defining residual and exclusive competences along with those that are shared and concurrent. This idea is also supported by another broadly applied principle - *subsidiarity*, which reflects the tendency to allocate decision-making and implementation at the lowest possible functional level of institutional organisation. The same is particularly regarded in the European Union's (EU) politics, internal organisation and way of functioning. In conjunction with the overarching idea of pluralism, these principles, to different degrees, promote *non-hierarchical polycentric* order marked by multiple centres of decision-making. In his landmark book *Exploring Federalism*, Elazar pointed out that the federal goal is *not centralisation* but rather *non-centralisation*. He was of the view that powers need to be distributed between various centres of political authority to make sure that no centre can dominate the agenda and permanently impose its views on the others. According to Elazar, the pursuit of this objective will help contribute to building trust among the partners and lead to the development of an evolving compact that guarantees respect between all members. Such an understanding of the political dynamics confirms that *non-domination*, as a political ideal, constitutes a key objective to be constantly pursued, especially in situations of divided polities. This further implies that the *majority principle* cannot apply generally as a rule in federal systems. It is often insufficient and inadequate as its universal application can infringe on the equality of federal partners. But the decisive issue is that there always needs to remain an area of significant self-rule which no centralisation can neutralise. In that sense, the federal principle requires significant restraint and cultivated habits of decision-makers to

value politics of reconciliation and local autonomy, by nurturing respect for mutual spheres of competence and the obligation to cooperate as one system.

The above considerations imply that there is something like a federal spirit which is necessary to inspire and animate the federal system. This has to do with the very meaning of federalism as a source of federal principles and its starting point. In that respect, the root of the term federalism relates to *foedus* - as a covenant or a pact, "which - as a voluntary agreement - is the basis for every federal arrangement. It is thus not surprising that the *covenantal* theory of federalism is one of the most influential in understanding both federalism as a theoretical concept and federal systems as a contemporary reality. The covenantal character of federalism implies that every authority stems from the basic agreement as typically enshrined and entrenched in the constitution and not from any other external or internal authority. This makes the constitution the very foundation that embeds the federal principle, which is further reflected in the choice and application of the state's organisational principles. Thus, a violation of the federal principle would imply any action contrary to the fundamental constitutional principles and values that are an essential part of the federal agreement/pact, contrary to the spirit of the established partnership, and if any of the constituent groups were placed in an unequal position in such a way as to threaten its institutional capacity of "self-rule/shared rule". This is where the moral strength of the federal pact is revealed as a potentially powerful source for re-stabilising relations in situations of constitutional crisis.

The federal principle in Bosnia and Herzegovina. From the generic viewpoint, federalism was used as a conflict resolution strategy for Bosnia and Herzegovina (BiH) and less as a conflict management tool. It was used by international actors to end the 1990s war and pacify the tense relations in the country through peace initiatives and proposals. As such, it is the outcome of multiple constraints rather than voluntary cooperation of the key constitutional players. So, the federal principle in BiH, besides its plural, nationally, ethno-culturally and religiously *differentiated societal basis* and the related descriptive denominations (multinational, multi-ethnic, multicultural, multi-confessional), was rather non-existent in legal and political terms before the Dayton Peace Accords (DPA) and the Constitution delivered as part of it. It means that, despite imperfections connected to its primary conflict-resolution function, DPA and its Annex IV (Constitution of BiH) remain the only firm and comprehensive normative basis for further analysis of the federal principle in BiH, although diversity management had a long prior tradition per se. The peculiarity of the BiH Constitution and its society is that it includes both abstract citizens and differentiated collectivities, whereas federations usually rest on two constituent elements – citizens and federal units. The first "constituent" element also exists in BiH's federalism, with the peculiarity that the latter has largely been dominated by a third element – *constituent* or state-forming *peoples* (see: Constituent Peoples). More concretely, the constituent elements of federalism in BiH are the citizens, entities, and peoples, which means that the constitutional system rests on the duality of the bearers of sovereignty.

The Preamble of the BiH Constitution is characterised by an inherent ambiguity, as it contains both individualistic (citizens) and collectivistic (peoples) elements (see: Collective and

Individual Rights), which both play an essential role in the organisation and functioning of the state. This can be seen after closer scrutiny of key elements of the entities' constitutional position, characteristic of federal units: the *right to self-organisation*, reflected in the right to independently adopt a constitution, which the institutions of BiH cannot influence in any way unless an entity's constitution is in conflict with the state's; the *division of competences* between the state and the entities resolved in the Constitution of BiH in a manner typical for federations, with the assumption of competence in favour of the entities (as shown by the residual powers-clause); the *right of the entities to perform all the functions of state power*; the *right of entities to independently regulate the organisation of public authorities on their territory* with the obligation to respect the Constitution of BiH; the *obligation of entities to harmonise their constitutions with the Constitution of BiH* and to respect its legal order; and the *absence of any mechanisms or institutions through which the state can interfere in the exercise of state power in the entities* unless the entities' institutions violate the constitutional legal system of BiH with their acts. In addition, a special way of *decision-making* in the upper house (House of Peoples) serves as a corrective to the majority principle typical of the lower house (House of Representatives), because in the House of Peoples, special procedures guarantee the representation of special collective interests. If both houses of the legislative body are equal in decision-making, as is the case in BiH, there is no fear of applying the majority principle in the lower house, because the consensus in the upper house would still prevent outvoting, which serves as a justification of the equal competences of both houses. Beside the procedure for the protection of vital national interests (VNI) entailed to the House of Peoples, the decision-making procedure in the House of Representatives requires one third of the delegates from each of the two entities and allows stopping any decision by a two-thirds vote from each of the entities if previous conciliation attempts fail. This "entity voting" is based on a formal territorial element, which de facto functions to protect collective group interests.

Obviously, the organisation of the BiH federal state goes hand in hand with the political system of consociational democracy (or "power sharing") (see: "Power-Sharing", "Power-Dividing"), which, in turn, reinforces the application of the federal principle as a supportive tool of institutional equality and fair representation. Conclusively, BiH is organised according to the principles of representative democracy and its underlying society is pluralistic because there are three dominant social segments (three constituent peoples), organised within their own subsystems or subcultures through their institutions, organisations, and habits of daily life.

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Bosnia and Herzegovina's Federal System
An (A)symmetrical "Twin State"

Bosnia and Herzegovina (BiH) is often cited as a "complex State" and a highly asymmetrical constitutional system created as a result of differences in identity and related territorial claims. A closer look reveals that BiH certainly contains some asymmetric constitutional solutions, but it is not necessarily a highly asymmetrical system. When compared to symmetrical federal systems such as Germany or the United States of America (USA), where relationships among the substate units are based on uniformity, BiH certainly may look highly asymmetrical. However, differences also exist in the systems that are considered symmetrical: education in Germany, ecology and the death penalty in USA, and local, cantonal, federal, and church taxes in Switzerland. Differences also exist among the asymmetrical systems regarding the scope of asymmetries: mild – the United Kingdom (UK), moderate – Belgium, strong – India as a borderline case. However, whether the differences are theoretical, practical, or both, and what their cause is, depends on the specific system.

Definitions and types of asymmetries. There are two types of asymmetries: political and constitutional. *Political asymmetries* are relationships that are based on actual differences in the size of territory and population, economy, but also on political narratives, and most importantly, identity (language, religion, culture, ethnicity). These relations are practically prerequisites for constitutional asymmetries. *Constitutional asymmetries* are political asymmetries that are established in the constitutional and legal framework of a particular system so that they produce and enshrine a differentiated position of certain groups and/or substate entities. Differences in identity are, in fact, the most important causes of constitutional asymmetries, but they are usually supported by economic and political factors. Both types of asymmetries may arise in systems with federal features.

Asymmetries in status, distribution of powers, and fiscal autonomy. Asymmetries in a constitutional system reflect on the institutional framework and procedures at all levels of government. Their particular influence is projected through *status* (such as the different status of sub-state entities, their ability to organise legislature and executive independently from the central authorities, differentiated representation at the central level, differentiated participation in constitutional amendment procedures, veto including specific locks for the protection of autonomy, etc.), *distribution of powers* (such as increased powers in specific areas, power to opt-in/out, differences in the techniques for distributing powers, etc.), and *fiscal autonomy* (differences in tax returns, reliance on transfers, borrowing control, etc.).

Asymmetries in BiH. Article I.3. of the Constitution of BiH defines BiH as a state consisting of two sub-state entities (the Entities), the Federation of Bosnia and Herzegovina (FBiH) and the Republic of Srpska (RS), while Article VI.4. establishes a special territorial entity, Brčko District (BD, the District) of BiH. The constitutional structure of the two Entities is defined by their constitutions, while the structure of the BD is defined by its statute. Thus, Article I.2. of the Constitution of FBiH stipulates that FBiH consists of 10 cantons, while RS is a unitary entity according to its Constitution, and BD is a special administrative unit of local self-government according to the Article 1.1 of the BD Statute. Thus, the internal organisation of all three sub-state entities is combined with a high degree of institutional autonomy, which enables the application of a different institutional organisation in the Entities and the District.

Regarding *status*, both Entities and the District have constitutions and statutes that give them broad powers in the organisation of legislative, executive, and judicial bodies. For example, while the Parliament of FBiH is bicameral, the National Assembly of RS and the Assembly of BD are unicameral. Furthermore, in FBiH, the president of FBiH and two vice-presidents are elected indirectly through the Parliament of FBiH, while the president and vice-presidents in RS are elected directly by the people. BD only has a government, but no president. At the state level, the territorial representation of the entity coincides with the representation of the constituent peoples, which introduces constitutional asymmetry. For example, the House of Representatives of the Parliamentary Assembly of BiH consists of 42 representatives, two-thirds of whom are elected in FBiH and one-third in RS. Undoubtedly, this directly elected lower house represents the Entities, but also the constituent peoples – considering the way the representatives are elected. This has two consequences. First, FBiH is overrepresented (2:1), which is due to the principle of parity of constituent peoples. At the time when the Constitution of BiH was adopted, FBiH was understood as a territory predominantly made up of two constituent peoples (Bosniaks and Croats), while RS was viewed as the territory of one dominant constituent people (Serbs). Second, the District is not represented, which is related to the fact that it was established later. It is defined as a condominium of both Entities, i.e., the residents of the District must decide in which of the two Entities they vote in the local and parliamentary elections in BiH. With respect to ethno-territorial representation, the constitutional provisions on decision-making procedures in the Parliamentary Assembly guarantee a balance of different interests. As the principles of parity and consensus are essential guarantees within the constitutional structure of BiH, the procedure for protecting the vital interests of the constituent peoples serves to protect their interests when consensus cannot be reached. However, this institute has rarely been used. Instead, the so-called entity voting, which is intended to protect the interests of the entity (i.e., territory), is (mis-)used as a veto mechanism to protect the constituent peoples, although constituent peoples can rely on the procedure to protect vital national interests. Another constitutional asymmetry between the three constituent peoples is related to the so-called entity voting as a veto mechanism. Unlike Bosniaks and Serbs, Croats, given their small number, may only use the procedure for the protection of vital interests as a veto mechanism (see: Veto Rights).

Concerning the *distribution of powers*, the constitutional system of BiH consists of a comparatively weak state level with narrow, exclusive competences and strong entities and the District. The Entities are symmetrically vested with a vast range of powers. They can, of course, decide to transfer competence to the state level, but such a decision must be mutual. Any differences in the distribution of powers are not a result of asymmetrical constitutional provisions but are asymmetries in the outcome. This is because there are several techniques for the allocation of powers in FBiH. Even though the powers are distributed in favour of FBiH, FBiH and the cantons also exercise exclusive and concurrent powers. As each canton can opt to exercise concurrent powers in different ways, differentiation among cantons is inevitable. The District's position, however, is asymmetric, given that its approval is not required for the transfer of powers and competences. This can be explained by the unfinished legal relations between the state level and the District after the adoption of Amendment I to the Constitution of BiH.

The fiscal system of BiH follows the general trend of centralising income and decentralising expenditure. After the fiscal system was reorganised in 2006, *fiscal autonomy* of the Entities was symmetrised. Direct taxes remained under the jurisdiction of the Entities and District, but indirect taxes were centralised. Broad fiscal autonomy produces a decentralised system of vertical and horizontal distribution of funds. Eventual differences are a consequence of autonomy and not necessarily an asymmetric position. Before the reorganisation of the fiscal system, the financing of the state level depended on entity transfers, since both entities were under the constitutional obligation to provide financial resources necessary for the execution of obligations under the jurisdiction of the state. Thus, it was established that two-thirds of the international obligations of BiH were provided by FBiH and one-third by RS. Since the reorganisation of the fiscal system, the amounts are paid directly into the state budget in the same proportion, which means that this approach still represents a constitutional asymmetry. The same is the case with the amount of income remitted to the District. If the District's income is below the prescribed coefficient, the entities compensate for the difference in the same ratio as in the previous example. Finally, the Management Board of the Directorate for Indirect Taxation is the most important organ of BiH's fiscal policy. However, unlike both Entities whose representatives have the right to vote, District representatives only have observer status.

BiH as a mildly asymmetrical system. The initial constitutional structure of BiH exhibited constitutional asymmetries, some of which disappeared over time. Those that remain are sufficient to mark BiH as a system that manifests comparatively "mild" constitutional asymmetry. The constitutional status of the Entities and the District is the most immediate marker of constitutional asymmetry. However, apart from that, constitutional asymmetries are not particularly emphasised. In terms of *territory*, the Entities and the District have equal powers and responsibilities; the situation is similar regarding fiscal autonomy. In terms of the difference in *identity*, however, the asymmetric status is strengthened by the principles of constituency of the peoples and their institutional equality ("power-sharing") and the overlap of these with the territorial principle in the practical application of the Constitution.

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Shared Rule and Self-Rule: The Essence of Federalism

Federalism as a balance between autonomy and system. Federalism is a system. It is a system of government in which power is divided and shared between a central government and sub-national units. In a federal system, self-rule and shared rule are important concepts in defining the distribution of political power. Self-rule is often associated with sub-national units, such as states or provinces. These units have a high degree of autonomy and control over their own affairs, including the power to pass laws and make decisions, e.g., related to education, healthcare, and public services. This allows local communities to have a say in decisions that directly affect them and provides a mechanism for addressing regional differences and concerns. While the sub-national units have a high degree of autonomy, they also share power with the central government on issues that affect the entire country, such as defence, foreign policy, and national security. This allows for a balance between local autonomy and State unity and helps to ensure that important decisions are made with the input of all levels of government.

The distribution of competences in Bosnia and Herzegovina's federal system. In Bosnia and Herzegovina's (BiH) federal system the *competences are divided into three levels of government*: state, entity, and municipal (see: Distribution of Powers). The state level has the highest authority and is responsible for foreign affairs, defence, and monetary policy. The two entities, the Federation of Bosnia and Herzegovina (FBiH, the Federation) and Republika Srpska (RS) , have a significant degree of autonomy and are responsible for areas such as education, health, and public administration. Within FBiH, which is itself a federal system, competences are divided between FBiH and the cantons (and between the latter and municipalities). The Brčko District (BD) has a unique status as a self-governing administrative unit that is not part of either entity.

The distribution of competences in BiH is *determined by its Constitution*, which was established as Annex IV of the Dayton Peace Agreement that ended the War in 1995. According to the Dayton Constitution, the powers of the central institutions are limited to those explicitly listed in the Constitution (Article III.1). Those powers not expressively assigned, i.e., the residual powers, lie with the entities (Article III.3a). While this is standard in federal systems, it is striking that the competences of the State institutions are comparatively very limited, leaving most powers to the entities. This is a result of the Dayton compromise on the substantial decentralisation of BiH's political system.

Thus, according to the Constitution, central institutions are only competent in the areas of a) foreign policy and foreign trade; b) customs and currency policy; c) immigration and asylum

policy; d) criminal law (limited cooperation with Interpol and between the two entities); e) air traffic control; and f) communication and transport policy between the two entities and with international partners (list in Article III.1). Indeed, there were only three ministries at the State level in the beginning, compared to nine ministries today, but BiH still does not have state-wide ministries for economy, education, and agriculture which would be useful for the coordination of policies and governance, even more so in the context of the requirements of the path towards EU accession.

The BiH Constitution assigns the most important responsibilities in the areas of taxation, security and defence, and all aspects of social policy to the entities. In the Federation, most of these responsibilities belong to the cantons, highlighting the different organisation of the two entities. While major decisions in RS are made by the RS Assembly, and municipalities only serve as instruments of policy implementation (see: Municipalities in Bosnia and Herzegovina), in the Federation, itself a federal system, it is the cantons that are the main decision-making bodies (see: Cantons, A (Non-Existent) Practical Role?), according to its Constitution, FBiH is responsible for defence policy, citizenship policy of FBiH, economic planning, the fight against terrorism and organised crime, licensing of frequencies, energy policy and limited aspects of taxation (Section III, Article I). Other important policy areas, such as social policy (health, social welfare), environmental protection and the administration of natural resources, are defined as shared areas of competence between FBiH and the cantons (Section Ill, Article 2). The cantons also have exclusive powers in the areas of policing, education, culture, the civil service, local economic development, welfare, and taxation (Section III, Article 2).

From a comparative perspective, it is surprising that most competences which are traditionally seen as attributes of statehood are given to the entities and not the central state. This is the case for defence policy, policing, and taxation. Furthermore, entities also have certain powers in foreign policy: They can sign international agreements with other States and international contracts, if the institutions of BiH agree, and they can develop "special parallel relations with their neighbouring countries" (Article III.2). While these "special parallel relations" do not require the approval of the State, they are limited because they must not threaten the sovereignty or territorial integrity of BiH.

Despite of the remarkable decentralisation of the political system, the Constitution of BiH also comprises a *supremacy clause* in favour of federal legislation. According to this provision, the Dayton constitution enjoys supremacy vis-à-vis all contrasting provisions in State legislation as well as in the entity constitutions and in their legislation (Article Ill.3 (b)). For the continuous validity of the entity constitutions, which were adopted before the Dayton Constitution came into force, the former had to be adapted in order to guarantee their conformity to the latter (Article XII). The superior position of the BiH Constitution corresponds with the power of the Constitutional Court of BiH to control conformity with the Constitution, which is necessary in order to enforce this supremacy (Article VI.3)

The evolution of the competence order. Decision-making, Constitutional Court decisions and agreements between the different levels have shaped BiH's constitutional politics, with the result that, in many areas, the reality no longer reflects the text of the Dayton Constitution. The *competence order has evolved, with many changes imposed by the Office of the High Representative (OHR)*, established under Annex X and tasked with the civilian implementation of the Dayton Agreement.

The Constitutional Court of BiH (see: Constitutional Court(s) and Constitutional Review) is responsible for decisions on *controversies* between the State and the entities (Art VI.3[a]). Numerous controversies have been decided regarding (the limitation of) State competence and the participation of entity institutions in the creation of new areas of competence for the State level and/or its institutions. While the Dayton Agreement required dynamic implementation, in the entities, in particular in RS, a defensive attitude prevailed which tried to use the text of the Dayton Peace Agreement as a line of defence against any expansion of State level competence beyond the minimum accepted in the DPA.

For instance, framework legislation or the competence to legislate in an area more generally was not foreseen in the text. Instead, the RS has consistently insisted on the separation of powers as outlined in Dayton, because it feared that further decision-making competence for the State level would weaken the entity and ultimately threaten its existence. In FBiH, however, framework legislation has been applied widely, for example in economic policies. In 2000, the Constitutional Court of BiH strengthened the power of the State and its institutions by arguing that the list provided in Article III.1 should not be seen as complete and closed, but as a qualified list. Based on the distribution of competences and the overall structure of the Constitution, the institutions of BiH have a responsibility to pass framework legislation that will affect the entities. The Court determined that this was particularly important for the provision of equal fundamental rights and freedoms across the entities and in the area of economic integration, i.e., the movement of goods, services, capital and people (Article 1.4). The Constitutional Court of BiH concluded that in order to ensure the functionality of the State of BiH and to prevent any form of disintegration, it is important that the institutions of the State, entity institutions and cantons work together in these areas and are jointly responsible for them.

In various decisions, the Constitutional Court has clarified the meaning of the areas of competence of the State listed in Article III.1 of the Constitution: Neither can this list be considered an exhaustive one; nor do the residual powers of the entities automatically comprise all the subject matter not mentioned in the list. For example, Article V.5(a) states that the Presidency is also (jointly) commander-in-chief of the military, even though the responsibility for defence and military affairs was given to the entities. In addition to the state Presidency's civil command control over the Armed Forces, the Constitutional Court of BiH confirmed the State level's competence in establishing a federal police force.

Procedures for changing the distribution of competences. The BiH Constitution provides expressly for a procedure permitting the vertical transfer of powers from entity level

to State level (Article III.5). Thus, *it is possible, at least in principle, to transfer every power to the State level on the basis of negotiation and consensus* (i.e., dependent on political will). In all these cases, it is not only possible to exercise transferred powers, but also to establish the institutions necessary for exercising them.

As the transfer clauses allow for dynamic evolution of the constitution, they are *highly controversial* due to opposing political positions on the role and the nature of the State. Many reforms have been based upon this flexibility clause, such as the establishment of a High Judicial and Prosecutorial Council (HJPC), an Indirect Taxation Authority (ITA) and the defence reform as well as the resulting reorganisation of the military, a State Prosecutor, a State Border Police and a State Secret Service Agency. These have been brokered, controlled or imposed by the International Community (primarily OHR) because of the inherent political precondition, which is a political agreement between the political representatives of the three constituent peoples (as underlined and substantiated in BiH Constitutional Court decisions U-5/98, U-23/14), but which may also be seen as – at least implicitly – the consent of the relevant political subjects. A new area of competence for the State level can be based upon the use of the flexibility clause under one of the following three conditions: (1) an agreement between the entities; (2) if foreseen in annexes 5 to 8 of the Peace Agreement (Arbitration, Human Rights, Refugees and Displaced Persons, Commission to Preserve National Monuments); or (3) if necessary to guarantee the sovereignty, territorial integrity, political independence and international legal personality of the BiH state. It seems that the third criterion, which least relies on the consent of local actors, was most used as motivation for expanding the competences of the State level in different areas.

In fact, the controversial establishment of a State Court, not foreseen in the Dayton Constitution, was justified by the Constitutional Court of BiH citing systemic arguments; as such, a State Court is necessary for the fulfilment of international obligations regarding the guarantees for adequate and comprehensive protection of fundamental rights against legal measures adopted by State institutions. A kind of subsidiary power of substitution vested in the State emerges from a comprehensive analysis of different decisions in the field of protection of fundamental rights vis-à-vis the entities, at least as long as the latter cannot or do not guarantee those rights themselves. In those areas and issues, exclusive competences of the entities become concurrent powers which can, in principle, be used, according to the specific situation and with some discretion, by the institutions of BiH in the form of "framework legislation."

This orientation led to further decisions in favour of State powers, for example regarding the privatisation of enterprises and banks (necessary for guaranteeing property rights), as well as regarding the determination and regulation of official languages by the entities: in both cases, framework legislation by the State level was considered necessary for coordinating the different legislation in the entities in order to guarantee minimum standards in the protection of fundamental rights, as well as institutional guarantees for a "pluralistic society" and a "market economy."

Financing the implementation of the competences. The *distribution of finances in BiH is unique* from a comparative perspective. Until 2006, the State level had no independent income; its only revenue were customs fees and support from international donors. According to the Constitution, "Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina" (Article III.2 (b); and "The Federation shall provide two-thirds, and the Republika Srpska one-third..." (Article VIII.3)." Thus, the State level relied completely on the entities for financial support. In the first post-war years, RS regularly refused to contribute to the finances of the State, which threatened its sustainability and ability to act.

