PROCEEDINGS OF THE CONFERENCE

TWENTY YEARS AFTER DAYTON. THE CONSTITUTIONAL TRANSITION OF BOSNIA AND HERZEGOVINA

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Twenty years after Dayton. The Constitutional Transition of Bosnia and Herzegovina

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Rome, November 2016
Ludovica Benedizione
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FRAMING DAYTON AGREEMENTS: INTRODUCTORY REMARKS

CARMELA DECARO BONELLA
FRANCESCA PIAZZA

More than twenty years have passed since the general Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement, reached near Dayton, Ohio, in November 1995, was signed. The Treaty put an end to the more than three-years-long Bosnian war and marked the history not only of Former Yugoslavia and of new equilibrium among Serbia, Croatia and Bosnia- Herzegovina but also of all Europe, both in international and in constitutional terms.

Actually, the origin of this historical moment lays in the establishment, at the end of WWI, of the Kingdom of Serbs, Croats and Slovenians, renamed Kingdom of Yugoslavia in 1929, aimed at ending the ethnic and communal disputes occurring among the different populations inhabiting this territory. At the 1945 Yalta Conference this institutional structure was confirmed, though the war events assigned the leadership of the country to the socialist General Josip Broz Tito, who established the Socialist Federal Republic of Yugoslavia (composed of Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, and of the two autonomous provinces within Serbia of Kosovo and Vojvodina), and defined for it a non-aligned position during the years of the Cold War. When Tito died, in 1980, intercommunal dissent arose again and the end of the Cold War, with the coeval emergence of an economic crisis, determined the beginning of an internal war. Relying on the constitutional provision of the federal Charter allowing for secession, on 25 June 1991 Slovenia declared its independence, which became definitive after the so-called ten days war, started on 27 June and concluded on 7 July, when the Brioni Accord was signed. Since then, the country started its path of European integration, becoming an EU member in 2004 and entering in the Eurozone in 2007, meanwhile becoming a NATO member in 2004. During that same period, the area was also frustrated by the conflict between Serbia and Croatia, also wanting to claim for independence, whose final spark were considered to be the clashes between fans occurred on 13 May 1990 at the end of the football match at Zagreb in Maksimir Stadium between Zagreb's Dinamo and Belgrade's Red Star. One year later, Croatia declared its independence and the real conflict began. Here, the main issue was the territorial belonging of the Krajina Republic, inhabited by Serbs but located inside the Croatian territory, and the conflict proved to be longer and harder than the one in Slovenia, to the point that UN intervened deploying UNPROFOR as peace-force. Finally, on 12 November 1995, the Erdut Agreement put an end to the conflict, though the final definition of the borders occurred in 1998 for the Slavonia territory and only in 2010 for Slovenia as for the repartition of the territorial see.

The most violent conflict, however, interested Bosnia and Herzegovina, a Republic of the then Yugoslavia, inhabited since its establishment by Croats, Serbs and Muslim Bosniaks. Therefore, while fighting for the definition of the new boarders, Croats vindicated for them the parts of Bosnia inhabited by them and the same did Serbs, while Bosniaks continued to support the need of safeguarding the multi-ethnicity of the state as their only possibility to be saved by the ethnic cleansing, in the lack of a motherland to look for a reunification. For this reason the first peace attempt, the Lisbon Agreement (18 March 1992), failed, as the Bosniaks' representative Alija Izetbegović refused to sign an agreement which would have defined specific territorial areas belonging to each community. Only two years later, on 18 March 1994, the Washington Agreement was able to set for a territorial division in ten autonomous and ethnically homogeneous cantons composing the Federation of Bosnia and Herzegovina, which became, together with the Srpska Republic, one of the members of the state of Bosnia and Herzegovina (BiH) after the Dayton Agreement (21 November 1995).

While the Croatian and Bosnian wars were on-going, also Macedonia held a referendum and peacefully reached the independence on 8 September 1991.

Evidently, the war produced dramatic effects on the constitutional organization of Yugoslavia, finally fragmented in five new States: Croatia, Slovenia, Former Yugoslav Republic of Macedonia (FYROM), Bosnia-Herzegovina and the Federal Republic of Yugoslavia, comprising Serbia and Montenegro – under the leadership of Slobodan Milošević until the 2000 elections – whose territorial fragmentation continued even later. Indeed, in 2003, following the defeat of Milošević, the Union of Serbia and Montenegro replaced the Federal Republic of Yugoslavia and approved a Constitutional Charter providing for a confederation, where the secession of the two republics was not allowed for the following three years. As soon as this deadline expired, in 2006, Montenegro proclaimed independence. Meanwhile Kosovo – still belonging to the Republic of Serbia but mainly inhabited by Albanians – started to claim its independence and, in order to avoid another violent war, in 1999, the UN established an international protectorate, intended to be a temporary solution before reaching an agreement on the province's final status. The raise of Albanian independentism produced consequences also in Macedonia, where a compromise solution was found on 13 August 2001 with the Ohrid Agreement, recognizing the administrative autonomy of the Albanian municipalities and the free use of their language as the State's official one. Whether the Albanian condition in Macedonia was settled, in Kosovo the situation was still controversial and, given the failure of the negotiations in order to define its institutional position, on 17 February 2008, the Assembly of the province proclaimed the independence. Nevertheless, it is very problematic to identify Kosovo as an independent and sovereign State, since so far a number of States, among which, first of all, Serbia, have refused to recognize it, while others, as France, Germany, Italy and the USA have instead done so.

With the exception of Former Yugoslav Republic of Macedonia and of Bosnia and Herzegovina, the idea of establishing a national state evident in case of the fragmentation of Serbia, clearly emerges, with strong emphasis, also from the constitutional

texts of the other States that were born from the dissolution of Yugoslavia. According to the Preamble of the 1990 Croatian Constitution, «[t]he millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty […]». Similarly, the 1991 Slovene Constitution recalls «the will of the Slovene nation» (Preamble, 1st paragraph) and explicitly refers to the «fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and […] the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood» (Preamble, V paragraph). In the same vein, finally, the 2007 Montenegrin Constitution refers to «the decision of the citizens of Montenegro to live in an independent and sovereign state» (Preamble, 1st paragraph) and, according to art. 2, sovereignty belongs only to Montenegrin citizens. The Constitutions of Serbia and Kosovo are also interesting. The Preamble of the former, indeed, constantly recalls the role of the components of the state and affirms that «Contrary to constitutional definitions of multi-national states […] the Constitution of Serbia does not define the State by applying the ethnic criterion ("a State of the Serbian people"), but by applying the democratic criterion of a national, namely citizen, sovereignty». Despite this, Kosovo is still a province of Serbia, together with Methodja, notwithstanding the fact that it has an autonomous Constitution recalling its independence since the Preamble.

However, the emphasis on the idea of the state as the expression of a dominant nation is moderated by a strong commitment to the protection of the rights of national minorities, as requested, after all, by the European standards that have to be fulfilled since these states obtained or applied for membership in the European Union as well as in the other European organizations, such as in particular the Council of Europe. As a result, in all these states, a detailed legal framework on national minorities has been adopted, based on providing measures for protecting individuals but without any territorial recognition, as regions may only enjoy moderate autonomy, anyway not related to the ethnicity of the population. Therefore, despite some problems related to the gap between the "law in the books" and its effective implementation, a rather good balance emerges between nationalism and multiculturalism.

Again, also in this regard, the case of Serbia is much more complicated due to the unsolved question of Kosovo, that the Serbian Constitution still considers as a region with a special status, recognizing special rights to the ethnic community residing into its borders. In addition to Kosovo, another region, Vojvodina, completes the already complicated territorial landscape of Serbia, being a special region with a deep internal multicultural organization.

As anticipated, FYROM and Bosnia and Herzegovina do not fall into the category of national states, due to the extreme fragmentation of their population that emerged at the end of the war and that prevented to identify a people as the dominant nation of the new state. As to FYROM, despite the reference to the idea of multicultural

state emerging from the text of the Constitution as amended after the Orhid Agreement (2001), a bi-national organization of the state, where the power is divided between the Macedonian and Albanian communities, is de facto in place.

In the case of Bosnia and Herzegovina, the multinational organization of the state is even more evident. Indeed, the Dayton Agreements of 1995 defined the institutional structure of the country, creating a central state "Republic of Bosnia and Herzegovina – BiH", divided into two entities: the Federation of Bosnia and Herzegovina, inhabited mainly by the Bosnians and Croatians, and the Republika Srpska, whose people's majority is made of Serbs, plus the autonomous district of Brcko. These complex institutional system responded to the need of securing peace in the country, allowing each of the three main ethnic groups – Bosniaks, Croats and Serbs, called "constituent peoples" – the mutual share of power. This caused several consequences on the institutional design of the state: for instance, the country has the highest number of political representatives per citizen in the world and both the Presidency of the Republic and the Presidents of two Houses of Parliament of the central state are tripartite, as three representatives for each of the three constituent peoples hold the office of President on a rotational basis every eight months.

On this ground, as Woelk puts it, three phases can be distinguished in the country's constitutional transition. After a first phase of stabilization, in which serious problems with the implementation of the constitutional elements of the Peace Agreement emerged, the second phase of transition has been characterized by major corrections to the constitutional order, imposed by the international community. The third stage was marked by positive changes in the regional context, in particular the democratization in Croatia and Serbia, as well as a change in the European Union's strategy vis-à-vis the Western Balkans.

After twenty years of Dayton's implementation, how has the situation in the country developed? The specific complexity of the institutional system is evident looking at the parliamentary elections held on 12 October 2014, when the electorate was called to vote for the tripartite Presidency of the State, the House of Representatives of the central State, the House of Representatives and the Cantonal Parliaments in BiH Federation, the President and the National Assembly of Republika Srpska. The results were controversial, as elections, preceded by violent protests in February 2014 in the Federation against the Bosnian leadership considered unable to respond to the profound social unrest generated by the economic crisis and unemployment, were attended only by the 54 per cent of the electorate. Furthermore, nationalist forces emerged and the tripartite Presidency has been assigned to them: for the Bosnians the Muslim Party of Democratic Action (SDA) with the 28 per cent of votes, for the Croats the Croatian Democratic Union (HDZ) with 12 per cent of the votes, and for the Serbian the Alliance of Independent Social Democrats (SNSD) with 39 per cent of popular support. In this book, the consequences of political parties' decision to constantly refer to ethnicity is considered among the reasons for the failure of state-building in BiH by Stefano Bianchini, who also underlines nationalist parties have been progressively reinforced by the will of protecting collective rights as well as by the institutional structure emerged at Dayton.

The last electoral results show how the country suffers from endemic instability and political fragility, due to weak coalitions within the Executive of the central state and BiH Federation, coupled with the profound dissatisfaction for the issue of war-crimes and for the behavior of the central judiciary, strictly connected to the attacks on the integrity of the country, in particular by the Serb entity. In order to allow the country to develop endogenous democratic practices, the "international protection" originally established with the Dayton Agreements, represented by the figure of the High Representative (HR), has become progressively less incisive in favor of a greater responsibility to local politicians. However, the issue of the Office of the High Representative is still pending: its closure is, in fact, subject to the attainment of five goals set by the Peace Implementation Council (PIC) such as the solution of the issue of apportionment of property between the central State and Entities; the settlement of the issue of property of Defense; the agenda for the establishment of the Brcko District; the settlement of pending issues relating to the restructuring of the tax system; the consolidation of the rule of law (approval of rules for war crimes, to foreigners and the right to asylum, the reform of justice). Furthermore, its closure was also related to the fulfillment of two conditions: the signing of the Stabilization and Association Agreement (SAA) with the European Union and the positive PIC assessment of the situation in Bosnia in light of the requirements set forth by Dayton.

In parallel, indeed, the "stressed" approach to European standards started developing itself, with a particularly important role of the EU Special Representative. To overcome a prolonged stalemate the EU has revised its strategy towards the country, according to an approach centered on the promotion of socio-economic reforms and the judiciary, rather than on the question of a possible institutional reforms post-Dayton. Actually, some steps forwards have been taken since the Agreements were signed, allowing Bosnia to come closer to the EU. Indeed, the European Council held in Thessaloniki in 2003 recognized Bosnia and Herzegovina as a "potential candidate country" for accession. The negotiations for a Stabilization and Association Agreement (SAA), started on 25 November 2005, were signed in 2008 and ratified in 2010. The SAA was in provisional application only for commercial matters, though the so-called Interim Agreement provided that the entry into force was linked to the launch in 2014 of a "Reform Agenda" which contains a package of urgent measures including the reduction of labor costs, privatization, labor market reform, the business climate, and the fight against corruption as well as to the adoption of a written commitment by Bosnia and Herzegovina to adopt the reforms demanded by the EU, primarily the constitutional ones. In 2015, the Agreement entered into force. Finally, Bosnia formally applied for EU membership on 15 February 2016. Actually, there are three issues relating to possible entry into the EU: 1) the implementation of credible reforms, particularly with regard to the amendment of the Constitution in order to be consistent with the European Convention on Human Rights; 2) the creation of a "coordination mechanism" between the various state-levels allowing Bosnians to "speak with one voice" in order to make fully effective the dialogue with Brussels; 3) the adaptation of the SAA at the entrance of Croatia into EU. Finally, BiH has to

deal with the economic criteria fixed for the EU accession, and therefore is committed to the process of transition to a market economy, its economy still being dependent on the support of international financial institutions and burdened with a high unemployment rate, bottlenecks in the labor market, strong public indebtedness, inadequate investment climate, oversized public sector, regulation and inefficient administrative organization. The relation of BiH with the European Union is deeply analyzed in the contributions of Jens Woelk and Valentina Rita Scotti. Notably, Woelk advances a critical vision to the EU's role and claims for it "an active role as facilitator of (constitutional) reforms". In her contribution, then, Scotti, relying on the normative power theory, comments on the EU's influence on the establishment of a transitional justice mechanism in BiH and considers its failure among the main reasons for the difficulties in overcoming the ethnic divide.

In this general framework, continuing threats of secession by Serb politicians and moreover the positive results of the 25 September 2016 referendum, which called the population of the Srpska Republic to decide whether to overcome the decision of the state Constitutional Court on the unconstitutionality of the entity's statehood day, seem to demonstrate that twenty-one years after the Dayton Agreements, the structures resulting from them are no longer corresponding to the Bosnian needs. In fact, the various attempts to reform the Bosnian Constitution have so far failed as opposing views on the future of Bosnia and Herzegovina consolidate: Bosniaks favor a state centralization project; Serbs prefer to maintain the Dayton structure and, if possible, want a further transfer of powers to the Republika Srpska; Croatians contrast the advancement of the country in its process of EU integration, also due to the fact that many of the members of this group already have a European passport as dual citizens (Bosniaks and Croats). Clearly, the country continues to be divided along ethnic ridges and the formation of a common identity that can identify all the components of the country appears a distant prospect.

The feeling of belonging is based primarily on ethnicity. Serbs and Croats do not feel connected to the Bosnian state: their loyalties are first and foremost with their national community, whose political leaders and local administrative structures set up on ethnic grounds. Only Bosniak community, not having another motherland to make reference to, considers vital the survival of a united, multi-ethnic Bosnia-Herzegovina. Furthermore, local politicians perpetuate and feed the ethnic and religious divisions as these allow them to remain in power, and hamper the reforms taking advantage, in turn, from the weakness of the central government. Dayton Agreements are therefore challenged by this political approach as well as by the claims of the seventeen recognized national minorities in BiH (Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Rutheni, Slovaks, Slovenes, Turks and Ukrainians).

Aware of the influence ethnic groups have, the international community often highlighted the need to overcome the ethnic divide, and especially the Parliamentary Assembly of the Council of Europe repeatedly urged local political leaders to implement the constitutional reforms, particularly deploring the abuse of so called "ethnic veto", which blocks any decision-making process. The ethnic issue has been also

at the center of the decision the European Court of Human Rights took on 22 December 2009 in the case Sejdić and Finci against Bosnia and Herzegovina, which seems to further demonstrate that the content of Dayton is no more consistent with the needs of the country. Jakob Finci and Sejdić Dervo, respectively representatives of the Jewish community and Bosnian Roma, appealed to the Court challenging the constitutional framework established in Dayton, according to which only the representatives of the three constituent peoples (Bosniaks, Serbs and Croats) can run for the Presidency of the country or to the House of Peoples. The Court ruled that the Bosnian Constitution violates minority rights and that the right to be elected to those charges should be provided also for citizens not belonging to the three ethnic groups of the "constituent peoples". Strasbourg, sentencing Bosnia and Herzegovina, actually sentenced the content of Dayton. Starting from the analysis of this case, Maria Dicosola studies the effects of ethnic federalism not only on "constituent peoples", but also on the "others", focusing on how it affects the dialogue of national institutions, notably the Constitutional Court and the Parliament, with European supranational organizations.

Though passible of critiques, Dayton remains a best practice in the international experience of conflict resolution and for reconstruction of national identity through institution building and governance. Under an international perspective, Dayton was the mean that allowed a stable ceasefire. In order to stop the hostilities in the region, a system of ethnic federalism was established by the Annex IV to the Agreement, which still represents the "international Constitution" of Bosnia and Herzegovina. A "Constitution" which was intended to be provisional, but that, in 2016, is still in force. Actually, under the constitutional perspective, at Dayton Bosnia and Herzegovina started a democratic and constitutional transition entirely guided by the international community, making citizens or ethnical groups irresponsible actors of the institutional and political scene. However, as European Union institutions and the European Court of Human Rights clearly pointed out, it is time for a democratic consolidation, also in the perspective of 2018 political elections. And, in order to consolidate democracy, a Constitution is needed, adopted by the Bosnian citizens, through a regular constituent process and based on the sovereignty of the people rather than on an international agreement. A Constitution, finally, that should correct the weaknesses and the adverse effects of ethnic federalism and of the institutional context designed at Dayton.

Nedim Kulenovic and Jasmin Hasic contributed to this book focusing on the specific aspect of the weakness of the Parliamentary Assembly in the institutional framework stating that it is a direct consequence of the political compromise reached in Dayton and advance some prospects for reforms. The lack of a sense of multinational federalism highlighted in the conclusions proposed by Kulenovic and Hasic is at the origin of Maria Romaniello's reflections. Relying on a normative analysis of federalism and federation, she advances some final remarks for establishing a common federal vision in BiH. A need that is at the center of the contribution of Valeria Piergigli, which complains for the lack of a constitutional identity in BiH and advances some hints for building it through the constitutional reform still awaited. The constitutional

reform is also discussed in the contribution of Laura Montanari, specifically focusing on its possible consequences on the protection of rights.

Conclusively, it is impossible to reflect on the Dayton Agreements and on the situation of Bosnia and Herzegovina forgetting the current international framework, characterized by an Islamist international terrorism that deeply affects also this country. Since 2014 the number of foreign fighters coming from the Balkans constantly increase and the region represents a transit hub for terrorists coming from other areas to Syria, where a cruel war is going on deeply involving, as it happened in the case of Balkans wars, civilians, at the same time victims and fighters. In the last decades, the "world civil war", an expression used by both Carl Schmitt in *Theory of the Partisan* and Hannah Arendt in *About Revolution*, seemed to start a new trend, according to which the reciprocal recognition of sovereign states is put aside. These internal *uncivil/uncivilized* wars, as many scholars define recent years' wars, are not circumscribed nor regulated anymore as the duel between or among States; they upset the boundaries between external and internal, civil war and terrorism; they radicalize the friend-foe contrast, criminalizing the enemy to the point of wishing for its annihilation. Unfortunately, recent events in Bosnia demonstrate that the country is not free from the risk of falling again in such a kind of war. In his *Stasis. Civil War as political paradygma*, Giorgio Agamben considers civil war in two crucial moments in the history of Western thought: in ancient Athens (from which the political concept of stasis emerges, as underlined in Hannah Arendt's definition of stasis: "civil strife that plagued the Greek *polis*") and later, in the work of Thomas Hobbes. For Agamben the stasis identifies the fundamental threshold of politicization in the West, an apparatus that over the course of history has alternately allowed for the depoliticization of citizenship (from *polis* to *oikos*-family) and the mobilization of the unpolitical (from *oikos* to *polis*). When the threshold is beyond and the equilibrium breaks because of discord rages, brother kills brother as if he were an enemy and no one is no longer able to distinguish between the intimate and the stranger, the inside and the outside, the house and the city, the blood kinship and citizenship.

This is the risk of the raising of national forces in Bosnia and this is why the Dayton Agreements, which tried to put an end to such a fratricide war, must be carefully revised and questioned twenty one years after their entry into force. Francesco Alicino analyses this risk in the light of the religious divide and conceive of 2004 Law on Freedom of Religion as a first step to build in BiH, with a hope for the whole Europe, a concrete and effective cohabitation among groups whose ethnic difference also includes a religious one.

THE CONSTITUTIONAL TRANSITION OF BOSNIA AND HERZEGOVINA BETWEEN NATIONALISM AND EUROPEAN CONDITIONALITY

JENS WOELK

1. INTRODUCTION

Twenty years ago, at the end of 1995, after military intervention by NATO the international community imposed a framework for the reconstruction of Bosnia and Herzegovina[1]: the General Framework Agreement for Peace, known as the Dayton Peace Agreement (DPA).[2]

Three phases can be distinguished in the country's constitutional transition after the war and based upon the DPA. After a first phase of stabilization, in which serious problems with the implementation of the constitutional elements of the Peace Agreement emerged, the second phase of transition has been characterized by major corrections to the constitutional order. These corrections have been imposed by the international community for making the agreement work and for containing obstructionist policies by nationalist political forces.[3] Positive changes in the regional context, in particular the democratization in Croatia and Serbia, as well as a change in the European Union's strategy vis-à-vis the Western Balkans, have created a true chance for the accession of all Western Balkan countries to the EU, provided that the political, economic and legal criteria are met.

1. "Bosnia and Herzegovina", "Bosnia" or the acronym "BiH" are used interchangeably.
2. General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton, OH, 14 December 1995); for the text of the DPA and its 11 annexes, see the website of the Office of the High Representative in Bosnia-Herzegovina at http://www.ohr.int/dpa/default.asp?content_id=380.
3. See for a profound analysis of the different phases of Bosnia's constitutional transition, J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008). For an analysis of Bosnia's institutional and federal system in English, see J. Woelk, *Federalism and consociationalism as tools for state-(re)-construction? Experiences from Bosnia and Herzegovina*, in G.A. Tarr, R.F. Williams, J. Marko (eds.), *Federalism, Subnational Constitutions and the Protection of Minorities* (Greenwood-Praeger, Westport Connecticut – London, 2004), 177-198, and J. Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, in M. Burgess, G.A. Tarr (eds.), *Constitutional Dynamics in Federal Systems: sub-national perspectives* (McGill-Queen's University Press, Montreal & Kingston, London – Ithaca 2012), 109-139, on which parts of this contribution are based.

Bosnia's postwar multinational[4] constitutional order has so far been guaranteed by the international community. However, (the prospect of) EU integration first of all requires a sustainable and functioning state from within. Thus, for the third phase of transition, an agreement is needed, among local political forces and the population, on the multinational foundations of the state guaranteeing the rights of all of its citizens. So far, however, the need to develop a common vision of the state has been the major obstacle to demonstrating "local ownership". Instead of reforms for progress on the way towards European integration, rather the interests of nationalist politicians in perpetuating the *status quo* have prevailed, leaving Bosnia in a kind of "assisted state" limbo.

«Once post-conflict "shining star", over the last ten years the country has been moving in the wrong direction», according to the assessment by Valentin Inzko, current High Representative of the International Community in Bosnia;[5] since 2008, the EU shares this assessment in its annual Progress Reports.[6] The challenge is (and remains) emancipation from an international quasi-protectorate, which is fading out, and becoming a viable and sustainable state thus qualifying for EU accession. However, as the latest rhetoric on referenda for independence and against state institutions show, in particular against the State Court and decisions of the Constitutional Court, agreement on the form of a multinational state and its constitutional foundations is far away.

2. YUGOSLAV TRADITIONS AND POST-CONFLICT TRANSITION

In the former Yugoslavia, despite its multiethnic society and its multinational, federal system, the republics as constituent units used to be identified with a titular "people" (constitutional terminology), i.e., with a dominant majority population conceived in ethnic terms. The two fundamental principles of Yugoslav federalism used to be Communism and Nation: whereas, on the one hand, the supreme communist principle of democratic centralism – i.e., the concentration of powers – emptied the federalist function of separation of powers impeding the development of its democratic and integrative effects, on the other hand, it also underlined the importance of the

4. The term "multinational" is used for a specific constitutional approach in the organization of a multiethnic society, like Switzerland or Belgium. Compared with the ideal type of the 'nation-state' created by one titular people ("nation") and systems of minority protection in which minority groups enjoy particular rights vis-à-vis the numerically dominant majority population, the principal characteristic of a multinational state is parity between its two or more constituent groups (independent from their real numbers). See for the different ideal-type models of constitutional approaches in reaction to social and cultural diversity R. Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in T. Bonazzi, M. Dunne (eds.), *Citizenship and Rights in Multicultural Societies* (Keele University Press, Keele, 1995), 206-210.
5. United Nations News Centre, *Bosnia and Herzegovina, once post-conflict 'shining star', is moving wrong direction, Security Council warned* (10 Nov 2015).
6. Commission Staff Working Document, Bosnia and Herzegovina. 2015 Report SWD(2015) 214 final (10.11.2015), at: http://ec.europa.eu/enlargement/countries/package/index_en.htm.

ethnic dimension as the very essence of the existence of Yugoslavia. As a result of gradual constitutional reforms (in particular, the one of 1974), the republics could be regarded as "nation-states",[7] and did so increasingly themselves.

Their quest for more powers during the long economic crisis in Yugoslavia in the 1980s was soon transformed by the emerging nationalist political parties, which offered themselves as fresh alternatives to the old Communist Party (SKJ)[8] and the old system, into a struggle for independence of the respective republic. In the name of self-determination of its "titular nation", those centrifugal forces could exploit the loss of strong central control by the SKJ as well as an only weakly developed common "Yugoslav" identity.[9] Legitimacy based upon ethnicity prevailed over loyalty to federal institutions as political parties and leaders discovered and deliberately used nationalism and ethnicity to mobilize voters in times of crises; together with outside interference from neighbours, the only possible consequences were violence and disaster.

In the past, the situation in BiH had been unique and much different compared to the other republics.[10] As a constant feature throughout its history, Bosnia was an identifiable entity of its own, but at the same time, part of a larger territorial organization: from the Ottoman Empire and Austria-Hungary to the Kingdom of Serbs, Croats and Slovenes and, finally, Yugoslavia. It was truly multiethnic in demographic terms: in 1991, Muslims accounted for 43.7%; Serbs for 31.45%; and Croats, for 17.3% of the population, whereas 7.7% considered themselves as not belonging to one of the three major groups and declared as "Others" (5.5%) or as "Yugoslavs" (2.2%). Also there were no separate, territorially defined or closed settlement areas for any of the groups.

This diversity existed for long periods in peaceful coexistence. The recognition of BiH's independence on 6 April 1992, in accordance with international law, resulted in war over the control of territory waged by the ethnic groups and supported by its neighbours.[11] Identification of a territory with one ethnic group became exclusive

7. According to the Western model; in Yugoslavia, the word "nation" was only used to refer to the Yugoslav nation (legally through citizenship, and to a large extent politically, but not constitutionally), whereas ethnic subcategories were "peoples" (Croats, Serbs, Muslims, Montenegrins, etc.).
8. During the 1950's, the Communist Party was renamed "League of Communists of Yugoslavia" (SKJ).
9. In fact, from its very origins, the Yugoslav Federation had substituted the political will of creating an effective federal system and an organization characterized by the principles of constitutionalism with the central power and control of the SKJ. This also meant that only a few instruments and procedures of cooperation between the Republics had been developed. Thus, transition did not only mean economic and democratic transformation, but also involved the very foundations of the federal structure of the state.
10. For an excellent and brief account of Bosnia's history, see N. Malcolm, *Bosnia. A short history* (Pan Books, Chatham, 2002).
11. The war lasted nearly four years and left more than 250,000 people killed or registered as missing. It led to the displacement of an estimated 1.2 million persons and to extensive physical and economic destruction. During the war, systematic ethnic cleansing was carried out by all warring factions in order to create ethnically homogenous areas. This strategy, vis-à-vis the civilian population, has been particularly evident in the long siege of Sarajevo, the genocide in Srebrenica, and the use of concentration camps.

and culminated in the systematic destruction of historical sites reminiscent of lasting peaceful coexistence, such as the state and university library in Sarajevo and the mosques in Banja Luka and elsewhere throughout the country. They were evidence of multiethnic experience in history that were to be destroyed, because they contrasted with the goal of creating ethnic homelands with a homogenous population according to the Western model of the nation-state.[12]

A rigid institutional separation of the three groups within a common frame was therefore considered the only possible way of promising stabilization for the physical reconstruction of the country. Thus, to end the war territorial division in two "entities" was imposed by the international community; the ceasefire line became the "Inter-Entity Boundary Line (IEBL)".[13] From the very beginning, however, this "ceasefire logic" contrasted with the second declared objective: restoring the prewar multiethnic society. Accordingly, operations of ethnic cleansing should not be recognized or rewarded,[14] and the problem of refugees and internally displaced persons had to be resolved by guaranteeing the right to return to their prewar homes.