Such a complete *dependency on contributions from the entities is very unusual*. In most federal systems, central level and sub-units share taxation powers and revenue income in order to ensure that each level has access to independent financial resources. In this regard, BiH could be compared to arrangements in the European Union (EU), which also largely depends on contributions from its Member States to sustain itself and to act, or to confederal models of governance. However, despite showing some federal features, the EU is not a State.

In 2003, OHR started a *reform process targeting the taxation system* and aiming at more unity and a fairer distribution of income. The tax reform of 2006 introduced a countrywide value added tax, which is collected by a newly created central agency. The income from this tax is then shared between the State level, the entities, the cantons and the municipalities. For the first time the central institutions have guaranteed and independent access to financial resources. This has not only increased the effectiveness of the State level and its sustainability, but also its independence from the good will of the entities, thereby contributing to a more stable and sustainable political system.

In sum: Dynamic, but controversial and never stable. The competence order reflects the fact that both entities already existed before the new Dayton framework came into force. Thus, the State level has struggled since 1995 to make important decisions and implement them because of ongoing tensions between the political elites of the three constituent peoples. Lacking financial and material resources, its re-establishment relied on external support. The situation of the State level has been continuously improving, first because it was supported by external actors and external financial assistance, and later because it got access to independent finances.

As the State level can take on more responsibilities and can sustain itself, the entities and cantons have lost their privileged position in the system. Increased debt as a result of high expenditure on welfare and social policy has also limited their possibilities. However, there are still frequent disputes between the entities and the State level over the distribution of powers, particularly in the areas of transport, infrastructure, and economic development. Competence disputes are also frequent in FBiH because of an ongoing push for more cantonal autonomy. Croat cantons have questioned the right of FBiH to issue framework legislation (as in the case of the Federal Ministry of Education and Science, which was declared unconstitutional by the decision of the Constitutional Court of FBiH) and have often been dissatisfied with

insufficient influence over decisions, thus not perceiving them as "shared rule," which triggers a greater demand for self-rule at the cantonal level.

The distribution of competences in BiH is a delicate balance between the need for a centralised government to maintain the country's unity and the desire of the different constituent peoples to maintain their own identities and autonomy. However, the implementation of the system has been fraught with challenges, including political instability, corruption, and ethnic tensions, which have slowed progress in achieving the country's economic and social development goals. Self-rule and shared rule are not yet considered elements of one comprehensive system.

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Distribution of Powers

One of the criteria for the classification of states is whether state power is exercised at one or two levels. If it is exercised at one level, the state is unitary, whereas in federal states, state power is exercised at two levels – at the level of the federal state and that of federal units. The fundamental difference between a federal state and federal units is the sovereignty of the former since its legal order is dominant over the legal orders of the latter. There have been examples where state power was exercised at three levels; such was the case with the Russian federal unit in the Soviet Union.

Bosnia and Herzegovina (BiH) is unique since state power is exercised at the levels of the state, the entities, the cantons in the Federation of Bosnia and Herzegovina (FBiH), and Brčko District (BD). At each of these levels, there is a particular legal system and organisation of state power; with constitutions as supreme legal acts (only BD has a Statute as its supreme legal act although its content is analogous to the entity constitutions, and the District enacts it without anyone's approval).

The very fact that state power is exercised at different levels, with autonomous legal systems and with the right to self-organisation, leads to the conclusion that BiH is a federally organised state. One of the basic features of federal states is the distribution of competences. It is prescribed in Article III of the Constitution of BiH as the distribution of competences between the institutions of BiH and the entities.

The theory of constitutional law recognises two basic ***methods of distribution of powers*** between a federation and federal units. According to the first, the competences of the federation are prescribed using *positive enumeration* (they are explicitly listed), while the competences of the federal units are prescribed using the *general clause* (the federal units exercise all the competences which are not explicitly given to the federation). The assumption of the competences is established in favour of the federal units. This method is used in most federal states, and it gives more autonomy to federal units since the federation can exercise only those competences which are explicitly enumerated as its competences. In the case of a conflict regarding competence, it would be assumed that a competence belongs to the federal units. The second basic method is completely opposite to the first one.

Article III of *the Constitution of BiH prescribes the first method of distribution of competences*. This is quite natural considering the very high degree of autonomy of the entities. It is in accordance with the entities' right to self-organisation, which is almost absolute, and the contents of their competences, which are very wide, that their competences are defined using

the method of general clause. Article III 1 lists the competences of the institutions of BiH in ten points. These are the exclusive competences of the state. However, there are some other competences, also prescribed in the Constitution, which are common to the state and the entities, such as the protection of human rights or the electoral system. They are not explicitly listed as common competences, but constitutional provisions prescribe them nevertheless. Therefore, the Constitution recognises three types of competences: 1) exclusive competences of BiH; 2) exclusive competences of the entities; and 3) common competences of BiH and the entities.

The Constitution does not explicitly list the competences of the entities since they are prescribed using the method of general clause. However, two of them are explicitly defined since they are original, and/or it is not self-evident that they belong to federal units. According to Article III 2a and 2d: 1) the entities have the right to establish special parallel relationships with neighbouring states; and 2) they may enter into agreements with states and international organisations. While the first of these two competences is the result of the specificities of the state and society in BiH, its history (first of all the most recent) and ethnic composition, the second is not unusual in comparative federalism. The entities may establish special parallel relationships without approval of any institution of BiH although they have to respect the sovereignty and territorial integrity of BiH. According to Article VI 3a of the Constitution of BiH, the Constitutional Court of BiH is authorised to check if these conditions are fulfilled.

Although not explicitly prescribed, it is in accordance with the nature of federal state that the entities may enter into agreements with states and international organisations only in the spheres which are under their authority. These agreements could be reached only with the consent of the Parliamentary Assembly of BiH since the state is the only subject of international law. However, this competence gives the entities limited international subjectivity.

Article III 5 of the Constitution of BiH regulates the institution which renders federalism in BiH unique – additional competences. It prescribes that BiH can assume competences: 1) for such other measures as are agreed by the entities; 2) are prescribed in Annexes 5 to 8 of the Dayton Peace Agreement; and 3) are necessary to preserve the sovereignty, territorial integrity, political independence, and international subjectivity of BiH.

A few issues are important for further analysis. Firstly, neither the state nor entity constitutions prescribe how the entities would reach an agreement on the transfer of competences to the institutions of BiH. In practice, it happened through agreements of entity governments. This is not an appropriate method since the transfer of competences is a constitutional issue and should only be prescribed by constitutions.

Secondly, there are no constitutional provisions on the method of transfer of competences in the second and the third of the abovementioned cases. In practice, it happened through the decisions of the High Representative and the laws enacted by the Parliamentary Assembly of BiH. Both methods are problematic for two reasons. The first reason is that the High

Representative does not have the authority to decide on the issue. The second reason lies in the fact that the transfer of competences is a constitutional issue which has to be decided principally by the Parliamentary Assembly in the Constitution's amendment procedure 'and not through the enactment of ordinary laws.

Thirdly, the third case for the transfer of competences is so broadly defined that it is possible to decide on the transfer of a wide range of issues, depending on the attitude of the Parliamentary Assembly whether it is necessary to transfer competences in order to preserve sovereignty, territorial integrity, etc.

Fourthly, the issue of returning the competences to the entities arises. The purpose of constitutionalising additional competences is to strengthen the state whose competences, according to the original constitutional text, were very weak. The Constitution has not explicitly prescribed the possibility of returning competences to the entities. However, it has not forbidden it either. According to some authors, it would not be unconstitutional to decide on returning competences if the appropriate decision were made. It is not clear how this decision would be made and by whom since there are no constitutional provisions on the issue. However, it seems that the state and/or both entities would have to be included in the decision-making procedure. Some authors explicitly conclude that the unilateral return of competences would be unconstitutional, although they do not exclude the possibility that the competences could be returned by an agreement between entities.

The distribution of competences in the material sense was executed in an unusual way because the state did not have some competences which are state competences as a rule. For example, it did not have competences in the domains of defence, border control or taxation. Article VIII of the Constitution, for example, prescribes that the state finances its spending and international duties from the budget, with 2/3 of the total amount being ensured by FBiH and the remaining 1/3 by the Republic of Srpska (RS). Such state financing can be defined as confederal in nature as the state did not have its own financial resources.

The competences of the state have been considerably broadened during the post-Dayton period in three basic ways: 1) through agreements of the entities; 2) by laws imposed by the High Representative; and 3) by laws introduced by the Parliamentary Assembly. The broadening of these competences, i.e., their transfer to the state, has had the following consequences: 1) the state has started to regulate considerably more areas of social life and state organisation; 2) new state institutions were established and continue to function today; and 3) the entities lost a part of their autonomy since they could no longer control those areas of social life which were transferred to the state, and entity institutions were dissolved or lost a part of their competences.

Although dozens of competences have been transferred to the state, they have never been explicitly included in the constitutional text. This is because some ethnic political elites do not agree with this transfer of competences, and they fear that, should the competences be

explicitly listed as state' competences in the Constitution, their return to the entities would never be possible.

The transfer of competences has been the subject of various debates in academic circles and of decisions of the Parliamentary Assembly and the Constitutional Court of BiH. Two main reasons for the disputes have been found in the following dilemmas. Firstly, the dilemma arises whether the transfers of competences were constitutional in some cases since the Constitution explicitly prescribes the division of competences, thus giving the entities the right to legislate on particular areas of social life and state organisation which could not be regulated by the state. Therefore, according to one opinion, the transfer of these competences to the state would be unconstitutional since it would breach the intention of the constitution maker.

The second dilemma concerns the appropriate method of transfer of competences, which, because of its importance, must always be regulated with a constitutional text. Theoretically, these matters have to be regulated according to Articles III and X of the Constitution (the latter regulating the procedure for the amendment of the Constitution'). However, Article III of the Constitution does not regulate the methods of transfer of competences, which is one of the most important deficiencies of the constitutional text.

The Constitution also prescribes that the entities may coordinate their efforts on matters which are their responsibility. The Presidency of BiH will be responsible for the coordination of these efforts unless one of the entities objects.

The distribution of competences has also been prescribed in Part III of *the Constitution of FBiH*. It has been *prescribed* using *the usual method* – the competences *of FBiH* are listed, *while canton competences are defined by a general clause*. The Constitution lists the competences of FBiH in eight points, and common competences of FBiH and the cantons in nine points. Two constitutional provisions regulate the exercise of these common competences in a relatively unclear manner. These competences may be exercised jointly or separately, or by the cantons as coordinated by FBiH. Each canton can enact its own laws in areas which fall under common competences (if the issues are not regulated by Federal laws), enact its laws concurrently with Federal laws on the same issues, or the Federal government can have the role of coordinator between the cantons which are responsible for the implementation of these policies.

Although the competences of the cantons have been prescribed by the general clause, 12 of them are nevertheless listed in the Constitution. Such a solution does not seem methodologically acceptable since there is no reason for the explicit enumeration of competences of the cantons.

In the material sense, it is obvious that FBiH is more centralised than BiH since FBiH has more numerous and more serious competences. For example, economic and fiscal policies at federal level are exclusive competences of FBiH, and it also participates in the regulation of areas such as protection of human rights, health, social welfare, tourism, etc.

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Stability of Constitutional Systems
The Concept Based on Cohesion, Solidarity, and Trust

The notion of ***stability*** is often used to describe the state of any system (i.e., stable or unstable) and as such, it has strong underlying functional connotations. The system is an abstract notion that refers to *a whole* made up of *an external boundary* and *internal subsystems*. This notion is broadly used both in natural and social sciences. In the latter group, namely in sociology, the notion of the system has been developed as a fundamental category upon which various theoretical perspectives are grounded, such as functionalism, structural-functionalism, neo-functionalism, and social system theory. Social relations, social order, social structure, role, status, etc. encapsulate the most general properties of social life in a particular system, such as cohesion, solidarity, and trust. Importantly, all three concepts are fundamentally related to the notion of stability.

As a property of a system, stability can vary depending on its relation with the environment, the orderliness of its components (in terms of their mutual relations and relation with the system as a whole), and their specific functioning. The general premise is that a system's survival (functioning) is dependent on the ability to maintain a boundary with the environment and on the ability of its subsystems to function properly (increase chances of survival). If the subsystem fails to perform (is impaired) or its function is not picked up by another subsystem (compensated), then stability of the system, even its survival, would be at stake. The notion of "equilibrium," borrowed from physics and popularised by Pareto, was used to describe the optimum level of system stability. The idea was that a system is routinely in the state of "equilibrium" unless disturbed by external forces and that it returns to its original state after the period of instability has passed. Since the notion was criticised for favouring the *status quo* and treating every social change as an aberration – "equilibrium" has come to stand for a state of maximum stability.

While the notion of stability has mostly positive connotations there can be negative connotations as well. For example, when it comes to the process of EU enlargement, the Western Balkan countries are sometimes described as "stabilitocracies." This term is used to describe the slow and ineffective process of EU accession of the WB6 countries, inhibited both by *status quo* veto-players and the intent of EU, as Kmezić notes: "to trade its own rule of law conditionality for other interests, namely for stability in its immediate neighborhood." Negative effects of "stabilitocracy" can be seen in the deep-rooted system of state capture, mostly via the use of judicial apparatus, low level of institutional trust – specifically to judicial institutions, and low level of trust in the process of EU-accession-related reforms. In "stabilitocracy" one finds a lack of clarity and credibility of EU conditionality on the supply side of EU accession processes and strategies, and obstructionist potential of gatekeeper elites and legacies of the

past on the demand side, namely concerning domestic drive for reforms. The "stabilitocracy" notion contains the same baseline logic as the classical notion of "equilibrium": favouring the *status quo* and treating social change as an aberration or, at least, as a vehicle of instability that would compromise (perceived) already loosely integrated, barely-holding-it-together systems such as political systems found in the Western Balkans Region, namely Bosnia and Herzegovina (BiH). In this way, stability becomes the primary system imperative that persists despite internal conflicts, disarrays, dysfunctionalities, and other sources of strain, pushed by both internal and external decision-makers.

Speaking about political systems and using them as a segue for exploring other notions in this entry, modern societies, as social systems, followed the trajectory of concentrating their political functions in constitutional form. As Thornhill asserts, constitutions and their normative reserves have proven to be vital for the stability of modern societies and the legitimacy of their political institutions. Modern societies are often described in terms of complex social systems with highly developed, relatively autonomous (and autopoietic), and differentiated subsystems such as political, legal, economic, security, education, etc. A legal subsystem is, in socio-legal literature, often recognised as one of the most important factors of stabilisation. For example, Luhmann maintained that a legal subsystem is unrivalled in stabilising normative expectations throughout a social system as a whole. Thornhill provides an example of the Polish Constitutional Tribunal playing a key stabilisation role in the Polish state in the transitional period between 1992 and 1997, explaining how modern social systems rely on different institutional apparatuses (subsystems) to compensate for the failure of other subsystems' to perform their function.

Besides describing the functional performance of subsystems, stability also describes the orderliness of relations between subsystems (structure). Another notion used to describe this very state is that of *integration* (see: Integration, Fragmentation, Coordination and Accommodation). However, notions that are usually used for describing states and processes of integration in social units are those of cohesion, solidarity, and trust.

It is important to note that the basis of cohesion, solidarity, and trust, and, more generally, social integration, is basic consensus on a set of key values and norms that relate to key goals and the means of realisation of those goals. This is also a basis for any social unit and its particular identity regardless of the type of social unit, such as group, category, organisation, or institution. The degree of cohesion, solidarity, and trust is thus dependent on the degree of adherence to the social unit's key goals and means, or values and norms. The said adherence itself is dependent on internal factors such as motivational (socialisation and social control) and organisational (a division of labour in society), and on external factors such as social change and adversity (i.e., conflict with another social unit). Notions of cohesion, solidarity, and trust are interrelated but mutually distinctive with respect to an epistemological and methodological application, and their role in a broader theoretical framework. Cohesion is often used as an analytical and descriptive notion, solidarity is a fundamental concept in sociology, and trust is a multifaceted notion used in different fields of scientific inquiry.

In the context of social units such as social groups, ***cohesion*** implies *stability of relations between group members*. Since it is dependent on the degree of adherence to the group's goals and means (values and norms), a group may either purposely deploy a set of processes and mechanisms to increase it or find itself in a situation of externally pressured change or adversity that produce the same effect – most effectively if the survival of the group is at stake, or its identity is under threat. Cohesion may be maintained more easily in less complex groups consisting of fewer members with a lesser relational distance between them. More complex groups, consisting of large numbers of members and higher relational distances between them need to put more effort in maintaining cohesion. Modern complex groups, such as religious, ethnic, and national groups, especially if co-extensive as is the case in BiH with Bosniaks, Croats, and Serbs, utilise different processes and mechanisms to increase cohesion. It appears that the most effective way to increase it concerns the so-called "identity politics" or strategy of identity construction based on the oppositional dichotomy of *Us-Them* as *Us versus Them*. This simply comes down to the construction of *Other* (*Them*) as a source of existential threat, hitherto a source of increased cohesion of the *Us* group. This also implies that cohesion may be a product of both consensual and coercive action.

The notion of ***solidarity*** denotes only *consensual action*. As theorised most notably by Durkheim, solidarity stands for the *basis of group formation and cohesiveness*. It also denotes a *sense of belongingness* that an individual experiences in social life and pertains to the direction of conduct toward mutuality and interconnectedness that characterises social behaviour and interaction. Durkheim argued that solidarity embeds social obligations or social norms through which members are obliged but not forced to participate in group activities and that the acceptance of the norms is consequential of acceptance of the group's entitlement to demand commitment. Social solidarity is based on social consciousness (moral or value-normative consensus) and the division of labour in society. Solidarity varies across social groups in the same way cohesion varies, namely concerning complexity, membership quantity, and relational distance between members. Durkheim considered that solidarity could be analysed only indirectly, namely via analysis of the law, which he understood as an external symbol of social solidarity. Following this methodological proposition, he distinguished between real and positive solidarity – the former prevalent in property law (relations between social actors and things) and the latter prevalent in other areas of law regulating social relationships – and between mechanic and organic solidarity – the former prevalent in criminal law and the latter prevalent in "cooperative law" (i.e., constitutional or contractual law). In a broader sense, solidarity relates to the extension of our borders of *Us*: from our primary groups to members of other groups in our society, to members of different societies, and even to the whole of humanity. There is certainly a humanistic sense in the notion of solidarity prevalent in acts of solidarity toward strangers. In normative ethics, such a sense is grounded in the moral duties bounding all members of mankind and universal in their scope. Acts of solidarity, and even mechanisms of solidarity – grounded not on ethics but political and legal arrangements – are not solely acts nor solely mechanisms deprived of deeper social implications. *Au contraire*, they are constitutive actions that lay the foundation for social cooperation, which is the potential for higher-patterned social relations, operating not just as conduits for human

sociability but also as means of construction of society. In this sense, the notion of solidarity transcends the scope of meanings belonging to the notion of stability, describing a higher and deeper order of things in the social universe. Modern complex groups, as is the case in BiH, extend their social cooperation, regardless of their identity affiliation in events of urgency. One such event in BiH was the catastrophic floods in 2014 during which citizens showed solidarity while the entities' authorities were lagging with a fast response or any response at all. For example, the citizens of the municipality of Doboj in the Republic of Srpska (RS) were helped by the citizens from the surrounding municipalities in the Federation of BiH (FBiH), such as Tešanj. Usually, issues of solidarity arise over the redistribution of wealth such as in Belgium, Canada, and Spain. In BiH, this seemingly does not happen since, for example, the fiscal system has been redesigned to match the redistribution.

Still, one can hardly imagine stability, cohesion, and solidarity as nodes of social order without trust. The notion of ***trust*** is multifaceted and has a plethora of relational meanings depending on the specific context of its use. Some of the more general meanings of the notion include *personal disposition* (trusting) *or quality* (trustworthy), *part of social relationships*, or *part of economic exchange*. The trust consists of two basic elements: *beliefs and commitments*. Trust is not only a calculating relationship based on rationality but also a psychological impulse. The decision to trust may be based on three grounds: reflected trustworthiness, personal trustfulness, and trust culture. In social sciences, the notion of trust is usually understood as a cultural or economic resource necessary for the viable functioning of society and an indispensable ingredient of viable economic systems. Trusting is considered a crucial strategy for dealing with uncertainty, unpredictability, and the risk of ever-growing complexity generated by modernity. Generally, trust is attached to two basic phenomena: human actions and the future. This is why Stzompka defines it as "a bet about future contingent actions of others." In this sense, trust can be scaled from the least demanding or weakest to the most demanding, strongest, or most risky bets of trust. One example of the most demanding/most risky bets can be found in what Barber terms as "fiduciary trust": defined as "duties in certain situations to place others' interests before our own." In social sciences, namely in sociology and political science, trust is analysed in the context of culture. The notion of trust in this sense implies cultural values, norms, and attitudes or cultural environment that either encourages or discourages trust. Cultures can themselves be distinguished on this basis: high-trust or low-trust, depending on values and norms that encourage social trust and its reciprocity. Values and norms are related to normative expectations, namely with normative obligations to trust and normative obligations to be trustworthy, credible, or reliable. If these values and norms become institutionalised and rooted in the cultural structures of society, trust becomes a powerful factor influencing the decision to trust, as well as the decision to reciprocate trust. In this way, trust may become a profound stabilising force that affects the social system in a way that guarantees persistence and continuity of trust. Co-dependency of trust and (stability of) normative expectations is exemplified by high levels of social trust that are the results of stable normative expectations and *vice versa*, stable normative expectations yield a high level of trust. While trust operates as a force of stability – in both personal and social systems – and can be utilised as an important resource in social interaction in different areas

of the social system, it is a finite resource prone to vulnerability and a force that can diminish easily once stability understood as "equilibrium" becomes primary system imperative – as exemplified by "stabilitocracy" mentioned above. Western Balkan countries, as social entities undergoing democratic transition and often caught up by the legacies of their past, withal while pertaining co-extensive religious-ethnic-national social groups who opt for strategizing the oppositional dichotomy *Us versus Them*, are not in the best position to generate intra, yet alone interrelation trust. One of the negative effects of "stabilitocracy" is lower trust levels of citizens toward political and judicial institutions. The diminishing of institutional trust can hardly be a positive predictor. The low-level culture of trust in the Western Balkan Region, namely in BiH, is exemplified by a low-level of institutional trust. The country-specific context, characterised by recent violent conflicts and present-day political conflicts, and a wide range of social deviances only partially encapsulated by the notion of "stabilitocracy," is fertile ground for trust diminishing, not a fertile ground for trust generating. Social solidarity, as a feature of social life that is inherently transcendental of stringent social group boundaries, can be hardly maintained, let alone increased in the absence of a culture of trust. Even if the cohesion of distinct social groups and other social units may remain high or even increase, it still accounts for little to nothing when a social system is undermined by a notion of stability that sanctifies the *status quo*.

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Legitimacy in Multilevel Systems

Traditionally, the definition of legitimacy is based on several accompanying criteria such as legality, justifiability, and legitimation. The legitimacy of a system is then based on *legal rules that are justifiable through the recognised political authority and legitimised by relevant bodies*. Prerequisites, however, include sovereignty and the effective functioning of government bodies. Given that this approach is closely connected with unitary and nation-states or even mono-national federal states, it makes it inapplicable to federal systems with identity differences such as Bosnia and Herzegovina (BiH).

Legitimacy in BiH reflects a *balance of different interests*, and therefore, depends on two interconnected aspects. First, legitimacy is envisaged in such a way as to acknowledge that it originates not only from citizens but also from specific groups or territories. On the one hand, legitimacy is tied to specific ethnic groups, meaning the three constituent peoples. On the other hand, legitimacy is tied to the territory, that is to say, to sub-state entities. In other words, it is tied to the Federation of BiH (FBiH) and the Republic of Srpska (RS) (the Entities), cantons, and the Brčko District (BD). Second, legitimacy reflects how these sources interact with each other horizontally and vertically in balancing their interests. This means that it depends, considerably, on the mutual relationship of the central authorities, sub-state entities, and ethnic groups.

Importantly, legitimacy in BiH is based on aspects of the so-called *input, output, and throughput legitimacy*. ***Input legitimacy*** includes effective political participation by the people. This means that people authorise political representatives to represent and participate in decision-making at all levels of government. This usually happens through elections; however, it is also possible through referendums. Hence, authorisation in BiH is based on a multiplicity of subjects from which legitimacy in BiH is drawn: the citizens, ethnic groups and levels of government, sometimes even under specific conditions. This means that input legitimacy is vested in multiple subjects simultaneously to enable their equality in processes. However, multiple subjects provide input in multiple levels of government such as the state level, the Entities, cantons, etc. This may affect transparency as it may not always be clear which subject is providing input and where. For example, constituent peoples provide input in the legislative and executive bodies at the cantonal, Entity, and state levels based on the principle of representation and participation of the constituent peoples. The cantons delegate the constituent peoples to the House of Peoples of the Parliament of the FBiH, and the Entities delegate the constituent peoples - Bosniaks and Croats from the FBiH, and Serbs from the RS – to the House of Peoples of the Parliamentary Assembly of BiH, ensuring input at the entity or state level. The specific position of the BD, however, is noticeable, given that the

residents of the BD have to decide in which of the two entities they will vote in the local and parliamentary elections. The internal structure of BiH obviously affects input legitimacy in that the relationship between the subjects from which legitimacy is drawn is blurred since there are several relationships, some of which are indirect. At the same time, all subjects, especially BD, are not an integral part of input legitimacy.

Output legitimacy includes effective political participation for the people. This happens thanks to access to information, responsiveness, and accountability. In other words, output legitimacy reveals how political representatives were involved in decision-making through publicly available information about their work. This is a good indicator of whether they were responsive enough to meet the expectations of those who authorised them, and consequently, it raises the question of their accountability. For example, Bosniaks and Serbs have often used the so-called entity vote, which unites territorial and identity features into a qualified majority, in the legislature at central level to block legislation, although there is a procedure for the protection of vital national interests guaranteed to the three constituent peoples. Due to their small number, Croats cannot use the entity vote as a veto mechanism. Similarly, in the three-member presidency in BiH, the procedure for protecting the vital interests of the constituent peoples is often used by the members of the Presidency to prevent decision-making without consensus. This, for example, is the case with the decision on accession to the North Atlantic Treaty Organization (NATO), which the Serb member of the Presidency regularly opposes. Another example is that both FBiH and RS can opt to transfer some of their powers to state level on the basis of a mutual agreement. Since the political establishment in RS stands against transferring powers, most of the powers that have been transferred (including the establishment of the Court of BiH, the Prosecutor's Office of BiH, and the High Judicial and Prosecutorial Council of BiH) were imposed by the Office of the High Representative for BiH (OHR). In RS, the establishment of these institutions has never been approved since there was no agreement on the issue. Considering the complexity of output legitimacy, it is natural to conclude that both effectiveness and accountability are imperilled, which diminishes these essential characteristics of the democratic process in BiH.

Finally, ***throughput legitimacy*** includes effective political participation with the people. This happens by ensuring that the content of decisions is justified, and that decisions are made in such a way that all subjects have had the opportunity to be involved in decision-making processes. This may also include public hearings, consultations, and citizens' initiatives. For example, the already mentioned entity vote in decision-making procedures puts one constituent people, the Croats, in an unequal position. This undermines throughput legitimacy as it creates the perception that one is unable to participate in decision-making.

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Power Sharing

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"Power-Sharing", "Power-Dividing"[3]

Power-sharing refers to *any form of distribution of power* amongst several participants, expressed through the levers and mechanisms of government, mainly in the case of a classical vertical distribution between the general-central government and the constitutive components of a federation, which is typical of federalism. The emphasis, however, can also be on the horizontal division between several segments of society, whose primary goal is to preserve some form of autonomy, and for this purpose, they have or demand institutional guarantees to participate in political processes, which is most often the case with consociation, i.e., consociational democracy.

Power-sharing is more a descriptive technical term that does not necessarily prejudge or reveal a broader doctrine or concept which legitimises a specific scheme of power distribution in a given context. Such *conceptual neutrality* provides an advantage because it enables the interpretation, description and understanding of certain structures which have mechanisms of co-decision (shared-rule) and/or independent decision-making (self-rule) or autonomy embedded in them. So, in this sense, it is a convenient, self-explanatory, practical term which, due to its meaning and flexibility, has a wider applicability and useful value. As such, "power-sharing" can be regulated at different normative levels (constitutional, legal, statutory), at different administrative-political levels, depending on the level and scope of the official policy of accommodation, the constitutional profile and character of the state, as well as the instruments used in a specific case.

Power-sharing *implies institutional and legal-procedural mechanisms for the distribution of political power* that are generally accepted and constitutionally-legally based. The goal of using these mechanisms is usually to achieve a relative or complete balance of power between the components of a society, but in such a way as to strengthen its weaker components and thus ensure the conditions for their independent development, emancipation, and co-ownership of socio-political management processes. In this sense, power-sharing is a comprehensive concept that is most often associated with the concepts of federalism, consociation, and political and social integration. At state level, it is used for systemic solutions to the problem of accommodation and managing differences (as an instrument for conflict resolution in Bosnia and Herzegovina (BiH), and in the case of Belgium, for the preservation of the state while simultaneously affirming its dual bi-federal character), but it is also applicable both at subnational (South Tyrol) and supranational level. level (the European Union (EU) institutional framework) and even at local level (certain bilingual municipalities in Switzerland, e.g., Biel/Bien).

[3] Translated from the Croatian and Bosnian languages by Ivana Draganić.

Furthermore, the term easily *crosses the boundaries between scientific register and colloquial usage*, which makes it more pervasive in public discourse, and also well-received by the professional public who study the management of differences from a constitutional-legal, political, sociological, philosophical-moral or some other perspective. The advantage of power-sharing is that it is ideologically unencumbered (since federalism and consociation in certain contexts cannot always be observed in an ideologically-politically neutral way in relation to the characteristics of public opinion, its standards, norms, capacities for articulation and absorption of academic ideas that can be translated into political programs and projects or are connected with them). In this sense, power-sharing can help to circumvent obstacles, at least in communication, but also potential ideological obstacles that may arise when federalism is imposed in a certain way as a theoretical-normative framework for understanding and managing the constitutional-political development of a particular state, and at the same time, it can help to address and articulate it in a less indiscreet and risky way.

However, this does not mean that there are no strong *links between power-sharing and federalism*. Their closeness is evident, but one cannot speak of synonymous terms, especially since power-sharing as such is not a single academic concept, but rather a convenient term that finds wide application in the field of multi-level management, federalism, consociation, political and social integration, management of differences and accommodation policies of linguistic, cultural, ethnic or national collectivities.

Impotantly, one should bear in mind that every model for managing differences does not automatically imply power-sharing, which, for example, applies to policies and practices for the protection of national minorities. These are mostly regulated by international standards, which do not particularly oblige nation-states to enter into the more demanding constitutional processes of accommodation but only to fulfil the minimum international legal-political expectations and standards in favour of guaranteed rights for national minorities, who are not actually autochthonous but are usually native citizens of one of the neighbouring countries.

Power-sharing, or "sharing of power", is basically a division of power/authority, but more than that in the sense that it *enables and implies the cooperation of different components at the level of the entire system of government*, which must be unique. This means that it is not enough to insist on the strict delimitation (division) of the powers of different orders (levels) that unite a single general state order, but to create conditions for the development of cooperative schemes of cooperation, coordination and integration. In this regard, "power-sharing", which integrates "divided and sharing power/authority," also has repercussions on the concept of sovereignty, where it makes use of a federal conception that allows the sharing of sovereignty, so then one speaks of spherical, relative or diffuse sovereignty, but in such a way that all centres within the polycentric order remain simultaneously part of the single, constitutional-legal political system of government. Therefore, it is always about the one and the same sovereignty, regardless of the fact that it is exercised at different levels and to different extents by several constituent entities.

In this sense, a more *appropriate translation of the term* "power sharing" is "*sharing* power" instead of "power-division," which is also a recommendation for how to interpret and translate "power-sharing" into the official languages of BiH in order to be used in an adequate and harmonised way by the domestic public. Especially because it is a term that is unavoidable when problematising the structure and form of government in BiH, which is based on a combination of federal and consociational elements. This seemingly minor, but still essentially significant distinction, is also visible in one of the classic definitions of the federal principle as a method of distributing power so that the general and regional governments are each coordinated and independent within their own sphere. Therefore, power is not a goal in itself, but a means of achieving other ultimate goals through the adequate organisation and coordination of government structures at different levels that should function as sub-systems of the one and the same system of government, so in this sense we speak of "sharing power" as "sharing" the one and the same "indivisible" sovereignty, which can never be completely "divided" but can therefore be "shared" and be "joint". In the same sense, one of the goals of institutional arrangements based on power-sharing is to enable a divided society, which has experienced conflict, to build a sustainable democratic system for the benefit of all its members, both collective and individual.

However, the general meaning of the term is one thing, and its application and *appropriate contextual elaboration* another. Thus, when it comes to the "method" of power sharing, we delve deeper into the space of federal theory and its key determinants of "self-" and "shared-rule" (self-governance and joint i.e., shared governance), which are indispensable for understanding power-sharing in a certain context when it is necessary to review, explain and even justify its manner of application.

Furthermore, *"self-" and "shared-rule" are always conceptually and operationally synchronised*, their primary function is to protect the integrity of each of the constituent federal entities and they function according to the mirror principle, with the self-management/autonomy capacity of the constituent segments being reflected on the joint/shared level administration. Namely, if their integrity is primarily protected by "self-governance", as a form of political subjectivity and a prerequisite for substantial participatory action within the political system, then integrity as subjectivity must be respected and ensured in the segment of joint, i.e., shared, rule. For example, as a relevant note in the context of BiH, if a dominant group tries to unilaterally change electoral procedures and processes or undermine the rules of the distribution of power (including its constitutional division and functional division), there is a likely threat to the integrity of the non-dominant other, by disrupting the balance of the system of distribution of power. It is precisely for this reason that shared rule protects self-rule, by preventing the centre from making one-sided systemic decisions, which could undermine the position of the weaker members of the power division system and thus jeopardise their position. For this reason, joint/power-sharing incorporates the political will of all the segments of society into the decision-making processes. This political will is then an expression and expansion of their right to autonomy and concretely to the status of constituency, which further implies that the violation of the principle of shared rule leads to a violation of the political will, the constitutionally guaranteed position, status

and rights within the federal system. Thus, the fundamental components of any power-sharing system are self-rule and shared rule as two interdependent and complementary principles. They function together because they are connected according to the principle of connected vessels and represent the obverse and the reverse of one and the same federal principle (privacy/separation/differences/autonomy). Their reciprocity practically works in the following way: self-government is transferred to and strengthens the joint government, and the latter in turn protects the autonomy expressed through the self-governing competences of the constituent components. This complex balance of reciprocity ensures the effect of "sharing" instead of "divided" power, because it is based on their organic interdependence and functional connection at the level of the general management system. On the other hand, the process of institutionalising a complex balance of reciprocity focused on actors who share power, with the aim of regulating and stimulating relations between different social communities, can be accompanied by various challenges. One of them is the permanent absence of political pluralism, which stimulates the development of a deliberative democratic culture and standards necessary for the affirmation of forms of civic responsiveness and responsibility, both at the level of society, at the level of communities and in the context of their relationships. This is consequently reflected on the ability to internalise and the commitment to the establishment and respect of the general system of law and the rule of law, the inhibition of social integration within the framework of a plural society which, specifically in BiH, rests, to the greatest extent, on inter-ethnic dialogue, exchange, understanding and convergence.

To conclude, in multinational federations (power-sharing), sharing/joint power gains additional importance, because both mentioned principles of power management are more pronounced as the importance and role of joint rule for the sustainability and stability of the system increases. The balanced application of the two federal principles at the level of the entire socio-political system thus helps to consolidate structural equality, balance and stability. This balance is further based on the ratio of dispositions of all provisions of independent and joint administration in the federal system, its institutions and regulatory framework in relation to each of the constituent/constitutional subjects. In other words, the only relationship that is more important than the ratio of the overall application of the principle of power sharing at the level of the entire legal-political system is their equal or symmetrical distribution. Therefore, unlike multinational federations with constitutional asymmetry, the dynamics in multinational federations with built-in constitutional symmetry must also be regulated horizontally, between different but statutorily equal constituent subjects (groups, units, peoples, etc.). Although such relations can be read as confederal, they also speak of how different power division concepts (confederal, federal, regional-devolutionary, consociational, etc.) can meet and intersect within the same constitutional-legal political system. In this sense, the term "power-sharing" enables a more flexible, analytical approach to specific cases, including BiH as a consociational-federal system that operates at different levels with symmetrical and asymmetrical elements. Ultimately, it is important to emphasise that power-sharing is possible under the umbrella of one sovereignty, which remains indivisible and does not multiply, but is differentiated through different levels and administrative-political units that have original functional competence in some of its segments.

In other words, the crux is participation in the one and the same sovereignty and not about its consistent factual division. Such an understanding is a prerequisite for an integrated management model, and it can be achieved in different ways depending on the characteristics of the system. (For example, in Switzerland, the emphasis is on the horizontal coordination of regulations and policies at cantonal level through the mechanisms of the cantonal conference, and in Belgium, for example, these are bilateral regulations between linguistic regions/communities, used to resolve practical governance issues in order to avoid demanding and exhausting constitutional changes that are politically very demanding and expensive with an uncertain outcome). An opportunity to improve the integrated system of government in BiH is its European path, which is very demanding in terms of administrative, technical and legal-political terms, but additionally points to the need for better organisation and coordination of constitutionally divided functions and competences in order to achieve the effect of systemic coordination and synchronised movements of all administrative units on the road as the EU. This means that instead of a strict separation of powers as a passive defence strategy, it is necessary to move to the register of power sharing, which implies a wider proactive action of all sub-structures in order to maintain and develop the general one. In this sense, functional and innovative coordination mechanisms can bridge complexities and enable a higher level of compliance and efficiency in the adaptation of legislation and the implementation of policies. In addition, the register of power sharing in the sense of proactive action also implies the willingness to address issues of key long-term importance for the perspective of such arrangements, such as tensions between collective and individual rights, creating conditions for the exercise of personal autonomy and the promotion of unity within the framework of a comprehensive, inclusive and plural civil order.

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Consociational Democracy

Consociational democracy is a form of political regime typical for *segmented (plural) societies*. It is typical for *(post)conflict societies* in which social groups, formed along ethnic, linguistic, religious or other lines, have particular, and often divergent, interests and views on the organisation of state and the nature of society. These social groups try to achieve their aims through their own network of organisations and institutions, whether these are political parties or cultural, economic, sport, educational, professional and other organisations and institutions.

In segmented societies, individuals who belong to particular social groups usually, although not necessarily, support the political parties of their respective social groups, and participate in other organisations and institutions of these groups (trade unions, cultural associations, sport clubs, professional organisations, in some cases educational institutions, etc.). Therefore, it seems that the society is composed of as many sub-societies as there are social groups whose importance prevails in the global society. This also means that one type of social group has a greater social and political importance than the others. Its importance is seen in the fact that such a social group predominantly influences decision-making processes through their political representatives, and that they fulfil their economic, cultural, professional and other interests dominantly, although not exclusively, through their own organisations and institutions.

Bosnia and Herzegovina (BiH) is one of a few constitutional democracies. The other countries are Belgium, Switzerland, Lebanon, and examples from the past are the Netherlands, Austria, Cyprus and some other countries. These examples would be acceptable if consociational democracy were not limited solely to societies in which the main societal divisions are created along ethnic, linguistic, or religious lines.

In BiH, three ethnic groups, i.e., three peoples (Bosniaks, Serbs, and Croats), constitute specific social segments which participate in the decision-making processes in political institutions through their political representatives. The Constitution of BiH prescribes in the last line of its Preamble that it has been enacted by the Bosniaks, Serbs, and Croats, together with the others, and the citizens of BiH. In this manner, the Constitution gives the constituent peoples the status of bearers of sovereignty, together with the citizens. The Preambles of the entity constitutions contain similar clauses.

In plural societies, political and social stability has to be established and preserved. Although stability can be jeopardised by different factors, the most visible and frequent reason for its distortion is the domination of one of the social segments over the others. This domination

is evident when members of that social segment dominate in the political institutions, giving them the strongest influence in the decision-making process.

As Lijphart used to say, the *centrifugal tendencies* characteristic to plural societies have to be counterbalanced through the *cooperative attitudes* and behaviour of segmental political elites. Consociational democracy is based on the following *principles*: 1) a vast parliamentary majority in the form of a great coalition, composed of political parties representing all social segments; 2) a coalition government enjoys support and includes political parties from all social segments; 3) institutions are composed according to the principle of parity or at least proportional representation of each social segment; 4) decision-making is mostly based on the special mechanisms for decision-making (veto powers, consensus, qualified majority, etc.) which have a major importance in political institutions; 5) the electoral system is based on proportional representation in order to enable all social segments, due to their different numerical strength, to have just political representation; and 6) autonomy of social segments, which means that they have the right to exercise legislative, executive, and judicial powers, particularly if this autonomy is territorialised in the form of federal units which are dominantly settled by one social segment and have their own constitutional systems.

A *grand coalition* has to ensure the cooperation of the political representatives of all the social segments in the ruling majority. In BiH, for example, the grand coalition includes at least three political parties, each one representing one constituent people. After the first post-war elections were held in 1996, the great coalition was composed of three political parties, each constituent people being represented by one of them. After that, due to internal conflicts in ethnic parties and the creation of new parties out of the old ones, the grand coalitions were composed of more than three parties.

An important political issue is whether it is enough for grand coalitions just to include political parties which are entirely or mostly monoethnic in their composition, regardless of their real political support, or it is necessary for these political parties to be legitimate representatives of the majority of voters who belong to each constituent people. The constitutions in BiH do not formally require that grand coalitions include political parties which are supported by a simple or absolute majority of their respective constituent peoples. Constitutionally, it is acceptable for a political party which represents only a minority of a constituent people to participate in a grand coalition. This happened in 2000, when the grand coalition around the Alliance for Changes included Croat political parties which enjoyed only a small portion of support among the Croat population.

Consociational democracy also means that social segments should have their political representatives in the executive power. It means that an exact number or percentage of government members have to belong to each social segment, or at least, that a government has to be composed of members who belong to different social segments regardless of their exact numbers or percentages. The Constitution of BiH does not prescribe the ethnic composition

of the Council of Ministers, although the Law on the Council of Ministers prescribes that the constituent peoples have to be equally represented in it.

The entities' constitutions contain somewhat different norms. They prescribe that the governments have to include a precise number of members from each constituent people, which does not exclude the possibility that one member of the respective governments belongs to the Others. The members of governments cannot at the same time be members of respective entity parliaments. The consequence of this solution is that members of governments belong to social segments, without necessarily being their legitimate political representatives.

The *mutual veto* is one of the necessary features of a consociational democracy. The different numerical strengths of social segments must not have the domination of one or a few social segments over others in political and other institutions as its political and constitutional consequence. In BiH, the mechanisms which prevent the prevalence of one of the constituent peoples in the decision-making are as follows: 1) consensus; 2) qualified majorities; 3) veto powers; and 4) protection of vital national (i.e., ethnic) interests.

These mechanisms for legislative and executive institutions are prescribed by the state and entities' constitutions. The so-called entity vote, a particular kind of qualified majority, has been prescribed as a decision-making method in both houses of the Parliamentary Assembly of BiH. The Constitution of BiH also prescribes the procedure for the protection of vital interests of the constituent peoples in the House of Peoples of the Parliamentary Assembly. Therefore, the Parliamentary Assembly never decides using the principle of the majority vote.

The Presidency of BiH decides on certain issues, enumerated in the Constitution, by consensus. Only if consensus cannot be reached, can decisions be made by majority vote. Even in these cases, a member of the Presidency who finds the decisions contrary to the vital interest of their entity, has the right to veto them. In that case, the parliament of the respective entity would finally decide on the veto.

The Law on the Council of Ministers prescribes that it makes decisions by the majority of voting and present members only on issues on which its decision is not final and the final decision will be made by other institutions (such as is the case with the draft budget, for example). If the Council of Ministers has the authority to make a final decision on an issue, at least one minister who belongs to each constituent people has to agree with it.

In both entities, parliaments decide using simple majority principles. However, the procedure for the protection of vital national interests has been prescribed in both constitutions. In the Republic of Srpska, the Council of Peoples decides on their protection, while in the Federation of BiH (FBiH), it lies in the competence of the House of Peoples of the FBiH Parliament. The cantonal constitutions also contain norms on protection of vital national interests. The members of the unicameral cantonal assemblies serve simultaneously as the delegates of the constituent peoples when it comes to the protection of these interests.

The governments of entities do not use the qualified majority voting mechanisms. In the FBiH, the President of FBiH can decide on particular issues (appointment and dismissal of the Government, dissolution of the Parliament, appointment of judges of the Constitutional Court, etc.) only with the consent of both Vice Presidents, which is important since the President and two Vice Presidents belong to three different constituent peoples.

Favourable conditions for the success of the consociational democracy are: balance of power between segments, external threats to all segments, socioeconomic equality of segments, etc. The two most important conditions for BiH are: 1) consensus of ethnic political elites on the very existence of the state as well as on its form of government and political regime; and 2) tradition of cooperation of ethnic political elites, showing their readiness to exercise accommodation policies.

The first condition means that the ethnic political elites and the very constituent peoples accept: 1) the very existence of the state; 2) the two-entity structure of the federal state; and 3) the political regime of consociational democracy. There is no consensus on any of these issues which fundamentally aggravates the functioning of the consociational democracy.

The second condition encompasses the will and ability of the segmental political elites to develop accommodation policies. In other words, they must be able to negotiate, cooperate, and compromise to make decisions. In BiH, the policies of segmental political elites' have their roots in the war and post-war conflicts. They are rooted not only in the antagonistic wartime goals of the ethnic political elites but also in antagonistic attitudes towards the organisation and functioning of BiH in the post-war period.

Although some of fundamental conditions for a consociational democracy to succeed are lacking, it is still the only possible model of democracy for BiH. In a society whose segments of population hold totally different views on the causes and nature of the war in the 1990s, as well as contrasting attitudes toward the organisation and functioning of the state, consociational democracy contains valuable mechanisms for the functioning of the state that will prevent the domination of any of its social segments.

The critics of consociational democracy argue that it freezes the conflict instead of resolving it. It institutionalises existing social divisions, and the citizens are compelled to act through segmental political parties and other institutions and organisations. However, this is not necessarily the case, as the recent example of the Belgian radical left shows. The advocates of this democratic model say that consociational arrangements are the *product* and not the *source* of social divisions. The existing social divisions and conflicts could not be resolved by the imposition of majority rule but only by the development of accommodation policies.