The constitutional transition of Bosnia and Herzegovina starts with the imposition of a new constitutional order as Annex 4 to the Dayton Peace Agreement. However, this constitution recognizes two pre-existing constituent territorial units that had been established during the war, as well as their constitutions: the *Republika Srpska* (RS) and the Federation of Bosnia and Herzegovina (FBiH). The former had been established declaring its independence in reaction to the recognition of Bosnia and Herzegovina's independence; the latter had been founded in Washington in 1994 in a peace agreement between Bosniaks and Croats, ending two years of war between them.[15]

As an outcome of diplomatic negotiations in Dayton, Ohio, the DPA had been signed in Paris in December 1995 by the "War Presidents" Izetbegović (Bosnia), Tudjman (Croatia), and Milošević (Yugoslavia), who represented the three major groups in conflict, but also Bosnia and Herzegovina and its two neighbours, Serbia and Croatia. The kin states of Bosnian Croats and Bosnian Serbs exerted considerable influence by supporting their ethnic kin from outside. The signatures under the agreement can therefore be considered a recognition of the three titular or "con-

12. These objectives were set by the then leadership of Croatia (Tudjman) and Serbia (Milosevic) in 1991 ("Karadjordjevo" plan); the Bosniaks (still called "Muslims" at the time) were to be assimilated in one of the two parts of the divided state.
13. The 49%-51% division of the territory reflected the military situation after the NATO airstrikes and was facilitated by the fact that actually no party had succeeded in making major territorial gains.
14. War criminals should be arrested, indicted, and put on trial before the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague (see http://www.icty.org/).
15. Their constitutions have been adopted as constitutions of "sovereign" states before the DPA. The RS declared its independence on 28 February 1992 and adopted its constitution on 07 April 1992; the FBiH has its origins in the Washington Agreement between Bosniaks and Croats (18 March 1994) and was approved three months later by a constituent assembly on 24 June 1994.

stituent" peoples of postwar Bosnia, who are forced together in one state the international community wanted to preserve against the declared objectives of at least two of the groups.

Given this situation, it is no surprise that the "Dayton Constitution" has never been democratically legitimated, neither by a referendum, nor by a ratification by the two pre-existing entities that became the constituent units of BiH.[16] The massive military and civilian presence of the international community determined to oversee, guarantee, and assist the implementation of the DPA can therefore rightly be considered a substitute for this democratic deficit; the international community has therefore been considered as "fourth constituent part".[17]

As a negotiated, international peace agreement and instrument of conflict settlement, the DPA is characterized by compromise and the necessity to end a war. Besides military issues, all possible kinds of civilian aspects are regulated in its 11 annexes, and various civilian authorities with international components were established to facilitate, guarantee, and monitor the implementation process:[18] the OSCE for the organization of elections (Annex 3), the Constitutional Court with three international judges (Annex 4, Art. VI), the central bank with an international governor (Annex 4, Art. VII), the Human Rights Commission (HRC; Annex VI, Art. II), the Real Property Claims Commission (Annex 7, Art. VII), the High Representative (Annex 10) and the International Police Task Force (IPTF; Annex 11).

3. The Dayton Peace Agreement: Static and Dynamic Elements

There is an underlying tension in the DPA between static and dynamic elements. Preserving the *status quo* at the end of the war, the constitution provides an institutional framework for guaranteeing a "negative" peace through segregation and mutual control. However, the references to international standards in human rights protection as well as the progressive return of refugees and internally displaced persons add a dynamic dimension to its implementation that often contrasts with the static elements.

16. This also explains why the only official version of the DPA, and even of the constitution, is in English and has never been translated into the "local language(s)", sometimes creating problems in interpretation.
17. S. Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention* (Oxford University Press, Oxford, 2002).

3.1 The Federal System: Strong Periphery and Weak Centre

Bosnia's federal system[18] is based upon the dominant role of the two "Entities" (not member states)[19] that exercise all powers and functions not expressly assigned to other authorities (Art. III.3.a Const.). In the field of foreign affairs, the Entities, *Republika Srpska* (RS) and the Federation of Bosnia and Herzegovina (FBiH), are expressly allowed to establish and maintain independent relations with neighbouring states, which includes agreements with these states and international organizations.[20] This should obviously preserve and facilitate their "special" relations with the respective kin states.[21] In addition, the close to complete fiscal and financial autonomy permits independent action of the Entities. By contrast, the BiH constitution only contains basic principles regarding the resources of the central government, one third of which have to be borne by the RS and two thirds by the FBiH.[22]

Both Entities have created complete state-like institutional structures, each with a president, government, legislative institutions, and a judicial system. However, their territorial organization is strongly asymmetrical. The RS is centralized and unitary, whereas the FBH is itself a federal system, consisting of 10 cantons with a wide range of powers and their own constitutions (eight cantons are rather homogenous in ethnic terms; only two are "mixed"). Accordingly, the RS initially had only one parliamentary chamber, the National Assembly, whereas the FBiH's federal structure is reflected by its bicameral system consisting of a House of Representatives and of a House of Peoples, the latter representing the interests of the 10 cantons.[23] The equal constitutional status of Bosniaks and Croats in the FBiH is symbolically expressed by the rotation between president and vice-president of the two houses as well as in the office of Prime Minister of the Entity.

18. However, the state is not explicitly defined as "federal". Often, the continuity with the republic is used as an argument to deny the qualification of the state as a "federal system" despite its evident federal elements. Thus, in Bosnia the federal level is referred to as "state", and the term 'federal' is reserved for the "Federation of BiH" (one of the Entities).
19. In fact, the abstract term "Entities" shall avoid any reference to a "State"-like character of these territorial units. This however has been contested until today by the RS leadership which insists on BiH as a "union of Entities" that have state-like character.
20. These relations or agreement are subject to the approval by the state parliament (Art. III.2.d) and counterbalanced by the obligation of the entities to provide the support to the central government necessary for the respect and the implementation of international obligations (Art. III.2.b).
21. RS and Serbia as well as FBiH (in particular Herzegovina) and Croatia. Agreements on special relations were concluded between FBiH and Croatia in 1998 and between RS and the then Federal Republic of Yugoslavia in 2001; for the texts, see http://www.ohr.int.
22. Articles III.2.b and VIII of the BiH Constitution.
23. The 74 members of the House of Peoples are elected by the cantonal assemblies; quotas guarantee the equal representation of Bosniaks and Croats (30 members each, plus 14 "Others").

Despite their strong position vis-à-vis the state, both Entities have been not able to effectively control all of their respective territory.[24] A special status has been awarded to the Brćko District, which in 1999, has been declared a territory under international supervision, in an international arbitration award because of its strategic importance.[25]

Compared with the powers of the Entities, those of the state are rather modest and comprise only foreign policy, foreign trade relations, customs, currency, refugee policy, parts of the financial policy, international and inter-entity criminal-law enforcement, air traffic control, and communication; further functions and powers can be transferred by agreement between the entities (Art. III.1.), but this has not happened in practice.

The weak and underdeveloped state institutions are the result of the intention of keeping the state to a bare minimum rather than creating efficient and functional institutions.[26] Accordingly, the supremacy clause, which should guarantee the legal integration of BiH by establishing the supremacy of the constitution over all other sources of law including the Entity constitutions (art. III.3.b.) and the obligation of bringing the latter in line with the state constitution (Art. XII.2.), have been substantially disregarded.

The participation of the constituent units in the decision-making process of the state is guaranteed through a second chamber for the representation of territorial interests, but already, its name, "House of Peoples", is alluding to the predominance of ethnic interests in this institution. The head of the state is a tripartite presidency (Art. V.2) whose members, one for each constituent people, are directly elected and rotate in the office of the acting president.[27] The Council of Ministers is nominated

24. The highly decentralized cantonal structure of FBiH facilitated the creation of parallel institutional structures, the preservation of Croat military units, and direct political, institutional, and financial relations with Croatia, which interfered in Herzegovina until the end of the Tudjman era, although not openly. The political centralization of RS has not been matched with geographical integration, because the latter entity consists of two separate areas that are connected only through the city of Brčko in northern Bosnia. See F. Bieber, *Governing Post-War Bosnia and Herzegovina*, in K. Gál (ed.), *Minority Governance in Europe* (Local Government and Public Reform Initiative, Budapest 2002), 328 ff.
25. Brčko Arbitration Tribunal for Dispute over Inter-Entity Boundary in Brčko Area, Final Award (5 March 1999), para. 1 e 11, attributed Brčko a status similar to the District of Columbia in the United States, but with an international supervisor. Its special status has been "constitutionalized" in 2009, art. VI(4) which ended international supervision and established Brčko-district as a unit of local self-governance under the sovereignty of the State; see M. Parish, *A Free City in the Balkans: Reconstructing a Divied Society in Bosnia* (I.B. Tauris, London, 2009).
26. This is clearly seen in the initial lack of state powers regarding defense, as well as in its total dependence on financial transfers from the Entities; both were mainly guaranteed by the international community itself.
27. The candidates for office have to declare their group affiliation and are elected in "their" territories: the Serb member is elected by voters in RS, while voters of FBiH elect the Bosniak and Croat member.

by the presidency after approval by the House of Representatives; its weak position is already visible in the lack of a separate provision.[28]

In sum, the DPA has created an extremely weak frame of state institutions, which totally depends on the two Entities. However, their territorial representation in the state institutions is mainly used for ethnic representation. By the creation of de facto "ethnic homelands", this "ethnic federalism" predominantly guarantees the autonomy of the constituent units and – implicitly – of the three constituent peoples, rather than facilitating integration into the state or efficient governance.

3.2 Strong Institutional Safeguards for Ethnicity

In a context in which ethnicity is an important factor, the institutional recognition of groups is a necessary "correction" of liberal democracy based upon individual rights. The institutional system established at all levels of government in Bosnia is characterized by "consociationalism" or power sharing.[29] In a segmented society, elite cooperation shall be facilitated through the representation and participation of all groups in public life. At the same time, the autonomy of the groups shall be guaranteed regarding decisions (particularly or only) affecting them, as well as veto rights for the protection of important interests.

The federal system guarantees a high degree of autonomy for the groups (on a territorial basis): it assigns most of the responsibilities to the Entities, including even some traditionally related to statehood (such as the military, police, etc.). This autonomy has above all been used for blocking anything that would strengthen the institutions of the state.[30]

Parity of the three constituent peoples is the main scheme in the state institutions. Thus, equal participation of their representatives in government is guaranteed through the tripartite presidency and the rotation of its chair, through the requirement that ministers and deputy ministers must not be of the same group, and by the

28. The Council of Ministers is part of the article on the presidency (Art. V.4). Furthermore, the constitution only mentions two ministries (Foreign Affairs and Foreign Trade); only after 2000 have further ministries been added.
29. See for this concept, A. Lijphart, *Democracy in Plural Societies* (Yale University Press, New Haven, CT, 1977); A. Lijphart, *The Power Sharing Approach*, in J.V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies* (Lexington Books, New York, 1991), 492–494; F. Bieber, *Recent Trends in Complex Power-Sharing in Bosnia and Herzegovina*, in Eurac/ECMI (eds.), *European Yearbook of Minority Issues*, vol. 1, 2001/2002 (Kluwer Law International, The Hague, 2003), 269–282; S. Wolff, *Complex Power Sharing as Conflict Resolution: South Tyrol in Comparative Perspective*, in J. Woelk, F. Palermo, J. Marko (eds.), *Tolerance through Law. Self-Governance and Group Rights in South Tyrol* (Martinus Nijhoff-Brill, Leiden and Boston, 2008), 329–370.
30. This is particularly evident with regard to the possibility of transferring powers from the Entities to the state. This "dynamic" feature of the constitution (art. III. V a) has not been used, except in cases in which laws and subsequent new institutions were imposed by the High Representative.

prescription that no more than two thirds of the government's components can be from FBiH.[31]

As in the Federation, the parliament of the state consists of two chambers. The 42 members of the House of Representatives are elected in separate caucuses by the population of the *Republika Srpska* (one third) and in the Federation (two thirds). This parity scheme – two Entities, three constituent peoples – is also applied to the House of Peoples: five members are delegated by the RS National Assembly and ten members by FBiH. The equal representation of constituent peoples includes the chair of both houses, with a rotating system of one chair and two vice-chairs.

According to the theoretical model of power sharing, proportionality should be the basic standard of political representation, public service, appointments, and allocation of public funds. However, the rigidity of the parity scheme excludes the representation and participation of "Others" (i.e. those who are not affiliated with one of the constituent peoples): neither the constitution nor the DPA defines roles for citizens not belonging to one of the three peoples or of mixed ethnic heritage.[32]

The consociational approach is also reflected by three different kinds of veto rights for the protection of essential group interests. The first is at the legislative level. Decisions are generally made by a simple majority vote in both houses.[33] Although a general quorum shall guarantee the participation of a minimum of group representatives,[34] the representatives of each Entity may also express a suspensory veto,[35] which can turn into an absolute one, if in the second voting procedure two thirds of the members representing one entity vote against the decision (Art. IV.3d).

The second veto mechanism is in the House of Peoples. Each of the constituent peoples may block any decision by declaring that an issue touches upon a "vital interest".[36] In the case of doubts expressed by a majority of another group regarding such a statement, a compromise shall be worked out within five days in a Joint Commission (one member selected by the delegates of each ethnic group). If this attempt proves

31. For a comparative analysis, see F. Bieber, *Institutionalizing Ethnicity in Former Yugoslavia: Domestic vs. Internationally Driven Processes of Institutional (Re-)Design, 2 The Global Review of Ethnopolitics* (January 2003), 3-16.
32. Thus, members of other ethnic groups and individuals refusing to declare their affiliation with one of the three peoples cannot stand as candidates for the post of delegate or member of the presidency, a clear violation of minority protection standards as well as the principle of equality of citizens.
33. Both Houses have to approve all decisions on legislation, budgetary issues, ratification of international treaties, and coordination with the Entities.
34. In the House of Representatives, a majority has to be present; in the House of Peoples, at least nine members (three of each constituent people).
35. If a cross-community minimum approval of at least one third of deputies from each Entity cannot be achieved, the chairs of each House are obliged to present a re-elaborated draft within three days. If this fails to win approval, a simple majority is sufficient for the adoption of the decision.
36. A majority within the three groups of present members is required (Art. IV.3e). This means that for a veto on legislation, an ethnic group of delegates constituting only 20% of the House of Peoples is sufficient.

impossible, the Constitutional Court has to decide on the vital interest issue (Art. IV.3f).

Third are the practically important extensive *de facto* veto powers of the presidency stemming from the requirement of unanimity for decision-making (Art. V.2c): in fact, agreement is often impossible, as the three members are elected independently from any intention to act as a coalition. Although decisions may be made by two members only, this carries the risk of an appeal by the out-voted member to the parliament of the respective Entity; the Entity parliament can block the State presidency's majority decision by a two thirds majority.

Frequent (ab)use of these extensive veto rights has often effectively blocked any state action between 1995 and 2000 and further weakened an already structurally weak central government.[37] This contributed to the continuous disintegration of the state, while both Entities operated nearly independently from each other. In the institutions, there is no true distinction between the representation of territorial and of group interests. According to the delegation of its members by the Entities, the House of Peoples should be expected to represent territorial interests. However, in reality "Entity voting" in the House of Representatives, as well as the "Entity veto" in the presidency, are the true instruments of protection of territorial interests (which are often considered identical to ethnic or group interests).

3.3 Dynamic elements for equality and justice

The peculiar Bosnian combination of ethnic federalism and power sharing established by the DPA clearly demonstrates the risks in the lack of counterweights to the necessary recognition of ethnicity. The far-reaching autonomy of the groups in territories considered ethnic homelands is not matched by integration at the state level; defensive guarantees outnumber incentives for cooperation; and identification with and domination of parts of the territory by groups continue to prevail. They are facilitated by the highly complex system of institutional separation, which is neither functional nor cost-effective.[38]

The ethnic structures and segregative institutional mechanisms are elements favoring the preservation of the *status quo*. They contrast, however, with the declared objective of the international community to restore the prewar multiethnic society, for the sake of "justice" and long-term stabilization. The system of ethnic democracy in favour of the three constituent peoples also neglects the rights of citizens not be-

37. The veto has mostly been used by those groups who had no interest in strengthening the common state, especially Croat and Serb nationalists (see Study of the Konrad Adenauer Foundation, *Evaluation of decision-making in Parliamentary Assembly of BiH 1996-2007*). Often the primary loyalty of political representatives in state-level institutions lies with the Entities, where the "real power" is exercised, with the national groups they represent, and – most importantly – with the nationalist political party they represent.

38. There are 13 governments and constitutions, parliaments, constitutional courts, etc., at the state, Entity, and canton levels, plus the special district of Brčko (in a country of 4 million inhabitants!). It is estimated that 60% of the GNP is needed to maintain this gigantic institutional apparatus.

longing to one of the constituent peoples,[39] and it contrasts with other constitutional principles, such as the democratic principle and the rule of law.[40] As dynamic elements, these objectives, rights, and principles represent the other dimension of the DPA that aims to address and remediate the injustices created by war.

The objective of a truly multinational state should be progressively achieved by encouraging and actively promoting the return of refugees and displaced persons to their pre-war residence. The right to return is expressly mentioned in the constitution in the article on Human Rights and Fundamental Freedoms (Art. II.5.) and specified in Annex 7 of the DPA. Often the demographic situation has changed during the war, and the "minority returns"– i.e., returns to areas now ethnically more homogenous or with a majority of another group – should not only address the individual right of refugees and displaced persons regarding their property, but should also gradually change the demographic picture into a more diverse one. Implementation and the effective use of the right to return more often than not have been met by resistance from the local (majority) population and by the authorities. This explains why, until 2000, no relevant numbers of returns had been registered.[41] One means of overcoming this resistance was to allow the returnees, independently from their effective return, to vote in their pre-war residence. The objective was to make political representation more diverse than the actual population distribution by adding a virtual community of former inhabitants to the current, often ethnically more homogenous, one and consequently changing – at least virtually – the ethnic composition of the local community. Again, the problem was how to break the ethnic identification of the territory.

More generally, human rights protection is linked to the issue of return as a further dynamic element requiring gradual implementation and reforms. The constitution expressly refers to the guarantee of international standards in human rights in Article II.2., which provides for the direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its protocols and their "priority over all other law".[42] Human rights protection is thus directly linked to international standards and principles and constitutes an important source of legitimacy of international intervention and interference. In fact, the international standards were additionally guaranteed by a "mixed" composition of

39. Despite the formulation in the preamble expressly including them: «Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows: [...]».
40. Art. 2 of the BiH Constitution: «Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.»
41. Regarding the situation, see United Nations High Commissioner for Refugees, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford University Press, Oxford, 2000), 232; International Crisis Group (ICG), *Bosnia's Refugee Logjam Breaks: Is the International Community Ready?*, ICG Balkans Report, no. 95 (Sarajevo/Washington/Brussels, 2000), 2-5.
42. In absence of a Bosnian catalogue of human rights, Annex 6 of the DPA contains an appendix that lists 14 international human rights instruments. For an overview, see P.C. Szasz, P.M. Moore, P.H. F. Bekker, *The Protection of Human Rights through the Dayton/Paris Agreement on Bosnia*, 90 AJIL (1996), 305-311.

"international" (i.e. foreign) and domestic members in the Human Rights Chamber (HRC), in the Constitutional Court, and in the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). In all these institutions, two thirds of domestic members decided together with one third of "international" ones (i.e. either Bosniaks, Croats or Serbs, or foreigners). According to the pattern of parity, two thirds of the domestic members are nominated by the FBH, one third by the RS.[43]

Complexity and coordination were further problems as numerous bodies dealt with the protection of human rights in general or in specific cases, at the state level and at the entity level: in the three constitutions, altogether 10 different organs were expressly charged with dealing with human rights violations.[44] This institutional pluralism did not produce "effective" protection of the individual, but rather created confusion as to which remedy to use while contributing to delay final and binding decisions. Until the end of the mandate of the HRC, it was also not clear which institution had the "final" say.[45]

However, as counterweights to the static elements of "ethnic democracy"[46], the progressive introduction or strengthening of the dynamic elements required changing the original situation created with the DPA. This raised the question of where change might come from.

4. CORRECTIONS FROM THE OUTSIDE: IMPOSING CHANGE

The problems with the effective implementation of the dynamic elements of the Dayton system highlight the absence of non-ethnic, non-nationalist – i.e. "Bosnian" – actors and the general lack of a "civic" understanding of the state and its institutions. The nationalist political forces did not have any interest in change and reacted with

43. The international constitutional judges and members of the HRC were nominated by the president of the European Court for Human Rights in Strasbourg. The work of the HRC has been directly based on Annex 6 of the DPA (see http://www.hrc.ba) and the work of the CRPC on Annex 7 of the DPA (http://www.law.kuleuven.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm).
44. At the state level: the Constitutional Court, the ombudsperson, the Chamber of Human Rights (Annex VI) and the CRPC (Annex VII); in the federation: the Constitutional Court, the Supreme Court, the Human Rights Court, the federation ombudsmen, and the Federation Implementation Council; and in the Republika Srpska: the Constitutional Court and the Supreme Court.
45. It was by no means clear from text of the constitution whether this authority is vested with the Human Rights Chamber or the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court declared appeals against decisions of the Human Rights Chamber inadmissible in cases U 7/98 through U 11/98 in *Official Gazette of Bosnia and Herzegovina*, Nr. 9/1999. In 2004, the HRC's mandate ended, and the responsibility for claims of human rights violations has been transferred to the Constitutional Court.
46. According to the concept illustrated in S. Smooha, P. Järve (eds.), *The Fate of Ethnic Democracy in Post-Communist Europe* (European Centre for Minority Issues and Local Government and Public Service Reform Initiative Budapest, Budapest, 2005).

obstruction. Their continuous resistance risked to block virtually everything and had to be contrasted by the two institutions that, by their mandate, guarantee the coherence and existence of the whole system established by the DPA.

Final authority within the constitutional system is exercised by the Constitutional Court, which decides on all controversies between the state and the entities as well as on issues referred to it by each member of the presidency, the president of the Council of Ministers, the chair or deputy chair of each chamber of parliament, or a quarter of all members of each chamber, at either the state or entity level (Art. VI.3a).[47] The "mixed" composition of the Constitutional Court – three "international" judges in addition to the usual parity pattern (two judges appointed by RS and four by the FBH) – reflects serious international concerns about the fragility of the Dayton scheme and its implementation (Art. VI.1a).[48]

Final authority for the interpretation of the DPA and the coordination of the civilian aspects of its implementation is vested with the Office of the High Representative (OHR) of the international community, established by Annex 10 of the DPA.[49] In 1997, the High Representative was vested with extraordinary powers of coercion:[50] these "Bonn powers" include the authority to impose laws in substitution of the ordinary procedures and to remove obstructionist politicians or civil servants from office. Between 1998 and 2005, more than 750 decisions have been adopted and all major laws have been imposed by unilateral decree of the High Representative. These included functional and technical reforms regarding the judicial system and the defense organization; strengthening state institutions; and laws on citizenship, state symbols, the state flag, passports and identity cards, license plates, etc.,[51] which have a symbolic dimension besides effectively guaranteeing the freedom of movement throughout Bosnia and Herzegovina.

47. In its rules of procedure, the court decided by majority vote that decisions were to be taken by a simple majority without any further requirement or ethnic or other veto. See Constitutional Court, Rules of Procedure, Art. 35 (http://www.ustavnisud.ba/en/rp/default.asp).
48. The three "international" judges are nominated by the president of European Court of Human Rights.
49. The first High Representative was been nominated by the International Peace Implementation Conference in London, December 1995, afterwards confirmed by the UN Security Council; thus the institution is a strange hybrid, because it is not totally resolved whether it represents the UN or the "international community" in general (a legally undetermined and open concept).
50. Conferral of the "Bonn powers" has been decided by the Peace Implementation Council (PIC), an international forum of 55 states supporting the peace process in Bosnia and monitoring the activities of the High Representative. A steering board meets regularly and provides strategic guidelines for the international community's action in BiH; see http://www.ohr.int/pic/default.asp?content_id=38563.
51. See for a list of all decrees adopted http://www.ohr.int/decisions/archive.asp. The removals of obstructionist politicians from office even included presidents and prime ministers.

4.1 Strengthening the Multinational System

Five years after the DPA, in 2000, the Constitutional Court addressed the multinational character of the country and its dysfunctional institutions in a landmark judgment, generally known as the "constituent peoples" case.[52] In 1998, the then Bosniak chair of the presidency, Alija Izetbegović, claimed that a number of provisions of both the Entity constitutions were in contrast with the constitution of the state of BiH. The essential question was whether a multinational system could be legitimately grounded on an absolute partition of power along territorial lines, i.e. de facto on three mono-ethnic subsystems.[53] In concrete terms, the question to decide was whether the formulation in the preamble of the state constitution – «Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina […]» – meant their equality only at the state level or whether it gave these three peoples equal status throughout Bosnia and Herzegovina, at all levels.

The court answered by drawing a clear distinction between constituent peoples and the constitutional category of a national minority (at 63). From this distinction follows a constitutional obligation of the Entities not to discriminate against those constituent peoples of the state who are, as a matter of fact, a numerical minority within their territory (i.e., Serbs in the Federation, Bosniaks and Croats in the *Republika Srpska*). Thus, the principle of nondiscrimination does not only apply to individuals,[54] but also to groups as such, prohibiting special adverse treatment. A principle of "collective equality" of the constituent peoples «prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation».[55]

Focusing on human rights violations, as a common practice in the Entities, and in particular, on the right of refugees and displaced persons,[56] the court cited the domination of institutions in the Entities (especially government, the courts, and police) by privileged peoples to illustrate the discriminatory effect of the contested provi-

52. Bosnia and Herzegovina Constitutional Court judgment, Case no. U 5/98-III (1 July 2000), in *Službeni glasnik* (Official Gazette) no. 23/2000, 14th September 2000, at http://www.ustavnisud.ba/eng/odluke. See the analysis by the judge *rapporteur* in the case: J. Marko, *'United in Diversity'?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina*, 30(3) *Vermont Law Review* (Spring 2006), 503–550.
53. At that time, no Serb was elected in the institutions of the FBiH or as a representative of the FBiH in the institutions of the state, and the same was true for Bosniaks and Croats in the RS.
54. As established in Art. II.3 and 4 of the BiH Constitution.
55. At 59 and 60. The court ruled that «despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination, national homogenization or a right to uphold the effects of ethnic cleansing» (at 61).
56. The right to «voluntary return and harmonious reintegration, without preference for any particular group» is provided for in Annex 7 of the DPA (Art. II.1).

sions in the entities' constitutions.[57] Therefore, the provisions of the Entities' constitutions, which declare only one or two peoples as constituent in the respective entity and ensure a more favorable treatment of those peoples in the governmental structure of the Entities, were declared unconstitutional due to the violation of the constitutional principle of collective equality.[58] The court did not simply confirm the static elements of the territorial and ethnic compromise found in Dayton, but also strengthened the dynamic elements in the DPA – the return of refugees and IDPs – as a means for rebuilding a truly multiethnic society. With this interpretation, the court went well beyond the text of the constitution, by integrating it with sources of international law.[59]

Using the principle of parity as the very foundation of Bosnia's multinational system in order to avoid any discrimination and to prevent the creation or preservation of ethnic homelands has been confirmed by the constitutional court in further important decisions on place names,[60] symbols of the Entities,[61] etc. In the case on symbols, the court confirmed the right of the groups to preserve their traditions, culture, and identities, also through legislative means (laws on flags, coat of arms, hymn, religious holidays), but reminded the legislators of the Entities that this right is for all three constituent peoples. Consequently, it is not possible to preserve the national symbols of only one constituent people in one Entity, because this means the exclusion of those of the other two constituent peoples.[62]

4.2 Strengthening the State for Making It Functional

Often overlooked is another important aspect of the constituent peoples judgment: the Constitutional Court recognized a state framework legislation in some subject matters that otherwise would fall into the exclusive powers of the Entities. Accord-

57. The judges pointed to population figures to demonstrate that these constitutions established discriminatory frameworks aimed at discouraging return. For instance, the government of RS was composed only of Serbs (21 members out of 21), and the same was true for police forces (93,7%) and judges (97,6%); analogous figures were in place in FBiH. See at 92 (RS) and at 137 (FBiH).
58. In addition, Article 5 of the UN covenant against racial discrimination of 1966 (right to equal access to governmental posts) was seen as violated.
59. Referring to the other annexes of the DPA and to the international sources mentioned in the constitution, in particular those related to human rights protection, which consequently, because of their supremacy, can be considered supreme constitutional principles.
60. Const. Court of BiH judgment U 44/01, 27 February 2004. See D. Feldman, *Renaming cities in Bosnia and Herzegovina*, 3(4) *International Journal of Constitutional Law* (2005), 649-662.
61. For example, Const. Court of BiH case U 4/04 (partial decisions from 30 March 2006 and 18 November 2006). See for a profound analysis of the Constitutional Court's case law, C. Steiner, N. Ademović, *Kompetenzstreitigkeiten im Gefüge von Dayton*, in W. Graf Vitzthum, I. Winkelmann (eds.), *Bosnien-Herzegowina im Horizont Europas* (Duncker & Humblot, Berlin, 2003), 109-147
62. In a recent decision, the Court declared a national holiday in RS unconstitutional, as it was the religious holiday of only one constituent people (St. Stephen, for Serbs) as well as the date (9 February) in which RS in 1992 had declared its independence from Bosnia, November 2015 (U-3/13).

ing to the Court, the particular importance of some matters for the (economic) integration of the whole system, as well as the necessity of strengthening the powers of the state institutions, for avoiding separation and guaranteeing the minimum base for the functioning as a state require the joint responsibility of all levels of government.[63] Going beyond the limited catalogue of state powers (art. III), and based on systematic arguments, the court interpreted the constitutional competence lists as "open", in particular, for guaranteeing equal levels of human rights protection throughout the country (e.g. by determining minimum standards)[64] and a functioning economic integration in order to effectively realize and guarantee the fundamental economic freedoms in the constitution of the state.[65]

Among other important legislation, the value added tax was introduced on this basis,[66] as well as the State Border Service[67] and a state court.[68] The latter was part of a comprehensive reform of the judiciary at all levels.[69] To further strengthen the government of the state, the High Representative also adopted a decree on the reform of the Council of Ministers that ended the rotation for its chair, introducing a four-year term corresponding with the legislature, and established new ministries (Justice and Security).[70] Of utmost importance for the internal situation, but also for BiH's future integration in NATO's Partnership for Peace process was the unification of the defense forces and the creation of a political and military command structure at the state level.[71]

63. BiH Constitutional Court judgment, Case no. U 5/98-IV (fourth partial decision); the decision was based on the precedent of the *Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina* imposed by the High Representative in 1998.
64. In Constitutional Court case no. U 5/98-IV, at 24 and 34. The Court confirmed the (implicit) power of the state to determine minimum standards regarding the regulation of the official use of languages, which was part of the exclusive competencies of the Entities but had been used in a discriminatory way.
65. Art. I.4. Constitution BiH guarantees the free movement of persons, goods, services, and capital. A Framework legislation of the state might be necessary to guarantee the fulfillment of the Entities' obligations and to remove obstacles to the common market; Constitutional Court case no. U 5/98-IV, sub 31 and 34.
66. The state VAT (17%) has applied since 1 January 2006.
67. The SBS was created by decree in January 2000 after the BiH Parliament had failed to adopt the respective law by the end of 1999.
68. The state court, consisting of a civil, criminal, and administrative section, has been established by a decree of the High Representative (12 December 2000). It judges in all controversies concerning legislation of the state as well as Court of Appeal against first-grade decisions of entity courts; in 2005, a special War Crimes Chamber was established for cases transferred from ICTY in The Hague.
69. The reform of the judicial system has been substantially imposed by the High Representative, who established an Independent Judicial Commission in 2001 for the coordination of all reform activities. In 2004, even amendments of the Entity constitutions have been imposed for establishing two High Judicial and Prosecutorial Councils; some months later, the same institution was also established at state level, but without constitutional amendment.
70. In December 2002. A further reform of the Council of Ministers aiming at strengthening decision-making procedures was imposed in October 2007.
71. In fact, until 2003 each Entity had maintained control over "its" army (in the FBiH, separa

4.3 International Protectorate?

The landmark ruling in the constituent peoples case strengthened the dynamic elements in the implementation of the DPA. The judgment would have been impossible if a minority veto had existed within the Constitutional Court: in fact, a narrow majority of the three "international" and the two Bosniak judges voted in favor, against the four votes of the Croat and Serb judges.[72] Thus, implementing the decision was no priority, and the necessary amendments of the Entity constitutions were not adopted.

After a series of deadlines for the amendment of their constitutions were missed by both Entities, and after a political agreement on the principles of the court decision that the parties would have to comply with, in the end, the High Representative imposed the necessary constitutional amendments.[73] The imposed constitutional amendments recognized Bosniaks, Croats, and Serbs as constituent peoples in both Entities and reduced the institutional asymmetries by creating an upper house in RS and two vice presidential posts in each Entity, creating representation of all three constituent peoples (the holders of the three offices were required to come from different constituent peoples). For the first time, "vital interests" was defined (education, religion, language, culture, promotion of tradition, and equal representation in government institutions) as well as the procedures to protect these interests in order to limit their obstructionist abuse. Paradoxically, the need to respect the "collective equality" of all constituent peoples led to an even more rigid scheme than before because of the introduction of a "constitutional principle" of proportional representation for all ethnic groups in the "public institutions", in particular in ministries and administrative authorities at the Entity, cantonal, and municipal levels and in the courts of both Entities.[74]

Because of their impact on ethnic issues, the implementation of a number of further judgments, in particular those regarding place names and national symbols in the Entities had also been blocked, in some cases for months and despite repeated judgments setting deadlines. In the end, in most cases the controversial rulings had to be imposed by the High Representative by decree.

te Croat and Bosniak units continued to exist). In May 2003, the High Representative established a Defense Reform Commission composed of 12 local and international members; in December 2003, reform legislation based on the Commission's recommendations was adopted by the BiH Parliament.

72. Consequently, the Court's decision was condemned by most Serb parties, but was welcomed by the Bosniak parties as well as by the international community.

73. On 19 April 2002, High Representative Wolfgang Petritsch, in his last days in office, imposed all amendments of the FBiH Constitution (first decision), corrected shortcomings of the RS Constitution (second decision) and – in light of the October 2002 elections – amended the election law according to the previous constitutional amendments (third decision). See, for a critical analysis, European Stability Initiative, *Imposing Constitutional Reform? The Case for Ownership* (Berlin, Sarajevo, 2002).

74. See for a detailed analysis, F. Bieber, *Towards Better Governance with More Complexity? The 2002 Constitutional Amendments and the Proliferation of Power Sharing in Bosnia and Herzegovina*, in C. Solioz, T.K. Vogel (eds.), *Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina* (Nomos, Baden-Baden, 2004), 74-87.

The massive use of the Bonn powers between 2000 and 2006 soon triggered an intense debate on the nature of these powers, on the sustainability of imposed change, and on the accountability of the international actors. In fact, assuming an active role rather than remaining an external supervisor and coordinator, the High Representative had himself become part of the game as an institutional actor. By frequently substituting Bosnian institutions, he was able to unblock a number of crucial issues and to adopt necessary reforms, in particular for strengthening the common state institutions. But at the same time, this played into the hands of elected nationalist politicians, who would simply blame the international community for the consequences of decisions they had tried to prevent for the sake of the interests of their group. International imposition often appeared to be in contrast with democratic legitimacy.[75] Furthermore, it had negative effects in terms of sustainability: because the threat of international substitution was always present, politicians had ever fewer incentives for compromise and agreement on controversial issues. Thus, paradoxically, a more orthodox nationalist stance of most political parties was the undesired collateral effect of international intervention. Finally, difficult questions about the international community's own responsibility and accountability were raised because the High Representative was only subject to the mere political supervision by the Peace Implementation Council (PIC) Steering Board,[76] and because legal remedies against his decisions usually do not exist.[77]

In addition, the corrections to the DPA aimed at implementing it fully and making it work require answers as to which kind of state is to be built in Bosnia-Herzegovina. Reference to international standards is possible in some areas, such as human rights protection, but not for all issues. And the delicate balance between static and dynamic elements can hardly be found on a case-to-case basis. Rather a clear strategy is necessary. However, the truly political and not merely technical nature

75. See the analysis by the European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation of Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD (2005)004, 11 March 2005. The Venice Commission had received a mandate by the Parliamentary Assembly of the Council of Europe (CoE) to examine the conformity of the extraordinary powers with CoE principles.
76. The Constitutional Court declined its power to control the Bonn powers of the High Representative according to a concept of "functional dualism" of two institutions operating in different legal systems (judgment on case U 9/00, 29.9.2000, regarding the constitutionality of the Law on the State Border Service). However, in some cases it has stated the constitutionality of imposed legislation adopted within and on the basis of the constitutional order. Consequently, decisions about removal from office that are extra-constitutional are therefore beyond the control by the constitutional judges. See J. Marko, *Challenging the Authority of the UN High Representative before the Constitutional Court of Bosnia and Herzegovina*, in E. de Wet, A. Nollkaemper (eds.), *Review of the Security Council by Member States* (Intersentia, Antwerp, 2003), 113-117.
77. The lack of legal remedies is problematic under the principle of the rule of law, which the same international community promoted and established in the institutional system. An instructive example of de facto international "immunity" is the lustration process in the police forces carried out through a certification procedure by the IPTF; cf. European Stability Initiative (ESI), *On Mount Olympus. How the UN violated Human Rights in Bosnia and Herzegovina, and why nothing has been done to correct it* (Berlin, Brussels, Istanbul, February 2007), see http://www.esiweb.org.

of such a strategy, it inevitably raises the question of constitutional legitimacy, especially when taken without involving the population.[78] 10 years after Dayton, the interventions of the High Representative have been increasingly criticized as being no longer justifiable in terms of emergency powers, as benevolent dictatorship, or as a paternalistic international protectorate.[79]

In reality, the international community had already begun to drastically reduce its engagement, by means of the transfer of functions from international organizations or bodies either to Bosnian institutions or to the EU.[80] In most cases, international involvement had already been conceived in the DPA as transitional and was consequently brought to an end. This process of gradual fading out of other international actors left the High Representative in a more isolated and antagonistic position vis-à-vis the local leaders.

4.4 "Ownership" and EU assistance?

With the shift in the EU strategy after 1999, EU accession became a promise for the countries in the Western Balkans. Rather than powers of substitution, the perspective of EU integration should facilitate gradual reforms – being the creation of functional state structures conditional – and guarantee implementation and persuasion. Because a power vacuum had to be avoided, the concept of local "ownership", i.e. emancipation and full responsibility of Bosnian politicians, was advocated as essential precondition for preparing EU accession. Accordingly, a number of "technical" reforms have been required and adopted, such as in the public administration. Since 2005, the High Representative has also acted in the capacity of European Union Special Representative (EUSR); his coercive extraordinary powers remain limited to (the implementation of) the DPA and must not be used for swiftly adopting reforms requested by the EU.[81]

78. This is frequently criticized; see, in particular, David Chandler (ed.), *Peace without Politics? Ten Years of International State-Building in Bosnia* (Routledge, London – New York, 2006).
70. The debate on Bosnia has been deeply influenced by G. Knaus, F. Martin, *Travails of the European Raj, Lessons from Bosnia and Herzegovina*, 3 (14) *Journal of Democracy* (July 2003), 60–74, in which Paddy Ashdown's mandate as High Representative is compared to British rule in India. For the contrary position see International Crisis Group (ICG), *Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building*, ICG Balkans Report, no. 146 (22 July 2003); see also R. Caplan, *Who guards the Guardians? International Accountability in Bosnia*, in D. Chandler (ed.), *Peace Without Politics? Ten Years of International State-Building in Bosnia* (Routledge, London and New York, 2007), 157-170.
80. With regard to the transfer to Bosnian institutions since 2004, the Constitutional Court is responsible for human rights protection after the closure of the Human Rights Chamber and the State Court for the prosecution of war crimes (from ICTY). Regarding security, EUFOR (operation "Althea") took over from NATO's SFOR (December 2004), and EUPM from IPTF (January 2003).
81. For potential and limits of the EU's role, see, e.g. S. Recchia, *Beyond international trusteeship: EU peacebuilding in Bosnia and Herzegovina*, The European Union Institute for Security Studies, Paris, Occasional Paper no. 66 (February 2007); and S. Sebastián, *The Stabilisation and Association Process: are EU inducements failing in the Western Balkans?*, FRIDE Working Paper, no. 53, February 2008.

An instructive example is the demand of adopting a structural police reform (2005). Three principles were to be adopted and implemented in order to begin negotiations on a Stabilisation and Association Agreement (SAA). Exclusive legislative powers on police matters (and financial resources) had to be allocated at the state level, territorial operational districts had to be reorganized according to functional criteria, and guarantees against political interference with police work had to be reinforced.[82] The requests for such a reform moved from the fact that Bosnia's 15 different police authorities were considered too many, too costly, and too difficult to coordinate.[83] Police was seen as an expression of power of the respective majority population rather than as an efficient instrument of crime-prevention and prosecution. This also shows that police reform did not only regard mere technical issues. After defense reform, the police have remained the most visible sign of power remaining in the Entities. Thus, the reform's objective – taking away all powers from the Entities and transformation into a two-layered system (local and state police) – met staunch resistance. Obstructionist politics that made the reform process drag on for years clearly demonstrate that controversies that touch fundamental issues of the Dayton structures are inevitably transformed into battles about symbols (and power). Again, claims by the respective constituent peoples for controlling parts of the territory make a "functional solution" impossible as long as the necessary common frame for such a solution is not generally accepted.[84]

Because the process of police reform had stalled, the new High Representative, Miroslav Lajćak, presented his own proposal in August 2007. But even this "softer" version (criticized by experts for watering down the original requests) did not reach political consensus and continued to be the biggest obstacle to the signature of the SAA. Only in April 2008, Parliament adopted two laws on police reform (the High Representative's compromise version);[85] in June 2008, the SAA was finally signed.

These difficulties are an example for general stagnation in Bosnia's politics and the increasingly hostile rhetoric as well as obstructionist behaviour of its political leaders since 2006; vis-à-vis an international community that is far from speaking with one voice and acting in a uniform way. Contrary to the past and also because of the protectorate debate, in recent years much less use is made of the Bonn powers for imposing decisions.

82. EU Commission, EC feasibility study, 18 November 2003, COM (2003) 692 final Feasibility Study 2003, under «Item 7.6: Bosnia and Herzegovina must achieve a structural police reform with regard to rationalization of the police forces».
83. According to a functional review carried out by the commission in 2004, the police forces resulted in being divided, overstaffed (19.000 officers, 10% of public expenditure), and not capable of operating in the other entity.
84. However, the European Union itself is also partly to be responsible because it is difficult to identify a true European "standard" in police matters, e.g., there are 17 police forces (Federation and Länder) in Germany, and Catalonia and the Basque Countries have their own regional police forces.
85. The laws establish a new coordinating and supervisory authority, but do not provide for a centralization of police forces, leaving this issue to future police and constitutional reforms.

5. EU-MEMBER STATE-BUILDING: DOES SUSTAINABLE CHANGE REQUIRE CONSTITUTIONAL REFORM?

Going beyond the Dayton frame, the police reform also shows the limits of EU conditionality, which is based on voluntary adherence ("local ownership") and cannot be unilaterally substituted by coercive measures. The specific situation of the Western Balkan countries requires specific instruments as well as a tailor-made process for "EU Member State-Building".[86] Thus, in the case of Bosnia preparation for EU accession by means of overcoming the structural contradictions of the DPA and creating solid foundations for a sustainable multinational state is an important argument in favor of constitutional reform. Besides this functional outward-oriented reason, broad agreement between political leaders and within the population is also the only way to achieve emancipation from the international protectorate and to end the current phase of constitutional transition.

The debate on the legitimacy of the international protectorate has led to speculations regarding the closure of OHR and its complete substitution, on a different basis, by the EU(SR). The Peace Implementation Council (PIC) has clearly linked this scenario to the fulfillment of five objectives (State property; defense property; completion of the Brcko Final Award; fiscal sustainability; entrenchment of the Rule of Law) and two conditions:[87] signing of the SAA and a positive assessment of the situation in BiH by the PIC Steering Board based on full compliance with the Dayton Peace Agreement. The closure of the OHR and the end of the international protectorate thus depend on domestic guarantees for a functional state, which will make international guarantees superfluous. Although it is not formally a requirement for the closure of OHR, agreement on substantial constitutional reform as visible expression of local ownership would mean overcoming the imposed Dayton system and thus mark the end of transition.

5.1 What Has to Be Changed and How?

Regarding the content of constitutional reforms, already in 2005, the Venice Commission underlined the urgency of addressing the problems of the current constitutional structures (at 21 ff.) and the conformity of the BiH Constitution with the ECHR and the European Charter on Local Self-Government (at 66 ff.). The Commission also examined the conformity of the powers of the High Representative with

86. F. Bieber, *Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans*, 63 *Europe-Asia Studies* (2011), 1783-1802, and J. Woelk, *EU Member State-Building in the Western Balkans: (Prolonged) EU-Protectorates or New Model of Sustainable Enlargement? Conclusion*, 41 *Nationalities Papers: The Journal of Nationalism and Ethnicity* (2013), 469-482 (Special Issue: Europeanization, State-Building and Democratization in the Western Balkans).

87. Declaration of the PIC Steering Board, Meeting of the Political Directors, 27 February 2008 (at http://www.ohr.int/pic/default.asp?content_id=41352), confirmed in later meetings.

the standards of the Council of Europe.[88] Drastic reforms, in particular for strengthening the state institutions, are advocated in order to arrive at a reasonable equilibrium between the protection of the interests of the three constituent peoples and the necessity of an effective and efficient government. To this extent, the role of the House of Peoples is criticized as limited to the (preventive threat of an) exercise of the veto powers rather than representing the territorial interests. Also the abolition of the tripartite presidency, and the concentration of executive powers in the Council of Ministers are proposed. The Venice Commission criticizes the exclusion of the "Others", the dominant role of political parties based on ethnicity, and advocates a strong decentralization and simplification of administrative structures and decision-making procedures (reducing the ethnic veto powers).[89]

The Venice Commission concludes that the use of the High Representative's extraordinary powers has been beneficial from a political point of view, but «it is however certainly not a normal situation that an unelected foreigner exercises such powers in a Council of Europe Member State».[90] Because such a situation is «fundamentally incompatible with the democratic character of the State and the sovereignty of BiH [...] [t]he longer it stays in place the more questionable it becomes» (at 90). More and new legal remedies and control mechanisms should therefore be introduced (at 92 ff. regarding the removals from office); the use of the extraordinary powers should «gradually be abandoned, preferably in parallel with a constitutional reform making the legislative process in BiH more efficient» (at 91). In the long run, the mandate and powers of the High Representative should change from decision-making to mediation (at 100).

Ten years after Dayton, time seemed ripe for constitutional change. After preparatory negotiations, the US administration launched an initiative that led to a political agreement on four major constitutional amendments in March 2006:[91] (a) constitutional confirmation of the transfer of powers to the state, which had so far been imposed by the High Representative; introduction of a category of "shared com-

88. European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation of Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD (2005)004, 11 March 2005, at http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf. The Venice Commission had received a mandate by the Parliamentary Assembly of the Council of Europe.

89. Considering the importance of the entities, the Venice Commission suggests the abolition of the cantons or a transfer of their legislative powers to the federation.

90. Venice Commission, *Opinion on the Constitutional Situation*, cit. (at paragraph 86); «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.»

91. See the documents and comments on this process at http://www.daytonproject.org/publications as well as the comments by the Venice Commission: European Commission for Democracy through Law (Venice Commission), *Preliminary Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina*, CDL-AD (2006)027, 7 April 2006, and by J. Marko, *Constitutional Reforms in Bosnia and Herzegovina 2005-06,* in *European Yearbook on Minority Issues*, (Martinus Nijhoff, Leiden – Boston, 2007), 207-218.

petencies" between states and entities; and a "European affairs" clause in favor of state institutions;[92] (b) changes in the composition and procedures of the legislature, including the abolition of perfect bicameralism and a definition of the "vital national interest" veto; (c) substitution of the collective presidency by a single president and two vice presidents; (d) reform of the Council of Ministers. Importantly, the "April Package" did not change the Entity-structure, which facilitated support by the largest parties from all sides. Nevertheless, in the House of Representatives, two votes were missing for the approval for the necessary two-thirds majority.[93]

Two later attempts that tried to build on the political agreement reached also failed: a US initiative in May 2007, which tried to broker a diplomatic agreement, and an initiative by High Representative Schwarz-Schilling who tried to open the procedure for reform by including nongovernmental organizations and other groups in a constitutional commission (July 2007). Whereas the former attempt to save the contents of the April package was substantially driven by the Americans (alone), the latter seems to have failed because of scarce support by some EU member states and the same Americans. Besides the lack of coordination, the international community does not seem to know (or agree) what might be the best strategy for promoting and assisting reform.[94]

Differences already regard the most important question: which procedure should be advocated? Agreement seems to prevail on the exclusion of a "Dayton II" i.e., the imposition of a new constitutional system, as well as on the gradual and incremental reform of the current constitution. So far, attempts to put constitutional reform at the political agenda by diplomatic negotiation between party leaders, known as the Prud Process, has not yielded concrete results.[95] The alternative, an open and inclusive process – like the convention procedure at EU level (art. 48 TEU) – would be a first step away from the monopoly of representation by nationalist parties and towards a more "civic" concept of democracy; however, it is not widely supported.

5.2 An Important Indicator: The Treatment of "Others"

Although the multinational organization is certainly the dominant feature in Bosnia's institutional and federal system, there are also other minority and diver-

92. This new category should include the tax system, the electoral process, the judicial system, local self-governance, agriculture, environment, and science and technology.
93. On 24 April 2006. With elections due in October 2006, the reform process stopped completely; in addition, the parties that had sustained the April package suffered losses in the elections.
94. After the failure in saving the April package in Summer 2007, police reform dominated the debate for the following 10 months until the signature of the SAA in June 2008.
95. In the small town of Prud, leaders of the three main governing parties, SDA (Bosniak), SNDS (Serb), and HDZ (Croat) agreed on a joint statement in which they called for gradual constitutional reform on four points: 1) harmonization with ECHR, 2) responsibilities of the state, 3) more functional BiH institutions, and 4) territorial organization or a middle layer of government. A similar attempt gathering leaders at EUFOR headquarter, Sarajevo airport (known as "Butmir-process") failed in October 2009.

sity issues to be resolved. In fact, the main problem with the emphasis on the constituent peoples is the institutional discrimination of "Others" through their exclusion from political representation because of the identification of territory with groups.[96]

The main problem is the de facto marginalization of minority groups, which are too small and dispersed for claiming parts of the territory.[97] From their recognition by the constitution as "Others" follows that they are considered "neutral" in ethnic terms. This creates the paradox that members of minorities, finding themselves excluded from promotional measures based on ethnicity, are in the first place individuals ("citizens") and thus have a particular interest in strengthening the "civic" elements of the multinational state as counterweights to the dominant "ethnic" democracy.

In 2006, a complaint has been filed to the Constitutional Court against the exclusion of "Others" by the then Bosniak member of the presidency, Suleiman Tihić, who lamented a violation of the passive right to stand for election (Art. 14 of the ECHR and Art. 3 of the Third Additional Protocol).[98] By declaring the complaint inadmissible, the Court saved the institutional system and avoided having to decide on the delicate balances between individual rights and collective institutional guarantees. The judges also managed to avoid a clear statement regarding the supremacy of the ECHR.[99] In her dissenting opinion, however, one international judge addressed the underlying problem of the "ethnic identification" of territory as the main obstacle for the inclusion of "Others" (rather than the power-sharing system as such); justifiable in 1995, it could not be upheld 10 years after the end of the war.[100]

96. According to the census of 1991, nearly 8% of the population declared not belonging to one of the three constituent peoples; 5.5% declared themselves as "Others" (and thus as minorities in the strict sense) and 2.2% as "Yugoslavs" (as an overarching category, not linked to ethnicity).
97. A law on minorities was only adopted in 2003. Law on the Protection of the Rights of the Members of National Minorities, Official Gazette of Bosnia and Herzegovina, 12/2003.
98. Constitutional Court, case U 5/04 (27.1.2006). Art. V of the BiH Constitution limits the right to run in an election for member of the presidency and of the House of Peoples to candidates who have – prior to the elections – declared belonging to one of the constituent peoples. For the collective dimension, i.e., the numerical strength of the groups, reference is still made to the census of 1991, whereas individuals give an ad hoc declaration at the moment of their candidacy or application for a job. A second complaint was directed against provisions of the electoral law with exclusive effect, but the Constitutional Court decided that the electoral law was based on the constitution and thus was constitutional; U 13/05 (26 May 2006).
99. It is by no means clear whether "over all other law" (in Art. II.1 BiH Const.) really means absolute supremacy of the listed international sources, even regarding the constitution, or, because of the different translation in the local languages, supremacy over "all other [ordinary] *legislation*" in an intermediate position between constitutional and ordinary law. For the multilevel protection of human rights in Bosnia, see L. Montanari, *La tutela dei diritti nelle nuove Costituzioni dei Balcani occidentali*, in M. Calamo Specchia, M. Carli, G. Di Plinio, R. Toniatti (eds.), *I Balcani occidentali. Le Costituzioni della transizione* (Giappichelli, Torino, 2008), 161-202.
100. In a further judgment, AP 2678/06 (29 November 2006), Constance Grewe underlined the fundamental importance of the multiethnic constitutional principle, which would require renouncing the territorial principle for the origin of the candidates for the BiH presidency.

On 22 December 2009, the European Court of Human Right ruled that the concentration on the parity of the constituent peoples in the Constitution and the consequent exclusion of a whole segment of the population are in open contrast with the guarantees of the ECHR.[101] Two citizens, Sejdic and Finci, had filed a complaint against their ineligibility to stand for election in the House of Peoples and the Presidency of BiH on the ground of their Roma and Jewish origin as access to both institutions is limited by the Constitution to citizens belonging to one of the three "constituent peoples". The Court ruled 16 to 1 that Article 1 of Protocol No 12 (general prohibition of discrimination) had been violated and held by 14 to 3 votes that also Article 14 ECHR (prohibition of discrimination), in conjunction with Article 3 of Protocol No 1 (right to free election), had been violated. A partly dissenting opinion, however, stressed that the historical context of the Constitution had not sufficiently been taken into account.

The judgment raises the question, for how long the over-institutionalization of (three) ethnic identities can be justified, in combination with the unlimited precedence of collective guarantees over individual rights? For the majority of judges, the significant positive developments in the country and the existence of other mechanisms of power sharing which do not automatically lead to the total exclusion of representatives of other communities obliges Bosnia to adapt its constitutional system in order to guarantee fundamental rights of all citizens. The judgment also raises the question whether an (international) court can undo an (internationally brokered) political agreement on power sharing as an elite compromise.[102]

Touching the very nerve of the system established by Dayton has made implementation more than difficult: even six years (and two elections) after, no constitutional amendment is in sight – despite Declarations of the Committee of Ministers of the Council of Europe, pressure by the EU.[103] On 15 July 2014, the ECtHR confirmed its judgment in a similar case (Zornic) calling for the establishment of a system for elections without discrimination:[104] more than 18 years after the end of the tragic conflict, there could no longer be any reason for the contested provisions to be maintained.