Another critical notion is that the minority could use the decision-making mechanisms in order to impose its will even if this only means the prevention of making a decision. In response to this critique, one could claim that it would be equally dangerous if a majority

could impose its will on a minority. It seems that the only possible solution is for segmental political elites to reach a balance between their segmental interests and the need for the stable functioning of the system.

Consociationalism favours the elitist approach to democracy, and it hinders the strengthening of political movements whose ideologies exceed the basic segmental divisions. Political parties which are not organised along ethnic lines can operate successfully if they have a relevant number of sympathisers in all social segments and are capable of combining and reconciling the political struggle for the interests of each constituent people as well as for the interests of social groups which transcend ethnic characteristics. Consociational democracy is not principally opposite to direct democracy which, however, has to be limited. It also does not exclude the existence of strong political parties which espouse going beyond the conflicts or antagonisms of segmental interests.

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Veto Rights

The political regime in Bosnia and Herzegovina (BiH), according to most theorists, is a consociational system (see: Consociational Democracy). Veto rights represent one of the four fundamental characteristics of consociational democracy or "power sharing" as defined by Lijphart (group autonomy; proportional representation; participation of all in government; veto rights). Lijphart calls the veto, as the so-called negative rule of the minority, a mutual veto, which aims to ensure that the majority (alone) cannot reach a decision that would outvote the minority in fields affecting its vital interests, and thus it ensures political protection to each segment (group) of the consociational society.

Definition of the veto. In the constitutional-legal sense, the veto can be defined as the *constitutional competence within the state institutions* (president, parliament etc.), *which can be used to block* (permanently or temporarily) *the enactment of a specific decision*. Veto mechanisms can be classified in relation to different criteria - in relation to the competence bearer, we distinguish the veto of a legislative body and the veto of the head of state, and in relation to the effect, we distinguish an absolute and a suspensive veto. In relation to the scope of constitutional-legal control, veto mechanisms can be divided into mechanisms that are subject to constitutional judicial control from the procedural and substantial aspect, and mechanisms that are not subject to supervision. Except for the abovementioned, veto mechanisms can also be conceived as a form of protection of specific interests or values that are in correlation with the state arrangement model, the nature of the political regime, minority groups, and so on.

The origins of the veto in BiH. A historical predecessor of veto mechanisms in BiH's constitutional system can be found in Amendment LXX/10 to the Constitution of Socialist Republic of BiH (SRBiH) from 31 July 1990. This constitutional provision stipulated that a Council for the Implementation of Equality between Nations and Nationalities of BiH was to be established in the Parliament of SRBiH. The Council was entitled to take decisions by consensus of its members from all nations and nationalities to prevent outvoting. The Council was explicitly empowered to determine the proposal of a parliamentary act, if 20 members of the SRBiH Parliament found the proposal violated the equality between nations and nationalities. Pending the determination of such a proposal by the Council, it would be subsequently adopted in the SR BiH Parliament by a qualified (2/3) majority. Thus, the mechanism had the nature of a suspensive veto. However, the law that should have regulated the content, competences and working procedure of the Council was not adopted by the authorities that won the elections in November 1990. Therefore, this veto mechanism has never been used in practice, and the country experienced a severe political crisis and subsequent tragic conflict.

In today's constitutional system, the complexity of state arrangement on the one hand and the nature of the political regime on the other are the reasons for institutionalising two basic models of veto mechanisms at different levels of government. One as the protection of vital interests of constituent peoples, which serves primarily to protect the ethnic interests (vital national interests). The second veto mechanism has the goal to protect entities as territorial units (territorial interests).

The "vital national interest" veto. The procedures for the protection of the vital interests of constituent peoples are established at state and entity levels, cantonal levels of government in the Federation of BiH (FBiH), Brčko District (BD) (through the procedures designed to prevent outvoting in the BD Assembly) and in the city councils of the City of Mostar and City of Sarajevo.

In the *Parliamentary Assembly of BiH*, the mechanism for the protection of vital interests of the constituent peoples is exercised through the caucuses of peoples in the House of Peoples and is directly connected to the legislative procedure. All legislative decisions must be adopted in both chambers of the Parliamentary Assembly of BiH. During the legislative procedure, a majority of delegates from the ranks of Bosniak, Croat or Serb peoples can declare the proposed decision as destructive to the vital interest of one of the constituent peoples. In that case, for the contested decision to be adopted, it must gain the support of the majority of the total number of delegates, as well as the majority of Bosniak, Croat and Serb delegates who are present and voting. However, if another caucus launches an objection, a procedure is launched to decide on the issue of vital national interest of a constituent people. In that case, the Speaker of the House of Peoples will immediately convene a Joint Commission consisting of three delegates, each from one of the constituent peoples, to resolve the issue. If the Commission fails to resolve the issue and reach consent on the said matter within five days, the case will be transferred to the Constitutional Court of BiH whose task will be to review the procedural correctness of the matter in an urgency procedure. The Constitutional Court examines whether the procedure was respected; if it was, whether the case relates to a vital national interest, and whether it was actually violated. After the decision of the Constitutional Court, the procedure continues in the House of Peoples according to the decision: (a) If it has been determined that the contested decision does not relate to the vital national interest, or that it does, but it is not destructive, the decision can be adopted by a majority; and (b) if the Constitutional Court of BiH determines that the contested decision is destructive, it can only be adopted by a majority of votes within each of the caucuses (which often means that it will not be adopted).

The Constitution of BiH specifies that the Constitutional Court examines "procedural" correctness. However, expanding its competences, the Constitutional Court also examines the merits of the case itself. Since the Constitution of BiH does not define the notion of "vital national interest," the Constitutional Court applies functional criteria in each individual case, guided by the "values and principles that are of essential importance for a democratic and free society," whereby it must not "endanger the implementation of the theory of state functionality." However, the Constitutional Court will not individually identify and list the

elements of vital national interest of one people. From the decisions so far, we can conclude that it relies on the definitions contained in entity constitutions, i.e., equal rights of the constituent peoples in the decision-making process, education, religion, language, culture, tradition, and cultural heritage.

Invocation of the vital national interest as veto protection mechanism is also exercised at the level of entities, i.e., in the *House of Peoples of the Parliament of FBiH* and the *Council of Peoples of the Republika Srpska* (RS). The definition of matters of vital national interest was equally defined by the constitutions of both entities, as well as the procedure itself, by a Decision of the High Representative (HR) Petritsch, in April 2002. In October 2022, HR Schmidt issued the decision "Enacting Amendments to the Constitution of FBiH" in which he made some changes concerning the vital national interests in the House of Peoples FB&H.

Vital national interests of constituent peoples are defined in both entities as:

- exercise of the rights of constituent peoples to be adequately represented in legislative, executive, and judicial authorities;
- identity of one constituent people;
- constitutional amendments;
- organisation of public authorities;
- equal rights of constituent peoples in the process of decision-making,
- education, religion, language, promotion of culture, tradition and cultural heritage;
- territorial organisation; and
- public information system.

The Constitution of RS also adds:

- other issues treated as of vital national interest if so claimed by two-thirds of one of the caucuses of the constituent peoples in the House of Peoples.

The last clause allows for the possibility that any issue, and not just those stated above, can be treated as an issue of vital national interest.

In RS, depending on the procedure launched, the invocation of vital national interest may have the effect of an absolute or of a suspensive veto. When, during a legislative procedure, more than one speaker or deputy speaker of the House of Peoples/Council of Peoples considers that the proposed law interferes with issues of vital national interest, a majority in each of the caucuses is needed to adopt this law. By contrast, if only one speaker or deputy speaker considers the matter to be of vital national interest and two thirds of the delegates from the corresponding caucus agree, the issue is forwarded to the Council for the Protection of Vital Interest (Council) in entity constitutional courts. Within one month, the Council has to decide whether there was a violation; two votes are sufficient for considering the matter as destructive to the vital national interest. In that case, the proposer must not initiate a new procedure with the same text of the proposal. By contrast, if the Council does not see an encroachment of the vital national interest, the decision can be adopted by simple majority.

In FBiH, the change of procedures was made by the mentioned HR decision. If two-thirds of one of the caucuses of the constituent peoples in the House of Peoples or more than one Chairman or Vice Chairman of the House of Peoples decides that a law affects a vital national interest, that law is deemed to be adopted, if a majority of each caucus represented in the House of Peoples votes in favour of such a law. If no agreement can be reached in the House of Peoples, the Constitutional Court of FBiH shall be addressed to decide finally whether the law in question relates to a vital interest of a constituent people. The Vital Interest Council of the Constitutional Court of FBiH shall decide by a two-thirds majority within one week on the admissibility of such a case and within one month on the merits of a case held to be admissible. The vote of at least two judges is needed for the Court to decide that it is a vital interest. If the Court decides in favour of a vital national interest, the law shall be returned to the proponent for a new procedure. In the event the Court decides that no vital interest is involved, the law, regulation or act is deemed to be adopted/shall be adopted by simple majority.

The entity veto(es). The Constitution of BiH does not define the form of state arrangement itself, but the entity arrangement, the division of competences, and the structure of state institutions indicate that BiH is closest to the federal model. Thus, mechanisms to protect the interests of entities have been established at state level. In the *House of Representatives and the House of Peoples of PABiH*, the decisions are made with a majority of those present and voting (abiding by the rule on quorum). However, no decision can be adopted without at least a minimum of one-third of the present representatives or delegates from the territory of each entity voting in favour of the decision. In that case, a commission composed of speaker and deputy speakers of the chamber is formed in order to secure the appropriate support. If they do not manage to do so, the decision will be adopted by a majority of votes from those present and voting, provided that the votes against do not amount to two-thirds or more of the delegates and representatives elected from each entity. The said method of decision making is referred to as the so-called entity vote.

The members of *Presidency BiH* are elected from the ranks of three constituent peoples; they represent the citizens of the entity in which they were elected and act as the collective head of state. Their competences are foreign policy, appointing international representatives of BiH, representing BiH abroad, international treaties and the execution of PABiH decisions (Article V/2.a)e) of the Constitution of BiH). Decisions should be reached by consensus, and if all attempts to reach a consensus fail, by majority, i.e., with two votes in favour. In that case, the outvoted member of the Presidency may resort to veto, in other words declare the decision to be destructive to vital national interests of the entity in which he was elected (entity veto). For the veto to have an absolute effect and prevent the enactment of the decision, the National Assembly of RS or the Croat or Bosniak caucus of delegates in the House of Peoples of FBiH, depending on which member of the Presidency invoked the vital national interest of the entity, is required to support the objection of the Presidency member with a two-thirds majority. If confirmed in this way, the veto is of absolute character and the contested decision of the Presidency has no effect.

The invocation of a vital national interest of the entity primarily serves as a guarantee for ethnic and not for "territorial" interests. In fact, it depends on the support of the corresponding caucus (Bosniak or Croat) in the House of Peoples ofthe Parliament of FBiH (PFBiH), rather than in the House of Representatives of PFBiH, which is the body that represents all citizens of FBiH. Where the entity veto is invoked by the Serb member, it is true that the decision needs to be supported by two-thirds of the representatives in the National Assembly of RS (NARS), but in all convocations of NARS so far, the dominant majority of representatives come from the ranks of Serb people; thus, the ethnic character of the veto dominates, too.

Issues and practice. Any basic analysis of veto mechanisms at state and entity level focuses on two key issues: the definition of "national interest" and the competences of the Constitutional Courts.

In the Constitution of BiH, there is no definition: basically, everything may be considered an issue of vital national interest, which leaves room for misuse and blocking of legislative procedures by different caucuses. At the same time, the absence of a definition allows broad discretion for the Constitutional Court of BiH (there are also no criteria in place to assess destructiveness or harmfulness). This raises the issue of the scope of constitutional legal supervision by the Constitutional Court. According to the letter of the Constitution of BiH, the Constitutional Court only has the competence to assess the procedural correctness of the procedure, while in judicial practice, there are also decisions on the merits.

The entity constitutions list the issues of vital national interest, but they have also left a door open, as a qualified majority of delegates from each caucus can declare any issue to be of vital national interest. Again, this opens the mechanism to potential misuse. Therefore, many authors point to the need to specify and restrict the issues of vital national interest to strengthen the functionality of legislative bodies. However, other authors oppose this idea, as this would restrict the right of representatives of constituent peoples to determine vital national interests. In addition, these authors argue that constitutions could omit some important issues or new issues might arise in social reality and they suggest lists of areas of social life as more appropriate for determining vital national interests.

With regard to future European Union (EU) accession, in its Opinion on BiH's application for EU membership, the European Commission states that "(t)he composition and decision-making of several administrative bodies are based on ethnic criteria, which risks affecting the implementation of the EU acquis. Ethnic-based veto rights also could affect the work of the Parliament and of the entity legislative assemblies." It observes that ""vital national interest" vetoes and entity voting also affect the effective functioning of parliaments, risking to delay the adoption of legislation". Among the 14 key priorities, the European Commission recommends "that all administrative bodies entrusted with implementing the acquis are based only upon professionalism and eliminate veto rights in their decision making, in compliance with the acquis."

The parliamentary practice at state level shows that the so-called entity veto has been more frequently used to stop the enactment of undesirable laws, since it is the faster and simpler procedure. By contrast, at entity level, the invocation of a vital national interest is more frequent (much more so in RS compared to FBiH). A veto right is conceived as a last resort, as an ultimate guarantee. Its frequent use (and misuse) is an indicator of the political situation.

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Integration, Fragmentation, Coordination, and Accommodation

The concept of ***integration*** is one of the most fundamental concepts in social sciences in general, and sociology in particular. Since the early days of sociology, the concept of integration has been used to provide answers to the most fundamental questions about society: the processes of its formation, reproduction, change, and order. In terms of the latter, namely the question: "what holds society together in spite of idiosyncratic motivations of individuals and inevitable conflicts that emerge among their interrelation in social action?" or "what stops social actors in pursuing their own idiosyncratic goals with potential risks of societal disintegration?" – the answer came down to the notion of social order and its foundation – social integration.

The notion of *social order*, and consequently *social integration*, were treated with the highest level of attention in the early days of sociological theorising and continue to provide an impetus for sociological inquiry. These include macro-oriented perspectives such as functionalism, structural-functionalism, neofunctionalism and social system theory. These perspectives and their respective, to some degree similar, theoretical frameworks inform both the general understanding of social order, and social integration in social sciences, and particularly the socio-legal outlook that underlies the way in which this entry is written.

The notion of integration is, on the one hand, related to the holistic notion of system and, on the other hand, to the notion of structure that relates to internal aspects of the system. The notion of system, and its specific understanding in the sociological theoretical perspectives cited earlier are outlined in the entry on stability in this Glossary (see: Stability of Constitutional Systems, The Concept Based on Cohesion, Solidarity, and Trust). In this sense, integration describes the process of incorporation of new elements into an existing system. In the sense of structure or an internal orderliness of system elements – integration describes the process by which these elements are functionally aligned to the existing structure. The process may, albeit not necessarily, result in a change of structure – often described as a structuration process – but its functionality for the system must remain. However, new elements, system components or subsystems are not only involved in the process of integration. It is a process related to existing ones as well. Actually, when it comes to social integration – the integration of existing elements, components or subsystems is a more important issue for both social theory and for social practice.

Parsons, probably the most notable representative of the theoretical strand of structural-functionalism, theorised the social system as a structurally differentiated system of social roles and expectations that is maintained by four functional imperatives (adaptation, goal-attainment, integration and latency). The functional imperative of integration pertains to the subsystem of

societal community and maintains the system via regulation, coordination and facilitation of intra and interrelationships of other subsystems (system of the organism, personal system and cultural system) and their respective functional imperatives. Parsons asserted that law plays a major role in maintaining social integration, namely through system or primary integration of other subsystems, and through secondary integration or control of social actors' motivations and sentiments. The latter is realised through the coordination of social exchanges between cultural value and social wants, where law operates as a neutral entity that serves to resolve disputes and acts as a formal instrument of social control. Motivations for coordinated (inter) action are maintained through the process of socialisation and social control. They generate from the moral or value-normative consensus of society on the one hand, and from interdependence maintained by division of labour on the other. In this sense, social integration is an ongoing process that maintains and is supported by social order.

Parsons' understanding of the relations between integration, order and law follows the legacy of his predecessors, namely of Herbert Spencer who referred to market forces, centres of power and law as structurally interdependent elements that work in unison to maintain integration. Auguste Comte and Émile Durkheim referred to social solidarity as an integrative force that follows from the division of labour in society and is reflected through morals, law and religion. Parsons' distinction between primary and secondary integration was revitalised by another and more contemporary social scientist – Habermas – who distinguished between two types of integration dependent on where exactly they take place in society. He envisaged society as being composed of two distinguished parts: "lifeworld" – consisting of personality, culture and society and following the logic of social integration and "system" – consisting of system logic, occupation and role and following the logic of system integration. Social integration and socialisation, according to Habermas, take place in the "lifeworld" via communicative action. Communicative action refers not only to mutual understanding and the transfer of cultural knowledge but also to interaction processes from which membership in various social groups is generated and developed. System integration takes place in a "system" that pertains to different kinds of action systems which people create to satisfy their material needs. System is run by steering media, money and power. Law is said to present a medium between "lifeworld" and "system."

Detailed and focus-specific accounts on law and how it came to play such a viable role in constituting modern societies are generally absent from the works of the authors mentioned above. Chris Thornhill, who specialises in the sociology of constitutions, is referenced here to fill that void. Thornhill notes that modern social orders and their features of integration and positive inclusion were constituted "through the abstraction of political power as a positive autonomous object," and that the "generalized use of law and power normally required an inclusionary apparatus that acted evenly to integrate social actors within the sphere of political power, to solidify uniform societal conditions for the application of law and to create a climate of general responsiveness to law."

Thornhill also distinguishes between primary (system – institutional) and secondary (social – normative) integration when explaining the social role of modern constitutions. In the former

sense, modern constitutions provide mechanisms for the integration of legal systems, and in the latter sense, constitutions maintain normative integration – namely of individual subjects through constitutionally guaranteed legal rights. Thornhill emphasises that normative integration is prominent in modern times by virtue of the legal-rights-expanding judicial practice of constitutional courts, and that this is a highly significant feature of democratic political systems. The concept of the citizen as an abstract individual assumes crucial importance in this context. Citizenship as a legal form communicates the boundaries of the political system thereby expanding its structure. Normative integration operates on the logic of institutionalisation of patterns of individualism that characterises modern societies and, therefore, the question of democracy is primarily a question of normative integration.

Still, more concretely speaking, the question arises about the diversity of elements that ought to be integrated. Namely, are individuals and social groups seen as elements to be integrated into a singular public identity or multiple public identities reflective of respective differences between the comprising elements, differences considered worthy of preservation in specific socio-political contexts? Besides, as we saw, the concepts of integration, fragmentation and coordination lie at the heart of contemporary sociological theory, but these are also very important for political sciences, which use them to explain the organisation of political and constitutional systems,' underlined by their societal structure. By analogy, this, in particular, refers to another highly relevant concept, that of ***accommodation***, which has gained increased relevance in contemporary political sciences, especially in relation to the organisation of political life in diverse pluralist societies. Hence, in the vocabulary of diversity management and the terminology of the renowned political theorists McGarry, O'Learry and Simeon, there are two prevalent sets of public policies available to democratic states willing or obliged to manage national, ethnic, and communal diversity. One of them has already been widely discussed here – integration, whereas the other one is accommodation.

On one hand, integration promotes a single public identity coterminous with the state's territory, primarily seeking the equality of individual citizens before the law and within public institutions, usually countering public recognition of group identities. On the other hand, accommodation promotes *dual or multiple public identities*, and its proponents also advocate collective equality with institutional respect for differences, as deemed a requisite for the stable management of deep diversity. While assimilation can still be favoured by some integrationists as an end goal, accommodationists are firmly committed to preserve societal differences and group identities as they are, allowing their autonomy in the public space. In this sense, accommodation can be positioned in-between integration and assimilation, on one side, and fragmentation on the other, thus broadening alternatives for pluralist societies. Accommodation and integration are not mutually exclusive; on the contrary, they can be applied parallel within a social and political framework. This is primarily to avoid assimilation and fragmentation as two extremes.

Speaking about the notion of ***fragmentation***, it was described above in Thornhill's account on normative integration that the process follows the logic of institutionalisation of "patterns

of individualism" in modern societies. Still, speaking about the condition of modernity, the "patterns of individualism" syntagm resonates differently in contemporary sociological theory that deals with post, late or liquid modernity and the impact of globalisation on society – where individualism is equated with fragmentation of social life. This strand of sociological theorising, represented by authors such as Giddens, Beck and Bauman, is *focused on the processes of fragmentation related to conflicts of rival value systems that emerge from social change* – this sees traditional social structures devoid of their previous importance, and generates "individualisation." This process is not necessarily considered negative, but is a condition of living in and thinking about society in a way that is historically unprecedented. Heuristically, fragmentation in this sense is equated with deconstruction.

In a more proverbial sense, fragmentation describes a *process that runs in the opposite direction of integration* and is, in terms of meaning, closer to the notion of disintegration. In structural and functional theorising, both these notions are imbued with negative connotations since they refer to the *dysfunctionality* of the structure that threatens the survival of the system – especially the case with the notion of disintegration. On one hand, the issue of social disintegration and related concepts of social deviance, aberration, social problems, disorganisation, nonconformity and the like – are of key interest for studies of deviance and social control that focus on negative or dysfunctional social phenomena. On the other hand, the issue of social fragmentation and related concepts of social conflicts, domination, exploitation, segregation, violence, value and power divisions – are of key interest to conflict studies. Social conflict theory, with Dahrendorf as one of the most prominent authors, shares many epistemological and methodological propositions with structural functionalism, but sees social conflict as the most fundamental element of social order, rather than moral consensus. From this perspective, integration is seen as a process involving coercion, domination and subjugation that inevitably results in conflict and subsequent fragmentation. Many social cleavages, such as gender, ethnicity, race, religion, social status and others, are understood as fault lines of potential fragmentation accompanied by conflicts of values and interests, and different types of violence.

Conflict theorists argue that the law is not a neutral expression and codification of society's values. Instead, the law is understood as the outcome of power politics and interest group conflict. For instance, Aubert observed conflicts of interests (that have a source in competition) and conflicts of values (that have a source in dissensus) and maintained that they are practically unbound. Parties in conflict, besides disagreeing on value-related issues, are also competing over the scarce resources (i.e., positions of power and authority) needed to propagate their beliefs. Hence, a conflict of values is almost always intermingled with a conflict of interests. Trevino claims that "in stark contrast to the functionalist argument that the law reflects the moral consensus of the community [...] the need for the law appears to be greatest when consensus is least likely to be achieved." Turk insisted that law is weaponised or primarily mobilised as a weapon in social conflict, claiming that: "(t)hose groupings in the population that hold the power of law use it as a weapon to safeguard and further their own interests. In other words, the creation of law is more likely to be a result of conflicts

among different subcultures with different norms than an expression of general consensus." This is why social order should be treated as a result of conflicts, and legality as an attribute of the more powerful.

The recurring theme of social order is also relevant for the notion of ***cooperation*** and redirects the discourse back to structural and functional sociological theorising in order to explain it. The notion was already referenced throughout this entry while explaining integration. In the context of system, cooperation not only *involves social actors but also the systems of social action*. Yet, when one thinks about the notion of cooperation, one is likely to associate it with the innate human characteristic and the prerequisite of any social action – described as purposeful behaviour involving goals and means. Social sciences operate with two, most basic, models of social action: the rational model premised on self-interest and the normative model premised on normative orientation. These models are profoundly analytical and coincide in practice. Sociology and law often employ the normative model. Turner asserts that the stability of social order is often theorised in sociology on the premise of the normative model of action which analyses action as "being anchored in normative orientations that contribute to constitution of action goals and to the selection of means. Actors are understood to share normative orientation that allows them to coordinate their acts." The possibility of a stable social order is possible only because of such common normative action orientations. In other words, integration would be unimaginable without coordination based on normative orientations.