101. Grand Chamber ECtHR, judgment in the case of *Sejdic and Finci v. Bosnia and Herzegovina* (applications no. 27996/06 and 34836/06). See the comment by the European Commission for Democracy through Law (Venice Commission), Opinion no. 483/2008, Strasbourg, 22 *October 2008, Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina.*
102. *This is the main question discussed with reference to Bosnia and the Sejdić and Finci case in* C. McCrudden, B. O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford University Press, Oxford, 2013).
103. Against too drastic consequences of non-implementation ESI, *Lost in the Bosnian Labyrinth. Why the Sejdic-Finci case should not block an EU application*, ESI discussion paper, 7 October 2013.
104. ECtHR, judgment in the case of *Zornic v. Bosnia and Herzegovina* (application no. 3681/06); the only difference was that Ms Zornic had refused to declare affiliation to any ethnic group.

6. "WAITING FOR GODOT" OR ACTIVE FACILITATION? CONCLUDING REMARKS

The diagnosis is clear:[105] the (long-term) perspective of EU accession (alone) will hardly be sufficient to stop the downward spiral and keep Bosnia-Herzegovina from reaching a dead end.[106]

For centuries Bosnia has been controlled by larger systems in which it was integrated as a peculiar multiethnic part. After the 1992 to 1995 war and a threefold transition (political, economic, and from war to peace) and for the first time in centuries, it has to become a viable state of its own. However, because of its specific situation, it is not possible to simply adopt the general Western model of the nation-state. Instead, a specific multinational formula, inclusive of all citizens, has to be found for a sustainable state. EU membership alone does not offer such a formula.[107] As long as there is no agreement on a common denominator for the state, the shared goal of EU accession remains secondary to the aim of preserving the relative power of one's own group.

Bosnian Serb politicians insist on the integrity of RS, promoting and defending a concept of "sovereignty of Entities", and they regularly seek to undermine state institutions or question the state itself.[108] Kosovo's unilateral declaration of independence on 17 February 2008 has renewed debate on self-determination and secession, in

105. European Commission, *Enlargement Strategy and Main Challenges 2008-2009*, COM(2008)674 final, 05 November 2008 (Progress Report): «Lack of consensus on the main features of State building, frequent challenges to the Dayton/Paris peace agreement, and inflammatory rhetoric have adversely affected the functioning of institutions and slowed down reform [...]. The authorities have not yet demonstrated sufficient capacity to take the necessary political ownership and responsibility. The role played by ethnic identity in politics hampers the functioning of the democratic institutions and the country's overall governance. No progress has been made as regards constitutional reforms». Similar formulations fill all Progress Reports of recent years, as progress has been limited and in particular the Sejdic-Finci judgment has still not been implemented.
106. This efficient formulation has been chosen as the title of a paper by K. Bassuener, *How to pull out of Bosnia-Herzegovina's dead-end: a strategy for success*, Democratization Policy Council briefing, 19 February 2009, http://www.democratizationpolicy.org.
107. After the Maastricht Treaty, many member states constitutionalized EU integration introducing integration clauses, and most of the new members have adopted such a clause prior to accession. An integration clause, which also includes conditions and procedures for a transfer of powers to the state (if necessary for EU integration), might be a useful focal point for the constitutional debate in BiH; see J. Woelk, *Balancing 'United in Diversity': Federalism and Constitutional Reform in Bosnia and Herzegovina*, in F. Palermo, G. Poggeschi, G. Rautz, J. Woelk (eds.), *Globalization, Technologies and Legal Revolution. The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitutional Theory. Liber Amicorum in Memory of Sergio Ortino* (Nomos, Baden-Baden, 2012), 511-538, in part. 522-526.
108. The independence of Kosovo in 2008 and the renewal of Russia's activism in the Balkans have encouraged the Serbs to press their case in Bosnia: the Prime Minister of RS, Milorad Dodik, has repeatedly threatened a referendum on RS secession from Bosnia.

particular of RS.[109] For Bosniak leaders, the very existence of RS, the "Serb entity", is still a provocation and should be overcome by transforming Bosnia into a "civic" and unitary state, i.e., not based on ethnicity and without the current Entities.[110] As the smallest group, Croats seek above all to consolidate their status as one of the constituent peoples and insist on their equal standing (also in territorial terms). Some continue to demand a "Croat Entity", others link any reform of FBiH to an overall constitutional and institutional reform asking for at least four constituent units, one of which must have a Croat majority.[111]

Bosnia is an extreme case of combining power sharing and "ethnic federalism" and shows the clear limits of such an approach, which cements territorial entrenchment of ethnicity. For guaranteeing a sustainable multinational system and the rights of all citizens further "civic" and liberal democratic "corrections" will be necessary: guarantees for groups cannot totally override individual human rights. Without "civic" counterweights, the system inevitably degenerates into "ethnic democracy" controlled by nationalist parties claiming a monopoly in representation and often jeopardizing the sovereignty of the state itself.

Two judgments have been fundamental in Bosnia's constitutional transition, introducing new phases: in the constituent peoples case, the Constitutional Court "corrected" the DPA for permitting a multinational order in the whole country; in *Sejdic-Finci* (and Zvornic) the European Court of Human Rights strengthened individual rights as counterweights to "ethnic democracy". The difficulties with implementation of both judgments show the limitations of a judicial and necessarily case-based approach. The lack of political support shows that constitutional transition has not yet ended.

If there shall be an "end of transition" in Bosnia, the European Union must assume an active role as facilitator of (constitutional) reform. Considering the current stalemate, the EU cannot afford to sit and wait for BiH to become a sustainable multinational state by itself, because this would play into the hands of the nationalist parties and elites. The difficulties with the implementation of the DPA have shown that this *Peace without Politics* (David Chandler) is no viable option. Although Bosnia and Herzegovina will have to decide for itself, it still needs strong external support and assistance on its way to a reform that makes it possible to overcome the tensions between static and dynamic elements of the Dayton system laying the foundations for a sustainable multinational system. Such a reform and a functioning multinational State would also be an important result for the European Union.

109. A resolution by the RS National Assembly, adopted on 22 February 2008, alludes to a reconsideration of the status of RS in case a majority of states should recognize Kosovo, thus introducing a new standard regarding the exercise of the right to self-determination.

110. The decision on the genocide in Srebrenića by the International Court of Justice in April 2008 has further widened the divide and sparked nationalist rhetoric between Bosnian Serbs and Bosniaks.

111. Often a special status for Sarajevo is proposed: that of a fourth unit or a federal district.

EUROPEAN UNION AND TRANSITIONAL JUSTICE IN BOSNIA AND HERZEGOVINA: A CASE-STUDY FOR THE EU'S "STICK AND CARROT" APPROACH.

VALENTINA RITA SCOTTI

1. INTRODUCTION

The German geographer August Zeune introduced the notion of "Balkan peninsula" at the beginning of the XIX century in order to substitute the political denomination previously into force of "European part of Turkey". Actually, both definitions seemed to ignore the fact that the region has been for long time an area of conflict between empires, with the consequent migrations of populations and the rising of ethnic and religious animosities. At the end of WWI, a notion of "Western Balkans" arose in order to justify the establishment of the Kingdom of Serbs, Croats and Slovenes – then renamed Yugoslavia in 1929 –, aimed at halting these animosities, which the definition of borders at the 1945 Yalta Conference and the Cold War furthermore frozen. Only when the Soviet Union dissolved, the tensions for long time silenced by the authoritarian regime exploded in a violent inter-ethnic war, resulting in the dissolution of Yugoslavia.

In Bosnia and Herzegovina,[112] the rules to be followed for peace-building and for the transition to a constitutional democracy were defined in 1995 by the General Framework Agreement for Peace in Bosnia and Herzegovina, better known as the Dayton Agreement, from the name of the military base where it was signed. The Agreement, in order to safeguard the integrity of Bosnia at the same time protecting the three main communities inhabiting it (Bosniaks, Serbs and Croats), provides for a federal State, where each community has its own territory, institutions are shared according to ethnic belongings, and the stability of the system is ensured by an international UN-NATO tutelage, mainly led by the US. Whether the European Union was limitedly involved in the definition of the Dayton Agreement, after it the EU increased its role at the point that an EU tutelage progressively substituted the international one.[113] In this evolution, the EU rephrased the notion of "Western Balkans" with that of "Great Balkan area", which was conceived as more in line with the

112. As in other essays in this book, the denominations of Bosnia and Herzegovina, Bosnia and BiH are used interchangeably referring to the federal state composed by the Federation of Bosnia and Herzegovina and the Srpska Republic, as established after the 1995 Dayton Agreements.

113. See A.E. Juncos, *The EU's post-conflict Intervention in Bosnia and Herzegovina (re)Integrating the Balkans and/or (re)Inventing the EU?*, 2 *Southeast European Politics* (2005), 88-108, in part. 91-93.

policy it was going to launch intending the area surrounding the EU – Former Yugoslavia, post-communist Eastern European countries, the Mediterranean area and the Middle-East – as a whole neighboring area.[114]

For this reason, in Bosnia, as in all the other neighboring countries interested in an accession process, the EU applied the principle of conditionality to harmonize BiH's legal system with the EU law and to let the country respect the criteria for the accession. Concretely, the EU provided for economic support in exchange of reforms harmonizing the country's legislation, and its constitutional framework, to the EU *acquis* and to the values of democracy and rule of law. As mentioned elsewhere in this book, this "stick and carrot" approach has been particularly evident in the cases of the police reform and of the constitutional revision process.[115] Another interesting case-study, representing the focus of the present essay, is the influence of the EU's conditionality in the implementation of a transitional justice mechanism, considered as a valuable tool to restore truth about war events by punishing perpetrators and compensating victims.

Therefore, this essay comments the general approach the EU uses toward acceding countries and illustrates the main steps of the process leading Bosnia among the EU potential candidate countries, in order to provide a background for analyzing the role the EU played in the process for establishing a transitional justice mechanism in Bosnia. Some final remarks concerns the effectiveness of this approach.

2. THE EU APPROACH TOWARD ACCEDING COUNTRIES: VALUES OR INTERESTS?

The European Union represents a *sui generis* phenomenon of aggregation of States, which achieved to establish a common ground for peace and stability among its Member States, but also tried to share the values on which this common ground is built with neighboring countries.

Since its establishment in 1957 as European Economic Communities, the six founding States promoted a policy of progressive inclusion, which allowed the EU to be composed, in 2016, by 28 States.[116] The rules for such inclusion have been progressively defined and, in 1993, the Copenhagen Council provided for three specific criteria (political, economic, administrative),[117] used from the enlargement in 2004 toward Eastern European Countries onwards, including the on-going process concerning the Western Balkan region. To these criteria, the one concerning the absorption capacity of the EU has been added, aiming at ensuring that the accession of a new State could be fruitful both for the Union and for the State itself.

114. See E. Kavalski, *From the Western Balkans to the Greater Balkans Area: the External Conditioning of 'Awkward' and 'Intergrated' States*, 3 *Mediterranean Quarterly* (2006), 86-100.
115. See J. Woelk's contribution in this book.
116. Though they will presumably become 27 after the "leave" vote in the British referendum of June 2016.
117. See European Council, *Conclusion*, Copenhagen, 21-22 June 1993.

In its relations with neighboring countries during their accession process, the Union acts as "normative power",[118] conceiving itself as a global actor promoting the values of democracy, rule of law and protection of rights.[119] Scholars defined this promotion of values as EU-ization, a «process of a) construction b) diffusion and c) implementation of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things", and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic discourse, identities, political structures and public policies».[120] In this vein, the normative dimension of EU's foreign policy ranges from the hard, and less used, military interventions, to the soft tools of diplomacy and assistance.

However, some other scholars criticize this vision of the EU, asserting that it does not act with the aim of protecting values, but just aiming at replying its own model, merely «exporting isomorphism as a default option».[121] Furthermore, they accuse the EU to use the same approach when dealing with all the neighboring countries, their historical, economic and political peculiarities notwithstanding. Therefore, according to them, the EU turns into being an organization recognizing to itself a sort of "civilizing mission", relying on which the relation with non-Member States is merely aimed at the exportation of the "good European values".[122] This critique goes even further, and, finally, there are scholars believing that, by replicating its model, EU is not trying to share its values, but is just protecting its own interests, hiding them behind declarations of good intents.[123]

This controversial position seems to be confirmed by the asymmetries in the relations between the EU and candidate countries, as the EU is able to postpone their accession indefinitely when considering that the criteria, including the absorption one, are not met, while candidate countries have small, or none, negotiating powers and are just compelled to follow EU's conditions.[124] An asymmetry that contrasts

118. See I. Manners, *Normative Power Europe: a contradiction in terms?*, 2 (40) *Journal of Common Market Studies* (2002), 235-258. This is one of the different definitions about the EU proposed since the definition of "civilian power" introduced in F. Duchene, *Europe's Role in World Peace*, in R.J. Mayne (ed.), *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, London, 1972), 32-47.
119. This aim of the Union has been clearly stated in article 1 of the TUE after the 2009 Lisbon revision, according to which «In its relations to the wider world, the Union shall uphold and promote its values».
120. See C. Radaelli, *Wither Europeanization? Concept stretching and substantive change*, 7 *European Integration Online Paper* (2000), http://eiop.or.at/eiop/comment/1999-007c.html.
121. See F. Bicchi, *'One size fits all': Normative power Europe and the Mediterranean*, 13 *Journal of European Public Policy* (2006), 286-303.
122. See R.G. Withman, *Norms, Power, and Europe: a New Agenda for study the EU and International Relations*, in R.G. Whitman (ed.), *Normative Power Europe. Normative and Theoretical Perspectives* (Palgrave, Basingstoke, 2011), 1-22.
123. See, in a vast literature, A. Hyde-Price, *Normative Power Europe: a Realist Critique*, 2 (13) *Journal of European Public Policy* (2006), 217-234.
124. See A. Dimitrova, *Enlargement, institution-building and the EU's administrative capacity requirement*, 4 (25) *West European Politics* (2002), 171-190.

with the traditional principles of non-interference in States' domestic affairs and allows imposing a sort of external governance on candidate countries.[125]

Therefore, an issue concerning legitimacy rises, and the case of BiH provides for specific evidences of the difficulties in legitimizing the EU's activities in the country, which sometimes have been contested as a foreign attempt to control domestic democratic choices.

2.2 The role of the European Union in Bosnia: from war to candidacy

At the end of the war, Annex IV of Dayton Agreement provided BiH with a multilayered structure of government with multiple systems of power-sharing, based on 14 legislatures and governments, each of them supported by its respective bureaucratic structure. According to this system, moreover, each of the three founding ethnical groups was entitled with a veto power, in the total lack of integrative elements, such as joint institutions, to overcome possible stalemates. The decision-making of domestic actors was furthermore limited by the establishment of a High Representative (HR) of the international "guardians". In 1995 at Dayton, it was entitled with extensive executive and legislative powers, then increased during the 1997 Bonn Conference,[126] actually transforming the country in an international protectorate. And, since the establishment of the European Union Special Representative (EUSR) in 1996, as the same person is vested both with the charge of HR and of EUSR, it acts as guarantor of the implementation of Dayton and as promoter of EU-ization.[127]

In the aftermath of the war, EU strengthened its relations with Western Balkans in the framework of the Royaumont Process launched by the EU French Presidency to participate in the stabilization and peace-building of South-Eastern Europe.[128] Furthermore, since 1997, the EU initiated to provide for economic assistance toward these countries, through the Phare and Obnova programs, on the condition that they engaged in the respect of human rights, democracy and the rule of law. Nevertheless,

125. L. Friis, A. Murphy, *The European Union and Central and Eastern Europe: governance and boundaries*, 2 (37) *Journal of common market studies* (1999), 211-232, 226; J. Zielingka, *Europe moves eastward: challenges of EU enlargement*, 1 (15) *Journal of Democracy* (2004), 22-35, 23.

126. The Bonn Conference was a meeting of the Peace Implementation Council (PIC), established according to the Dayton Agreement and composed by 55 countries, with the aim of controlling the democratic development and the peace-building in BiH. On that occasion, for instance, the Office of the High Representative was vested with the power of dismissing both elected and non-elected officials considered to obstruct the implementation of Dayton. This progressive increase of foreign governance in Bosnia has been often criticized by the doctrine (see, i.e., D. Chandler, *Bosnia: Faking Democracy after Dayton* (Pluto, London, 1999).

127. For some evidence of this double activity of the HR/EUSR, see D. Majstorovic, *Construction of Europeanization in the High Representative's Discourse in Bosnia and Herzegovina*, in 5 *Discourse and Society* (2007), 627-651.

128. On the evolution for the international standing of Europe this process represented, see N. Tocci, *L'Unione Europea come promotore di pace: meccanismi, potenzialità e limiti*, in G. Bonvicini (ed.), *L'Unione Europea attore di sicurezza regionale e globale* (FrancoAngeli, Milan, 2010) 93-114.

this Regional Approach proved ineffective, to the extent that, for supporting Bosnia, in June 1998 the EU-BiH Consultative Task Force was established, providing for technical advices in the fields of judiciary, education, media, administration and economy. Conceived as the first step toward EU membership,[129] it paved the way for the 1998 Declaration of Special Relations between EU and BiH.

Then, in 1999, the European Council of Cologne launched the Stabilization and Association Process (SAP) towards Western Balkans, according to which bilateral Stabilization and Association Agreements (SAAs), adapted to the specific situation of each partner country, would be signed as a basis for the implementation of the accession process, providing the conditions for economic and political cooperation.

Thus, in March 2000, the European Commission (EC) presented a roadmap of 18 priorities for Bosnia. Since then, EU acquired great powers in driving the transition of Bosnia, and applied to the country the principle of conditionality, overlapping the peace process with the accession process, and the reforms necessary for the democratization of the country with the conditions for the accession. In September 2002, the EC declared that the reforms recommended were substantially introduced, and a feasibility study for opening the negotiations for a Stabilization and Association Agreement was asked. Meanwhile, on the Thessaloniki European Council (June 2003), the EU Member States agreed that all the SAP countries had to be considered as potential candidates to EU accession. Indeed, based on the feasibility study, on November 2003, another set of 16 reforms was defined in order to start the SAA negotiations, as it happened in November 2005. The European Council then adopted a new European partnership with BiH on 18 February 2008, followed by the SAA on 16 June 2008. Recognizing the progresses made by the country, on 27 May 2010 the EC also recommended lifting the requirements for visa for Bosnia's citizens, which were then entitled to freely travel without visas in the Schengen area since 15 December 2010. Ten years after the beginning of negotiations, on 1 June 2015, the SAA entered into force; therefore, on 15 February 2016, Bosnia asked for membership.

All along this evolution, in order to manage the accession process and to support peace-building, EU established several bodies. The mentioned European Union Special Representative (EUSR) in BiH, acting as the High Representative established according the Dayton Agreement as well, had the task to support Bosnia in meeting the requirements for the EU membership.[130] Vested also with the power to directly intervene on national authorities according to the mentioned competencies given to the HR at the Bonn Conference, the EUSP has been often criticized for having acting authoritatively while dismissing obstructionist public officials, in frank contra-

129. See D. Susko, *EU enlargement and the case of Bosnia and Herzegovina: a Brief historical sketch*, 1 (2) *Journal of Faculty of Arts and Social Sciences of International University Sarajevo* (2009), 104-105.

130. This task is clearly stated in European Commission, Commission Staff Working Document, *Bosnia and Herzegovina 2009 Progress Report* accompanying the Communication to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, Brussels.

diction with the principles of the rule of law this charge was supposed to implement.[131] In January 2003, the EU also established the European Union Police Mission in Bosnia and Herzegovina (EUPM) to replace the UN's International Police Task Force, and, in December 2004, replaced NATO's SFOR mission with the EU Military Operation in Bosnia and Herzegovina (EUFOR-Althea); both of them were conceived as tools for shifting the country from the era of Dayton to the era of Brussels.[132]

3. TRANSITIONAL JUSTICE IN BOSNIA AND HERZEGOVINA

Bosnia established a mechanism of transitional justice following other examples of incorporation of such mechanisms in peace agreements aiming at facilitating sustainable peace-building by overcoming atrocities and at providing for a selecting view of the past able to lead to national reconciliation.[133] The rationale behind these mechanisms is also to provide for retributive justice as a means to ensure accountability, reducing the risks of revenges, preventing the return to power of war criminals and, by individuating them, removing the stigma of collective guilty from the communities they belong to.

With this aim, the United Nation Security Council Resolution n. 827 of 25 May 1993 established the International Criminal Tribunal for Former Yugoslavia (ICTY), with the task of prosecuting the authors for gross violations of international humanitarian laws in the territory of Former Yugoslavia after 1 January 1991. This body was included in the Dayton Agreement as an international attempt of supporting reconciliation and promoting justice in BiH. In a first period, the Tribunal tried to prosecute local perpetrators in order to establish evidences for linking them with senior military officials and political leaders. When it was clear that it would be unable to take to trial all the suspects during its time-limited period of operation,[134] in July 2002 the BiH's Parliament, basing on a law promulgated by the Office of the High Representative in 2000, established the State Court of Bosnia and Herzegovina and its War Crimes Chambers (WCC), entered into force on 9 March 2005. These Chambers were hybrid tribunals, being under the national jurisdiction but employing both domestic and international judges and applying a mix of international and domes-

131. See J. Marko, *Post-conflict Reconstruction through State and Nation-building: the Case of Bosnia and Herzegovina*, 4 *European Diversity and Autonomy Papers (EDAP) 2005*, EDAP 4/2005, www.eurac.edu/edap.

132. See Interview with Javier Solana, EU High Representative for the CFSP, published on 29 May 2004, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/sghr_int/80698.pdf.

133. On this role of transitional justice, see L. Huyse, *The Process of Reconciliation*, in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook* (IDEA, Stockholm, 2005), 19-33.

134. It was scheduled that the Tribunal had to complete all proceedings by 2010, but, the workload and the difficulties demonstrated by local judiciaries in performing its task delayed the completion of its work and, in July 2016, the Tribunal is still active.

tic laws. Their main task was to decide on the cases transferred from the ICTY according to the rule 11bis of its Statute and with the most sensitive cases directly initiated in Bosnia as well.[135]

Some attempts were done also to establish truth-seeking mechanisms, though few results were reached. In fact, the ICTY opposed to the establishment of an official national Truth and Reconciliation Commission in Bosnia, fearing that it would overlap its activities with those of the Tribunal. When, in 2001, the ICTY overcame its fears, political factions did not sufficiently support the proposal to set up the Commission, as it happened for the government-led Sarajevo Truth Commission in 2006. This Commission, whose mandate was confined to the investigation of the wartime suffering of the population of Sarajevo, did not reached the interest of people and little debate arose in the public domain.[136] Therefore, local NGOs and CSOs gathered in the Reconciliation Center in Sarajevo, aiming at preventing selective manipulations of the memory of specific events and at assisting the judiciary in prosecuting criminals.

The only institution officially established with the aim of truth seeking has been the result of an activity of pressure of the Office of the High Representative (OHR). Willing to ascertain the truth about the Srebrenica events and increasing the awareness about this massacre of Bosniaks in the Srpska Republic, in 2003 the OHR forced the Assembly of the Republic in establishing the Commission, whose official name is Commission for Investigation of the Events in and around Srebrenica between 10 and 19 July 1995. The final report of the Commission,[137] issued on 14 April 2004, confirmed the execution of thousands of people and resulted in official apologies by the Government of the Srpska Republic for the massive crimes perpetrated by the Army in 1995. It is worthy to note that, while apologizing for the crimes, the Srpska Republic refused to recognize the nature of genocide to the events in Srebrenica. On the contrary, the ICTY used the definition of genocide in the decision *Prosecutor v. Krstic*, unanimously stating that «the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide».[138] This decision represents a landmark case, as it paved the way for other allegations of genocide, such as the one against the former President of Yugoslavia, Slobodan Milosevic, accused of perpetrating genocide while attempting at

135. On the activity of WCC see B. Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (International Center for Transitional Justice, New York, 2008).
136. See Balkan Investigative Report Network, *No progress for Sarajevo Truth Commission. Justice Report*, 23 February 2007.
137. The report is available at http://www.justiceinperspective.org.za/images/bosnia/Srebrenica_Report2004.pdf (last retrieved July 2016). For some comments on its activity, see L. Mallinder, *Commission for Investigation of the Events in and around Srebrenica between 10 and 19 July 1995*, in L. Stan, N. Nedelsky (eds.), *Encyclopedia of Transitional Justice* (Cambridge University Press, Cambridge, 2012), 38-43.
138. *Prosecutor v. Krstic*, ITCY Appeals Chamber Judgment, 19 April 2004, case n. IT-98-33-A. In the case, while defining the events as genocide, the Chamber found Krstic only guilty of aiding and abetting genocide, therefore reducing his sentence from 46 to 35 years.

building the Great Serbia. Similar allegations also concerned the commanders at the Bosniak concentration camp where Bosnian Serbs were detained,[139] and Bosnian Croat leaders for the crimes in the Lasva Valley.[140]

Aware that disappearances were the major part of the crimes occurred in Bosnia, and that they actually meant hidden killings in whose respect the responsibility of the authorities, the status of families of those who disappeared and their right to social benefits remain unclear, on 21 October 2004 the BiH's Parliament approved a law on missing persons.

Finally, another element of transitional justice that should be considered is vetting. The Dayton Agreement stated that no person indicted by the ICTY could hold public offices and that public servants and police officers responsible for serious violations of minority rights should have had prosecuted and dismissed by their charges. This vetting process effectively occurred, but several complaints were then filed by police officers with the Human Rights Commission of the Constitutional Court and, later on, the Bosnia's Human Rights Ministry decided to establish a Commission to deal with such an issue.

4. EU CONDITIONALITY IN THE IMPLEMENTATION OF BOSNIA'S TRANSITIONAL JUSTICE

The case of BiH is particularly noteworthy because the external-led peace process between Bosniaks, Bosnian Serbs and Bosnian Croats was based on an ethnic compromise according to which there was not a victorious side nor a defeated one. This compromise compelled international "guardians" in supporting the reconciliation of these communities at the same time ascertaining the truth for the violent events which interested each of them. The idea, already mentioned in this essay, was to avoid that a single community was deemed guilty of the violence and that responsibilities were to be punished as pertaining to individuals and not to communities. For these reasons, the establishment of transitional justice proved to be particularly relevant for building BiH's future, and the EU demonstrated to be aware of this. In fact, transitional justice, in the form of an effective cooperation with the ICTY, was included among the criteria for the accession listed in the SAP, together with the respect of human and minorities rights, the creation of opportunities for refugees and the opportunity for the internally displaced persons to return. Particularly, the cooperation with ICTY was highly emphasized as a priority of the European Partnership, and its lack represented the main obstacle to the conclusion of the SAA until spring 2008. Indeed, in 2006, the Council reiterated this priority,[141] and the Commission stressed the fact that, while the cooperation of the Federation was satisfactory, the efforts of

139. *Prosecutor v. Kordic*, Trial Chamber Judgment, 26 February 2001.
140. *Prosecutor v. Galic*, Trial Chamber Judgment, 5 December 2003.
141. See Council Decision n. 2006/55 on the Principles, Priorities, and Conditions contained in the European partnership with BiH and repealing decision 2004/515/EC, OJ L35.

the Srpska Republic were insufficient.[142] Only after the arrest of Zdravko Tolimir in May 2007, when the Republic started cooperating in undermining the support networks of indictees, the EU proceeded in signing a SAA with Bosnia.

Furthermore, transitional justice was also among the aim of the EUPM and of the EUFOR-Althea. The latter directly supported the ICTY and local authorities in the detention of persons indicted of war crimes, while the former indirectly supported the Tribunal in the reform of the police, but did not implement any other mechanism of transitional justice such as vetting. Nevertheless, on the topic of vetting, it should be added that the EU representatives at the UN addressed this issue at the UN Secretariat in 2007 aiming at defining a better legal framework for deciding on the dismissal of police officers accused of war crimes in order to overcome the lack of transparency the process was accused of. Although UN did not issue a resolution on this topic, the EU Police Mission in Bosnia acquired the task to look over future selections of police officers.

As shown, indeed, the EU put great efforts in supporting international justice, but its engagement in assisting domestic courts in transitional justice did not prove relevant as well. For example, apart from mentioning the need of staffing and funding the State Court and its WCC, transitional justice was not mentioned among the European Partnership priorities and was excluded from the criteria the Commission defined for assessing the respect of the conditions for the accession.