However, regardless of moral systems that motivate cooperation normatively, *rational choice* and *trust* also play a viable part in the process. In his detailed analysis of kinship, cooperation and moral systems, Enke argues that both in-group and out-group cooperation is related to, on the one hand, kinship structures and trust, and on the other, to a diverse and seemingly unrelated set of characteristics attributable to cultural variation: belief in moralising deities, moral values, punishment strategies, shame, guilt, and disgust – that form internally consistent moral systems tasked to motivate cooperation on both a consensual and coercive basis. Enke also notes that "different cultural traits serve a similar role in enforcing cooperation within a given moral system, so that their co-occurrence is simply a by-product of the fact that they discipline prosocial behaviour in similar ways".

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Democratic Principles

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The Electoral System

Types of electoral systems. Representative democracy is a form of government in which citizen participation is realised through elections at which they elect their representatives in government bodies. Electoral law is one of the instruments that shape a state political system, regulate the balance between legislative and executive power, and define the responsibility of political office holders, thus also influencing internal party organisation, cohesion, and democracy.

The electoral system consists of several elements. First, there are electoral regulations that define the electoral system in a broader sense as "a set of social relations regulated by legislation on the election of representative bodies and the President of the Republic," that is, as "a systematised set of rules for holding elections." Electoral rules regulate electoral and other political rights, the organisation and implementation of the entire electoral process, protection of electoral rights, and determination of election results. These rules also define the form of the electoral system, so we can distinguish between a system of proportional representation, a majority electoral system and a mixed electoral system. Furthermore, there are elements that determine the electoral system in a narrower sense as a set of rules by means of which the votes won in the elections are converted into parliamentary mandates.

The primary function of the electoral system is the establishment of democratic political institutions that meet two basic criteria: representativeness and functionality. Representativeness should enable different political options to be represented in the representative body, based on the votes obtained in the elections, that is, based on the trust shown to them by the citizens. At the same time, political institutions should be effective and efficient in making and implementing decisions. The choice of electoral system aims to balance representativeness and functionality, often in favour of one or the other. Generally speaking, proportional electoral systems result in a higher degree of representativeness, while majoritarian electoral systems enable the creation of more stable and efficient political institutions.

In countries with a proportional electoral system, the possibility of preferential voting and the type of candidate lists stand out among the factors that influence election results. Candidate lists can be closed, open or flexible depending on the degree to which voters can influence the ranking of the elected candidates and the winning of the mandate. During preferential voting, voters choose not only parties but also individual candidates, so their vote ultimately can influence which candidates of a certain party will be assigned the mandates won by that party. Preferential voting is only possible in systems that use open and flexible candidate lists. On the other hand, systems with closed lists are proportional electoral systems in which voters

can only vote for political parties, and the distribution of mandates depends solely on the established party list of candidates. The number of mandates intended for a certain political party is determined based on the number of votes won by that party, and the mandates are distributed from the first candidate on the list onwards.

International standards in electoral law. The European electoral heritage is based on five key principles: universal, equal, free, secret, and direct suffrage, and the holding of elections at regular time intervals (regular elections). These principles were inspired by international human rights law, more specifically by Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) and the relevant jurisprudence, the Code of Good Practice in Electoral Procedures of the Council of Europe, and OSCE's Guidelines for Reviewing a 'Legal Framework for Elections. By adopting the existing standards on democratic elections and incorporating the principles of the European electoral heritage, states should strive to ensure representativeness, political pluralism, and the protection of minorities when choosing an electoral system.

The electoral system of Bosnia and Herzegovina. Annex 3 (Agreement on Elections) of the Dayton Peace Agreement defined the conditions for the organisation of free and democratic elections in Bosnia and Herzegovina (BiH). The Organization for Security and Co-operation in Europe (OSCE) Temporary Election Commission was also established, which adopted the Rules and Regulations on the basis of which elections were held in BiH in the period from 1996 to 2000 under the auspices of the international community.

The permanent election system was established in 2001 with the adoption of the Electoral Law. Since then, state institutions, specifically the Central Election Commission, have been responsible for organising elections. The legal framework of the electoral system of BiH consists of the Constitution of BiH, constitutions of the two entities – the Federation of BiH (FBiH) and the Republic of Srpska (RS) – and those of the cantons of FBiH, the Election Law of BiH, the Election Law of RS, by-laws, acts passed by the High Representative of the International Community in BiH, and court decisions. The permanent electoral system envisages that general elections at state, entity and cantonal levels, as well as local (municipal) elections are held every four years.

The highest legislative and executive bodies in BiH are elected directly and indirectly. The following bodies are directly elected: at state level, the House of Representatives of the Parliamentary Assembly of BiH and the three-member Presidency of BiH; at entity level, the Houses of Representatives of the Parliament of FBiH and the National Assembly of RS, and the President and Vice-Presidents of RS; cantonal assemblies in FBiH, heads and mayors in both entities, councils of local self-government units (except for the mayors of Sarajevo and Mostar, as well as the mayors of East Sarajevo and Brčko District (BD), who are elected indirectly), and the Assembly of BD. The House of the Peoples of BiH, the House of the Peoples of FBiH, the president and vice-president of FBiH, as well as the Council of the Peoples of

RS are directly elected (see: Legislative Power in Bosnia and Herzegovina, Executive Power in Bosnia and Herzegovina, and The Brčko District).

The Electoral Law of BiH defines key concepts and mechanisms for the functioning of electoral law, including the determination of electoral units, the formula for distributing mandates, procedures for conducting elections, the composition and competences of the Central Election Commission, the protection of voting rights, etc.

Political parties, coalitions, and independent candidates have the right to participate in elections for all levels of government in BiH. Requests for participation in elections, with lists of candidates (in the case of parties and coalitions), are submitted to the Central Election Commission. Direct elections for legislative bodies and councils of local self-government units take place according to the proportional system, with an electoral threshold of 3% of the total number of valid ballots. The vote-to-seat conversion is done according to the Sainte Laguë method, which enables a fairly high degree of proportional representation in representative bodies and a greater representation of smaller parties. A part of the seats of the House of Representatives of the Parliamentary Assembly of BiH (7 from FBiH and 5 from RS), as well as a part of the seats (23-27%) of the House of Representatives of FBiH and the National Assembly of RS are distributed to parties and coalitions through compensatory lists according to the number of unused votes won at entity level. Only parties and coalitions that win more than 3% of the total number of valid ballots in the territory of the entity can participate in the distribution of compensatory seats. Compensatory lists are used to compensate for insufficient proportionality in the case of excessive dispersion of support for parties at entity level.

The system of flexible or semi-open lists is used in all local units in both general and local elections. Political parties determine the order of candidates on their lists, and voters can support an unlimited number of candidates within the party list by preferential voting. In order for a candidate to advance within the list, it is necessary to win at least 20% of the total number of votes given to their party's list in general elections, or 10% in local elections (the so-called intra-party electoral threshold). In practice, such a high threshold makes lists closed, especially in general elections. The seat won essentially belongs to its holder, not to the party, coalition or list of independent candidates that proposed them.

The electoral law provides for mandatory electoral quotas, which should ensure equal representation of men and women on the electoral lists and among the elected candidates. At least 40% of candidates of both sexes must be on the election lists; among the first two candidates on the list, one must be male, the other female; among the first five candidates, at least two must be male and at least two female; among the first eight candidates there must be at least three candidates of both sexes.

Members of the Presidency of BiH, as well as the President and Vice-Presidents of RS, are elected directly according to the system of relative majority. Therefore, the candidate who wins

the largest number of votes is elected. One candidate is elected from RS for the three-member Presidency, who must be Serb, regardless of the identity background of the voter. Two candidates are elected from FBiH of BiH, one Croat and the other Bosniak, who are on the same ballot, but on separate lists. Voters can vote for only one candidate from one list, regardless of their identity background. The president and vice-presidents of RS are elected from a single list. Mandates are awarded to the candidates of the three constituent peoples who win the largest number of votes.

For the House of Representatives of the Parliamentary Assembly of BiH, 42 deputies are elected in 8 constituencies (28 in 5 constituencies in the FBiH and 14 in 3 constituencies in the RS). 12 deputies are elected from compensatory lists (7 from FBiH and 5 from the RS). The House of Representatives of FBiH consists of 98 deputies, 70 of whom are elected directly in 12 constituencies (three to nine deputies are elected from each constituency in proportion to the number of inhabitants), and 28 from compensatory lists. The National Assembly of RS has 83 deputies who are elected from 8 constituencies, 20 of whom are elected from compensatory lists.

Deputies of the House of Peoples of BiH, the House of Peoples of FBiH and the Council of Peoples of the RS are elected indirectly. The House of Peoples of BiH has 15 members, five from each constituent people. Croatian and Bosniak delegates are appointed by the clubs of these peoples in the House of Peoples of FBiH, while Serb delegates are appointed by the National Assembly of RS. Delegates to the House of Peoples of the FBiH (80 in total) are elected by the cantonal assemblies of the FBiH, and the members of the Council of RS are elected by the clubs in the National Assembly of RS.

As far as the application of international election standards is concerned, it can be stated that the principles of direct and regular elections are respected in BiH, but there are serious deficiencies when it comes to respecting the principles of universal and equal voting rights.

The European Court of Human Rights (ECtHR) in a series of judgments (Sejdić-Finci, Zornić, Šlaku, Pudarić) established the existence of discriminatory provisions that prevent citizens of BiH who do not declare themselves to be members of any of the constituent peoples (but also members of the constituent peoples depending on the entity in which they have residence) to run for members of the Presidency of BiH and delegates of the House of Peoples of BiH. The principle of equal suffrage implies that all voters have the same number of votes (as a rule, one vote) and equal voting power, which means that an approximately equal number of voters should choose an equal number of candidates, or more precisely, that the parliamentary seats should be equally distributed by constituency.

The Venice Commission and the OSCE have repeatedly drawn attention to the fact that in constituencies, both in FBiH and in RS, there are significant discrepancies in the number of registered voters represented by elected delegates in the Parliamentary Assembly of BiH and in entity parliaments. One of the main recommendations of the OSCE concerns the

necessity of adopting a system of mandate distribution by constituencies in order to ensure that the number of votes needed to elect members of parliament is equal. The electoral law stipulates that the Parliamentary Assembly of BiH, the Parliament of FBiH and the National Assembly of RS review electoral units and the number of deputies elected from each electoral unit every four years in order to guarantee proportionality between the number of voters and the number of parliamentary seats. However, these legal provisions are not respected.

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Majoritarian Democracy

Majoritarian democracy is defined as a *form of government in which decisions are made according to the principle of majority*. The principle of one man, one vote turned out to be a simple idea that would imply general participation, political equality and one winning side (party or coalition) that would gain political control over key government institutions by winning the elections. The model, which owes its popularity to the theory which had equated democracy with majority rule for a long time, rarely emerged in its "pure form"" in practical application. Lijphart originally typified it in the cases of the United Kingdom UK), New Zealand until 1996, and Barbados. The inductive framework, which was built on three real-world cases with a simple and clear definition of democracy, according to which democracy was only achievable as the application of majority rule (because such a democratic process calls for political equality that does not favour diversity), clashed with the complex reality in which a fragmented society does not have such congruent dimensions. In the works of contemporary advocates of democracy, who try to discover what makes democracy "better,"" the very concept is questioned, and more often they give preference to a weaker intensity of the majority principle. They simultaneously question the shortcomings of majority rule, such as exclusivity, competitiveness and conflict, as well as the intrinsic threat of exclusive power in multicultural, plural and divided societies, with a constant concern for cases where it is impossible to determine the will of the majority.

Exclusive majority rule is moderated through ***representative democracy***; it is not about the majority of citizens with respect to voter turnout, but the electoral majorities that are legislative majorities in such democracies. A sort of adaptation of this model is the idea of the super-majority, that is, the mathematical calculation that the probability of the majority being right is increased by its growth in numbers, thus insisting on a two-thirds majority as a rule. Today, however, there is a growing interest in heterogeneous societies and how they specify majority rule; what if there is no majority, or how to avoid agenda manipulation by the majority group'. These important and related dangers in non-homogeneous societies are ambitiously proliferated by Dahl, in his classic book *Polyarchy*, through an imaginary debate between critics and supporters of the majority rule principle of democracy: "a minority can reject the majority rule of democracy in a concrete political unit and insist on changing the unit itself." In order to avoid the mentioned centrifugal tendencies in heterogeneous societies like Bosnia and Herzegovina (BiH), democracy as necessary majority rule has mostly been corrected in favour of the circumstances of the respective system. The complex responses of the varieties has led to the denomination of democracy "with adjectives"" and new reference terms, in which majority rule has mostly been retained in the lower house of the bicameral legislative body.

The ***majority principle*** in the decision-making process in the lower houses is in conjunction with all the inequalities, which must be convincingly justified within the legislature. The nature of the constitution-maker's efforts is to represent the interests of the citizens and the political configuration of the state in the Houses of Representatives. At the same time, the constitutional documents prescribe the majority, the types of majorities in parliamentary decision-making, that is, the quorums that are required for majority decision-making. Broader guidelines can be found in the rules of procedure on the work of legislative bodies. According to the Constitution of BiH, the election of representatives in the House of Representatives of the Parliamentary Assembly of BiH is tied to the entities, and 2/3 of the representatives are elected on the territory of the Federation of BiH (FBiH) (28), and the other third on the territory of the Republic of Srpska (RS) (14). The Constitution does not describe the legislative procedure in detail; it stops at brief explanations of the decision-making cycle and the quorum, which is the majority of elected representatives necessary to make a decision. According to the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of BiH, the quorum is 22 representatives, while the earlier provision that the majority in the House of Representatives of the Parliamentary Assembly should include a third of the representatives from the territory of each entity was deleted by the decision of the High Representative. As a protective mechanism for the equality of the entities, efforts are made to obtain the consent of a third of the present representatives from the territory of both entities when making decisions. If this fails, the chairman convenes a collegium consisting of club chairmen and independent representatives, which must reach an agreement or come up with new solutions within three days. (According to the Rules of Procedure, the Club can be established by three or more representatives as a way of acting, preparing and determining the session's agenda.) If it fails, the decision is made by the majority of the deputies present, now on the condition that two-thirds or more of the deputies elected from each entity are not against the decision. Without a quorum, the issue is put on the agenda for the subsequent session. Although Art. 79 of the Rules of Procedure states that decisions are made by the majority of the representatives who are present and voting, decision-making by simple majority, which is applied in the election of the chairman and vice-chairmen who must be from different constituent peoples, and in the adoption of the Rules of Procedure, changes to a qualified majority in the case of amendments to the latter, that is, it incorporates the aforementioned entity voting. This is the most common decision-making process, which means the majority of those present and a third of the votes from each entity in order for the decision to be adopted.

In FBiH, democratic decision-making requires a simple majority in each chamber, except for laws of vital national interest, which require a two-thirds majority. A majority of representatives in the House of Representatives constitutes a quorum, unless the Constitution or Rules of Procedure stipulate otherwise for specific issues. Equally, a quorum for the work of the National Assembly of RS exists if a majority of the total number of representatives is present at the adoption of the minutes, determining the agenda, as well as when making decisions. Decisions, acts and laws are adopted by a majority vote of all elected representatives, unless a different majority is stipulated by the Constitution. Likewise, in the decision-making process

in the unicameral legislative bodies of the cantons, a simple majority was applied, and a two-thirds majority in decisions concerning the cantonal constitution. In the case of matters of vital national interest, a two-thirds majority of one of the constituent peoples' clubs of the Parliament is required, which will claim that the law, act or decision is of vital national interest, and a majority of votes in each of the represented clubs in the cantonal legislative body. Importantly, according to the Constitution of FBiH (V.3), the Club of Delegates of the constituent people is formed on the condition that there is at least one delegate of that constituent people in the legislative body of the canton.

The lowest representative level of government in complex local territorial communities is a reflex of the institutional-political characteristics of the entire BiH system. In unicameral councils, each councillor is a representative of all members of the local community, and a member of the clubs of the political parties represented in the local council. Decisions are made by majority, and in order to reach the decision-making stage, the presence of the majority of council members is required. When the statute, budget and final account are on the agenda, a two-thirds majority is required for a decision. However, representative bodies in a community with a complex political configuration such as the city of Mostar require correctives – a two-thirds majority. They relate to the issues of urban planning, recognitions and awards of the City, the removal of the mayor, president and deputy council, the appearance of the city's symbols, the names of streets, squares and bridges, and the protection of constituents through the three clubs of the constituent peoples in the Council and the statutory provisions on representation, according to which at least four and a maximum of 15 members of each constituent people and a minimum of one member from the list of Others can be represented in the City Council of the City of Mostar. In conclusion, even at local level, the pure majority model is understood as the *majorization of democracy* when a more numerous segment in a heterogeneous system has the opportunity to make decisions respecting the universal right to vote, which can have detrimental consequences for the political community as a whole. Therefore, the principles of majority democracy are complemented by corrective mechanisms so that they do not become mechanisms of domination.

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Direct Democracy and Referendum

The notion of *direct* democracy (DD) is not necessarily the best semantic choice to describe a democratic system in which referendums and citizen' initiatives come into play in order to *complement* the political processes within the institutions of representative democracy. Therefore, some scholars refer to "semi-direct democracy" while others propose to abandon the adjective "direct" altogether and speak of "popular vote processes in democratic systems". Nevertheless, the notion of direct democracy is still widely used in the literature and, as long as we know what we are referring to, we can keep it for the time being.

Forms of direct democracy. DD can take various forms. The two most important criteria to distinguish them are to ask (1) who is legally entitled to initiate the process (government, parliament, or citizens); and (2) whether or not the outcome of the popular vote is binding. The following Table offers a basic overview of the various instruments of DD.

	Binding	Non-binding
Top-down (decided by parliament/government)	*Obligatory referendum* *Plebiscite*	*Consultative plebiscite*
Bottom-up (it is necessary to collect signatures)	*Facultative referendum* *Citizens' initiative Recall*	*Consultative plebiscite*

Table 1: A basic overview of direct democratic instruments

Yet the reality is more complex than this overview suggests. For example, some non-binding direct democratic instruments are *de jure* non-binding but, due to a specific context or to political pressures, they are (or they become) *de facto* binding. Think of the role of government-initiated referendums in the United Kingdom (UK) (e.g., Brexit) that are legally non-binding – and hence fall into the category of "consultative plebiscites" – but whose results have politically binding effects. On the other hand, the result of some *de jure* binding tools, such as popular initiatives in Switzerland, can be put aside if a majority of parliament comes to the conclusion that their implementation would produce major negative drawbacks for the country. See, for example, the non-implementation of the 2014 popular initiative "against mass immigration" in Switzerland; its implementation would probably have ended the bilateral agreements with the European Union (EU) that are considered of vital importance for the Swiss economy. The top-down vs. bottom-up distinction can also be questioned because citizens' initiatives are on occasion launched by political parties and/or interest groups and not by citizens' committees or grassroots movements.

In addition, it is evident that the tools of DD typically imply that, at the end of the process, a popular vote should take place. But sometimes the initiators – for example, a citizen's committee that has successfully launched an initiative – can stop the process if some of their demands are met by parliament.

For the sake of parsimony, two direct democratic tools will be developed in further detail: the *facultative referendum* (also called "optional referendum"), and the *citizens' initiative* (also called "popular initiative"). This focus is justified by these being the two most used forms of DD worldwide. Importantly, the dominance of these two instruments "worldwide" is strongly driven by their dominance in Switzerland, where six out of ten popular votes held in the world at national level since the late 18th century have taken place. If we include sub-national popular votes, the predominance of the Swiss case would be even stronger.

Facultative referendum. In Switzerland, most bills, acts, and regulations adopted by parliament can be fought via a facultative referendum. "In these cases, a parliamentary decision becomes law unless 50,000 citizens or eight cantons, within 100 days, demand the holding of a popular vote. If a popular vote is held, a simple majority of the voting people decides whether the bill is approved or rejected (...)". Schematically, the process can be summed up as follows:

Various inputs suggest the necessity to adopt a new bill or to reform an existing one → the executive drafts a bill proposal → consultation (pre-parliamentary) procedure in which relevant political actors (parties, interest groups) but also ordinary citizens can provide comments and input → the bill is submitted to parliament (parliamentary procedure) → the bill is approved by parliament (post-parliamentary procedure) when the collection of signatures for a referendum can start → if the requested number of valid signatures is collected, the referendum campaign (of both sides) starts → several weeks before the popular vote, all enfranchised citizens receive an official booklet informing them about the topic of the vote → popular vote (the bill is approved or rejected by citizens) → if approved, the implementation of the bill (by the government and public administration) can start.

Citizens' initiative. The second instrument of DD, the citizens' initiative, is triggered from below. In Switzerland, 100,000 citizens can sign, within 18 months, a formal proposal demanding an amendment to the constitution. If the collection of signatures is successful, the initiative is discussed by the executive and parliament. "This can involve drawing up an alternative proposition or, if the popular initiative is couched in general terms, formulating precise propositions. Initiatives and eventual counterproposals are presented simultaneously to the people. As with all constitutional changes, acceptance requires majorities of both individual voters and cantons". The process can be summed up as follows:

Various inputs suggesting the necessity to have a political reform that the government and/or parliament are hardly likely to adopt → an initiative committee is set up in order to elaborate a written proposal → the proposal is officially adopted and the collection of signatures can start → if the necessary number of signatures is collected, the government recommends that

parliament approve or reject the initiative, or make a counterproposal → the executive and parliament deliberates on the content of the initiative and decide to approve or reject the initiative, or adopt a counterproposal → the initiative committee decides whether or not to withdraw the initiative (in the light of the outcome of parliamentary deliberations and/or the current political context) → if the initiative is not withdrawn, the campaign (of both sides) in view of a popular vote starts → several weeks before the popular vote, all enfranchised citizens receive an official booklet informing them about the topic of the vote → popular vote (the initiative is accepted or rejected by citizens) → if accepted, the procedure concerning its implementation (by the government and parliament) starts → decisions on the implementation are carried out by public administration and possibly the courts.

The fear of populism vs. multiple majorities and minorities. Surveys show that citizens of established democracies want more direct participation in political decisions. However, this has hardly led to an upsurge in direct democracy in the respective countries. Indeed, their political, economic, and academic elites fear that referendums and popular initiatives might open the doors to populists and end up undermining democracy itself. Scepticism towards direct democracy is further nourished by the fact that populists themselves are actually calling for more direct democracy. In 2014, for example, parties such as the UK Independence Party, the Swedish Democrats, and Alternative for Germany (AfD) founded the "Alliance for Direct Democracy in Europe."

Yet an essential characteristic of populists is that they are not only anti-elitist but also anti-pluralist. "Their claim is always "We – and only we – represent the true people". The "true people" is thereby represented as a unitary, homogeneous community. The key insight, here, is that a *frequent and regular* use of direct democracy *structurally* undermines populist ideology based on "the people's will" and a unified, non-pluralist conception of the people. Of course, we know that this conception is fiction but it is easier to unmask in a political system in which direct democracy is commonly used.

To see this, it is of crucial importance to underline that a frequent use of direct-democratic tools creates a context of unstable and ever-changing majorities and minorities. While mainstream theorists of democracy consider this fact as a significant *disadvantage* of DD (Schmidt 2010: 188), it is crucial to a non-populist account as it increases the likelihood that members of minorities will be parts of political majorities on some issues (Rothchild and Roeder 2005: 17). This insight also contributes to relativising the charge that DD can exacerbate the danger of majority tyranny and the twin problem of persistent minorities. Yet it is in purely representative democracies, especially if the representatives are elected according to majoritarian rules, that minority groups can be systematically outnumbered by the majority. In a system of frequently employed DD – where people can vote on ordinary policy issues such as pension reform, healthcare, a new motorway tunnel, or environmental regulations – the chances are high that a citizen belonging to a minority group will quite often be on the winning side, that is, in the *majority*. This effect of DD confers legitimacy on the political system and allows it to counter the populist rhetoric of real or potential ethnonationalist leaders and movements.

Direct democracy in Bosnia and Herzegovina. The definition of a referendum in Bosnia and Herzegovina (BiH), as a form of direct democracy, is present only in the Law on Referendum and Citizen Initiative of the RS. The normative part of Annex IV of the Dayton Peace Agreement, i.e., the Constitution of BiH, does not contain provisions on any form of direct democracy. There is only a provision on democratic principles, which defines BiH as a democratic state that functions as a legal state based on free and democratic elections. This points only to the existence of indirect democracy. Also, the European Convention on Human Rights and Fundamental Freedoms (ECHR), which is directly applicable in BiH, does not contain provisions on forms of direct democracy. Article 3 of Protocol I to the ECHR defines only the right to free elections with secret ballots when electing legislative bodies, that is, it guarantees the right to apply indirect democracy. The legal basis can hardly be sought in the provisions of the International Covenant on Civil and Political Rights (ICCPR) or the very idea of democracy, as some authors suggest.

Nevertheless, it is important to note that in some countries of comparative interest, for example in Belgium, referendums are not held at state level, because the possibility of holding such a referendum is not prescribed in the constitution.

How to apply direct democracy in deeply divided societies? Clearly, caution is warranted if DD is to be introduced in a political system that has hardly ever used it, especially in countries such as BiH with structural minorities. For this reason, here are some ideas of recommendations that could be useful if institutional designers should want to introduce direct democratic tools in "deeply divided societies".

Think of DD as a slow, gradual, and long-term process. The possible introduction of direct democracy to deeply divided societies should not be rapid and abrupt. In Switzerland, direct democracy was introduced gradually, step by step, and it has taken decades before its centripetal effects became visible. In other words, do not expect to see its effects immediately, and do not be discouraged by one negative experience. Furthermore, do not end the experiment too early, as the authorities of the Netherlands did in 2018 after two national referendums that had not produced the results they had hoped for.

Start at the local level. Citizens should get accustomed to direct democracy first and foremost at the local level. If citizens see that they can decide on the construction of, say, a new bridge in their local community, or vote on the local budget or start an initiative for eliminating a disliked parking place, they might be more open to extending direct democratic tools to higher levels of government. The federal set-up of BiH, which grants important autonomy to the cantons (in FBiH) and municipalities (in both entities), is particularly inviting in this context.

Exclude "communitarian" issues from the reach of DD. In order to prevent DD from becoming a (further) source of ethnic division, instead of centripetal integration, some highly divisive issues should be put out of reach of popular vote, at least in the initial phase. In the context of BiH, such issues are typically related to territory and the education system. Of course,

there will likely be many borderline cases so it might be difficult to clearly distinguish communitarian from non-communitarian issues.

Provide a qualified majority for votes on constitutional amendments. The Constitution (or an equivalent set of norms and documents) is of central importance in every democracy. Hence, in many democratic systems, a constitutional amendment is subject to a qualified majority. In some cases, depending on the exact nature of the qualified majority and the size of minority groups, this can reassure minorities that important reforms will not be adopted without their consent. ln direct democratic procedures, this implies that pure majoritarian rule (50 percent plus one always wins) should be abandoned in favour of a more complex majority rule. In Switzerland, as already noted, any change of the constitution is subject to a "double majority" of the people and the cantons. Of course, the Swiss solution is hardly transferable to countries such as Belgium or BiH, but it could become a source of inspiration and could lead to the adoption of a specific rule of qualified majority. For example, constitutional amendments could require the approval of the majority of voters of BiH and at least 35 percent of citizens in each entity.

Complement DD with deliberative mini-publics. Deliberative mini-publics – composed of a randomly selected group of lay citizens – can be put in place in order to provide citizens with the necessary information on the topic of the upcoming popular vote. This is, in a nutshell, the Citizens' Initiative Review (CIR) model that has already been experienced in Oregon and other US states and cities, as well as in Finland and Switzerland (see www.demoscan.ch). What makes the CIR model special is that its conclusions are not simply sent to the government and/or parliament, with these being free to decide what to do with them, but are distributed to all enfranchised citizens of the respective polity. While the empirical evidence is still not conclusive, some studies have found that populist proposals have a harder stance in a deliberative mini-public. The first experience with a mini-public at national level in BiH – held in February 2022 (see: Citizen's Assemblies in Bosnia and Herzegovina) on the topic of electoral reform – showed that lay citizens coming from all regions and ethnic groups could deliberate without tensions even on very complex and politically sensitive issues (such as the implementation of the Sejdić and Finci ruling) and propose innovative solutions.

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Citizens' Assemblies in Bosnia and Herzegovina

Democratic legitimation remains an imperfect and incomplete endeavour influenced by an increasing trend of democratic deficiencies. Deep societal divisions reinforce democratic deficiencies and undermine public trust in democracy as a form of governance. Citizens feel disengaged from decision-making while societal polarisation is rising due to a lack of open deliberation across groups in society. As a result, the legitimacy of representative politics is brought into question.

Deliberative democracy emphasises discussion and debate in decision-making. It is different from representative democracy which relies heavily on voting. Decisions are not formulated, discussed, and adopted by a small number of representatives, but by a broad and inclusive group of citizens, residents, and affected individuals.

Definition of citizen's assemblies. Various forms of citizens' consultations have been part of policymaking for a while now, but forms of deliberative democracy are rather new. Citizens' assemblies are one of the most innovative forms of deliberative democracy. They do not aim to replace decision-making in representative institutions, but rather to serve as a formal way to include citizens' views and voices in public policy and decision-making. In doing so, citizens' assemblies can be tied to a specific topic, or they can be permanent and institutionalised. Three primary roles are (1) to allow citizens the opportunity to recommend political decisions, (2) to increase the legitimacy of political institutions, and (3) to introduce discussion and debate with citizens in decision-making.

Citizen's assemblies in Bosnia and Herzegovina. As a very new form of deliberative democracy, citizens' assemblies have only recently become more common. In Bosnia and Herzegovina (BiH), the first citizens' assembly was held in the *City of Mostar in 2021* on the issue of city cleanliness and public spaces. Because Mostar had been without a functioning government for eight years prior, the role of the assembly was to address unresolved policy issues and strengthen the legitimacy of the government. The second citizens' assembly was held at *national level in 2022* on the issue of constitutional and electoral reform, two issues that have frustrated policymaking for more than a decade. The citizens' assemblies of Mostar and BiH did not intend to replace decision-making in the Mostar City Assembly or the BiH Parliament. They do not have that kind of mandate. Instead, their role was to broaden policy debates to include citizens' views and help introduce new ideas to address difficult policy issues. The aim of both assemblies was to ultimately re-engage citizens in democratic processes.

Establishing citizen's assemblies. Citizens' assemblies are usually formed on the initiative of a governing institution that aims to engage more substantially with its citizens on a difficult

or controversial policy topic. But they can also be initiated by civil society organisations, international organisations, or groups of citizens. As they are a resource-intensive form of citizen engagement, it is necessary to think about the suitability of the mechanism as the best way to address a particular policy issue. The policy issue is usually formulated as a question for deliberation, called the remit of the assembly.

Assembly participants are usually composed of a diverse group of people who are representative of the broader population. Letters of invitation, often several thousand, are sent out to random individuals or households in the city or country. From the respondents who express interest in participating, a group that is representative of the polity is selected through random sampling or other methods to ensure a diverse and balanced group. The idea is to have a city in a room, or a country in an auditorium, where the demographics of the participant group match the demographics of the polity.

The guiding principles of inclusiveness and transparency are important from the start and all to increase the legitimacy of debate and recommendations. The entire selection process, therefore, needs to be as transparent as possible. Additionally, compensation for participation is often included to ensure that most people are motivated to take part, and meetings are scheduled on weekends to facilitate working schedules.

Establishing citizen's assemblies in BiH. The Mostar Citizens' Assembly was jointly initiated by the City of Mostar and the Council of Europe (CoE). It consisted of 48 randomly selected residents of Mostar. They received one of 5000 letters sent to households in the city, expressed their interest in participating, and were selected by random sortition as part of a representative sample of the city's population. The BiH Citizens' Assembly was initiated by the European Union (EU) Delegation to BiH. It consisted of 57 participants, randomly selected from those that expressed interest, after 4000 letters had been sent to households throughout the country. Both assemblies were highly representative of the demographics of the city or country with respect to gender, age, ethnicity, education, employment status, and residency.

Principles of citizen's assemblies. There are four main elements to how citizens' assemblies work. The first is *facilitation* by trained moderators who help to guide the discussions and ensure that they are conducted in an inclusive and respectful manner. The second is the *presentation of information and evidence* to participants in an unbiased and open way by experts and stakeholders. Effectively all participants should be able to have access to the same knowledge and the same ability to participate in the process. The third element is *deliberation* itself where participants discuss the issue of the citizens' assembly and consider different perspectives and options. A discussion takes place both in plenary sessions with all participants present, as well as in smaller groups that can have specific tasks to discuss parts of the remit. The back and forth between group and plenary discussions allows for all voices to be heard. Deliberation is usually structured and facilitated to ensure equal opportunity as well as productive and respectful discussion. The fourth element is the *drafting of recommendations*, a report, and sometimes decisions on the issue being discussed. It is common

practice to put all recommendations up for a vote and adopt those that receive majority support or fulfil stricter criteria.

Principles of the BiH citizen's assemblies. Participants of the Mostar assembly met for six days over four consecutive weekends. Each day was specifically designed with an agenda to focus on one of the elements listed above. Participants could learn from experts and stakeholders and best practices elsewhere. They also learned about the current systems in place in Mostar and plans to reform them. They could subsequently deliberate what solutions might work in the context of Mostar and how existing plans can be improved. Finally, they had the chance to engage directly with City officials. The assembly produced 32 recommendations, some of which were very practical and others that were more substantive.

The BiH Citizens' Assembly met for two consecutive weekends and a total of four days in two different locations. Each day, the participants had a precisely designed agenda that was divided into learning and deliberation segments, with very strong facilitation to guide the process. This was required due to the complexity of the topic and the limited time available. Participants heard from experts and political stakeholders but could not engage with policymakers. They formulated and adopted 17 recommendations that demonstrated a way forward in resolving some of the most persistent political issues in BiH.

The potential of citizen's assemblies. The potential for citizen-driven decision-making is a key attribute of citizens' assemblies. The initiating body, whether a government or organisation, usually decides beforehand what output they want from citizens and what they want to do with it. Most assemblies are just consultative, where recommendations are discussed in the legislature in an open session. Sometimes decision-makers can commit to implementing all or the main citizens' recommendations before they call the assembly. As participants cannot make binding policy decisions themselves, any recommendation needs to be adopted in legislature or implemented through executive decisions. The purpose of citizens' assemblies is multifold: they can help to identify preferred policy solutions and to legitimise decision-making on difficult issues. This may be an important goal, but their real value is much greater. Assemblies can foster a new form of engagement between politicians and citizens that relies on dialogue, cooperation, and trust, rather than voting, governance, and disdain. The outcome of assemblies is legislatures and executive that are much more transparent and communicative towards their constituents, and citizens that are much more active and engaged in their communities.

The potential of the citizen's assemblies held in BiH. All recommendations from the Mostar Citizens' Assembly were adopted by the City Council a few months later and a plan to implement them was drafted. Some have already been implemented, while other more complex recommendations are being addressed. The implementation is being tracked and a second citizens' assembly is planned for 2023. The BiH Citizens' Assembly recommendations were presented before members of the BiH parliament but were not further discussed or followed up on. This is a missed opportunity as BiH Parliament did not engage with citizens,

and the EU Delegation as the convener did not follow the recommendations. In both cases, assembly members openly deliberated on relevant issues for their city and country showing a high level of respect for different and divergent opinions. In the survey conducted with participants, all expressed great satisfaction with the process and that it helped them better understand the issue and build trust towards fellow citizens. The two divergent experiences in implementation show the importance of political commitment from policymakers. Despite a successful deliberative process in both cases, only Mostar had a strong political will to implement citizens' recommendations.

Citizens' assemblies cannot replace decision-making in representative institutions in BiH, but rather provide an avenue for citizens and policymakers to engage in constructive dialogue. As long as all sides approach each other with respect and as equals, citizens' assemblies have the potential to significantly improve democracy in BiH.

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The International Dimension

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General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement

The General Framework Agreement for Peace in Bosnia and Herzegovina, i.e., the Dayton Peace Agreement (DPA) is an international agreement that ended the tragic war in Bosnia and Herzegovina (BiH). The DPA was initialed at in Ohio, the United States of America (USA), on the 21 November 1995, and formally signed in Paris, France, on the 14 December 1995. The signatories of the DPA were the Republic of BiH (RBiH), Croatia and the Federal Republic of Yugoslavia (FRY), by authorisation of the Republic of Srpska (RS). The DPA was also signed by representatives of the European Union (EU), France, Germany, the Russia, the United Kingdom(UK), and USA, as witnesses. The DPA is based on the previously agreed Geneva Principles issued on the 8 of September 1995 and the New York Principles issued on the 26 of September 1995.

The DPA text contains a preamble and 11 articles of the main text, as well as 12 annexes. In the text of the DPA, the signatories undertook, among other things, to conduct mutual relations in accordance with the principles established by the Charter of the United Nations (UN), the Helsinki Final Act and other Organization for Security and Co-operation in Europe (OSCE) documents, to fully respect the sovereign equality of one another, to settle disputes by peaceful means, to refrain from any action, by threat or use of force or otherwise, against the territorial integrity or the political independence of BiH or any other State. The signatory countries also committed to cooperate with all entities included in the implementation of the peace agreement as well as entities authorised by the UN Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law. The DPA also led to the mutual recognition of the FRY and BiH as sovereign, independent states, within their internationally recognised borders.

Essentially and in terms of content, the largest part of the DPA consists of 12 annexes, which bear the following names:

- Annex 1-A Agreement on Military Aspects of the Peace Settlement;
- Annex 1-B Agreement on Regional Stabilization;
- Annex 2 Agreement on the Inter-Entity Boundary Line and Related Issues;
- Annex 3 Agreement on Elections;
- Annex 4 Constitution of BiH;
- Annex 5 Agreement on Arbitration;
- Annex 6 Agreement on Human Rights;

- Annex 7 Agreement on Refugees and Displaced Persons;
- Annex 8 Agreement on the Commission to Preserve National Monuments;
- Annex 9 Agreement on BiH Public Corporations;
- Annex 10 Agreement on Civilian Implementation, and
- Annex 11 Agreement on International Police Task Force.

Annex 1-A governs the ***military aspects of the peace settlement*** such as the establishment of a multinational military Implementation Force (IFOR) composed of contingents from North Atlantic Treaty Organization (NATO) members and non-NATO countries, in accordance with the appropriate resolution of the UN Security Council, and for the purpose of implementing this annex. The aim of this annex is a durable cessation of hostilities, with the obligations of both entities (see: The Entities in Bosnia and Herzegovina) and the authority of IFOR to ensure this. Annex 1-A regulates the withdrawal of all foreign forces – except for the United Nations Protection Force (UNPROFOR), IFOR and the International Practices Task Force (IPTF), redeployment of entity armed forces, deployment of IFOR forces, withdrawal of UNPROFOR forces, establishment of the Joint Military Commission, prisoner exchanges, cooperation, notification of the content of this annex to Military commands of the entity's armed forces, the designation of the IFOR commander as the final authority for the interpretation of the military aspects of the DPA. The signatories of Annex 1-A of the DPA were the RBiH, the Federation of BiH (FBiH) and the RS, endorsed by the representatives of Croatia and the FRY.

Annex 1-B contains an ***agreement on regional stabilization***, aimed primarily at arms control and other security arrangements aimed at increasing transparency and trust between the parties. This annex specifically regulates the measures that need to be implemented within BiH and the measures aimed at building regional trust and security. Special attention is paid to arms control, both in the territories of the signatories of this annex, as well as in the wider area of the former Yugoslavia and its surroundings. The signatories of Annex 1-B of the DPA were the RBiH, the Croatia, the FRY, FBiH and RS.

Annex 2 contains the ***agreement on the inter-entity boundary line***, which is described in the map in the appendix to this annex. The same annex also regulates in detail the issues related to the demarcation between the entities, such as the adjustment of the inter-entity boundary line with the mutual consent of the entities, demarcation on rivers, delineation and marking, arbitration of the disputed portion of the inter-entity boundary line in the Brčko area, transitional arrangements and the status of the appendix to Annex 2. The signatories of Annex 2 of the DPA were the RBiH, FBiH and RS, endorsed by the representatives of Croatia and the FRY.

Annex 3 or the ***Agreement on Elections*** regulates issues related to the electoral system and the conduct of elections, such as the conditions for democratic elections, the role of the OSCE, the formation of the Provisional Election Commission that had the task of passing rules on the conduct of the first post-war elections, the exercise of voting rights and the formation of the permanent election commissions in the later phase of the implementation of this annex. The signatories of Annex 3 of the DPA were the RBiH, FBiH and RS.

Annex 4 contains the ***Constitution of BiH***. Unlike the usual practice in comparative constitutional law, the Constitution of BiH is a part (annex) of DPA, as an international treaty. However, the Constitution of BiH is at the same time the highest and basic legal act in the legal system of BiH. Therefore Annex 4 of the DPA has a more far-reaching legal effect compared to other annexes of the DPA, because it can be amended and supplemented by domestic institutions, i.e., a decision of the Parliamentary Assembly of BiH, in the manner prescribed by Article X of the Constitution of BiH. The basic outline of the Constitution of BiH follows the structure of the USA Constitution, even in the numbering of the articles and in the institutional setting. It has a preamble, 12 articles, two annexes and one amendment. These establish the basic values and principles on which BiH rests (the preamble) and regulate the basic provisions under the title "Bosnia and Herzegovina" (Article I), human rights and freedoms (Article II), competencies and relations between BiH institutions and entities (Article III), Parliamentary Assembly (Article IV), Presidency (Article V), Constitutional Court (Article VI), Central Bank (Article VII), Finance (Article VIII), general provisions (Article IX), amendments (Article X), transitional arrangements (Article XI), entry into force (Article XII), additional human rights agreements to be applied in BiH (Annex I) and transitional arrangements (Annex II). The only amendment so far regulates the status of Brčko District of BiH (Amendment I to the Constitution). The generally accepted position of the theory of constitutional law in BiH is that, in addition to the Constitution of BiH as a formal and material source of constitutional law in BiH, other annexes of DPA are also included in the material sources of constitutional law in BiH. The signatories of Annex 4 of the DPA were RBiH, FBiH and RS.

Annex 5 regulates the ***arbitration agreement***, by which FBiH and RS, in accordance with the Geneva Principles, committed to resolve mutual disputes through binding arbitration, with a prior mutual agreement on the design and implementation of a system of arbitration settlement of mutual disputes. The signatories of Annex 5 of the DPA were FBiH and RS.

Annex 6 or the ***Agreement on Human Rights*** contains a catalogue of human rights (in Article I of Annex 6) and a list of 16 international documents on human rights that apply in BiH (in the appendix to Annex 6). Annex 6 also established the Commission on Human Rights, which has two components: the institution of the Ombudsman (currently functioning in accordance with the Constitution of BiH and the Law on the Ombudsman of BiH) and the Human Rights Chamber (the Human Rights Chamber ceased its work on the 31 December of 2003, and its cases were taken over by the Commission on Human Rights of the Constitutional Court of BiH). Finally, the issue of support to international and non-governmental organisations that operate in the field of human rights protection has been regulated. The signatories of Annex 6 of the DPA were RBiH, FBiH and RS.

Annex 7, i.e., the ***Agreement on Refugees and Displaced Persons***, regulates several issues of importance for sustainable return after the war, such as the protection of the rights of refugees and displaced persons, creation of suitable conditions for return, cooperation with international organisations and international monitoring, repatriation assistance, the

issue of persons unaccounted for and the issue of amnesty. The same annex established the Commission for Displaced Persons and Refugees and in detail regulated its organisation and functioning, i.e., processing and deciding "any claims for real property where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property." The signatories of Annex 7 of the DPA were RBiH, FBiH and RS.

Annex 8 contains the ***Agreement on the Commission to Preserve National Monuments***, which regulates the establishment, composition and means of the Commission's work, its powers and proceedings before the Commission, as well as other issues of importance for the Commission's work. The signatories of Annex 8 of the DPA were RBiH, FBiH and RS.

Annex 9 governs the ***Agreement on the Establishment of BiH Public Corporations***, which establishes the Commission on Public Corporations and the Transportation Corporation, with the possibility of establishing other corporations as well. The signatories of Annex 9 of the DPA were the FBiH and the RS.

Annex 10 contains the ***Agreement on Civilian Implementation of the Peace Settlement***, which provides for the appointment of a High Representative (HR) (see: The High Representative and Annex 10 of the Dayton Peace Agreement), consistent with the relevant resolutions of the UN Security Council in order to facilitate the efforts of the signatory parties and coordinate the activities of the implementation of civilian aspects of the DPA as entrusted by the UN Security Council resolution. This annex regulates the mandate and methods of coordination and liaison of HR, the staff of HR, the obligation of cooperation of the signatory parties with HR, and the provision by which HR is designated as "the final authority in theater regarding interpretation on the civilian aspects of the DPA implementation" (Article V). The signatories of Annex 10 of the DPA were RBiH, Croatia, the FRY, FBiH and RS.

Annex 11 regulates the ***Agreement on International Police Task Force***, which established IPTF, with the aim of supporting the signatories of this annex in the implementation of the constitutional obligation to provide a safe environment to citizens, for which a special support program was designed. This annex also regulates the special responsibilities of the signatory parties, the mechanism for responding to the failure to cooperate by the signatories, as well as responding to cases of human rights violations, and determining the entities to which this annex applies. The IPTF ended its mission on 31 December 2002 (from 1 January 2003 until 31 December 2011, it was followed by European Union Police Mission – EUPM). The signatories of Annex 11 of the DPA were RBiH, FBiH and RS.

During the first years of implementation of the DPA, the International Community directly guaranteed security through the Stabilisation Force (SFOR) and stability through special international bodies, e.g., the Electoral Commission and IPTF. For key institutions in the reconstruction phase, a "mixed" composition was chosen: together, international and domestic members were to guarantee the functioning of the Human Rights Chamber, the

Constitutional Court of BiH, and the Commission for Real Property Claims of Displaced Persons and Refugees. The applied scheme was one-third international and two-thirds domestic members, with one-third of the latter nominated by RS and two-thirds by FBiH. The massive involvement of the International Community, and in particular the coercive powers of HR, led to considerable criticism labelling the arrangement as an "international semi-protectorate" and the International Community as the "fourth constituent part." A decade after the end of the war, the period of reconstruction with the direct engagement of the International Community had ended in most areas; only the EUPM and a few international judges and prosecutors continued their mission until 2011. Since then, only the Office of the High Representative (OHR), based upon Annex 10, as well as the three foreign judges at the Constitutional Court of BiH (Annex 4) recall the direct international intervention and guarantees in the country's reconstruction and the implementation of the DPA.