5. Concluding remarks. Did the EU's "stick and carrot" approach prove to be effective in Bosnia?

As mentioned in the first section, the EU intervention in BiH firstly had to overcome the perception of a lack of legitimacy. In fact, Bosnia's citizens felt the powers recognized to EU in the transition as a way to impose a dependency from a foreign power, able to influence nation-building and controlling local forces.[143] This perception increased even more the mentioned asymmetry in the EU's conditionality toward candidate countries, as an international pact, the Dayton Agreement, sanctioned the external influence on this country, lacking of any form of legitimation from local political actors and citizens. Furthermore, the former used the perception of illegitimacy in order to strengthen their position and the no winner/no loser EU's approach unintentionally reinforced ethnic domestic cleavages based on competing notions of reform, economic interest and identity.[144]

This unintentional consequence may be explained by the historical situation the

142. See Commission, *Bosnia and Herzegovina 2006 Progress Report*, COM (2006) 649 final, 8 November 2006.

143. See O. Anastasakis, *The Europeanization of the Balkans*, 1 (12) Brown Journal of World Affairs (2005), 77-88.

144. On this point, see K. Featherstone, G. Kazamias, *Europeanization and the Southern Periphery* (Frank Cass, London, 2001). See also V. Dzihic, A. Wiser, *The crisis of Expectations – Eu-*

EU was living when the war occurred. In fact, at that time, the EU was not ready to face such a huge international challenge, as it was already a powerful trading bloc, but its standing in international affairs was still weak because of the lack of instruments for coordinating the EU foreign policy. Only the progressive definition of the Common Foreign and Security Policy and of the European Security and Defense Policy allowed the EU to be perceived as an international actor able to adopt a comprehensive strategy for stabilizing the area. Among the other reasons for the failure of the implementation of the Dayton Agreement, there is the fact that US and EU policy-makers misunderstood the social reality of the country, trying to remove the idea of a protection of rights based on group rights and promoting the protection of individual rights; an idea that was far from popular self-perception as well as from the perception of the political elites. Furthermore, this approach caused a sort of denegation of the role of local political elites, which tried to justify their presence in the policy-making by proposing their own interpretation of the causes of the war, commemorating the tragic events related to their own ethnic group and propagating the hostility toward "the others".[145] A clear contrast with the supposed aims of the Dayton Agreement.

Another controversial element derives from the EU's application of the principle of conditionality. It has been generally applied as an instruments for providing formal compliance with the criteria for the accession, but the substantial compliance could still be contested, as the development of a democratic culture has been slow as well as the involvement of civil society in the public sphere.

When coming to the EU's role in supporting transitional justice, a general reflection on the effects of international jurisdiction need to be addressed. In fact, some scholars argue that the «external imposition of the exercise of universal jurisdiction, such as was the case with the International Criminal Tribunal for the Former Yugoslavia [...] can disrupt delicate domestic peace and reconciliation processes», and, «while not facilitating domestic reconciliation, such practices financially benefit international human right lawyers and domestic human rights agencies».[146] Furthermore, it should be noted that countries belonging to Former Yugoslavia, such as Bosnia (in 1993) and Croatia (in 1999), "used" the ITCY by appealing against the then Yugoslavia claiming violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[147] These appeals reinforced ethnic cleavages and the narratives of genocide, despite the EU's approach toward individual

ropeanisation as 'acquis démocratique' and its limits. The case of Bosnia-Herzegovina and Serbia, 3 *L'Europe en Formation* (2008), 81-98.

145. See R. Kostic, *Nation-building as an Instrument of Peace? Exploring Local Attitudes Towards International National-building and reconciliation in Bosnia and Herzegovina*, 4 *Civil Wars* (2008), 386-414.

146. R. Kostic, *Transitional Justice and Reconciliation in Bosnia-Herzegovina: whose Memories, whose Justice?*, 4 *Sociologija* (2012) 649-666, 651. In the same vein, see also C.L. Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, in R. Mac Ginty, O. Richmond (eds.), *The Liberal Peace and Post-War Reconstruction. Myth or Reality?* (Routledge, New York, 2009).

147. The application against Former Yugoslavia, filled on 20 March 1993 and available at www.icj-

responsibility, which only slowly affirmed.

Another criticality concerns the incapability of strengthening domestic institutions, as the case of the support to the judiciary demonstrates. In fact, limiting staffing and assistance to the sole State Court meant a lack of support for local ordinary Courts, which however had to decide on the most part of the cases concerning war crimes due to the decision to entitle War Crimes Chambers dealing only with cases transferred from ICTY and with the most sensitive cases initiated in Bosnia. This approach also affected the domestic capacity of ensuring a higher quality of local justice, which remains strongly influenced by nationalist elements and political parties as well as by a constant deficiency in the cooperation between local authorities in truth seeking.

Conclusively, the international activity in BiH was able to endure peace and stability for the country, but, since the Dayton Agreement, a lack of attention to transitional justice occurred, the intervention of the EU's conditionality was not able to eliminate. The EU seemed to follow the idea that «judicialisation of the truth about individual crimes and perpetrators, delivered in impartial proceedings at the international level, would challenge the region's collectivist ideologies, deter future conflict, and facilitate reconciliation across ethnic divides».[148] Nevertheless, this aim was not completely reached, as the far place where trials were held and the scarce resound at the domestic level of the decisions caused the disaffection of the population and allowed political leaders to use the activity of the Tribunal to further promote their ethnic ideologies. For instance, when the former co-President of BiH, Biljana Plavsic, pleaded guilty, expressed her remorse for the war events and called for reconciliation, Serb leaders underlined the relevance of her gesture as a reconciling one, but Bosniak leaders, and the most part of the Bosnian Muslim population, focused their attention on the fact that she refused to testify about other criminals and condemned the plea bargain she obtained and the decision of the ICTY as well.[149] Therefore, the EU, by ignoring the relevance of local remedies in establishing transitional justice, missed the opportunity to strengthen the role of local authorities and to push them in cooperating ethnic cleavages notwithstanding.

The criticalities in the EU's approach toward the BiH's transitional justice may be justified by «the lack of coherence, confusion even, within the pillar structure about transitional justice and transitional justice mechanism»[150] existing before the entry

cij.org/icjwww/idocket/ibhyframe/htm, actually meant an application against the remaining States of the Yugoslav Federation, Serbia and Montenegro.

148. I. Rangelov, *EU Conditionality and Transitional Justice in the Former Yugoslavia*, in 2 *CYELP* (2006), 365-375, 371. The Author derives this consideration from the reflection put forward in J. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, in 24 *Yale Journal of International Law* (1999), 365-480, 436.

149. *Prosecutor v. Plavsic*, 27 February 2003, n. IT-00-39&40/1. On the critics to this decision, and generally on the role of the ICTY, see M. Biro, D. Ajdukovic, D. Corkalo, *Attitude toward justice and social reconstruction in Bosnia and Herzegovina and Croatia*, in E. Stover, H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity* (Cambridge University Press, Cambridge, 2004), 183-205.

into force of the Treaty of Lisbon (2009).[151] Aware of these deficiencies, the EU Action Plan on Human Rights and Democracy 2015-2019 commits EU in developing a specific EU policy on transitional justice. Therefore, the Council Conclusion of the Foreign Affairs Council held in November 2015 adopted the EU's Policy Framework on Support to Transitional Justice, relying on the UN definition of transitional justice.

Considering the gains of EU intervention in BiH, it clearly appears that «the EU has deployed in the BiH the full spectrum of instruments at its disposal, including military instruments, to promote its external objectives and to pave the way for BiH to attain EU membership. Indeed, the membership carrot has become one of the main instruments of the EU to support its normative power». Furthermore, Bosnia «has been a slow process of learning from failure [...] where the EU has firstly tried to introduce a comprehensive approach towards conflict management: including political tools like conflict mediation, economic ones like humanitarian aid and long term economic assistance, and military ones like police and peace-keeping missions».[152] Nevertheless, the EU seemed to forget to pay the due attention to transitional justice and to the mechanisms of reconciliation of the population. This may be one of causes for the difficulties in overcoming ethnic divides in the political life of the country and for the slowness characterizing its path toward the accession. Indeed, the "stick and carrot" approach generally functioned for Bosnia, as it led the country in becoming a potential candidate, but its role in strengthening transitional justice mechanisms proved less effective.

150. L. Davis, *EU Foreign Policy, Transitional Justice and Peace Mediation: Principle, Policy and Practice* (Routledge, New York, 2014), 177-178.

151. For a general review of the means EU used in the pillar system to support transitional justice even before the Treaty of Lisbon, see K.A. Crossely-Frolick, *The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond*, 3 *Contemporary Readings in Law and Social Justice* (2011), 33-51.

152. Juncos, 2005, 93.

THE INFLUENCES OF DAYTON AGREEMENT ON INSTITUTIONS: PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

NEDIM KULENOVIC AND JASMIC HASIC

I. INTRODUCTION

The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) did not only bring an end to a protracted and bloody armed conflict in Bosnia and Herzegovina, but also heralded the deep transformation both in the state structure and political regime in the country.[153] The transition from a traditionally unitary into a complex, most likely federal state,[154] and from a majoritarian into a classical consociational democracy has had a profound effect on the nature of the parliamentarism in the country, as exemplified in the state parliament, namely the Parliamentary Assembly of Bosnia and Herzegovina.

Although it is often described as a «"central arena" in which democratic processes unwind in most direct way», because of which the «people should, mainly, identify with the [Parliamentary Assembly of Bosnia and Herzegovina]»,[155] the reality is different. Indeed, it has been suggested that its very name (Parliamentary Assembly), which is a curious pleonasm in local languages, and which is characteristic mainly for international organizations, indicates the «disfunctionality of Bosnian political system, that stems from the Dayton Peace Agreement, as well as the lack of the will of the political elites to remove the deficiencies that such an agreement produced».[156] It points to the problematic locus of sovereignty in the post-Dayton regime which established «the weakest federal system in the world»,[157] such that the identification of the "people", a term of complex meaning in Bosnian context, is more likely to be found with the parliaments of the two constitutive "entities" of Bosnia

153. Perhaps more accurately it finally crystalized the processes of ethnocratisation started in the early nineties. See i.e. T. Haverić, *Ethnos i demokratija* [*Ethnos and Democracy*] (Rabic, Sarajevo, 2006,) *passim*.

154. S. Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate, Burlington, 2013) 3.

155. N. Ademović, J. Marko, G. Marković, *Ustavno pravo Bosne i Hercegovine* [*Constitutional Law of Bosnia and Herzegovina*] (Konrad Adenauer Stiftung, Sarajevo, 2012) 174.

156. D. Čepo, *Parlamenti i skupštine: demokratski deficit Parlamentarne skupštine Bosne i Hercegovine'* [*'Parliaments and Assemblies: Democratic Deficits of the Parliamentary Assembly of Bosnia and Herzegovina'*], 2 (8) *Studia lexicographica* (2015), 55-75, 73. All the translations from Bosnian/Croatian/Serbian language are authors'.

157. J. Marko, *Constitutional Reform in Bosnia and Herzegovina 2005-06,* in *European Yearbook on Minority Issues*, vol. 5 (Brill, Leiden, 2005), 207-218, 213. See also Keil, 2013, 169.

and Herzegovina. Such attitude towards the state parliament can be witnessed also in its size which with its total of fifty-seven members is among the smallest parliaments in the world and is dwarfed in comparison to entity legislatures. Indeed, its limited functions have also led commentators, including former judges of the Bosnian Constitutional Court, to classify the country as a confederation.[158] The practical consequence of this has been the political marginalization of the Parliamentary Assembly of Bosnia and Herzegovina which has not been the main forum for the debate of the most important political issues, such as the constitutional reform, which have rather been displaced to private settings where the negotiations are conducted between the small circle of the political elites of the dominant ethnic parties.

The internal functioning of the Parliamentary Assembly of Bosnia and Herzegovina is again not something that will win it any sympathies with the general population. As will be shown it is rightly seen as extremely inefficient, and a good reflection of the general disfunctionality of the country. One of the main characteristics of the state parliament are precisely the predominance of the consociational power-sharing elements, particularly the existence of several mutual vetoes, in Lijpharts typology,[159] which seriously hamper the parliament's legislative output. It is worth recalling that the consociational power-sharing regime in Bosnia and Herzegovina established a form of "ethnic sovereignty",[160] which on the state level and its parliament has established a form of a "participatory ethnocracy"[161] between three dominant ethnic groups or the so-called "constituent peoples"(Bosniaks, Croats and Serbs). This is particularly well exemplified in the second chamber of the state parliament, namely the House of Peoples, as a main forum for the representation of the ethnic rather than federal interests, which contrary to expectations are more directly represented in the House of Representatives through its territorial veto in the form of the so-called "entity voting" procedure. Indeed, as will become obvious, the ethnic aspects of the constitutional system take precedence over the federal ones also in the state parliament.

The aim of this paper is to provide the overview of the state legislature as it has been established by the Annex IV (the Constitution) of the Dayton Agreement, through the brief analysis of its structure, functions, organization, and relationship to other branches of government and relevant stakeholders. We will also briefly consider the attempts at a parliamentary reform, before concluding.

158. See S. Savić, *Republika Srpska poslije Dejtona* [*Republika Srpska after Dayton*] (Centar za publikacije Pravnog fakulteta u Banja Luci, Banja Luka, 1999), 29.

159. See A. Lijphart, *The Wave of Power-Sharing Democracy*, in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press, Oxford, 2002), 39.

160. S. Yee, *The New Constitution of Bosnia and Herzegovina'*, 7 *European Journal of International Law* (1996), 176-182, 187. See also R. C. Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 *Yale Journal of International Law* (1996), 459.

161. E. Šarčevič, *Ustav iz nužde: konsolidacija ustavnog prava u Bosni i Hercegovini* [*Constitution from Necessity: Consolidation of Constitutional Law in Bosnia and Herzegovina*] (Rabic, Sarajevo, 2010) 42. See also N. Stojanovič, E. Hodžič, *Introduction: Ethnocracy at the Heart of Europe*, 4 (14) *Ethnopolitics* (2015), 382-389.

2. FUNCTIONS AND ORGANIZATION OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA

The Parliamentary Assembly of Bosnia and Herzegovina is one of the six institutions provided for in the Constitution of Bosnia and Herzegovina, and in the system of the envisioned separation of powers it represents the legislative branch and is the «main democratic organ of the state and the main body of popular representation».[162] The state parliament is composed of two chambers: the House of Representatives and the House of Peoples, which jointly have to approve all legislation, thus presenting the Parliamentary Assembly of Bosnia and Herzegovina as a form of "perfect bicameralism".[163] The two houses of state parliament are also highly autonomous, as seen in the independent adoption of internal working rules, which has led commentators to conclude that in the functional sense the state parliament is not a single institution.[164] The peculiar state structure is thus reflected in the organization of the state parliament which «expresses the principles of popular sovereignty, equality between three constituent peoples and the complex state structure, namely the fact that [Bosnia and Herzegovina] is composed of two entities».[165] This fact of its nature naturally raises a myriad of problems and difficulties, particularly relating to the scope of representation of all of these various component units and interests, a point to which we will turn later.

The Parliamentary Assembly of Bosnia and Herzegovina has three key roles: legislative role, within exclusive competences of the institutions of Bosnia and Herzegovina, as well as in other areas under the jurisdiction of the entities, which were previously transferred onto the state level; elective role, for approval and appointment of key officials of the executive branch, which relates to approving the appointment of the Chair of the Council of Ministers, on the proposal of the Presidency of Bosnia and Herzegovina, as well as other members of the Council of Ministers on the proposal of the Chair of the Council of Ministers; role in international affairs, in the field of international relations, developed in line with the foreign policy priorities of Bosnia and Herzegovina, through the work of standing delegations, inter-parliamentary friendship groups, and development of bilateral and multilateral relations with parliaments

162. Ademović, Marko, Marković (eds.), 2012, 174.
163. Keil, 2013, 101.
164. See N. Pobrić, *Ustavno pravo* [*Constitutional Law*] (Slovo, Mostar, 2000), 261. See also Ademović, Marko, Marković, 2012, 178.
165. K. Trnka, *Ustavno pravo* [*Constitutional Law*] (Fakultet za javnu upravu Sarajevo, Sarajevo, 2006), 288. In so far as Brčko Distrikt of Bosnia and Herzegovina is to be seen as a de facto third entity, due to the extent of its competences that radically diverge from those of ordinary units of local self-government in the country, it is clear that its existence is not fully taken into account in the representation bodies at the state level. See eg F. Bieber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (Palgrave Macmillan, New York, 2006), 135; Keil, 2013, 114.

of other countries.[166] The Parliamentary Assembly of Bosnia and Herzegovina also has the power to amend the constitution. The Constitution itself limits the role of the Parliamentary Assembly to: (a) enact legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under the Constitution; (b) decide upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina; (c) approve a budget for the institutions of Bosnia and Herzegovina; (d) decide whether to consent to the ratification of treaties; (e) other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.[167] In the following we will make an overview of the two chambers, their internal organization, their functions and decision-making procedures.

2.1. House of Representatives

House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina represents, constitutionally at least, the interests of all the citizens in the country. It is composed of forty-two members, directly elected, with two-thirds (twenty-eight) from the territory of the Federation of Bosnia and Herzegovina entity and one-third (fourteen) from the territory of Republika Srpska entity.[168] It has been noted that such constitutionally entrenched number of representatives is not reflective of the comparative solutions, as well as the changing demographics in the country.[169] Although the House of Representatives in theory represents the interests of all the citizens in the country, it has regularly been criticized as a covert ethnic representation body in practice ("ethnic parliamentarians"),[170] due to clear ethnic homogenization in two entities, and fact that the electoral units for this chamber are such entities.[171]

Of the total number of the representatives the majority of all the elected compose the quorum.[172] The representatives are elected pursuant to an election law, which

166. See Trnka, 2006, 289-291; N. Saraćević, *Parlamentarna skupština Bosne i Hercegovine* [*Parliamentary Assembly of Bosnia and Herzegovina*], in D. Banović, S. Gavrić (eds.), *Država, politika i društvo u Bosni i Hercegovini: Analiza postdejtonskog političkog sistema* [*State, Politics and Society in Bosnia and Herzegovina: Analysis of the Post-Dayton Political System*] (University Press, Sarajevo, 2011), 231-232.
167. See Article IV/4 of the Constitution of Bosnia and Herzegovina.
168. See Article IV/2 of the Constitution of Bosnia and Herzegovina.
169. See G. Marković, *Bosanskohercegovački federalizam* [*Bosnian Federalism*] (University Press, Sarajevo, 2012), 90.
170. N. Pobrić, *Ustavno pravo* [*Constitutional Law*] (Slovo, Mostar, 2000), 262. For contrary view, see Marković, 2012, 89.
171. See S. Hodžić, *'Parlamentarizam i politički pluralizam'* [*'Parliamentarism and Political Pluralism'*], *Pravna misao* (1998) 24. See also Saraćević, 2011, 231-232, 235.
172. See Article IV/2.b) of the Constitution of Bosnia and Herzegovina. Until 2007 the Rulebook of the House of Representatives contained an unconstitutional provision that the quorum must additionally include at least one-third of representatives of each entity. See N. Ademović, C. Steiner (eds.), *Constitution of Bosnia and Herzegovina: A Commentary* (Konrad Adenauer Stiftung, Sarajevo, 2010) 624.

was passed by the Parliamentary Assembly, except that the first election took place in accordance with Annex 3 to the Dayton Agreement.[173] The Constitution did not regulate the duration of the mandate of elected representatives, and the question was thus regulated in the Electoral Law of Bosnia and Herzegovina.[174]

Decisions in this House of Representatives are normally to be taken by majority of those present and voting, but a two-thirds majority of the representatives from the territory of either entity (rather than ethnic group) may block a measure.[175] This practically means that during such "entity voting" procedure either the Bosniaks or the Croats separately as a group may not have enough votes to veto a decision in the House of Representatives, unless either group elects two-thirds of all members from the Federation of Bosnia and Herzegovina. Together these two groups have a veto, including where both agree on the matter under consideration or where they disagree but one group wins enough members from the other to constitute a two-thirds majority. The Serbs from Republika Srpska as a group, however, will always have a veto.[176] Indeed, because of this particular fact the Bosniak member of the Presidency had challenged the provisions of the Electoral Law of Bosnia and Herzegovina and the Rulebook of the House of Representatives, due to the fact that it does not provide for proportional representation of the constituent peoples and the "Others" in this chamber, as allegedly required by the Constitution as interpreted by the Constitutional Court of Bosnia and Herzegovina in a landmark decision on the constituency of peoples.[177] It is particularly claimed that such configuration in practice transforms the so-called "entity voting" veto in the House of Representatives into another "ethnic veto" contrary to the Constitution.[178] The Constitutional Court of Bosnia and Herzegovina rejected such challenge since it concluded that the Constitution of Bosnia and Herzegovina does not require proportional representation of constituent peoples and the "Others" in the House of Representatives, regardless of the realities of ethnic homogenization in practice.[179]

Both parliamentary chambers are constituted at the beginning of each term on a first constituting session, convened by the collegium of the previous convocation,

173. See Yee, 1996, 184.
174. Trnka, 2006, 289. After the first three elections the mandate of the elected representatives was two years, and now it is four.
175. See Article IV/3.d) of the Constitution of Bosnia and Herzegovina.
176. See Yee, 1996, 188. Similarly in Marković, 2012, 96.
177. On the landmark decision, see N. Maziau, *Le contrôle de constitutionnalité des constitutions de Bosnie-Herzégovine. Commentaire de decisions de la Cour constitutionnelle, Affaire n ° 5/98 Alija Izetbegovic* ['Constitutional Review of the Constitutions in Bosnia and Herzegovina. Commentary on the Decisions of the Constitutional Court, Case no. 5/98 Alija Izetbegović'], 1 (45) *Revue française de droit constitutionnel* (2001) 195-216; A.M. Mansfield, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovi*, 8 (103) *Columbia Law Review* (2003), 2052-2093.
178. Similarly in Ademović, Steiner (eds.), 2010, 627.
179. See Decision of the Constitutional Court of Bosnia and Herzegovina in Case no. U-13/09, 30 January 2010.

when representatives or delegates elect chairpersons of the Houses and their deputies (chairperson and his/her two deputies need to be from different constituent peoples). Houses are managed by the Collegium, which consists of Chairman, First and Second Vice-Chairman, who rotate every eight months. In the House of Representatives, the Collegium can operate in an extended composition, when consultations and decision on the preparation of plenary sessions is needed. Collegium is responsible for coordinating and solving tasks related to representatives' work at the chamber, cooperation with other chamber, cooperation with the Presidency and the Council of Ministers, cooperation with political parties, organizations and associations of citizens, decision-making at the legislative procedures on the competence of certain commissions and other.

There are seven standing committees operating in the House of Representatives, which are composed of nine members. Committee members are elected in proportion to the size of represented members in the House, while respecting the principle of territorial representation (two-thirds from the territory of the Federation of Bosnia and Herzegovina entity, and one third from the territory of the Republika Srpska entity). Decisions are made by a simple majority, provided that the majority of members is present. The Rules of the House of Representatives allow for establishment of the ad hoc committees to deal with matters of special and great importance.

The Standing Committees in the House of Representatives are: Constitutional Committee; Committee on Foreign Affairs; Committee for Foreign Trade and Customs; the Committee for Finance and Budget; Committee on Transport and Communications; the Committee for Gender Equality; and the Committee for the preparation of the election of the Council of Ministers.[180] The work of both Houses of the Parliamentary Assembly of Bosnia and Herzegovina is organized the following working bodies: Collegium of the Chamber (*Kolegij doma*); Parliamentary caucuses of representatives or delegates (*Klubovi poslanika/delegata*); Committees of the Chamber (*Komisije doma*); and Sessions of the Parliament (*Sjednice doma*).[181] Joint working bodies of both Chambers of the Parliamentary Assembly of Bosnia and Herzegovina are formed in order to harmonize common interest, relevant to the work of both chambers. There are also Permanent Joint Committees, set up to resolve all matters that not regulated through the work of individual standing committees in either of the Chambers, but are under constitutionally prescribed national jurisdiction. These include questions of defense and intelligence-security policy, economic reform and development, European integration, administrative tasks, and issues in the field of civil affairs. Joint Committees have twelve members, six elected representatives from each of the two Chambers, with one-third from the territory of Republika Srpska, and two-thirds of the members from the territory of the Federation of Bosnia and Herzegovina.

180. Saračević, 2011, 239.
181. Saračević, 2011, 236.

2.2. *House of Peoples*

The House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina is the second chamber of the state parliament and is in many respects a good reflection of the Bosnian ethnocratic form of government. It is comprised of fifteen delegates, ten from the Federation of Bosnia and Herzegovina entity (proportionally five Croats and five Bosniacs), and remaining five from Republika Srpska entity (i.e. five Serbs).[182] It has been suggested that the chamber combines ethnic and territorial representation,[183] but unlike the second chambers in other federal states the House of Peoples is not primarily a representation body for the constituent entities of the state, but rather the representation body for the three dominant ethnic groups, the so-called "constituent peoples". Nine members of the House of Peoples comprises the quorum, with the requirement that at least three members come from each of the dominant ethnic groups.[184] Since the House of Peoples enjoys full legislative powers, in the sense that it co-decides with the House of Representatives on all legislative acts, these rules on quorum in the House of Peoples allow only three delegates, by abstention, to block the entire Parliamentary Assembly of Bosnia and Herzegovina.[185]

The composition of the House of Peoples, designed for the purpose of ensuring the constitutional equality of the three dominant ethnic groups,[186] has from the very inception generated various normative critiques. This has particularly focused on the inadequacy of the representation of all the relevant interests in this chamber, as seen in an least three forms of exclusion. First of all, and most obviously, anyone who does not identify with the three dominant ethnic groups, namely the members of the "Others", are excluded from the chamber, which is particularly problematic having in mind the extensive competences conferred on the chamber.[187] Secondly, the members of the constituent peoples from the "wrong" entity, namely Bosniaks and Croats from Republika Srpska, and Serbs from Federation of Bosnia and Herzegovina entity are similarly excluded, even though they are guaranteed constitutional equality in the whole country and not only in two respective entities. Finally, in so far as it can be claimed that the House of Peoples indirectly represents territorial in-

182. See Article IV/1 of the Constitution of Bosnia and Herzegovina.
183. Keil, 2013, 101.
184. See Artcle IV/1.b) of the Constitution of Bosnia and Herzegovina.
185. Such potential permanent blockade could only be solved by dissolution of the House of Peoples. See Article IV/3.g) of the Constitution of Bosnia and Herzegovina.
186. See G. Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers, Leiden, 2005), 142.
187. The category "Others" is somewhat ambiguous, but it is generally understood to include both the national minorities and citizens who refuse to identify ethnically. See generally D. Abazović (ed.), *Mjesto i uloga "Ostalih" u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu* [*Place and Role of the "Others" in Constitution of Bosnia and Herzegovina and Future Constitutional Solutions for Bosnia and Herzegovina*] (Fakultet političkih nauka Sarajevo, Sarajevo, 2010).

terests it is clear that Brčko District of Bosnia and Herzegovina is not represented even in such extenuated way. The European Court of Human Rights has found that the relevant provisions of the Constitution of Bosnia and Herzegovina that relate to the House of Peoples, considering the first form of exclusion, are discriminatory and contrary to the European Convention on Human Rights.[188]

In principle, like the other chamber the House of Peoples also adopts legislation by simple majority, which however is also potentially subject to the already mentioned "entity voting" procedure in case the majority initially does not include one-third of the delegates from both entities. Since this procedure already exists in the House of Representatives this reduplication is dubious, particularly having in mind the existence of the specific form of ethnic veto in the House of Peoples, namely the procedure for the protection of the "vital interests of the constituent peoples", or more commonly referred to as "vital national interests". Namely, the Constitution provides that the proposed legislative act can be declared to be destructive to vital national interests of the relevant constituent people, in which case the decision has to be made by the majority of the delegates from each of the ethnic caucuses in the House. However, if members of one ethnic caucus object to such invocation of the ethnic veto the Joint Commission is formed, comprising three delegates from each of the constituent peoples, for the purpose of the resolution of the issue. If no agreement is reached the matter is referred to the Constitutional Court of Bosnia and Herzegovina which has to review it "for procedural regularity".[189] This procedure itself has been criticized, particularly for not defining the scope of "vital national interest" thus allowing full discretion to the delegates to use and abuse the procedure, and also for granting the unelected Constitutional Court of Bosnia and Herzegovina the role of determination of the "vital interest" of particular constituent people, which raises legitimacy issues.[190]

The House of Peoples has three permanent commissions: the Constitutional commission; the Commission for foreign and trade policy, customs, traffic and communications; and the Commission for budget and finances. These commissions have six members and along the general rules concerning representation of the constituent peoples are respected, including the entity distribution, namely two-thirds of the members come from Federation of Bosnia and Herzegovina and one-third from Republika Srpska entity.[191]

188. See *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos 27996/06 and 34836/06 ECHR 2009 and Zornić v. Bosnia and Herzegovina, no. 3681/06 ECHR 2014. See generally S. Bardutzky, *The Strasbourg Court on the Dayton Constitution: Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009', 6 *European Constitutional Law Review* (2010), 309-333.
189. See Article IV/3.e)-g) of the Constitution of Bosnia and Herzegovina.
190. See eg N. Kulenović, *Uloga sudova/vijeća u određenju sadržaja pojma vitalnog interesa naroda* [*The Role of the Courts/Councils in the Determination of the Content of the Notion of Vital National Interest*], in D. Banović, Dž. Kapo (eds.), *Šta je vitalni interes naroda i kome on pripada? Ustavnopravna i politička dimenzija* [*What is Vital National Interest and To Whom Does it Belong? Constitutional and Political Dimension*] (Centar za političke studije, Sarajevo, 2014) 36-54; Marković, 2012, 96 and 101.
191. See Saraćević, 2011, 240.