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The High Representative and Annex 10 of the Dayton Peace Agreement

Legal basis, mandate and organisation. Important institutional segments of Bosnia and Herzegovina's (BiH) political system in the early post-war phase were under direct influence and control of different international institutions. Some important *domestic institutions were complemented/integrated with foreigners under the mandate of international institutions*. For example, three out of nine judges of the Constitutional Court (see: The Constitutional Court of Bosnia and Herzegovina, Individual Complaints) were (and still are) foreign citizens named by the President of the European Court for Human Rights (ECtHR), the governor of the Central Bank was a foreigner named by the International Monetary Fund (IMF), and the ombudsman was named by the Organization for Security and Co-operation in Europe (OSCE). Certain institutional functions were also performed directly by foreign organisations, for example the OSCE organised the first elections after the war (1996). However, these international functions were all envisioned as transitional, as assistance in overcoming obstacles in the creation of a new state and to achieve a functional system.

The *most significant institution* of the international community *is a High Representative* (HR), whose mandate is determined by United Nations (UN) Security Council resolutions (Annex 10, art. I.2). While some of the foreign or international institutions were integrated into the Constitution, the institution of HR remains outside the constitutional framework of BiH. The Office of High Representative (OHR) is *based upon Annex 10 of the Dayton Peace Agreement* (DPA) (see: General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement) in which the details of the mandate of HR are listed exhaustively (art. II). More precisely, it is stated in Annex 10 that HR shall: monitor the implementation of the peace settlement; maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organisations and agencies participating in those aspects; coordinate the activities of the civilian organisations and agencies in BiH to ensure the efficient implementation of the civilian aspects of the peace settlement; and facilitate the resolution of any difficulties arising in connection with civilian implementation.

So, *the task of the OHR* and HR at the beginning was to simply oversee the civilian implementation of the Dayton agreement, which includes humanitarian aid, respect for human rights, return of displaced persons and refugees, economic and infrastructural reconstruction, establishment of political and constitutional institutions, and holding of free elections. Under Annex 10 of the DPA, OHR has the *status of a diplomatic mission to BiH*. It is made up of diplomats seconded by the governments of the countries composing

the Peace Implementation Council (PIC), international staff hired directly, and national staff from BiH. The OHR opened the Banja Luka Regional Office in 1996, providing a point of contact to the different official and political institutions in the Republic of Srpska (RS). The OHR also took over the position of supervisor for the Brčko District (BD). The second most important function in the OHR, after HR, is the Principal Deputy High Representative (PDHR). From the beginning, representatives of the United States of America (USA) have always held that position. The first PDHR was Raffi Gregorian, and currently Jonathan Mennuti holds the position.

The function of High Representative in BiH was held by Carl Bildt (1995-1997), Carlos Westendorp (1997-1999), Wolfgang Petritsch (1999-2002), Paddy Ashdown (2002-2006), Christian Schwarz-Schilling (2006-2007), Miroslav Lajčak (2007-2009), Valentin Inzko (2009-2021) and Christian Schmidt (since July 2021).

Evolution from mediator to actor: the "Bonn powers". From its very creation, the constitutional framework of BiH and its political system was considered as temporary, i.e., transitional. It could and should be changed and adjusted to the new conditions in subsequent phases of democratic transition. It is crucial to emphasise that formal constitutional change through amendments would demand political consensus between representatives of all three constituent peoples (see: Amendments to the Constitution of Bosnia and Herzegovina). According to Annex 10, HR "is the *final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement*" (art. V). This power needs to be coordinated with the institutional mandate of the Constitutional Court BiH, which is the supreme interpreter of the BiH Constitution. Originally, the mandate as supervisor did not allow any active form of interference in executive, legislative or judicial power, or any interference in politics, such as suspension of politicians or decisions of institutions. In addition, HR is only mentioned in the second addendum of Annex 4 as a president of the Joint Interim Commission "which will be authorised to discuss practical issues regarding the implementation of BiH constitution, General Framework Agreement and its annexes, and to give recommendations and suggestions."

Thus, OHR was established as a political organ without a firm and clear connection with the political and constitutional system. However, HR soon became an active party in the post-war system. The legal foundation for that development was created outside the legal system of BiH, by the will of key international actors.

The turning point was the conference of PIC in Bonn on 10 December 1997, where PIC invested HR with extraordinary powers, i.e., to remove from office public officials who violate legal commitments and DPA, and to impose laws as he sees fit if BiH's legislative bodies fail to do so. These powers are hence known as *"Bonn Powers" which practically enable him to exercise and shape his own authority independently from domestic institutions*. Former High Representative Carlos Westendorp explicitly stated: "I have the authority to interpret my own authority."

As the initial powers were considered insufficient for HR to move the peace process forward, the PIC approved "the intention of the High Representative to henceforth issue binding decisions. Following this Conference, HR started to impose legislation and to remove officials from office who did not fulfil their duty to implement the peace agreement."

Although the OHR was intended as a mediator, it now *became an invasive part in the process of implementing DPA*, thanks to the coercive powers granted by the PIC. Until 1996, the OHR had no power to impose anything. Its mandate was to act as the Accords' guarantor and to "facilitate" the signatories' own efforts to implement the peace settlement. Soon after PIC authorised the OHR to stop incitations to violence broadcast on public media, HR Carlos Westendorp removed Dragan Čavić, a leading Serb politician, in October 1998 for inciting violence against international peacekeeping troops. In 2002, the Bonn powers were used to immediately suspend 10 judges, one deputy minister of justice, and one prosecutor. Even the Entity Constitutions were amended by international decree to implement the Constituent' Peoples' decision of the Constitutional Court (U III-5/98). Based upon the Bonn powers, by the end of 2002, more than a hundred individuals had been similarly dismissed. In total, hundreds of imposed decisions have been adopted.

Systemic problems of a "semi-protectorate". This type of decision-making power ultimately created an additional anomaly in the institutional organisation of BiH because it is a parallel legislative and executive power and a personification of the same. Accordingly, BiH has been defined as a kind of international protectorate. In December 1997, the deep institutional crisis was justification for *further strengthening the institution of the OHR* with the extraordinary Bonn powers as a temporary solution. This opened a much larger space for political action. In the new, so called "Bonn phase,"" HR ("if deemed necessary") convened and presided over meetings of joint institutions, adopted temporary measures when political actors failed to agree, as well as other measures for the purpose of implementing the Peace Agreement.

The fact that the Bonn powers also extend to public servants and officials obstructing public service or legal obligations arising from the Dayton Peace Agreement, according to the OHR's own assessment, led to a complete merger of legislative, executive, and judicial powers which established OHR as the most important institution in BiH.

The Constitutional Court interprets this position of OHR position as "a kind of *functional duality*: one authority of one legal system intervenes in another legal system, whereby its functions become dual... In the specific case, the High Representative - whose powers stem from Annex 10 of the General Framework Agreement, resolutions of the UN Security Council and the Bonn Declaration, and are not subject to the control of the Constitutional Court of BiH– intervened in the legal system of BiH, substituting local authorities. In this respect, therefore, OHR acted as the government of BiH, and the law it passed is of the nature of domestic law and must be considered the law of BiH" (U9/00, par. 2). However, the PIC also has no authority to prevent HR's decision. OHR clearly acts autonomously and only loosely coordinates its agenda with the PIC (weekly sessions of the Ambassadors). Twice a

year, there is a report in the UN. But there is no true and detailed accountability. Therefore, important political projects on which the political elites could not reach a consensus were entrusted to the OHR. Thus, HR sets the political agenda in the country to a great extent.

As they were controversial, even the symbols of statehood (coat of arms, flag, passport, licence plates) were imposed by High Representative decisions. In total, in the first decade (until 2007), OHR made use of the Bonn powers in 835 decisions. The political activism of the institution in the first decade after the war is best embodied by Paddy Ashdown (2002-2006), who made more than half of the listed decisions. In turn, the intensive use of the Bonn powers triggered important criticism by the domestic and international scientific community, as there is no legal remedy against decisions which were not even adopted democratically but imposed. This was widely considered colonialism rather than mediation. This was criticised by some, for "in BiH, outsiders actually set the agenda, impose it, and punish with sanctions those who refuse to implement it. At the centre of this system is the OHR, which can interpret its own mandate and so has essentially unlimited legal powers. It can dismiss presidents, prime ministers, judges, and mayors without having to submit its decisions for review by any independent appeals body. It can veto candidates for ministerial positions without needing publicly to present any evidence for its stance".

The Assembly of the Council of Europe (CoE) joined the criticism, holding that it is irreconcilable and unacceptable "...that the OHR can make executive decisions without bearing responsibility for them or the obligation to justify their validity...". The CoE's Venice Commission added that "it is (...) certainly not a normal situation that an unelected foreigner exercises such powers in a Council of Europe member state and the justification for these powers for the future merits not only political but also legal consideration. The powers can be qualified as emergency powers. By their very nature, emergency powers have however to cease together with the emergency originally justifying their use".

Thus, the High Representative, initially conceived merely as a mediator for the immediate post-conflict period, became a *consolidated and powerful institution* (around 2005, staff numbers exceeded 300) at the centre of BiH's post-war reconstruction as a State. In the wake of the debate on "local ownership"" and general international disengagement, the OHR was also supposed to complete its mandate. This phase was supposed to be the transition "from the phase of peace implementation to the phase of Euro-Atlantic integration." However, the closure of the OHR was postponed until five goals and two conditions were met (which would altogether mean political stability in BiH); yet simultaneously, it was decided to insist on "local ownership," starting the transformation process.

For some researchers, the extended stay of HR is a remnant of the imperial political culture of the West. The guardianship will continue until "the country is on the 'irreversible"' path towards the EU and NATO". It should be mentioned that, between 2002 and 2011, HR also served as the European Union Special Representative to BiH (EUSR). This dual function was abandoned in 2011, when the EUSR also became Head of the European Union (EU)

Delegation in BiH instead. With this renewed separation between HR and EU, the OHR returned to a rather passive observer role. There were no major interventions by Valentin Inzko except at the very end of his mandate (2009-2011).

However, the European Commission, in its Opinion on BiH's application for EU membership (May 2019), clearly stated that "extensive international supervision is in principle incompatible with the sovereignty of BiH and therefore with EU membership." (see: Bosnia and Herzegovina and European Union Integration, The Constitutional Impact of Accession to the European Union)

In fact, in July 2021, the outgoing HR, Valentin Inzko, using the Bonn powers, imposed amendments to the BiH Criminal Code to sanction the denial of genocide and the glorification of war criminals. This renewed use of the Bonn powers, in a politically very sensitive field, stirred up strong reactions, in particular in RS. The renewed use of the Bonn powers continued and intensified under Inzko's successor, Christian Schmidt, for the particular purpose of guaranteeing the holding of general elections on 2 October 2022. On the evening of the same elections, HR Schmidt intervened with a "functionality package" (various amendments to the Election Law and amendments to the Federation of BiH Constitution) for "ensuring timely implementation of the results of the October 2022 elections." This intensified use of the Bonn powers, after a long period of abstinence, raises serious questions about the OHR as well as about the sustainability of the system. In addition, Schmidt's appointment has been contested for the lack of consistency related to the appointment procedure described in the relevant United Nations Security Council resolution – compared to, for example, the appointment of Petritsch.

Essentially, the *international community has become a "fourth constituent part" in BiH* , as the OHR has become an effective political actor in the complex constitutional system (based upon the dominant role of the three ""constituent peoples"). This condition shaped the *circulus vitiosus* - a political system that is dependent on international presence (and assistance). It is clear that any revitalisation of OHR's active role neither liberates the country from this vicious circle, nor brings it closer to the declared objective of EU accession.

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Bosnia and Herzegovina and European Union Integration
The Constitutional Impact of Accession to the European Union

The Dayton Constitution is silent about European integration. This can be easily explained by its primary function of ending war and permitting consolidation of the post-conflict situation. Although the country's relations with the European Union (EU) have revolved around the perspective of future accession to the EU for two decades, and Bosnia and Herzegovina (BiH) was granted candidate status in December 2022, there is still limited public discussion on the constitutional impact of the integration path towards the EU. Nevertheless, if we look at the experiences of other Member States, it appears that creating a secure constitutional basis for EU membership and its consequences on the domestic legal system, are both necessary and a common feature in most of them. Some specific issues in BiH require constitutional amendments before the country can accede to the EU.

The relations between BiH and the EU. At the end of *December 2022*, the Member States of the EU decided to grant *candidate status to BiH*. This is an upgrade from the previous status of "potential candidate." As early as 2000, the Stabilisation and Association Process for the Balkans was launched by the EU, and since the Thessaloniki European Council summit in June 2003, the EU has opened the accession perspective to all Western Balkan States: "The future of the Balkans is within the European Union" (Summit Conclusions). While some States were soon recognised as candidates (North Macedonia, 2005, Montenegro, 2010, Serbia, 2012, and Albania, 2014), and even started negotiations (Montenegro, 2012, Serbia, 2014, in July 2020 the draft negotiating framework for Albania and North Macedonia was presented to EU Member States), Kosovo and BiH remained in the category of "potential candidates."

However, since then, several agreements have entered into force between the EU and BiH. They include the Visa Facilitation and Readmission Agreements (2008), the Interim Agreement on Trade and Trade-Related Issues (2008), and, most importantly, the Stabilisation and Association Agreement (SAA) which entered into force on 1 June 2015 (although it had been initialled in June 2008, and ratified by all EU Member States in 2011). These agreements build the legal basis of the bilateral relationship and shall help in the country's preparation for future accession. "From Dayton to Brussels" has become a common slogan: local ownership of the transformation process for becoming a member of the EU was supposed to replace massive international intervention and direct interference.

The EU has deeply engaged with BiH within the framework of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).

The EU Special Representative (EUSR) is at the same time also Head of the Delegation of the European Union (EUD), one of the largest EU representative bodies in the world. Between 2003 and 2012, the EU runs a police mission (EUPM), and it still operates a EUFOR mission (operation ALTHEA) with troops and an executive mandate which should guarantee a stable and secure environment in the country (upon mandate by the UN Security Council). Significant technical and financial assistance is provided through the IPA programmes (Instrument for Pre-Accession Assistance); estimated EU financial assistance to BiH between 1996 and 2021 amounts to 3.5 billion euros. The EU is also BiH's main trading partner (exports of almost 75% of goods and services to the EU, and imports from the EU of about 60% of total imports).

Despite the assistance and support from the EU and other donors, progress on the way toward EU accession has been extremely slow and characterised by continuous misperceptions and mistakes. Although various commitments made by local political leaders to important reforms have not been respected, the country has always been allowed to move forward anyway, thus softening or even questioning the strict "conditionality" of the EU's enlargement process. Prime examples are police reform (as a condition for the SAA) and constitutional reforms (after the 2009 *Sejdić-Finci* case). In the end, the SAA entered into force almost 7 years after its initial signing and 4 years after ratification by all Member States, but without the commitments, undertaken by the signatories, having been respected. Due to the political situation, other reforms stalled, too. In academic literature, the annual reports by the European Commission have been widely referred to as "No progress-reports."

BiH submitted its candidacy for membership in 2016. The European Commission prepared an "Opinion on the application for membership," which was published in May 2019 and presents 14 key priorities. These conditions in the areas of democracy, state functionality, governance, the Rule of Law, fundamental rights, and public administration reform need to be fulfilled before the European Commission can recommend candidate status and the opening of accession negotiations. The methodology is the same as has been applied to all applicant countries: The authorities received a detailed questionnaire and the European Commission carried out an assessment regarding the level of preparedness and indicated the ways to achieve conformity with EU law and standards. This assessment is based upon the responses of BiH authorities: however, altogether it took nearly two years to answer the 3,900 questions (compared to 2 months in Serbia and 3 months in Albania). As of today, there is almost no follow-up to the recommendations or to key conditionality requirements, despite the formal commitment at the highest political level. According to the European Commission's report from 2022, of the 14 defined criteria, only a few have been met.

This situation may be a reflection of "(pre-)enlargement fatigue," even though no true alternative to future EU membership for BiH (and the Western Balkans) seems to exist. On the one hand, there is dissatisfaction with the slow pace towards accession (which is part of the broader, regional picture, if we take into consideration the blocking of the start of accession negotiations with Albania and Northern Macedonia from 2018 until July 2022). On the other

hand, the EU itself neither seems ready for further enlargement nor particularly unhappy with the situation of relative stability in the Western Balkan region.

Due to geopolitical developments after the Russian invasion of Ukraine and the membership bids of Ukraine, Moldova, and Georgia, *the European Commission recommended candidate status for BiH in October 2022, although the country clearly has not fulfilled the criteria*. In December 2022, a positive decision by the Council followed; again, the highest EU officials did not hide the fact that the decision to grant candidate status to BiH was a political one (as was granting candidate status to Ukraine and Moldova).

Preparing BiH and its Constitution for EU accession. The Council of Europe's (CoE) Venice Commission presented a comprehensive and detailed analysis of the constitutional situation in BiH as early as 2005. Its indications may still serve for orientation on what needs to be changed. Subsequently, the need for constitutional change has been confirmed by various judgments of the European Court of Human Rights (ECtHR); further changes are necessary because of the application for EU membership.

Ten years after the war, the Venice Commission criticised the country's constitutional situation with clear and harsh words listing the problems one by one. This profound analysis is still valid and provides an excellent orientation for any reform effort. The main critical points identified are the confusing overlap of territorial structures and ethnicity as well as the composition of the State Presidency and the House of Peoples, the weakness of the structures at State level, and the lack of both a clear definition and a limitation of the sp-called "vital interest" veto (see: Veto Rights). The latter should be limited to core matters of "identity interest" of the three constituent peoples, such as language, culture, and religion. Upon immense pressure from the International Community, Bosnian and Herzegovinian politicians signed a declaration of intent on constitutional reforms to be completed by the end of March 2006 and worked on amendments under the guidance of the United States of America (USA). Although seven of the eight biggest political parties embraced the agreed constitutional amendments, known as the "April package," the amendments failed to gain approval in Parliament by merely two votes.

Subsequently, several judgments of the ECtHR have declared the exclusion of citizens from some political offices by the very Constitution a violation of the European Convention of Human Rights (ECHR) (Article II.2 of the Constitution provides for direct application of the ECHR and its Protocols, which "have priority over all other law") (see: Fundamental Rights and Freedoms, The European Court of Human Rights and Individual Complaints). In a series of cases, the ECtHR had to decide on complaints by citizens of BiH who claimed to be discriminated against and deprived of their right to stand for election for specific institutions, as they either were not members of one of the three constituent peoples, did not declare as such, or were excluded because of their residence. Starting with the landmark decision in 2009, the case of *Sejdić and Finci v. BiH*, the decisions in the cases of *Zornić v. BiH* (2014), *Pilav v. BiH* (2016), *Šlaku v. BiH* (2016) and *Pudarić v. BiH* (2020) followed, all reinforcing the necessity to amend the Constitution to end the discrimination of citizens.

However, none of these decisions has been implemented so far. According to the Court, "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" (ECtHR in Zornić, 2014, para. 43). The continuous violation of fundamental rights due to the lack of implementation of the above decisions is a reason the International Community and the European Union insist on constitutional reform.

The European Commission's Opinion on BiH's application for EU membership (2019) contains concrete indications and clear priorities for the path toward EU accession. Among the 14 key priorities, the Opinion explicitly refers to various issues which require constitutional change, therefore making it clear that EU accession will not happen without amendments to the Dayton Constitution. This affects at least six key areas:

1. Ensure legal certainty in the distribution of competences across all levels of government;
2. Introduce a substitution clause to allow the State upon accession to temporarily exercise the competences of other levels of government to prevent and remedy breaches of EU law;
3. Guarantee the independence of the judiciary, including its self-governance institution (HJPC);
4. Reform the Constitutional Court, including addressing the issue of international judges, and ensure enforcement of its decisions;
5. Guarantee legal certainty, including the establishment of a judicial body entrusted with ensuring the consistent interpretation of the law throughout BiH; and
6. Guarantee equality and non-discrimination of citizens, notably by taking into consideration the ECtHR case law.

In addition, like any Member State, BiH must guarantee the efficient implementation of EU law throughout the whole country. The problems of institutional complexity and fragmentation need to be overcome by efficient and effective coordination (e.g., by developing specific mechanisms and procedures and by strengthening the role of the Directorate for European integration).

Although not established in the BiH Constitution but in Annex X to the Dayton Peace Agreement (DPA) (see: General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement), the Office of the High Representative (OHR) (see: The High Representative and Annex 10 of the Dayton Peace Agreement) and its extensive powers to decree legislation and remove public officials (so-called "Bonn powers") – are considered in the Opinion as "in principle incompatible with the sovereignty of BiH and therefore with EU membership." However, the European Commission acknowledges that the closure of OHR (a process "underway since 2008") is subject to conditions.

An EU integration clause as a secure constitutional basis for EU integration. Many EU Member States have created a specific constitutional basis for their membership in the EU by

inserting an EU integration clause into their constitutions. Ratifying the Maastricht Treaty in 1992, Germany amended its Constitution, thus creating a proper and secure constitutional basis for integration and clarifying the relations with the European Union from a constitutional perspective (art. 23 Basic Law, GG). In Austria, the same goal was realised on the occasion of EU accession in 1995, inserting articles 23a-23f into the Federal Constitution (B-VG). Member States which joined the EU in 2004 have followed these examples. In June 2010, Croatia adopted a constitutional amendment paving the way for accession to the EU. The main purpose of Chapter VII, entitled "European Union," is to provide the legal grounds for membership in the EU and to regulate the status of EU law in the domestic legal order.

An integration clause, with the limited scope of serving as a competence-base for State coordination vis-à-vis obligations resulting from the EU integration process, was already part of the 2006 "April Package" proposal (Art. III 6 c). Following this model and the example of most EU Member States, a specific integration clause should be included in the BiH Constitution. It should: (a) indicate European integration as an overarching constitutional objective for all authorities; (b) provide a constitutional basis for the transfer of sovereignty rights to the EU and other international organisations; (c) contain provisions on internal State responsibility in coordination as well as on participation of the Entities and of the Parliamentary Assembly in the decision-making process related to EU matters; and (d) regulate the principles of procedures for implementing EU Law (including implied powers!).

Upon conferral of the candidate status, the EU stated that Bosnian and Herzegovinian leaders must demonstrate their commitment to the European perspective by accepting necessary reforms to unlock the benefits of candidate status. Together with the necessary constitutional amendments, such a specific integration clause would provide orientation in the transformation process towards the primary objective of becoming a Member State of the EU.

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Bosnia and Herzegovina and NATO
The Security Dilemmas in Dayton's Bosnia and Herzegovina

After 45 years of existence, the North Atlantic Treaty Organization (NATO) had its first combat action when they shot down four Bosnian Serb fighter-bombers in breach of a no-fly zone over Bosnia and Herzegovina (BiH). The wars in former Yugoslavia changed other paradigms, too. Germany, to contribute combat troops to the NATO force, needed to change its national legislation that, until 1995, had restricted the use of the armed forces to the defence of its own territory and that of its NATO allies. The result of the fundamental rethink of long-standing foreign policy and security doctrines in the 1990s meant, firstly, an American-led military intervention to stop the war in BiH in 1995, followed by diplomatic efforts that established a post-conflict state.