3. EVALUATION OF THE DECISION-MAKING PROCEDURES

With the overview of the main features of the organizational structure of the Parliamentary Assembly of Bosnia and Herzegovina in mind, we now turn to the question of the actual outputs of the state parliament. Indeed, the decision-making procedure in the state parliament has rightly been described as the «most complicated and controversial' part of the constitutional provisions dealing with the state legislature, because of the clear 'mechanisms that can be used to block legislation».[192] As already mentioned both chambers of the state parliament contain the territorial veto, namely the so-called "entity voting" procedure, with the House of Peoples additionally containing the specific form of ethnic veto, namely the procedure for the protection of vital national interests. Importantly, only the later veto is subject to judicial review and potential neutralization.

The initial worries that the burdensome power-sharing arrangements in the state parliament could lead to chronic gridlocks in the decision-making procedures have turned out to be correct, as evidenced by several empirical studies of the parliament's outputs.[193] The studies have shown that even though the ethnic veto is used infrequently, as the result of judicial review as will be elaborated further, the territorial veto is used frequently in parliamentary proceedings resulting in sparse legislative output. It has also been shown that the veto is also used by the parties that are already in the government, namely the Council of Ministers of Bosnia and Herzegovina which is the primary initiator of legislative proposals, and furthermore that «there is no "European Partnership bonus" that points to a better cooperation between the veto players» when it comes to the EU-related laws which are as likely to be blocked as domestic legislation.[194] The main reason for this is that the power-sharing in Bosnia and Herzegovina is reduced to co-operation between representatives of the three constituent groups, which continues to be the application of politics as zero-sum-games.[195] As correctly concluded by Bahtić-Kunrath:

> As predicted by Tsebelis's veto player approach, Bosnia's veto players display a strong status quo orientation. Especially the institutional design of the Parliamentary Assembly discourages inter-ethnic cooperation between the veto players: Its most important veto mechanism, entity-voting, has turned into a super-veto which pushes the consociational setting of checks and balances to its ex-

192. Ademović, Steiner (eds.), 2010, 626.
193. See eg K. Trnka, *Evaluacija procesa odlučivanja u Parlamentarnoj skupštini BiH - 1996-2007. Godine* [*Evaluation of the Decision Process in Parliamentary Assembly of BiH - 1996-2007*.], in I. Marić (ed.), *Proces odlućivanja u Parlamentarnoj skupštini Bosne i Hercegovine: stanje - komparativna rješenja - prijedlozi* [*Decision Process in Parliamentary Assembly of Bosnia and Herzegovina: Current State - Comparative Solutions - Recommendations*] (Konrad Adenauer Stiftung, Sarajevo, 2009) 77-100; B. Bahtić-Kunrath, *Of veto players and entity-voting: institutional gridlock in the Bosnian reform process'*, 6 *Nationalities Papers* (2011), 899-923.
194. Bahtić-Kunrath, 2011, 907.
195. Keil, 2013, 105.

> tremes, making non-cooperation more advantageous to the veto players than compromise. Moreover, entity-voting has thwarted democratic agenda-setting as much as the political representation of the individual citizen and is thus detrimental to the country's democratic development.[196]

Not only this has resulted in very inefficient parliamentary output, but it has also forced the High Representative of the international community in Bosnia and Herzegovina, particularly in the country's formative period, to frequently intervene in the legislative procedure, as will be elaborated further. Decision-making procedures remain one of the most contested issues in debates concerning potential constitutional reforms, though it seems very unlikely that any relevant stakeholder will willingly relinquish their current veto position.

4. RELATIONSHIP BETWEEN TWO HOUSES OF PARLIAMENT

As already mentioned the current constitutional solutions establish a system of perfect bicameralism, which means that any legislative decision must be approved by both chambers before it can be considered adopted.[197] The two chambers have equal role to play also in issues dealing with foreign relations, particularly as to the consent on the ratification of treaties, which is not usually the case in comparative federalism.[198] Although the provisions of the Constitution dealing with the amendment procedure leave a lot to be desired in the sense of clarity, they are generally understood to mean that constitutional amendments can be adopted only after both chambers approve them, but where the two-thirds majority is required in the House of Representatives.[199] This in effect means that the ethnic veto could potentially be used even during the amendment procedure in the House of Peoples, making Bosnian constitution particularly rigid. Additionally, the collegiums of both cooperate together, and this can even lead to formation of the joint collegium that has a facilitating role as to the responsibilities of the Parliamentary Assembly of Bosnia and Herzegovina, and it decides by consensus. Finally, both chambers can hold a joint session, when joint collegium considers it necessary, but it cannot adopt legislative decisions.[200]

5. RELATIONSHIP WITH OTHER BRANCHES OF GOVERNMENT

The Parliamentary Assembly of Bosnia and Herzegovina does not act in vacuum, and in a system featuring the separation of powers it has an established relationship with

196. Bahtić-Kunrath, 2011, 918.
197. See Article IV/3.c) of the Constitution of Bosnia and Herzegovina.
198. See Marković, 2012, 110.
199. See Article X/1 of the Constitution of Bosnia and Herzegovina.
200. Ademović, Marko, Marković, 2012, 180.

other branches of government. In discussion of the relationship between the state parliament and the executive branch of government, we have to consider its relationship to both the Council of Ministers and the Presidency of Bosnia and Herzegovina, which share the executive power at the level of Bosnia and Herzegovina. It is also necessary to considered the relationship of the Parliamentary Assembly of Bosnia and Herzegovina to the Constitutional Court of Bosnia and Herzegovina, which exercises both strong judicial review, as part of its abstract review powers, and week review in relation to its adjudication of the ethnic veto in the House of Peoples,[201] but also other ways in which the Court has affected the functioning of the state parliament. Finally, we will briefly consider the relationship of the state parliament to the interventionist role exercised by the High Representative of international community in Bosnia and Herzegovina.

5.1. Relationship with the Executive Branch

When it comes to the relationship with the Council of Ministers, it has to be considered with regards its appointment by the state parliament, the legislative initiative powers of the Council, as well as the control function exercised by the Parliamentary Assembly of Bosnia and Herzegovina in relation to it. The Constitution provides that the Chair of the Council of Ministers, and the individual ministers that he later nominates, takes office only after the approval by the House of Representatives, upon the nomination by the Presidency of Bosnia and Herzegovina.[202] The state parliament can also hold the vote of no confidence to the Council of Ministers, but this has never materialized.[203] The state parliament also exercises its control function through other means, such as interpellations, but it has been suggested that due to the very small opposition in the parliament, due to the existence of the grand coalitions, the control function is not exercised effectively thus not allowing the full political accountability of the government.[204] Other factors identified as producing such low performance with regards to the control function are the marginalization of the Parliamentary Assembly of Bosnia and Herzegovina through the transfer of the center of decision-making to informal channels, and the entity and ethnic fragmentation in the state parliament.[205]

201. Generally on typology of judicial review, as used here, see N. Kulenović, *Bosnian Constitutional Court as a Policy Maker, delivered at conference 'Constitutional Courts in the Former Yugoslavia: The Role and Impact in Times of Transition'*, Sarajevo, 18 April 2016 (on file with authors). See also J. I. Colon-Rios, *A New Typology of Judicial Review of Legislation*, 3 (2) *Global Constitutionalism* (2014), 143-169.
202. See Article V/4 of the Constitution of Bosnia and Herzegovina.
203. See Saraćević, 2011, 233.
204. G. Marković, *Kriza parlamentarizma u BiH* [*Crisis of Parliamentarism in BiH*], in S. Gavrić, D. Banović (ed.), *Parlamentarizam u Bosni i Hercegovini* [*Parliamentarism in Bosnia and Herzegovina*] (Friedrich Ebert Stiftung, Sarajevo, 2012), 331-334.
205. M. Sahadžić, *Kontrolne funkcije Parlamentarne skupštine Bosne i Hercegovine* [*Control Functions of the Parliamentary Assembly of Bosnia and Herzegovina*] in S. Orlović (ed.), *Demokratske performanse parlamenata Srbije, Bosne i Hercegovine i Crne Gore* [*Democratic Performance of the Parliaments of Serbia, Bosnia and Herzegovina and Montenegro*], (Sarajevski otvoreni centar, Sarajevo, 2012), 157.

Not only is the Council of Ministers one of the actors who have the power of legislative initiative, but it in practice «holds the monopoly over legislative initiative», so much so that some commentators see in that fact one of the signs of the crisis of parliamentarism in Bosnia and Herzegovina.[206] It is also suggested that the fact that one-third of the legislative acts initiated by the Council of Ministers has been rejected by the state parliament, often by the members of the parties that are in the government, should not be seen as a sign of the independence of the parliament from the government, but a symptom of dysfunctional grand coalition, as a corollary of the consociational regime, and the fact that the Council of Ministers has different rules concerning adoption of decisions.[207]

With regards to its relation to the Presidency of Bosnia and Herzegovina, beyond approval of its nominee for the position of the Chair of the Council of Ministers, it is important to mention the power of the Presidency of Bosnia and Herzegovina with regards the dissolution of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.[208] However, the consequences of such a move are not perfectly clear, since there is no provision on similar dissolution of the House of Representatives and holding of the new elections.[209]

5.2. Relationship with the Constitutional Court of Bosnia and Herzegovina

The relationship between the Constitutional Court of Bosnia and Herzegovina and the Parliamentary Assembly of Bosnia and Herzegovina should not only be seen through the lens of characteristic issues dealing with the democratic legitimacy of the strong judicial review power of the former,[210] but also in the light of the Court's very complex role of both enabling the state parliament to act in broad policy areas, and also seriously curbing down on some of its important competences. Namely, we would have to consider the way that the Court has expanded the scope of the state competences, thus enabling the greater room for maneuver of the state parliament, but also of the manner in which it had interpreted its competences as relating to the ethnic veto mechanism in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, which made it largely ineffective.

With regards to the first point, namely the expansion of the state competences, we need to start with the frequent suggestion that the very limited scope of state competences is one of the primary indicators of the country's alleged confederal char-

206. Marković, 2012, 327.
207. See Bahtić-Kunrath, 2011, 902.
208. See Article IV/3.g) of the Constitution of Bosnia and Herzegovina.
209. See Saraćević, 2011, 233-234.
210. See i.e. W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Dordrecht, 2008), 27.
211. See i.e. F.L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 *Constitutional Commentary* (1996) 145-157; S. Savić, *Konstitutivnost naroda u Bosni i Hercegovini* [*Constituency of Peoples in Bosnia and Herzegovina*] (Pravni fakultet u Banja Luci, Banja Luka, 2000), 19; S. Bose, *The Bosnian state a decade after Dayton*, 3 (12) *International Peacekeeping* (2005), 322-335, 326.

acter.[211] Without getting into theoretical debates as to the correct conceptualization of the state structure, which according to the Constitutional Court of Bosnia and Herzegovina is of inherently *sui generis* nature,[212] it is hard to deny that Article III/1 of the Constitution of Bosnia and Herzegovina, providing for the apparently exhaustive list of the «responsibilities of the institutions of Bosnia and Herzegovina» leaves a lot to be desired of a constitution for a truly federal polity.[213] Through a mechanism that one of the authors has described elsewhere as a «dialectic of legitimation»[214] the Constitutional Court of Bosnia and Herzegovina, with constitutive assistance of the High Representative,[215] has extensively interpreted the sparse constitutional provisions in such a manner that now the «existing legal basis [on responsibilities of state and entities] does not reflect the existing legal situation in the country, i.e., its constitutional reality».[216] This was done not only upon the constitutional challenges to the legislation imposed by the High Representative, but also the legislation that was adopted by the Parliamentary Assembly of Bosnia and Herzegovina itself.[217] Of course the fact that the Constitutional Court of Bosnia and Herzegovina has opened the door to the Parliamentary Assembly of Bosnia and Herzegovina to adopt almost any legislation that it considers necessary, particularly if it can be brought into connection to the country's EU aspirations, does not mean that the state parliament will in fact use such opportunity. Its legislative output is conditioned by political considerations, having in mind the cited complex decision-making procedures that enable easy legislative blockades.

The second point, namely the manner in which the Constitutional Court of Bosnia and Herzegovina has curbed the important competence of the state parliament, turns to the way the Court has interpreted its competence to rule on the "procedural regularity"[218] in the invocation of the ethnic veto in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. The ordinary textual interpretation of the provision,[219] as well as some indications as to the intent of the drafters,[220] point to the conclusion that the Court was not envisaged as having the power to rule

212. Decision of the Constitutional Court of Bosnia and Herzegovina in Case U-1/11, 13 July 2012, para. 64.
213. The Constitution provides for residual powers in favor of the two entities. See Article III/3.a) of the Constitution of Bosnia and Herzegovina.
214. Kulenović, 2016.
215. See i.e. J. Marko, *Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina*, 4 *European Diversity and Autonomy Papers* (2005), 9.
216. Ademović, Steiner (eds.), 2010, 575.
217. See i.e. Decision of the Constitutional Court of Bosnia and Herzegovina in Case U-9/07, 4 October 2008.
218. See Article IV/3.f) of the Constitution of Bosnia and Herzegovina.
219. See eg P. C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 2 (19) *Fordham International Law Journal* (1995), 392; Yee, 1996, 188.
220. G. Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers, Leiden, 2005), 75-76.

on the substance of the invoked ethnic veto, which is realistic to presume was to have a more robust nature. With such interpretation of its competence on this issue the Court has effectively neutralized this "institutional veto player",[221] since it allows the bare majority of Court to decide that the ethnic delegates in the House of Peoples were substantially wrong in consideration that challenged legislative act is of vital national interest to the constituent people whose interest they are supposed to represent.[222] One of us has argued previously that this move by the Constitutional Court of Bosnia and Herzegovina should be seen in the light of its more general policy of undermining of the consociational compromises.[223] Ironically this serious curbing of one of the principal powers of the House of Peoples has at the same time eased the already burdensome legislative procedure, thus allowing the Parliamentary Assembly of Bosnia and Herzegovina to function more efficiently. That the move has not had such an effect is attributable to the fact that there exists the second veto point, namely the "entity voting", which is not susceptible to judicial review.

5.3. Relationship with the High Representative

The wide-ranging extent of the state-building role of the international community in Bosnia and Herzegovina cannot be understated,[224] so much so that the country has been described as a clear instance of internationally "imposed federalism".[225] This role of international community is not only seen in the state's constituting moment, but also, and particularly, in the post-Dayton period of state reconstruction and consolidation. Indeed, it is not possible to realistically consider the positioning and the functioning of the Parliamentary Assembly of Bosnia and Herzegovina without taking into consideration the role of the High Representative of international community in Bosnia and Herzegovina, which has often, particularly in the formative period of the state, substituted the state parliament, imposed substantial state-building legislation, and thus avoided the gridlocks that have otherwise characterized the workings of the parliament.[226]

221. Bahtić-Kunrath, 2011, 902. Similar conclusions in Trnka, 2009, 91-94; Kulenović, 2016.
222. Decision on the Public Radio-Television Service is an instance in which the majority of the Court, with both Croat judges dissenting, effectively overruled the veto of Croat delegates in the House of Peoples. See Decision of the Constitutional Court of Bosnia and Herzegovina in Case no. U-10/05, 22 July 2005.
223. Kulenović, 2016.
224. See S. Stroschein, *Consociational Settlements and Reconstruction Bosnia in Comparative Perspective* (1995–Present), 1 *The ANNALS of the American Academy of Political and Social Science* (2014), 97-115.
225. Keil, 2013, 102.
226. See G. Knaus, F. Martin, *Travails of the European Raj*, *Journal of Democracy* (2003), 60-74; Ademović, Steiner (eds.), 2010, 794-825; E. Omerović, *Ured visokog predstavnika međunarodne zajednice u Bosni i Hercegovini* [*Office of High Representative of International Community*], in Banović, Gavrić (eds.), 2011, 459-491. This is not a place to discuss the legal grounding for such interventions, suffice to say that it is not without serious doubts. See eg C. Steiner, *Friedenskonsolidierung durch Verfassungsgerichtsbarkeit in Bosnian und Herzegovina:*

This "post-liberal approach"[227] of democracy imposition in Bosnia and Herzegovina has been criticized for seriously undermining the state sovereignty,[228] and generating unavoidable paradoxes of democracy.[229] At the same time the necessity of such robust intervention in the municipal legal system, including the substituting of the state legislature, particularly in the state's formative period, is hard to deny,[230] even if it could also be claimed that it helped create a specific political culture of dependence that undermined the need for elite cooperation and compromise as necessary elements of existing consociational arrangements. Indeed, the analysis of the functioning of the Assembly of Brčko District of Bosnia and Herzegovina has also shown that its celebrated early efficiency is directly attributable to even more robust interventions by the deputy of the High Representative and Supervisor for Brčko District, and that its later disengagement was also followed by characteristic gridlocks.[231]

We must take into account the process of High Representative's gradual disengagement from robust legislative interventions since at least 2002, when it «became more of a facilitator than a direct negotiator».[232] It was hoped that such a development would lead to the maturing of the parliamentary culture and facilitation of compromise and the gradual overcoming of the inherent difficulties in the decision-making procedures. Such normative expectations are particularly well exemplified in the following:

> The process of creating structures of a legal state and democracy-oriented institutions at the State level, as provided for in the BiH Constitution, considering their development under a protectorate, face a double challenge today, years after the establishment of peace. After many years of guardianship, at times pleasant, the institutions of Bosnia and Herzegovina must learn to make difficult and unpopular decisions by themselves, which are necessary for Bosnia and Herzegovina to secure its future survival, and to stand by such decisions before its cit-

Lehren aus einem Versuchslabor der Internationalen Gemenschaft [*Peace-building through Constitutional Adjudication in Bosnia and Herzegovina: Lessons from A Laboratory of International Community*], (Nomos, Baden-Baden, 2015), 110-118; T. Banning, *The 'Bonn Powers' of the High Representative in Bosnia and Herzegovina: Tracing a Legal Figment*, 2 (6) *Goettingen Journal of International Law* (2014), 259-302.

227. M. Parish, *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia* (I.B. Tauris, London, 2009), 9.
228. G. Marković, *Bosanskohercegovaćki federalizam* [*Bosnian Federalism*] (University Press, Sarajevo, 2012), 315.
229. D. Chandler, *Bosnia: The Democracy Paradox, 100 Current History – New York Then Philadelphia* (2001), 114-119.
230. See eg S. Bose, *The Bosnian State a Decade after Dayton*, 3 (12) *International Peacekeeping*, (2005), 322-335.
231. See N. Kulenović, *Skupština Brčko Distrikta BiH: parlament ili općinsko vijeće?* [*Assembly of Brčko District of BiH: Parliament or Municipal Council?*], in Gavrić, Banović (eds.), 2012, 179. See also Bahtić-Kunrath, 2011, 916.
232. Keil, 2013, 173. Similarly on changing role of international community in BiH, see V. Perry, *Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?'*, 5 (22) *International Peacekeeping*, (2015), 490-510, 500.

> izens. In addition, these institutions must learn to make such difficult decisions by compromise, as stoppages in legislative and executive authority at the state-institution level are unacceptable, considering all the problems the country has.[233]

As seen in the example of the Assembly of Brčko District of Bosnia and Herzegovina, and indeed in the functioning of the Parliamentary Assembly of Bosnia and Herzegovina itself, such disengagement of international community was not followed by efficient parliamentary procedures, but by expected consociational maladies in form of chronic legislative gridlocks.

6. PROSPECTS FOR REFORM

The circumstances of Bosnian deficient constitution-making have engendered protracted discussions concerning the need for its reform,[234] and have inevitably included the proposals for the reform of the Parliamentary Assembly of Bosnia and Herzegovina. The discussions on the reform of the state legislature have focused on different structural failings associated with the two houses of parliament. As already indicated when discussing the decision-making procedures, the House of Representatives has in particular been a focus of criticism for its burdensome "entity voting" procedure which has a potential, and has indeed lead to chronic gridlocks in the parliament. Although this procedure is also applied in the House of Peoples, because of its size and structure, the problem is most fully exemplified in the lower house of parliament. The House of Peoples, on the other hand has faced much more fundamental challenges, particularly after the judgments of the European Court of Human Rights in the cited *Sejdić and Finci* and *Zornić* judgments. The critics have indicated that not only is the composition of this legislative chamber discriminatory, for its exclusion of the individuals who are not members of the three "constituent peoples", but that its very nature as a body of ethnic, rather than territorial representation is deficient[235] and even incoherent.[236]

233. Advemović, Steiner (eds.), 2010, 20. Similarly in S. Gavrić, 2012, 247-248.

234. See e.g. J. Marko, 2005, 375-381; D. Banović, S. Gavrić, *Constitutional Reform in Bosnia and Herzegovina, in Politička misao: časopis za politologiju*, (2010), 159; V. Perry, *Constitutional Reform Processes in Bosnia and Herzegovina: Top-Down Failure, Bottom-up Potential, Continued Stalemate*, in V. Perry, S. Keil (eds.), *State-building and Democratization in Bosnia and Herzegovina* (Routledge, London/New York, 2015), 15-40; G. Marković, *Ustavne promjene u Bosni i Hercegovini* [*Constitutional Changes in Bosnia and Herzegovina*], in Banović, Gavrić (eds.), 2011, 71-104.

235. See E. Hodžić, N. Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights in the Case of Sejdić and Finci v. BiH* (Analitika, Sarajevo, 2011), 119-124; S. Gavrić, *Constitutional Reform in Bosnia and Herzegovina. A Unicameral Parliamentary Political System as a Solution for the Implementation of the Ruling in the Case "Sejdić and Finci vs. Bosnia and Herzegovina"?*, 2 (1) *South-East European Journal of Political Science*, (2013), 75.

236. Kulenović, 2016.

The first serious attempt at the reform of the state legislature came in 2006 with the "April package" of constitutional amendments,[237] that in the end had a narrow defeat by two votes. No agreement could be reached with regards to the problematic decision-making procedures in the House of Representatives, namely the so-called "entity voting" which was seen as untouchable part of the initial constitutional compromise by the Serbian political elites. The number of representatives in the House was to be increased to eighty-seven, with three places reserved for the members of the "Others". On the other hand the existing perfect bicameralism would be abandoned, such that the competences of the House of Peoples would be reduced only to the consideration of the possible violations of the vital national veto of the constituent peoples, thus bringing this chamber closer to the Council of Peoples of the National Assembly of Republika Srpska. Such reduction in competences would likely put this body out of the material scope of the Article 1 to the Protocol no 3 to the European Convention on Human Rights,[238] which would, legally at least, justify the continuing exclusion of the "Others" from the composition of the chamber. The number of the delegates in the House of Peoples would be increased to twenty-one, with seven from each of the three "constituent peoples", to be indirectly selected by the House of Representatives. The amendment did not specify that Serb delegates would have to come from Republika Srpska, and Bosniak and Croat delegates from Federation of Bosnia and Herzegovina entity. Finally, the notion of the "vital national interest" veto would now be expressly defined, in line with the definitions in the constitutions of the two entities, and would include the right of constituent peoples to be represented in the bodies of the legislative, executive and judicial authority and to have equal rights in the decision-making process; identity of constituent peoples; territorial organization; organization of the bodies of public authority; education; language and script; national symbols and flags; spiritual heritage, particularly religious and cultural identity and tradition; maintenance of the integrity of Bosnia and Herzegovina; system of public informing; and amendments to the Constitution of Bosnia and Herzegovina. Also analogous to entity constitutions any other question could be declared to be an issue of vital national interest if two-thirds majority of any of the ethnic caucuses in the House of Peoples would so decide. Importantly, the Constitutional Court of Bosnia and Herzegovina would have been given an express power to adjudicate not only on the procedural issues concerning the invocation of the ethnic veto, but also its substantive aspects.

This failed attempt was followed in 2008 by the reform initiative known as "Prud process" which foresaw a very general agreement between the leaders of the three dominant ethnic parties in BiH – SDA, SNSD and HDZ – on the direction of constitutional reforms, including the harmonization of the Constitution of Bosnia and Herzegovina with the European Convention on Human Rights.[239] A more concrete proposal

237. See at http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Aprilski_paket1.pdf (accessed 19 July 2016).
238. Kulenović, 2016.
239. See at http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (accessed 19 July 2016).

was seen in 2009 in the form of the so-called "Butmir package" of constitutional amendments, which reaffirmed the main commitments of the reform package from 2006, as it relates to the Parliamentary Assembly of Bosnia and Herzegovina.[240] This proposal never gained widespread support and was not even taken before the state parliament.

An important characteristic of these constitutional reform attempts was their non-participatory nature, in form of the negotiations between elites and ethnic party leaders, often outside of the institutional structure and legal channels of the Parliamentary Assembly of Bosnia and Herzegovina. Although the constitutional reform talk is of perennial nature in Bosnia and Herzegovina, the prospects for more substantive reforms are slim.[241] The House of Peoples has best prospects for reform due to the pressure from the European Court of Human Rights in an ever growing number of cases, although as time has shown the enforcement of its decisions has proven to be very difficult. An important driving factor for reforms will be continuing engagement of Bosnia and Herzegovina in EU integrations, although the positions and conditions put before Bosnia and Herzegovina by the Union has evolved over time,[242] in face of absence of any consensus as to the organizational model to be adopted for the second chamber of the state parliament.

7. CONCLUSION

With its peculiar name, small size, limited competences, extremely inefficient procedures, failures in its control functions in relation to government, and political marginalization in practice – not only seen in moments of "high politics", such as negotiations of constitutional reforms, but also in effective monopoly of legislative initiative by the Council of Ministers – the Parliamentary Assembly of Bosnia and Herzegovina is an institution that has a long way to go before it establishes itself as a formidable actor on the political scene in Bosnia and Herzegovina. This, however, is not only a function of its own doing, or rather that of its members, but of its institutional features established by the Dayton agreement which has proved tenacious in face of initiatives for constitutional reform. It must be kept in mind that the form and functioning of any institution, as well as the state parliament, will ultimately be a consequence of underlying political compromises on the nature of state and polity. Precisely the lack of any common federalist ideology behind the state structure has led

240. See at http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Butmir_i_Prud.pdf (accessed 19 July 2016).

241. F. Vehabović, *Zašto neće doći do sistematskih ustavnih promjena* [*'Why there will not be systematic constitutional reforms'*], 2 *Svjeske za javno pravo*, (2010), 36; F. Bieber, *Why constitutional reform will not solve the Bosnian blockade'*, in *Florian Bieber's Notes from Slydavia*, 28 July 2014, at: https://florianbieber.org/2014/07/28/why-constitutional-reform-will-not-solve-the-bosnian-blockade/ (accessed 19 July 2016).

242. Perry, 2015, 500.

Burgess to conclude that Bosnia and Herzegovina is a «multinational federation without multinational federalism».[243] That this sentiment would also be reflected in the state's main body of political representation should not come as surprise.

243. M. Burgess, *Multinational Federalism in Multinational Federation*, in M. Seymour, A.G. Gagnon (eds.), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan, New York, 2012), 41.

FEDERALISM IN MULTI-ETHNIC STATES: A NORMATIVE ANALYSIS

MARIA ROMANIELLO

1. INTRODUCTION

Reflections on the political and legal implications of ethnic diversity have been the focus of scholarly debate for more than 40 years. The contemporary revival of nationalism and the emergence of multicultural states have stimulated a new discourses on the settled relationship between the state and the nation, putting into question the classical notion of state and triggering the famous Mazzini's nationalist slogan «[e]very nation a state, only one state for the entire nation».[244]

Nationalism became thus the instrument used by discontented minorities and ethnic groups for challenging the national authority and questioning the legitimacy of the state.