From NATO intervention and stabilisation to defence-reform. The post-conflict BiH was unique as a state with the continued existence of two armies that had been at war with each other until the Dayton Peace Agreement (DPA) in 1995. Inevitably, the peace agreement that left the two recently warring armies, albeit significantly scaled down, in the same state had to be observed and supervised by a large external force. The Implementation Force (IFOR) was envisaged to have some 60,000 troops. However, during its year of deployment, before being succeeded by the Stabilisation Force (SFOR), the strength at its peak was around 50,000. The multinational forces were American led, with troops from 14 NATO countries, a significant contribution from future NATO member states and those who never joined the alliance. It is ironic from the contemporary point of view that the Russian brigade included a Ukrainian contingent and was under the multinational US-led Task Force Eagle in the northeast of Bosnia.

The state structure of BiH provided by the DPA formally left the two armies that had fought each other until the NATO intervention untouched (although reduced in size). In practice, each of the three ethnic groups controlled a military force with little confidence in the other two's peaceful intentions. While the two armies officially co-existed – one for the Federation of BiH (FBiH) and another for the Republika Srpska (RS) – the reality was that Bosniak and Croat troops were not fully integrated and united until a comprehensive military reform a decade after the DPA.

While peace and stability had been secured in the country, external intervention continued by non-violent means. The American-led initiative unified the armies and created the Ministry of Defence at the state level in 2004, thus finally guaranteeing the state of BiH the monopoly of the legitimate use of violence, and thus of its Armed Forces. This change also proved that

the DPA could be reinterpreted and adapted, as the creation of the state-level Ministry of Defence proved. The Joint Staff of the armed forces has emerged as a multi-ethnic group of individuals in the country with deep ethnic divisions, thus even becoming a role model for future reforms in other fields that were not to follow soon.

Partnership for Peace or more? BiH joined NATO's Partnership for Peace program in 2006, and two years later, the Individual Partnership Action Plan (IPAP) was agreed upon with the Alliance. The state's Presidency submitted the application for Membership Action Plan in 2009 and was later invited to join the plan.

It is necessary to put these actions into the domestic and global timeframe and context. By the late 1990s, NATO expanded, as former Warsaw Pact member states joined, with some ambiguous reactions from Moscow and conflicting statements from the West about the agreed security understanding between NATO and Russia. Some official statements from Moscow showed apparent understanding that former Warsaw Pact members would not join NATO and when they did, it was seen as a betrayal. Although "the charge of betrayal is technically untrue, (it) has a psychological truth". The issue would be recalled by Putin in his infamous speech at the Munich Security Conference in 2007, prior to and during Russia's invasion of Ukraine and in many scholarly works and journalistic articles in the West. In the end, all former communist countries that would eventually join the European Union (EU) had joined NATO before. However, NATO membership is not mandatory for accession to the EU, as is shown by militarily neutral countries like Austria, Sweden and Finland that joined the EU in 1995. Despite its lack of membership in the alliance, the EU also became more and more active as a security guarantor in BiH, taking over from NATO-led SFOR, with the European Union Force in BiH (EUFOR) since 2004 - a significantly scaled-down military mission as well as with European Union Police Mission (EUPM), for guaranteeing internal security. The EUFOR, albeit rather small at just over 1,000 troops, is effectively averting any internal and external actors with the ambition to destabilise the country and the region.

An American-led initiative to change the Constitution of BiH in order to guarantee greater stability of the post-war arrangement by securing the reforms of the first decade, the April Package, was narrowly defeated by parliamentarians in Sarajevo in 2006. The refusal of part of BiH political elites to accept the changes, contributed to a lengthy pause from strong international involvement in state-building processes. The global financial crisis spreading from the US in 2007-2008 affected available financial resources and refocused Western priorities away from former security threats in the Western Balkans. The perspective of EU membership should guarantee stability and function as an incentive for endogenous reforms.

Overall, the international efforts have been decisive for scaling down the conflict and delivering three types of peace interventions: peace-making by military intervention in 1995, with the follow-up operations of peacekeeping during the first post-conflict decade. The following period of peacebuilding was interrupted by the BiH Parliament in 2006 and the disengagement of the Western countries which refocused to other regions. Since then, the country's

political elites have proven that domestic forces cannot finish the process of peacebuilding alone, without external intervention. They lack the capacity, competence and political will to move on to the final stage of state-building and finalising the state's security structures. The inclusion in the Euro-Atlantic security architecture became a bone of political contention. Thus, NATO membership remains a central issue for political leaders to solve.

NATO Membership: divisive or the solution? The country shows little signs of responsibility for its own defence. The successes in defence policies have been internationally driven until 2006. Without strong international involvement, a period of stagnation has unfolded, thus leaving a question of the state's capacity for security and defence. Internal disagreements within BiH undermine the overall concept of collective stability and security. While forming the state's government together, the three ethnic political elites interpret differently whether the country is within the Membership Action Plan (MAP) and what this means. A simple annual submission of documents to NATO causes strong disagreements about the title Annual National Programme, less so about the content. The core of the arguments is whether BiH is already a part of MAP, i.e., a step closer to NATO membership or not, i.e., collaborative but firmly out of the alliance.

The country's governing political parties and leaders, often antagonistic to each other, are united in verbally supporting integration into the EU. However, joining the EU means sharing the member states' common foreign and security policy. In 2022, the BiH Parliament voted down the proposal to align its foreign policy towards Ukraine with the EU's policy. While the country's political elites declare their determination to fully integrate into European political and economic structures, in practice they work against such integration. This raises questions about the seriousness of the country's political elites in their efforts to join the EU, as they remain divided on issues not only of NATO membership but generally on their own policies, including foreign policy and security. While membership in NATO is opposed by political parties with their base among Bosnian Serbs, the proposal to align foreign policy towards Ukraine with the EU policy, was opposed by both Bosnian Serbs and most of the Bosnian Croat representatives in the House of Peoples of the BiH Parliament.

The main opposition to deepening the relationship with NATO comes from the political parties based in RS. They show rhetorical animosity towards NATO and the Western world and block further steps by BiH to join the military alliance, although a genuine alternative to security arrangements within the EU and NATO is difficult to see. Two out of three neighbouring countries are already NATO members, thus leaving a "hole" on the Western Balkans-map made up of only Serbia, Kosovo and BiH which remain outside but are entirely surrounded by NATO countries.

Successful transformation of the armed forces: but what for? During the peace-building phase in the country's development, BiH successfully transformed its military and security forces compared to its original structures during the peace-keeping period of the first post-conflict decade. However, it still lacks the capacity to provide for its own security without

external intervention and supervision, where EUFOR and NATO remain the main security pillars. Internal actors lack the vision, capacity and will to put into consideration the changed international environment since 1995.

The Armed Forces of BiH are essentially a disaster response unit in times of floods, fires and other natural disasters or a resource for symbolically contributing to the UN peace missions. The country's security is effectively outsourced to EUFOR, with the levels of support, if needed, provided by NATO.

Ever since the refusal to adopt the April Package of constitutional changes and the global financial crisis, the international community, in particular NATO structures, showed a duality of policies towards BiH and the broader region. Following the initial concerns for peace and security in BiH and the strong involvement in setting up the structures, NATO was more ambivalent to the slowness of BiH political elites. It was only following the recent challenges by Russia that more urgent and determined actions developed.

The overall situation is, in its essence, a normative conflict of two constitutional settings: On the one hand, the DPA and its structures provide a status quo for political elites and allow them to keep exploiting their dominant positions without providing for state security or economic prosperity. On the other, the necessary reforms of security structures in order to integrate them into a broader European and global NATO alliance of 30 states, would undermine the elite's monopolistic powers. They would inevitably lose the positions which they have enjoyed since 1995. This is why the political elites, since the DPA, neither have capacity, competence and political will to provide security by domestic forces, nor do they show a vision of how to get external actors to do it for them. The solution is a change of political elites that could be achieved in two ways: either by the electorate voting them out of power or by external actors forcing the local elites to accept the reality of the contemporary world and the new international system.

Security in a changing international environment. A lack of internal consensus requires a broader international security arrangement to keep the country together. However, the lack of agreement on the future global security model, whether it is going to be a unipolar, bipolar or multipolar world, and how many poles there are going to be, keeps several crisis points contested. While some of them, like Ukraine, escalated into a violent conflict, BiH seems to have a stable security arrangement that prevents violent escalation of political disagreements. The presence of Western troops, even in almost symbolic numbers, effectively prevents other ambitious powers from contesting the country or having influence in the state running of BiH.

While joining the NATO alliance would cement the country's geopolitical position, the current formal and informal arrangements keep the state secure and prevent deterioration towards instability. However, a fundamental rethink of European security and the position of BiH in it is required from the country's political elites. The opposition to officially integrating

into European security structures must be addressed and openly discussed. After all, this is a requirement for EU membership which all political parties support, at least in words, if not with action. Although NATO membership is not an official requirement, it might be(come) necessary and all post-communist countries have actually joined NATO before EU accession. Neutrality, as propagated by political parties based in RS, is a stance that does not provide the same state security.

Nations that attempt to play a neutral position tend to have an interest and a strategy for exploring such a position to their advantage. The perceived neutrality of BiH is not linked to its potential prosperity; there is no economic miracle, and the country is being depopulated by emigration waves of the population in the search for the living standards and stability of the West.

A view that BiH can survive as a neutral country, balancing in the new world order the interests of Russia and the West, openly ignores reality: who provides for the state security already, who are the main trading partners and investors, and what is the union that all political elites claim they want to join? The current world simply does not provide for neutrality, or some kind of equidistance towards Brussels and Moscow.

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Constitutional Changes

Nevenko Vranješ
Joseph Marko

Amendments to the Constitution of Bosnia and Herzegovina[4]

The Dayton Peace Agreement (DPA) brought peace to the peoples of Bosnia and Herzegovina (BiH). Everyone agrees that this is its greatest asset. The DPA as an international treaty is a key legal and political act – all together composed of the "Framework Agreement" and 11 Annexes, with Annex 4 called "The Constitution" of BiH (see: General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement). Already with case U-7/97 the Constitutional Court of BiH indicated in an *obiter dictum* the legal unity of the entire agreement. In the following cases, as can, in particular, be seen from Partial Decisions III and IV of case U-5/98, the Court used the Human and Minority Rights Documents of Annex 1 to Annex 4 and the Annexes of the DPA as standards of constitutional review so that not only Annex 4 but the entire DPA with all its Annexes enjoys constitutional rank in the legal system of BiH. Insofar, the DPA together with the constitutions of the Entities must be called the constitutional system of BiH. This has to be seen in light of contrary scholarly opinions which have argued that the DPA should be seen as a bundle of free-standing international treaties. With the adoption of the DPA including "the Constitution" (henceforth: the Constitution with capital C), all actors of the political and military conflict in BiH gained but also lost something in terms of their goals and expectations. The Constitution of BiH is an act of the widest possible compromise, which restrained separatist aspirations, on the one hand, and the unitarization of BiH, on the other. Therefore, any amendment to this act must be carefully considered and based on the widest possible consensus so that the existing legal-political system is not violated to the detriment of constituent peoples and the citizens of BiH (see: Constituent Peoples and Citizenship).

The ***Constitution of BiH*** as an ***integral part of the DPA*** is specific both in terms of its creation and content which makes it a unique example in international comparative law and constitutional practice. The Constitution is a *short* document, made up of only twelve articles, which, precisely because of its brevity, failed to adequately regulate the constitutional matter, thus leaving room for different interpretations, but also for the additional dispersion of constitutional-legal norms within various laws without, however, necessarily enjoying constitutional rank. The Constitution was *written by officially unknown legal experts* (judging by the nomothetical approach, most likely of the Anglo-Saxon legal system) and adopted by the signatories of the DPA in Paris on 14 December, 1995. The entire DPA was *never formally ratified* by the representative, i.e., legislative, body composed of elected representatives of citizens in a regular or constitutional procedure and mandate according to this Constitution. And contrary to usual international practice, the Constitution of BiH was not adopted in a referendum by its citizens either before or after the DPA was signed.

[4] Translated from the Serbian language by Ivana Draganić.

No legal act, including the Constitution, necessarily has a permanent character. Although the Constitution represents the highest legal and political act of a country, it can be *subject to revisions and amendments* for numerous reasons (change of government, changed values, social development, changes in the political and legal system, changes in the source of sovereignty, integration, etc.). In line with French constitutional tradition, the constitution-making power must be distinguished from the power later established by the Constitution and the power that revises that Constitution so that, finally, citizens always have the right to initiate the review, amendment, or change the Constitution of their country.

The compatibility of the Constitution with ongoing social development shall be achieved through amendments to the constitutional act (*partial* revision) or its complete change (*full* revision). Constitutional amendments and changes must be foreseen by the Constitution itself. In some cases, it is impossible to revise the Constitution as a whole, but more often it is forbidden to change only certain constitutional principles. A prominent example is the so-called "eternity clause" of Article 79, paragraph 3 of the German constitution which declares that any amendment of the right to human dignity (Article 1) and the constitutional principles of Article 20 (republic, democracy, social state, and federalism) are prohibited.

Change (revision) of the Constitution implies the abolition of certain or all constitutional norms and their replacement by new norms, as well as supplementing the text of the Constitution with new norms. The Constitution-maker amends the Constitution or enacts a new one according to the principle established by the existing Constitution, which is why such constitutional power is called derivative power.

The process of changing a constitution or adopting a new one is much more complex and challenging than the legislative process, and it often implies a popular referendum. In theory, the current ***Constitution of BiH can be changed in two ways***: through the *adoption of constitutional law on changes and modifications to the Constitution* and through the *adoption of amendments to the Constitution*. The second approach prevails in practice. When the constitutional law on modifications and additions to the Constitution is passed, it directly replaces in the text of the existing Constitution. So, after the law enters into force, the original text of the constitution is changed. On the other hand, when adopting amendments to the Constitution, the original text of the Constitution remains unchanged, and the amendments are added to the end of the text and thus become an integral part of the Constitution. In the further use and interpretation of the Constitution, both the basic text and the amendments must be taken into account, because only when viewed together do they form a logical and coherent whole. Therefore, the goal of adopting the amendments is to make the text of the Constitution more specific and modern.

Article X of the Constitution, entitled "Amendment" in the original English text, consists of two paragraphs. Paragraph 1, entitled ***"Amendment Procedure"***, reads as follows: "This Constitution may be amended by a decision of the Parliamentary Assembly of BiH, including a two-thirds majority of those present and voting in the House of Representatives." Specifically,

the quorum voting for amendments to the Constitution of BiH would be 22 representatives in the House of Representatives of the Parliamentary Assembly, and at least 15 "yes" votes would be needed for adoption. Paragraph 2 of Article X, under the title "Human Rights and Fundamental Freedoms", reads as follows: "No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter this provision." This provision is the BiH variety of the "eternity clause". Hence, the above-mentioned constitutional norms prescribe which body is competent to change the Constitution, which majority is required for the adoption of changes, and the mechanisms through which changes are adopted. They also specify the provisions that may not be changed.

However, even if it is stated that amendments to the Constitution can be made by the Parliamentary Assembly, it is not specified whether both chambers of the Assembly participate in this process. The fact that a two-thirds majority is required only in the House of Representatives, without any mention of the House of Peoples, raises doubts about the possibility of involving the House of Peoples. However, bearing in mind that the House of Peoples is an integral part of the Parliamentary Assembly and that it represents the constituent peoples, it is clear that it should be included in the adoption of amendments to the Constitution. This idea is confirmed by Article IX of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly, which reads as follows: "The delegate has the right to initiate the adoption, modifications, and additions to the Constitution of BiH, laws and other acts, and to apply other procedures contained in these Rules of Procedure." This wording raises the question of whether the Parliamentary Assembly of BiH is authorised only to adopt amendments to the Constitution, or whether it can also adopt a new Constitution.

Expert' opinions on this issue are divided. Fira believes that the above-mentioned constitutional norm allows only a partial revision of the Constitution of BiH. Pobrić claims that amendments to the Constitution of BiH are decided by both houses of the Parliamentary Assembly and that the House of Peoples can vote on amendments according to a special procedure if the vital interest of one of the constituent peoples is invoked. Therefore, according to Pobrić, the Constitution of BiH cannot be changed unless all three constitutive peoples support the proposed changes. Marković takes the opposite view, arguing that the adoption of amendments to the Constitution in the House of Peoples requires the same majority that is used when enacting laws and other decisions. Unlike Pobrić, Marković believes that when deciding on the revision of the Constitution in the House of Peoples, it is not possible to invoke the vital interest of the constituent peoples. Trnka claims that constitutional changes in the House of Peoples can only be adopted by a majority vote of delegates from all three constituent peoples. As for the eventual possibility that the Parliamentary Assembly of BiH adopts a completely new Constitution, the provisions of Article IV.4 of the Constitution of BiH, which refer to the Parliamentary Assembly, do not explicitly consider this issue. However, paragraph 4 (a) stipulates that the Parliamentary Assembly has to "carry out the responsibilities of the Assembly under this Constitution." In this context, there is no doubt that the Parliamentary Assembly of BiH, like any other assembly, can carry out a complete revision of the Constitution, i.e., adopt a new Constitution, if supported by the necessary parliamentary majority.

In contrast to the usual decision-making process, for which it is necessary to secure a majority of the votes of the delegates present and voting, the revision of the Constitution requires a two-thirds majority of the delegates present and voting.

More specific rules for the procedure of revising the Constitution of BiH are defined by the Rules of Procedure of the two houses of the Parliamentary Assembly of BiH. The Rules of Procedure of the House of Representatives envisage that amendments to the Constitution can be proposed by any member of the House of Representatives, the House of Peoples, the Presidency of BiH, and the Council of Ministers of BiH. According to the same principle, the Rules of Procedure of the House of Peoples provide that the amendments to the Constitution can be proposed by each member of the House of Peoples, the House of Representatives, the Presidency of BiH, and the Council of Ministers of BiH. Given the above considerations, it is clear that the citizens of BiH have no right to propose changes to the Constitution. The Constitutional Commission of the Parliamentary Assembly is obliged to submit all proposed amendments to public discussion. The final decision on the eventual acceptance of suggestions and remarks made during the discussion is made by the Parliamentary Assembly.

To summarise, the Constitution of BiH can be changed by adopting amendments to the entire constitutional matter, except for the part that refers to human rights and fundamental freedoms guaranteed by the Constitution. The Constitution of BiH belongs to the group of rigid constitutions, given that a two-thirds majority of the members of the House of Representatives are present and voting is required to amend the Constitution. The procedure continues in the House of Peoples, where a simple majority of the representatives present and voting is required. According to the rules of procedure of the houses of the Parliamentary Assembly of BiH, the right to initiate amendments to the Constitution is guaranteed to a wide range of political actors, while citizens do not enjoy this right. The prevailing opinion is that the Parliamentary Assembly can adopt a new Constitution. There is no formally prescribed procedure related to the eventual possibility of initiating the mechanism of vital interest of constitutional acts before the Constitutional Court of BiH in connection with adopted amendments, nor has such a situation arisen in practice so far.

So far, *only one official amendment to the Constitution of BiH has been adopted*: Amendment I, which refers to the Brčko District (BiH). The amendment was adopted in 2009 with 36 votes in favour - 27 from the Federation of BiH (FBiH) and 9 from Republika Srpska (RS), one vote against and two abstentions in the House of Representatives, and 14 votes in favour and one against in the House of Peoples.

However, the *Constitution has undergone numerous changes that were not made official*. For example, the Constitution still mentions the armed forces of the two BiH entities, even though they have long been disbanded. On the other hand, since the adoption of the Constitution, numerous new institutions have been formed in BiH, which, however, are still not regulated by the Constitution as they should be. Therefore, one of the next amendments to the Constitution should concern the constitutional regulation of some already existing

institutions, which certainly requires significant efforts and the consensus of all constituent peoples, Others, and citizens of BiH.

Finally, a few remarks about the ***approach to the amendments to the Constitution of FBiH of BiH (FBiH) and the Constitution of RS***. According to the *Constitution of FBiH*, amendments to the Constitution can be proposed by the President of FBiH, in agreement with the Vice-Presidents, by the Government of FBiH, the majority of representatives in the House of Representatives, and the majority of Bosniak, Croat and Serb delegates in the House of Peoples. The proposed amendments are adopted by a simple majority in the House of Peoples (including a majority of delegates from all three constituent peoples) and by a two-thirds majority of representatives in the House of Representatives. No amendment to the Constitution can abolish or limit any of the rights and freedoms prescribed by Article II (A 1-7) nor can the mentioned article be changed (Amendment VIII, Articles I and II).

Chapter XI of the *Constitution of RS*, entitled "Amendments to the Constitution," reads as follows: "The proposal to initiate changes to the Constitution of the Republic can be submitted by the President of the RS, the government, and at least thirty members of the National Assembly. The National Assembly decides on the proposal to change the Constitution by a majority vote of the deputies. The draft act on amending the Constitution is adopted by the National Assembly by a majority of votes from the total number of deputies. The draft act on amending the Constitution is put up for public debate. After the public debate, the Commission for Constitutional Affairs of the National Assembly establishes a proposal for an act on amending the Constitution. The National Assembly and the Council of Peoples decide on the proposal of the act to change the Constitution. An amendment to the Constitution is adopted if at least two-thirds of the deputies of the National Assembly and the majority of members of the Council of Peoples from each constituent people and from the Others vote for it. If the amendment to the Constitution is not adopted, a new proposal for an amendment on the same issue cannot be submitted before the expiration of three months from the day the previous proposal was rejected. The act of amending the Constitution is promulgated by the National Assembly. The Constitution of the RS can be changed by constitutional amendments. In the event of war or an imminent threat of war, the National Assembly can establish a proposal to amend the Constitution of RS and adopt constitutional amendments at the same session (without a public discussion)".

From the above analysis of the procedures for the revision of the Constitution of BiH and the constitutional acts of the two entities, we can conclude that they are asymmetric solutions that are a consequence of the asymmetry of the political power structure in BiH.

The Constitution of BiH has not been fundamentally changed so far, but that does not mean that it is optimal and adequate in all its elements. Kuzmanović believes that it is necessary to consistently apply the Constitution of BiH and that it is not necessary to change it, considering that it does not hinder the development of BiH. In his opinion, the previous requests to amend the Constitution are political and are not based on the needs of the socio-economic

development of BiH. Other scholarly authors and NGO activists strongly advocate constitutional reform, but all internationally pressured constitutional reform efforts since the so-called "April package" in 2006 have failed so far. However, due to the series of judgments of the European Court of Human Rights (ECtHR) - beginning with the prominent case of *Sejdić and Finci v. BiH* in 2009 - declaring the automatic and absolute exclusion of citizens who do not declare themselves affiliated with one of the constituent peoples a serious violation of Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR), there is an ever more urgent need to amend the Dayton constitution (see: Fundamental Rights and Freedoms, The European Court of Human Rights and Individual Complaints). This is even more so the case because the implementation of these judgments has been made a condition for further EU integration (see: Bosnia and Herzegovina and the European Union Integration, The Constitutional Impact of the European Union Accession).

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Za sve one koji proučavaju politiku Bosne i Hercegovine, ali i jugoistočne Europe, *Rječnik osnovnih ustavnih pojmova u BiH. Građani, Ustav, Europa* pokazat će se neprocjenjivim alatom, koji će istovremeno ponuditi sveobuhvatan i temeljit pregled političkih institucija i ustavnih praksi u zemlji.

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Sveučilište u Edinburghu

This is a great resource for people who work in comparative politics and want to quickly understand how a specific mechanism or institution works in the Bosnian case. It also introduces to key legal debates in an accessible manner and provides a list of key works to consult further. The various authors and co-authors are all well-established scholars in their fields with ample experience in scientific research. That several entries are co-authored in different combinations increases the inclusivity and diversity aspect of this work and so also has symbolic traction.

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