The rise of multiple nationalisms within the state has thus brought at the centre of attention the need to find institutional solutions for assuring the accommodation of ethnic diversity.

Multicultural ethnic federalism has being increasingly presented as the best political settlement and a lot of scholars have extensively argued about the benefits of federalism in accommodating territorial division and in managing ethno linguistic conflicts. However, this positive assessment is not unanimous and others schools of thought have put into question the benefits of federalism and argued that in the long run federalism ends up by intensifying ethnic conflicts, while the territorial recognition of minorities can preserve and reinforce the differences between minority groups, boosting the disintegration forces within the state. «Here, in a nutshell, is the paradox: federalism has features that are both secession inducing and secession preventing».[245]

It follows that, although theoretical relevant, the benefits of federalism remain far from being empirically uncontested and therefore the main question that should be addressed when dealing with multicultural state is to what extent federation has the potential to successfully reconcile competing national aspirations.

244. Quoted in E. Hobsbawn, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge University Press, Cambridge, 1990), 101.

245. J. Erk, L. Anderson, *The paradox of Federalism: Does Self-Rule Accomodate or Exacerbate Ethnic Divisions?* (Routledge, London, 2010).

The aim of this chapter is to analyse this lively debate and to point out the strengths and weaknesses of federal systems in accommodating diversities in divided societies.

In order to do so, the chapter will first present the notion of nationalism and will analyse its historical evolution and the emergence of multicultural states. The chapter will also focus on the approaches and the affirmation of Liberal nationalism and the focus on minority rights.

In the second section will be generally introduced the idea of federalism, pointing out the importance to distinct it from the practical institutional arrangements, i.e. federal political systems. In the third section, the chapter will enter into the core of the debate and will present the main advantages of multicultural federalism and will also analyse the model of non-territorial cultural autonomy.

Finally, the chapter will end up with a general consideration on the negative implications of multicultural ethnic federalism and will make a final reflection on the famous Wheare's words and the need to develop a sense of a common vision of the state.

2. DEALING WITH MULTI-ETHNIC STATES: THE ISSUE OF NATIONALISM AND THE REVISED LIBERAL PRINCIPLE OF EQUALITY

The concept of nationalism describes a complex phenomenon, which has evolved through time and it has served different purposes.

Nationalism played a key role in the process of state building[246] and represented the leitmotiv for the establishment of the nation-state and for the legitimate recognition of its sovereignty. The state was thus justified as a territorial political community, whose prime allegiance was to its cultural self-identity, called nation or nationality. For this reason, at the time, the notion of state and that of nation overlapped. The two concepts were thus conceived as inextricable connected, and it is not a case that Hobsbawn claimed that the nation had to be considered as «a social entity only in so far as it relate[ed] to a certain kind of modern territorial state, the "nation-state", and it [would have been] pointless to discuss nation and nationality except insofar as they relate[d] to it».[247] It appears clear that the author places the concept in the era of the nation-states, synthetized in the famous Mazzini's nationalist slogan «[e]very nation a state, only one state for the entire nation».[248]

Although strictly connected, the concept of nation[249] and nationalism should not be used in an interchangeable way and actually the central difficulty in this field of

246. See A. von Bogdnady, S. Häussler, F. Hanschmann, R. Utz, *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches'*, in A. von Bogdandy, R. Wolfrum (eds.), 9 *Max Planck Yearbook of United Nations Law*, (2005), 579-613.

247. Hobsbawn, 1990.

248. Quoted in Hobsbawn, 1990, 101.

249. See R. Utz, *Nations, Nation-Building, and Cultural Intervention: A social Science Perspective, in von Bogdandy*, Wolfrum (eds.), 2005, 615-647.

study «has [always] been the problem of finding adequate and agreed definition of the key concepts, nations and nationalism».[250]

Smith identified five different usages of nationalism[251], while Gellner simply affirmed that nationalism represented «primarily a political principle, which [held] that the political and national unit should be congruent».[252] It follows that the concept of nation is the ultimate outcome of nationalists' claims:

> "Nation" does not denote a kind of community describable apart from nationalist projects and the claim of national self-determination. Once we have a sociologically persuasive account of where a "nation" is, we find that one way or another the political mobilization that nationalist theory is supposed to justify is already a part of how we are picked the community out. In other words the political program of nationalism is built into the category of nation to begin with; the normative argument is always circular.[253]

Beside the definitional issues,[254] what should be underlined is that nationalism has historically embodied the justifications for the establishment of a nation within well-defined territorial boundaries. In this sense, nationalism represented «the pursuit of a set of rights for the self-defined members of the nation, including a minimum territorial autonomy or sovereignty».[255] This approach to nationalism became fundamental for the recognition of the principle of self-determination and the establishment of some form of independent organized government within the state. Moreover, with the affirmation of the nation-state, it appeared thus unthinkable to divide the territory from the nation[256] and the boundaries demarcated the space of deployment of the national authority, recognized as legitimate by its *demos*.

Therefore, becoming the outstanding discourse for claims to political autonomy and self-determination, the notion of nationalism and ethnicity mostly coincided. Namely, «it is the modern state that defines nationhood, and pre-existing ethnic relations are revised either to coincide more or less with its boundaries or to constitute the basis of counter-state movements for the formation of new states».[257]

250. J. Hutchinson, A. Smith (eds.), *Nationalism* (Oxford University Press, Oxford, 1994).
251. A. Smith, *Theories of Nationalism*, 2nd ed. (Duckworth, London, 1983).
252. E. Gellner, *Nations and Nationalism* (Cornell University Press, Ithaca, 1983).
253. J. Levy, *National Minorities without Nationalism*, in A. Dieckhoff (ed.), *The Politics of Belonging: Nationalism, Liberalism and Pluralism* (Lexington Press, Lanham, 2004), 155-74.
254. See W. Wayne Norman, *Negotiating Nationalism. Nation-building, federalism and secession in the Multinational State*, (Oxford University Press, Oxford, 2006).
255. L. W. Barrington, *'Nation' and 'Nationalism': The Misuse of Key Concepts in Political Science*, in 4 (30) *Political Science and Politics* (1997), 712-716.
256. See S. Grosby, *Territoriality: the transcendental, primordial feature of modern societies*, 2 (1) *Nations and Nationalism* (1995), 143-62; J. Penrose, *Nations, states and homelands: territory and territoriality in nationalist thought*, 3 (8) *Nations and Nationalism* (2002), 277-297; T. Forsberg, *The ground without foundation: Territory as a Social Construct*, 2 (8) *Geopolitics* (2003), 7-24.
257. C. Calhoun, *Nationalism and Ethnicity*, 19 *Annual Review of Sociology* (1993), 211-239, 219.

The contemporary revival of nationalism and the emergence of multicultural states have stimulated a new debate on the settled relationship between the state and the nation, which has not only put into question the classical approaches, but it has also revised its prior features, puzzling its former nature and purposes.

Nationalism became thus the instrument used by discontented minorities and ethnic groups for challenging the national authority and questioning the legitimacy of the state. In this perspective, some scholars have underlined how nationalism has thus served at the same time different and conflicting purposes: «it has ironically contributed to the formation, and survival as to the dismemberment of nation states».[258] However, it should be stressed that all the above "conflicting" purposes are based on the same claim of popular sovereignty: i.e. the affirmation of the principle of self-determination.

However, those claims do not automatically and simply lead to a demand of secession and the subsequent recognition of political autonomy. Today, it is generally acknowledged that the famous nationalist slogan of Mazzini does no longer apply and we are facing with the existence of more conceivable nations than promising states and the term multinational state indeed refers to the «existence of three or more distinct national identities within the borders of one state».[259]

It follows that the concepts of ethnicity, nation and state no longer indicate the same sense of belongingness, but rather designate different and coexisting cultural and identity allegiance.

Therefore, multicultural democracies are at the same time characterised by the problem of accommodation of different cultures, practices, social expectations, role and languages and the need to recognise their autonomy and distinctiveness within the boundaries of the state.

In this perspective, scholars have underlined how politics of recognition have reached their own limits and they reconsidered the classical liberal principle of equality, which in its homogenising and neutral approach was estimated not helpful in recognising the rights of the national minorities and conversely it appeared to «systematically privilege the majority nation».[260] Liberal Nationalism has thus become the main theory to address the issue of diversity over the last decade.

Namely, freedom, as a key concept, has been revised and scholars have tried to reconcile the liberal traditional approach with the claims of ethnic and national minorities.[261]

On the one side, freedom has been used as a means for reformulating the classical principle of equality in order to recognise and accommodate the rights of mi-

258. P. Pamir, *Nationalism, Ethnicity and Democracy: Contemporary Manifestations*, in 2 (2) *The Journal of Peace Studies* (1997).

259. K. Soeren, *Multinational federalism in Bosnia and Herzegovina* (Ashgate Publishing,Burlington, 2013), 2.

260. W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, (Oxford University Press, Oxford, 1995), 51.

261. Kymlicka, 1995.

norities, through the introduction of policies for positive regulation of the differences. As underlined by Kymlicka «Group-differentiated rights – such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims and languages rights – […] can ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority».[262] In other words, equality has been used for justifying the introduction of measures aimed at preserving the distinctiveness of each group's culture vis-à-vis the state's dominant majority. In this perspective, the Liberal Nationalism is about minority rights and Liberal Nationalists argued for a new definition of nation building and nation-state «in the light of the existence of minority nations within the borders of a nation-state».[263] In this sense, the argument of Liberal Nationalism is based on the need to promote and accept diversity within the state.

On the other side, freedom has became also the tool for rethinking the classical principle of self-determination and it is now acknowledged as the power recognised to the member of «an open society to change the constitutional rules of mutual recognition and association from time to time as their identities change».[264] Differently from its classical definition, this normative approach does not entail the determination of people into a definite and a new constitutional arrangement, but rather assures the exercise of the right of self-determination within the state by participating and being involved in the decision-making process.

All the above, obviously requires a democratic system in place and new institutions and procedures are thus called for reconciling the claims of the different *demoi* and to include them in the national political arena and one of the most advocated form is through federal institutional arrangements.

3. Federalism and federation: a normative analysis

Long influenced by the American experience of the late eighteen-century, the discussions about the definition of federalism have long been at the centre of scholarly debate. However, still today, there is not a unique and uncontested definition and the term has vested different and practically purposes, strongly influenced by the academic discourses about its origins.[265]

The term federalism derives from the Latin word *foedus*, which means an alliance or pact among individuals reconciling both personal and common interests. Initially, it was interchangeably used with the term federation failing to mark the distinction between the ideological propensities of federalism from its institutional arrangements.

262. Kymlicka, 1995, 109.
263. W. Kymlicka, *Nation-building and Minority Rights: Comparing West and East*, 2 (26) *Journal of Ethnic and Migration Studies* (2000), 183-212, 187.
264. J. Tully, *Introduction*, in A. G. Gagnon and J. Tully (eds.), *Multinational Democracies* (Cambridge University Press, Cambridge, 2001), 5.
265. See M. Burgess, *Comparative Federalism. Theory and Practice* (Routledge, London and NY, 2006).

Preston King justified this gap by arguing that the lack of this distinction was mainly caused by the same difficulties in conceptualising federalism.[266]

An early differentiation can be found in Wheare's definition. Wheare, describing the federal principle as the «the method of dividing powers so that the general and the regional governments are each within a sphere, co-ordinate and independent»,[267] featured the distinction between the normative idea of federalism as organizing principle and its practical arrangement in a federation, that is the way the ideal type of federalism takes place in a specific organizational form, with defined structures, institutions and procedures.

However, it was only with King that the conceptual distinction between federalism and federation was lucidly introduced. King, arguing that «there may be federalism without federation, but there can be no federation without some matching variety of federalism»,[268] he stressed that federalism should have been defined as the ideological premise for regional independence and autonomy, while federation represented its practical institutional arrangement.

On the same, Ronald Watts argued that:

> Within the genus of federal political systems, federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens.[269]

Another important definitional contribution of federalism came from William Riker. Almost fifty years since its publication, Riker's book *Federalism: Origin, Operation, Significance* still continues in stimulating a vibrant debate among federalist scholars and it still remains one of the most influential contribution on the politics of federalism. In this regard, David McKay noticed that «[n]o one has come up with a theory of federalism that is remotely as ambitious or as powerful and Riker's theory remains, almost forty years later, the only theoretical perspective on the subject worthy of that name».[270] Furthermore, Stepan rightly argued that any new study on the field «cannot progress too far without either building upon his arguments, or showing good reasons to refine or even reject his arguments».[271] Riker identified a fed-

266. P. King, *Federalism and Federation* (Beckenham, Croom Helm, 1982), 82.
267. K. Wheare, *Federal Government* (Oxford University Press, Oxford, 1947).
268. King 1982, 76.
269. R. L. Watts, *Comparing Federal Systems* (Institute of Intergovernmental Relations, Kingston, 1999).
270. D. McKay, *On the Origins of Political Unions: The European Case*, 9 (3) *Journal of Theoretical Politics* (1997), 287.
271. A. Stepan, *Toward a New Comparative Politics of Federalism, Multinationalism, and Democracy. Beyond Rikerian Federalism*, in E.L. Gibson (ed.), *Federalism and Democracy in Latin America* (Johns Hopkins University Press, Baltimore, 2004), 29-84, 30.

eral constitution in the case «(1) two levels of government rule the same land and people, (2) each level has at least one area of action in which is autonomous, and (3) there is some guarantee of the autonomy of each government in its own sphere».[272] Federalism is the outcome of a constitutional rational bargain among self-interested politicians «for the purpose of aggregating territory, the better to lay taxes and raise armies».[273] Moreover, Riker emphasised the difference between centralised and peripheral federal model. According to Riker «the numerous possible federal constitutions may be arranged in a continuum according to the degree of independence one kind of the pair of governments has from the other kind».[274] On one side of the continuum, the peripheral federal model describes the minimum conditions, where the federal government has very restricted independence and power, on the other side, in the centralised federalism the "ruler(s) of the federation" has more powers and capacity to take decisions more independently in a larger category of matters.

This distinction is very important because it underlines how the relationship between the levels of government within the federation can take different forms, by recognizing not only different degree of autonomy and self-government to the subnational units, but also be arranged accordingly with the purposes of its existence.[275]

Federal systems can be thus differentiated with reference to the nature of their origins: i.e. in holding-together and coming-together federations,[276] as well as can be classified accordingly to the ratio of internal distribution of powers between the centre and its constituent units i.e. symmetrical and asymmetrical federations.[277]

To sum up, as a normative concept,[278] federalism is rooted in two main assumptions: autonomy and union, which reflect the famous Elazar's definition of "shared rule and self rule",[279] where autonomy, on the one hand, reflects the constituents' power of self-government and, the union, on the other hand, the government of the whole society characterised by the willingness of the citizens to «stay or come

272. W. H. Riker, *Federalism: Origin, Operation, Significance* (Little, Brown and Company, Boston, 1964).
273. Riker, 1964, 11.
274. Riker, 1964, 5.
275. S. G. Cheema, D.A. Rondinelli (eds.), *Decentralization and Development: Policy Implementation in Developing Countries* (Sage Publications, London, 1983); D.A. Rondinelli, J.R. Nellis, G. S. Cheema, *Decentralization in developing Countries: A Review of Recent experience*, *World Bank Staff Working Papers*, no. 581, 1983.
276. A. Stepan, *Federalism and Democracy Beyond the U.S. Model*, in 4 (10) *Journal of Democracy* (1999), 19-34.
277. F. Requejo, *Decentralisation and Federal and Regional Asymmetries in Comparative Politics*, in F. Requejo, K.-J. Nagel, *Federalism beyond federations. Asymmetry and Process of Resymmetrisation in Europe* (Ashgate, Burlington, 2011), 1-12.
278. Thorlakson, in order "to accommodate the wide range of federal arrangements yet preserve conceptual clarity, we can distinguish between federalism as a normative concept, federal political systems and federations. See L. Thorlakson, *Comparing federal institutions: Power and representation in six federations*, 2 (26) West European Politics, (2011), 1-22, 4.
279. D.J. Elazar, *Exploring federalism* (University of Alabama Press, Tuscaloosa, 1987), 5.

together for common purposes».[280] Moreover, the concept of union is also strictly connected to another likely pattern of federalism, as a political idea, i.e. its potential to «peacefully reconcile unity and diversity within a single political system».[281]

This pattern was already well expressed in Freidrich's definition, who emphasising the conceptual link between federalism and constitutionalism and he reassessed the notion of federalism «as a highly dynamic process by which emergent composite communities have succeeded in organising themselves by effectively institutionalising "unity in diversity"».[282]

In this respect, advocates of federalism highlight its capacity in improving the efficiency of the system of governance: the transfer of powers to elected local authorities, increases people's opportunities for participation and «increases the accountability and responsiveness of elected officials to local citizens, providing incentive for more responsive democratic government».[283] Thus, federalism has been recommended as the favoured form of democratic governance in assuring stability within multinational states. In other words, federalism is seen as a political tool for facing critical issues, such the presence of multi-ethnic and multi-linguistic groups in a Country.

4. ACCOMMODATING DIVERSITY: MULTICULTURAL-ETHNIC AND NON-TERRITORIAL FEDERALISM

Building their arguments on the Liberal Nationalist approach and thus on the minority rights agenda, many scholars have widely argued on the potential role of federalism[284] as a means for accommodating ethnic diversity[285] and promoting the lib-

280. Y.T. Fessha, *Ethnic Diversity and Federalism. Constitution Making in South Africa and Ethiopia* (Ashgate, Burlington, 2010), 26.

281. R.L. Watts, *The Federal Idea and Its Contemporary Relevance*, in T.J. Courchene et. al. (eds.), *The Federal Idea. Essays in Honour of Ronald L. Watts* (McGill-Queen's University Press, Montreal, 2011), 13-27, 14.

282. C.J. Friedrich, *Federal Constitutional Theory and Emergent Proposals*, in A. W. Macmahon (ed.), *Federalism: Mature and Emergent* (Russell&Russell, New York, 1962).

283. P. Norris, *Federalism and Decentralization*, in P. Norris *Driving Democracy, Do Power-Sharing Institution Work?* (Cambridge University Press, New York, 2008), 157-185.

284. For a theoretical analysis on the definitional issue see M. Burgess, *Multinational Federalism in Multinational Federation*, in M. Seymour, A.-G. Gagnon (eds.), *Multinational Federalism. Problems and Prospects* (Palgrave Macmillan, London, 2012), 23-44; see also J. Rex, *Ethnic minorities in the Modern Nation State. Working Papers in the Theory of Multiculturalism and Political Integration*, (Palgrave, New York, 1996).

285. T.R. Gurr, *Peoples against the State: Ethnopolitical Conflict in the Changing World System*, 38 *International Studies Quarterly* (1994) 347-377; M. S. Kimenyi, *Harmonizing Ethnic Claims in Africa: A Proposal for Ethnic-Based Federalism*, 1 (18) *Cato Journal* (1998), 43-63; J.J. Linz, A. Stepan, *Problems of Democratic Transition and Consolidation, Southern Europe, South America and Post-Communist Europe* (Johns Hopkins University Press, Baltimore, 1996); A. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 4 (10) *Journal of Democracy* (1999), 19-34.

eral values of peace and individual security, as well as, democracy, individual rights, and inter-group equality in multinational polity.[286] However, federalism does not only accommodate diversity, but it has been further advocated as a successful tool for promoting it as on of the main value of the multicultural state.

Federalism offers thus a constitutional device for embracing diversity as a virtue and an advantage that merits state protection and promotion. Therefore, the state should be organised in order to assure to the whole society a legal participation in the national decision-making, while guaranteeing the internal justice, the protection of minorities' freedom and the promotion of the peace.[287] The reason lies on the fact that the multicultural federation should be strongly characterised by tolerance, respect, compromise, bargaining and mutual recognition.[288]

Based on these arguments, federalism as the potential «to unite people who seek the advantages of membership of a common political unit, but differ markedly in descent, language and culture»,[289] and it responds to the «desire of national minorities for self-government, principally by creating a province in which one or more minority groups can constitute a clear majority of the citizens and in which they can exercise a number of sovereign powers».[290] Therefore, the value of federations is rooted in their capacity to accommodate through their multiple institutional arrangements the «competing and sometimes conflicting array of diversities in divided societies».[291]

Multicultural federalism becomes thus the most advocated theoretical tool for granting autonomy and it should be stressed that multicultural federations usually differs from other territorial federations,[292] since the claims of ethnic groups for distinctive recognition and self-government are usually mirrored in greater regional autonomy than the one normally granted in other forms of federation. Therefore, in multi-ethnic federation «a region is expected to provide ethnic or cultural homogeneity; more emphasis is given to self-rule than shared rule and there is a greater regional representation at the federal level».[293] Practically, the recognition of different degrees of autonomy and the distinctive treatment granted to each minority ethnic group is eventually accommodated through asymmetrical federal arrangements. In-

286. W. Kymlicka, *Federalism and Secession: At Home and Abroad*, 2 (13) *Canadian Journal of Law and Jurisprudence* (2000), 207-222, 212-213.
287. T. Fleier, W, Kalin, W. Linder, C. Saunders, *Federalism, decentralization and conflict management in multicultural societies*, in R. Blindenbacher, A. Koller (eds.), *Federalism in a changing world* (McGill-Queen's University Press, Montreal, 2003), 197-215.
288. Y. Ghai, *Ethnicity and Autonomy: A frame Work Analysis*, in Y. Ghai (ed.), *Autonomy and Ethnicity Negotiating Competing Claims in Multi-ethnic States*, (Cambridge University Press, Cambridge, 2000), 24.
289. M. Forsyth, *Federalism and Nationalism* (Leichester University Press, Leichester, 1989), 4.
290. W. Norman, *Negotiating Nationalism* (*Nation- Building, Federalism, and Secession in the Multinational State*) (Oxford University Press, Oxford, 2006), 87-88.
291. M. Burgess, A.G. Gagnon, *Comparative Federalism and Federation: Competing Traditions and Future Directions* (University of Toronto Press, Toronto, 1993), 7.
292. Abebe, 2014.
293. Ghai, 2000, 12.

deed, Gagnon argued that special recognition of diversity and self-government of minority nations combined with asymmetrical federalism, contributes to equality and a stronger democracy within the multinational state.[294]

However, in Western tradition multicultural federalism remains still anchored to the territorial dimension and the recognition of national autonomy has always implied a territorial base for the autonomous national community. In this perspective, many scholars have emphasised how federalism might represent the best way for an extensive recognition of self-government for national minorities, if national minority groups are regionally concentrated,[295] and they have underlined that the benefit of multicultural federation is the recognition of the distinctiveness of minorities and their right to self-rule in their homeland.[296] In other words, scholars when underlying the benefits of federalism in Western democracies, firstly recognise the advantages in granting «federal forms of territorial autonomy to enable self-government for national minorities and indigenous peoples».[297]

Contrary to this approach, the conceptual link between ethnicity and territory was broken entirely in the central Eastern Europe and a new approach emerged for dealing with the "dilemma of ethno-cultural diversity",[298] the so-called non-territorial cultural autonomy.

Hardly debated in the West constitutional tradition, the model for national cultural autonomy was originally theorised by the socialist thinking of Renner[299] and Bauer, representing, on the one side, a practical response to the national movements within the multinational Austro-Hungarian Empire and, on the other side, the intellectual response to the perceived failure of the dominant model of the nation state. In this respect, Renner stressed on the distinction between the nation and the state and he defined, the first, as a cultural community, while the state was envisaged as a shared territorial space populated by autonomous and organized ethno-national groups. In this sense Renner and Bauer indicated, at least in theory, how «the idea of the nation-state and the political representation of ethnic diversity are diametrical opposed».[300]

294. A. Gagnon, *The moral Foundation of Asymmetrical Federalism: A normative exploration of the Case of Quebec and Canada*, in A. Gagnon, J. Tully (eds.), *Multinational democracies* (Cambridge University Press, Cambridge, 2001) 90-109, 108.
295. W. Kymlicka, *Emerging Western Multinational Federalism: Are they relevant for Africa*, in D. Turton (ed.), *Ethnic Federalism: The Ethipian Experience in Comparative Perspective* (Adis Ababa University, Adis Ababa, 2006).
296. S. Alemante, *Ethnic Federalism: Its promise and Pitfalls for Africa*, 28 *Yale Journal of International Law* (2003), 51-107.
297. W. Kymlicka, *Federalism and Secession: At Home and Abroad*, 2 (13) *Canadian Journal of Law and Jurisprudence* (2000), 207-222, 212-213 and 207.
298. A. Roshwald, *Between Balkanisation and Banalisation: Dilemmas of Ethno-cultural Diversity*, in D.J. Smith, K. Cordell (eds.), *Cultural Autonomy in Contemporary Europe* (Routledge, London, 2008), 29-42.
299. K. Renner, *State and Nation*, in E. Nimni (ed.), *National Cultural Autonomy and Its Contemporary Critics* (Routledge, London, 2005), 13-41.
300. N. Ephraim, *Nationalist Multiculturalism in Late Imperial Austria as a Critique of Contemporary Liberalism: The Case of Bauer and Renner*, 3 (4) *Journal of Political Ideologies* (1999), 289-314.

The model for national cultural autonomy is thus characterised by a combination of traditional territorial and non-territorial federalism and it is rooted in the "personality principle". In this sense, some scholars considered the approach as a complex and counter-intuitive model for facing national and ethnic conflicts.[301]

Although theoretically promising, the practice of this model remained extremely attached to the socialist thinking and its application, in several Central and East European countries,[302] has not been used as a mean for accommodating diversity, but rather as a strategy of "divide and rule" and as a way to boost the national loyalty of minority groups. Consequently, completely focused on the realisation of a socialist and economic order, the application of federalism took place outside of a democratic framework,[303] and its failure is extremely evident in the experience of East European countries.

The analysis of this model leads us to two main features. On the one side, the theoretical premises of non-territorial cultural autonomy offers a new normative approach to federalism and it underlines how the sole territorial autonomy is not sufficient to protect minority nationalities. Consequently, the model retains the potential to complement the territorial based models of minority rights. On the other side, the practice of non-territorial cultural autonomy underlines the important linkage between democracy and federalism. In this respect, it becomes evident that in Western countries, multicultural states successfully established working federal systems also thanks to the existence of further relevant features: such as well-developed democracy; well-established protection of human rights and the existence of an advanced economic system.

Therefore, federalism should not be conceived as the panacea for ethno-national conflicts and its success strongly depends upon the existence of many other factors.[304]

5. Final remarks: looking for a federal common vision

Many studies on multicultural federal systems have thus suggested that multicultural ethnic federalism represent so far the most effective means for accommodating diversity.[305] However, how it has been already underlined, generalisations are nonetheless hazardous and although a lot of federalist scholars have extensively argued about the benefits of federalism in the accommodation of territorial divisions

301. M. Forman, *Nationalism and International Labor Movement* (Pennsylvania State University Press University Park, PA, 1998).
302. D.J. Smith, *Non-Territorial Autonomy and Political Community in Contemporary Central and Easter Europe*, 1 (12) *Journal on Ethnopolitics and Minority Issues in Europe* (2013), 25-55.
303. K. Soeren, *Multinational federalism in Bosnia and Herzegovina* (Ashgate Publishing, Burlington, 2013), 24.
304. W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press, Oxford, 2001).
305. U. M. Amoretti, N. Bermeo, *Federalism and Territorial Cleavages* (The John Hopkins University Press, Baltmore, 2004).

and the management of ethno-linguistic conflicts,[306] in the long run, the territorial recognition of minorities can «perpetuate and strengthen the differences between groups»,[307] and, therefore «secession becomes more conceivable and a more salient option, even with the best designed federal institutions».[308]

It follows that, although theoretical relevant, the benefits of federalism remain far from being empirically uncontested. Hence, «federalism entrenches, perpetuates and institutionalizes the very divisions it has designed to manage»[309] and the classical Elazar's definition – "*self-rule plus shared rule*" – is weakened by its same autonomy principle, where self rule tends to reinforce the internal divisions. This is labelled as the "paradox of federalism".

In other words, federalism provides neither an answer to all relevant questions in multicultural states nor does its implementation lower the demand for further autonomy and the quest for secession.

Therefore for a viable multicultural ethnic federalism, it has been already underlined how other features should be in place. Another of them is the need to develop a common political vision. As already stressed by Wheare «nationality in a federal state means something more complicated than it does in a unitary state. And one of the factors, which produce in states the capacity to work a federal union, is the growth of this sense of a new common nationality over and above but not instead of their sense of separate nationality».[310]

Therefore, the potential of federalism in preventing conflicts is determined by its own capacity to promote dialectical balances between opposing claims and, following the Rikerian approach, federalism entails bargaining process, where federal arrangements have the potential to «accommodate a negotiated compromise between secessionist demands of a minority and the demand of the government to reestablish complete control».[311]

306. E. Nordlinger, *Conflict Regulation in Divided Societies* (Cambridge University Press, Cambridge, 1972); A. Lijphart, *Democracy in Plural Societies. A comparative Exploration* (Yale University Press, New Haven, 1977); D.L. Horowitz, *Ethnic groups in Conflict* (University of California Press, Berkeley, 1985); J. Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (Norton, New York, 2000); S. Cornell, *Autonomy as a source of Conflict: Caucasian Conflicts in Theoretical Perspective*, 2 (54) *World Perspective*, (2002), 245-276; J. Erk, L.M. Anderson (eds.), *The paradox of Federalism. Does Self-Rule Accommodate or Exacerbate Ethnic Division?* (Routledge, London, 2009).
307. Erk, Anderson (eds.), 2009, 1.
308. W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press, Oxford, 2001), 113.
309. R. Simeon, *Canada and the US: Lessons from the North American Experience*, in K. Knop, S. Ostry, R. Simeon, K. Swinton (eds.), *Rethinking Federalism: Citizens, Markets and Government in a Changing World* (University of British Columbia Press, Vancouver,1995), 257.
310. Wheare, 1947.
311. R. Nakarada, *Communities - Civil Society and Conflict Managment. Federalism, Civil Society and Multiethnic Conflicts: Challenges in the Era of Globalisation*, in R. Blindenacher, A. Loller (eds.), *Federalism in a Changing World. Learning From Each Other* (McGill-Queen's University Press, Montreal, 2002), 260-277, 272.

However, the sole model of "federal bargaining" is not sufficient to assure the endurance of the state against the rise of secessionist quests of ethnic minorities, claiming for their own distinctiveness beyond the state. Alfred Stepan introduced an important concept in order to understand the origins of federalism: the concepts of «coming together federalism» and «holding together federalism».[312] This last approach was to some extent anticipated by Wheare, who further argued that in order to preserve a multicultural ethnic federal system would have been necessary to the develop a «sense of common nationality».[313]

It follows that the success of federalism is entrenched in its same capacity to «peacefully reconcile unity and diversity within a single political system»,[314] and to develop a sense of belongingness with the state, while embracing diversity as a virtue and an advantage that merits state protection and promotion.

312. A. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, in 4 (10) *Journal of Democracy* (1999), 19-34. He also introduces the concept of "putting together federalism" which refers to the forceful and non-democratic nature of a federation and he names the Soviet Union as an example.

313. K. Wheare, *Federalism and the Making of Nations*, in A.W. McMahon (ed.), *Federalism: Mature and Emergent* (Russell&Russel, New York, 1962), 28-43.

314. R.L. Watts, *The federal Idea and Its Contemporary Relevance*, in T.J. Courchene et. al. (eds.), *The Federal Idea. Essays in Honour of Ronald L. Watts* (McGill-Queen's University Press, Montreal, 2011), 13-27, 14.

ETHNIC FEDERALISM AND POLITICAL RIGHTS OF THE OTHERS IN BOSNIA AND HERZEGOVINA

MARIA DICOSOLA

1. INTRODUCTION

The coexistence among peoples, nations and minorities has been one of the biggest challenges for any State since the end of the XVII century[315] and is crucial in contemporary «divided societies».[316]

In multicultural regions, such as former Yugoslavia, this challenge is even more problematic, as the ethnic war of the nineties demonstrated.[317] As a consequence, in all the new States of former Yugoslavia, in the process of transition to democracy and integration in the European Union that started simultaneously soon after the end of the war, the introduction of special mechanisms fulfilling the aim to guarantee the pacific coexistence among different ethnic groups has been considered a crucial step. Indeed, European political conditionality was developed since the European Council in Copenhagen in 1993, where it was stated that the countries of Central and Eastern Europe could join the European Union, provided their commitment to a set of standards, including in particular human and minority rights.[318] Thus, in this area, group and minority rights are usually considered as a test in order to assess the progress of a country in the process of democratic transition. In this context, Bosnia and Herzegovina is an emblematic case.

315. The first international treaties on the rights of religious minorities have been adopted between the XVII and the first half of the XIX century: the Treaty of Vienna (1606), the Treaty of Westfalia (1648), the Treaty of Oliva (1660), the Treaty of Nimega (1978), the Treaty of Ryswidk (1679), the Treaty of Paris (1763). See J. Yacoub, *Les minorités dans le monde. Faits et analyses*, Desclée de Brouwer, 1998.

316. S. Choudry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in S. Choudry (ed.), *Constitutional Design for Divided Societies: Integration or Accomodation?* (Oxford University Press, Oxford, 2008), 3-40.

317. On the origins and the effects of the War of nineties in the Balkans, see: H. Poulton, *Minorities and States in Conflict* (Minority Rights Publications, London, 1994); W. R. Duncan, *Yugoslavia's Break-up*, in W. Raymond Duncan, G. P. Holmn Jr. (eds.), *Ethnic Nationalism and Regional Conflict. The Former Soviet Union and Yugoslavia* (Wesview Press, Boulder – San Francisco – Oxford, 1994), 19-51.

318. This political principle has been later formalized in art. 49 and 2 of the Treaty on the European Union. I explored this issue in my monograph: M. Dicosola, *Stati, nazioni e minoranze. La ex Jugoslavia tra revival etnico e condizionalità europea* (Giuffrè, Milan, 2010).

Indeed, Bosnia and Herzegovina paid the highest price for the terrible conflict that led to the political fragmentation of Yugoslavia, being carried into a bloody internal war, whose conclusion was possible only thanks to the intervention of the international community, that resulted in the adoption of the Dayton Agreement, on November 1995, that imposed a system of representation based on ethnic federalism.[319]

The peculiarity of the Dayton Agreement by the Constitutional law point of view is very well known. The Agreement is an international peace agreement, but, at the same time introduced, at Annex 4, also a provisional constitutional framework. The Annex was intended to be a provisional constitutional framework, to be replaced by a final Constitution. However, the peculiar institutional arrangement that was introduced at that time, while preserving for about 20 years peace and a relative stability, produced the adverse effect of freezing any attempt of reform towards a mature democratic system. As a consequence, the Constitution now in force in Bosnia and Herzegovina is still Annex 4.

According to this constitutional document, Bosnia and Herzegovina is a federal state, that, on the basis of the model of ethnic federalism, is divided along ethnic and territorial lines. The territory is divided in two Entities – the Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (F BiH) – and the population is divided in three constituent peoples: the Bosniacs, the Serbs and the Croats. The federalization of BiH was based on the borders created during the war of the nineties. Indeed, in the context of the dissolution of former Yugoslavia, in the territory of the multiethnic republic of Bosnia and Herzegovina, it was created the independent Republika Srpska, in 1992, and the Federation of Bosnia and Herzegovina, in 1994.[320]

The Constitution of Bosnia and Herzegovina, therefore, is based on a peculiar form of principle of sovereignty, based in part on international[321] and in part on ethnic elements.[322] By the point of view of the sources of law, it is quite peculiar that the federal Constitution, Annex 4, is a clear expression of this "international sovereignty", while the Entities' Constitutions were adopted before the agreement in order to give voice to the nationalistic aspirations of the three dominant peoples.[323] However, even

319. Indeed, ethnic federalism was not a negotiated but an imposed solution: see in this sense the comprehensive study of S. Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate, Burlington, 2013).

320. J. Marko, *Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina*, EURAC *European Diversity and Autonomy Papers EDAP*, 4/2005.

321. L. Pech, *La garantie internationale de la Constitution de Bosnie-Herzegovine*, 42 *Revue française de droit constitutionnel* (2000), 421 ff.

322. S. Yee, *The New Constitution of Bosnia and Herzegovina*, 7 *European Journal of International Law* (1996), 176-192. According to C. Grewe and M. Riegner, in Bosnia and Herzegovina, as in the case of Kosovo, three forms of constitutionalism are combined: "classical", ethnic" and "internationalised": C. Grewe, M. Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, in A. von Bogdandy, R. Wolfrum (eds.), in 15 *Max Plank Yearbook of United Nations Law* (2011), 1-64.

323. The Constitution of the Republika Srpska was adopted by the National Assembly of Republika Srpska on 28 February 1992 and the Constitution of the Federation of Bosnia and Herzegovina was first published on the Official Gazette of the Federation of Bosnia and Herzegovina, n. 1 of 1994.

the texts of the Entities' Constitutions have been radically "internationalized", due to major constitutional amendments adopted with the aim to implement Annex 4 and the case-law of the Constitutional Court.

Bosnia and Herzegovina is not the only example of federation based on ethnic and territorial lines in comparative law. Indeed, there are several historical and current examples of States organized on the basis of this rule. Former Yugoslavia is one of the most famous and has been also one of the models followed by the framers of the Dayton Agreement. More recently, the formula of federalism based on territorial and ethnic lines has been introduced in the process of reconstruction of countries emerging from ethnic conflicts, such as for example Nigeria, Ethiopia[324] and Iraq. In all the mentioned cases ethnic federalism proved to be controversial. Indeed, this mechanism, while being often the only possible tool in order to manage the emergency deriving from the political fragmentation of a State due to an ethnic conflict, could result in a recipe for more ethnic conflicts, due to the exacerbation of local national movements[325] or could be de facto deprived of its spirit due to the rise of authoritarian regimes.[326]

The case of Bosnia and Herzegovina is not an exception in this picture. Ethnic federalism has been introduced as an emergency and transitional tool and proved to be quite effective in order to guarantee peace and stability. However, it is more than evident the risk of the adverse effects of this peculiar form of federalism: the rise of national movements and the consequent violation of the rights of "the Others". According to Annex 4, "the Others" are all peoples and minorities of Bosnia and Herzegovina not belonging to any constituent people.[327]

Nevertheless, twenty years after the beginning of the process of state-building and democratic transition, Annex 4 is still in force and the Bosnian institutions do not seem to show the political capacity to introduce a new constitutional framework, with a more limited role for ethnicity. For these reasons, the international community has repeatedly requested to amend the problematic constitutional framework of BiH.

Against this background, this paper deals with the weaknesses of the system of ethnic federalism in Bosnia and Herzegovina, with particular reference to the political rights of the Others, which are almost totally denied. As it will argued, despite

324. On ethnic federalism in Ethiopia, see A. Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study* (Routledge, New York, 2013). For a comparison between federalism in Ethiopia and South Africa, with a special attention on the issue of ethnic diversity, Y. Tesfaye Fessha, *Ethnic Diversity and Federalism*, (Ashgate, Burlington, 2011). On ethnic federalism in Africa, A.G. Selassie, *Ethnic federalism. Its Promise and Pitfalls for Africa*, 1 (28) *The Yale journal of international law* (2003), 51-107.

325. In this sense, the most known example is without any doubt former Yugoslavia.

326. Such as in the case of Nigeria and to some extent also of Ethiopia, which is considered as a semi-authoritarian regime. On Ethiopia see, for example, A. Lovise, *Ethnic federalism and self-determination for nationalities in a semi-authoritarian state. The case of Ethiopia*, 2/3 (13) *International journal on minority and group rights* (2006), 243-261.

327. See the Preamble of Annex 4: «Bosniacs, Croats, and Serbs, as constituent peoples (along with *Others*), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows (…)».

the attempts of national and supranational Courts to fill the gaps of the system, the multilevel constitutional system currently in force in Bosnia and Herzegovina produces a number of adverse effects that make most of the efforts useless.

2. THE SYSTEM OF ETHNIC FEDERALISM

Bosnian ethnic federalism seems to be based on the classic theory of consociational power-sharing. However, when reading between the lines, it is evident that this constitutional system – in excluding the Others from the exercise of most of the political rights – reflects only an imperfect or deviated form of consociationalism.

According to the formula of ethnic federalism, in Bosnia and Herzegovina all the institutions are designed with the aim to represent the Serbian, Croatian and Bosniac constituent peoples.[328] The principle of equality of constituent peoples, while not explicitly stated in the text of the Constitution, has nevertheless to be considered immanent to the system, as the Constitutional Court affirmed in 2000.[329] In order to implement the principle of equality of constituent peoples, a number of adjustments to the Entities' Constitution and the federal and entities' legislation were introduced. In particular, the combination of the ethnic and territorial criteria in the Entities' Constitutions was strongly nuanced, according to the principle "three peoples, one State", instead of "one people, one entity".[330]

On the basis of these principles, the constitutional framework currently in force in Bosnia and Herzegovina provides for an asymmetrical and highly decentralised federation. In fact, Republika Srpska is unitary, while the Federation of Bosnia and Herzegovina is a "federation within the federation".[331] Moreover, the federal framework is particularly weak. Indeed, federal powers are extremely narrow, while the Entities have a wide margin of appreciation on a significant number of matters. In particular, federal institutions have responsibility only on the matters listed at art. III.1 of Annex 4, including foreign policy, customs policy, monetary policy, finances, immigration, refugee and asylum policy and regulation, international and inter-

328. L. Bieber, *Recent Trends in Complex Power-Sharing in Bosnia and Herzegovina*, 1 *European Yearbook of Minority Issues* (2001/2), 269-282.

329. Constitutional Court of Bosnia and Herzegovina, decision n. U 5/98, 1 July 2000, third partial decision. The decision has been widely commented by the international organizations as well as the scholars. See, for example, International Crisis Group, *Implementing Equality: The "Constituent Peoples" decision in Bosnia and Herzegovina*, 16 April 2002. Among the scholars, see: F. Palermo, *Bosnia-Erzegovina: la Corte costituzionale fissa i confini della (nuova) società multietnica*, 4 *Diritto pubblico comparato ed europeo* (2000), 1479-1489; in comparison with the Constitutional Court of South Africa case-law, see S. Issacharoff, *Constitutional Democracy in Fractured Societies*, 82 *Texas Law Review*, (2004), 1861-1893.

330. J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008), 117.

331. The Federation of Bosnia and Herzegovina, indeed, is divided in 10 Cantons, with separate governments.

entity criminal law enforcement, establishment and operation of common and international communications facilities, regulation of inter-entity transportation and air traffic control. On the contrary, the Entities have wide powers to regulate any matters not included in the abovementioned list as well as in specific areas mentioned at art. III.2 and III.4. As a result, for example, despite foreign power is a responsibility of federal institutions, the Entities have the right to establish special parallel relationships with neighbouring states.[332] The extreme decentralisation of the constitutional system is completed by art. VIII of the Constitution, providing for the almost absolute financial autonomy of the Entities. The institutional system put in place in Bosnia and Herzegovina with the Dayton Agreement, therefore, looks much more similar to a confederation than to a federation.

On the basis of the principle of equality of the constituent peoples, in all the institutions, both at federal and at Entity level, the three constituent peoples are equally represented. In particular, the federal first Parliamentary Chamber, the House of Peoples, is composed by 15 Delegates: five Croats and five Bosniacs appointed in the Federation and five Serbs appointed in the Republika Srpska.[333] The second Chamber, the House of Representatives, is composed by 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.[334] Also the Presidency consists of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.[335]

Accordingly, the composition of the legislative assemblies of the Entities is designed with the aim to respect the principle of equality of constituent peoples. On the basis of this principle, the bicameral Parliament of the Republika Srpska provides for equal representation of the constituent peoples. In particular, according to art. 71 Const., «At least four members of each constituent people shall be represented» in the National Assembly of the Republika Srpska. As the second chamber, the National Council, its composition is based on the principle of parity, with eight representatives from each of the constituent peoples.

The principle of equality of constituent peoples inspires also the composition of the Presidency of Republika Srspska. In fact, according to art. 83 Const., «The President of the Republic and the Vice-Presidents of the Republic shall be directly elected from the list of candidates for the President of Republika Srpska, so that the candidate who wins the most votes is elected President, while the candidates from the other two constituent peoples who win the most votes are elected Vice-presidents of the Republic».

332. See in this sense J. Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, in M. Burgess, G. A. Tarr (eds.), *Constitutional Dynamics in Federal Systems: sub-national perspectives* (McGill-Queen's University Press, Montreal & Kingston, London – Ithaca, 2012), 109-139.

333. Art. 9.12 Election Law.

334. Art. IV Annex 4; Art. 9.1 Election Law.

335. Art. V Annex 4.

Similar provisions are provided in the Federation of Bosnia and Herzegovina, where the Parliament is composed by the House of Representative – including at least four representatives of each constituent people[336] – and the House of Peoples of the Federation, that «shall be composed on a parity basis so that each constituent people shall have the same number of representatives».[337] As to the Presidency, «The President of the Federation shall have two Vice-Presidents who shall come from different constituent peoples».[338]

The institutionalization of ethnicity in the federal system is completed by the recognition to the constituent peoples of veto powers against legislative decisions at federal level. A suspensive veto can be exercised in the event of a legislative act adopted in one of the chambers without the consent of at least one third of each constituent people. In this case, the Chair and Vice-Chairs shall meet and adopt a new draft, to be approved within three days of the vote. In case of failure, the new text shall be approved by a majority of those present and voting.[339] In addition, a general power of veto can be exercised. Indeed, any decision of the Parliamentary Assembly considered to be destructive of a "vital interest" of the Bosniac, Croat, or Serb people can be blocked by a general power of veto, exercised by a majority of the Bosniac, Croat, or Serb Delegates.[340] Following the 2000 Constitutional Court decision on the constituent peoples, veto powers have been introduced also at entity level.

As it is evident, this system, in preserving the equal position of the constituent peoples, produces the effect of almost totally excluding all minorities from the right of political participation.[341] Thus, the constitutional system put in place by the Dayton Agreement was undeniably a valid instrument for the process of peace and state-building in Bosnia and Herzegovina soon after the 1995 cease-fire. However, through the imposition of a federal state[342] in a deeply divided society, it proved to be an instrument of further radicalization of ethnic rivalry and additional forms of discrimination against minorities[343] in a «federation without federalism».[344] This argument will be object of further analysis in the following paragraph.

336. Art. A.1.1 Const. Federation of Bosnia and Herzegovina.
337. Art. 6(1) Const. Federation of Bosnia and Herzegovina.
338. Art. B.1.1 Const. Federation of Bosnia and Herzegovina.
339. Art. IV.3.d. Annex 4.
340. Art. IV.3.e. Annex 4.
341. A limited right of political participation of the Others, indeed, is provided only in the National Assembly of the Republika Srpska, where four seats are reserved to them: art. 71 Const. RS.
342. By an international relations perspective, S. Keil argues that the link between conditionality and federalism in BiH was not successful: S. Keil, *Federalism and Conditionality in Bosnia and Herzegovina*, 4 *Diritto pubblico comparato ed europeo* (2008), 1770-1779.
343. See in this sense J. Marko, *"United in Diversity"?: Problems of State- and Nation-Building in Port-Conflict Situations: The Case of Bosnia and Herzegovina*, 30 *Vermont Law Review* (2005-2006), 503-550.
344. M. Burgess, *Territorial and Non-Territorial Identities: Multinational Federalism in Multinational Federation, paper presented for the conference Multinational Federalism in Perspective: A Viable Model?*, Université du Quebec à Montreal (UQAM), Montreal, Quebec, Canada, 25-27 September 2009, in particular 23.

3. THE RIGHTS OF THE OTHERS

As anticipated, in Bosnia and Herzegovina, the interaction between the division of the population in three constituent peoples and the exercise of veto powers transformed, de facto, a system based on the equal representation of ethnic groups, into a system detrimental to the rights of the Others.[345] In fact, even though the 2003 law on national minorities provides for their rights,[346] the rules on the composition of the institutions and the electoral system do not provide for any form of political participation of those not belonging to any constituent people.

In particular, according to the 2003 law, linguistic and cultural rights are widely provided. With reference to linguistic rights, national minorities have the right to use their language and to preserve their original names.[347] In municipalities and local self-government units where national minorities represent the majority of the population, it is allowed to show toponyms, names and symbols in the original language.[348] In the educational system, the law allows for the organisation and founding of courses in minority languages.[349] The members of national minorities may found TV and radio channels broadcasting in their language and, in general, the public TV system should show programmes in minority languages.[350] With reference to cultural rights, the law on national minorities recognises the right to found libraries, cultural centres, museums, archives and associations and to show symbols.[351]

On the contrary, the protection of political rights is much less effective. Indeed, the right to political participation can only be exercised trough the Council on National Minorities, whose members are Parliamentary Assembly representatives belonging to national minorities,[352] a body in charge with the protection of the right to participation to public life: to this aim, the council exercises advisory and initiative powers. Through this advisory body, the "Others" are recognised only an indirect power of participation to public life. On the contrary, any direct right of political participation is denied to the Others, who are in general excluded by the exercise of the right to stand for elections.

345. J. Marko, *The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina*, in *European Commission for Democracy through Law, Local Self-Government, Territorial Integrity and Protection of Minorities*, Proceedings of the Unibem Seminar, Lausanne, 25-27 April 1996, 189-212.

346. In Off. Journ. n. 12/03. On the law and, in general, on the legislative framework on national minority rights in Bosnia-Herzegovina, see S. Milikić, in E. Lantscher, J. Marko, A. Petrićušić (eds.), *European Integration and its Effects on Minority Protection in Europe* (Nomos, Baden-Baden, 2008), 297-340.

347. Art. 11.

348. Art. 12.

349. Art. 14.

350. Art. 5-16.

351. Art. 10.

352. Art. 21 Law on national minorities.

Indeed, in the Federation of Bosnia and Herzegovina, the Others, those who do not want to declare any ethnic affiliation, as well as the Serbian constituent people, are completely excluded from the right to stand for any kind of election. Moreover, with reference to the active right to vote, only art. 9.12 of the Election Law provides for the explicit exclusion of Serb and the Others' Delegates from the election of the House of Peoples. However, additional implicit cases of exclusion are possible. Indeed, the Others and the Serbs, while preserving the right to vote, are always obliged to express their political preference for a candidate declaring his/her affiliation with a different constituent group. Finally, the exclusion of those not willing to declare any ethnic affiliation is even worst, since in the BiH electoral system there is no place for the election of any representative not linked with any kind of ethnic group.

The situation is similar in the Republika Srpska, where the Bosniac and the Croat constituent peoples, the Others, as well as those not willing to declare any ethnic affiliation are excluded from the right to stand for election. They are also excluded from the right to vote, unless they decide to express their preference disregarding the ethnic affiliation of the candidate.

A general right to participation of national minorities in elections is only recognised at municipal level. Indeed, according to art. 13.14 of the Election Law, members of all national minorities which make up to 3% of the total population shall be guaranteed at least one seat in a Municipal Council/Municipal Assembly and those making over the 3% of the total population of a municipality shall be guaranteed at least two seats.

4. ETHNIC FEDERALISM AND MINORITY RIGHTS BETWEEN COURTS AND PARLIAMENT

The BiH Parliament, under the pressure of the Council of Europe,[353] was engaged several times in the process of reforming the system of ethnic federalism. Among the projects of reform, for example, the Venice Commission welcomed the idea of introducing the rotation among constituent peoples in the Presidency or an indirect electoral system.[354] However, none of the projects submitted by the Parliament to the supranational institutions has ever been approved.

In front of the inertia of the Parliament, a high number of referrals have been submitted to national and supranational courts, including in particular the Constitutional Court of Bosnia and Herzegovina and the European Court of Human Rights. Both Courts, however, had to deal with the complexities and the contradictions of the BiH

353. See for example European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Venice, 11 March 2005, CDL-AD (2005) 004.

354. European Commission for Democracy through Law (Venice Commission), *Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina*, Strasbourg 20 March 2006, n. 374/2006, CDL-AD (2006) 004.

constitutional system, deriving not only by the radicalization of the ethnic elements but also by the complex interaction between national and international law.

Indeed, in Bosnia and Herzegovina, the "living law" is the result of a number of interactions between: (a) national and supranational sources of law (in particular, the Constitution and the European Convention on Human Rights); (b) domestic and supranational case-law (in particular, the case-law of the Constitutional Court and the European Court of Human Rights); (c) domestic and supranational courts (in particular the European Court of Human Rights and the Constitutional Court) and the Parliament. The resulting legislative jigsaw of BiH, despite fulfilling the fundamental objective of giving a wide normative basis to a young democracy, entails nevertheless a number of adverse effects, affecting in particular the political rights of the Others, as it will emerge in the following paragraphs.

4.1 The interaction between national and supranational sources of law

The protection of the right to vote and to stand for elections in BiH presents some peculiarities that are common to all fundamental rights in this special constitutional system.[355]

Indeed, the complex nature of this constitutional system – at the crossroad between national and international law – is clearly reflected in the clauses concerning the protection of fundamental rights. It is not by chance that Art. II of Annex 4, devoted to human rights and fundamental freedoms, begins stating that «Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms».[356] Furthermore, before enumerating the fundamental rights and freedoms protected under the Constitution,[357] art. II.2 recognises a special value to the European Convention of Human Rights, that «shall apply directly in Bosnia and Herzegovina» and «shall have priority over all other law». Finally, a list of additional human rights agreements to be applied in Bosnia and Herzegovina is provided by Annex I. Therefore, on the basis of the interaction between national and supranational sources of law provided by the Dayton Agreement, a multilevel system of protection of fundamental rights is in force in BiH and a special status is recognised in particular to the European Convention of Human Rights.[358]

355. On the fundamental rights in the constitutional system of Bosnia and Herzegovina, see M. O'Flaherty, G. Gisvod (eds.), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (Martinus Nijhoff Publishers, The Hague, 1998); W. Benedek (ed.), *Human Rights in Bosnia and Herzegovina After Dayton: From Theory to Practice* (Martinus Nijhoff Publishers, The Hague, 1999).
356. Art. II.1 Annex 4. Italics mine.
357. Art. II.3 Annex 4.
358. On the primacy of the European Convention of Human Rights in Bosnia and Herzegovina, see D. Gomien, *Human Rights in Bosnia and Herzegovina: European Practice, Fraught Federalism and the Future*, in W. Benedek (ed.), 1999, 109-110.

However, notwithstanding the openness of Annex 4 to the internationally recognised human rights, the Constitutional Court clarified that the European Convention has not priority over the Constitution and constitutional legislation. This assumption produced direct effects on the issue of political rights of the Others. Indeed, in a number of cases, the Constitutional Court has declared inadmissible the question of compatibility of the system for the election of the Presidency of Bosnia and Herzegovina with the principle of non-discrimination as provided by the European Convention of Human Rights, on the grounds that the Convention, while having priority over domestic legislation, has not supra-constitutional value. Therefore, according to the Court, the European Convention, while being a standard for review of domestic legislation, in so far as it has been incorporated into the Constitution of BiH,[359] cannot be considered as a standard for review of the Constitution itself as well as the Election Law. This was the conclusion of the Constitutional Court in the cases n. U 5/04 of March 31, 2006 and U 13/05 of May 26, 2006.

The first case arose from the referral made by Mr. Sulejman Tihić, then Chair of the Presidency of Bosnia and Herzegovina, who argued that art. IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BiH, concerning the system for the election of the House of People and the Presidence of BiH, were in contrast with the principle of non-discrimination, as provided by art. 14 and art. 3 of Protocol 1 of the European Convention of Human Rights. The Court declared not to be competent to take any decision arguing that the case at stake involved a conflict between international and domestic law, a question on which the Court declared not to be competent to adjudicate. In particular, the Court acknowledged that «the rights under the European Convention», despite having a superior status over domestic legislation, «cannot have a superior status to the Constitution of BiH». Indeed, the Court explained, «The European Convention, as an international document, entered into force by virtue of the Constitution of BiH, and therefore the constitutional authority derives from the Constitution of BiH and not from the European Convention itself».[360]

The conclusions reached by the Court on the case n. U 13/05 of May 26, 2006 were similar. In this case, the request was lodged by the same claimant, with reference to the same standard of review, but on a different object, the Election Law of Bosnia and Herzegovina (in particular, art. 8.1 and 2 of the Election Law, concerning the election of the Presidency of BiH). Even in this case, however, the Court declared the challenge inadmissible arguing that the Election Law, de facto, derives from the Constitution of Bosnia and Herzegovina. Therefore, according to the Court, the Election Law, while not being formally part of the Constitution, is nevertheless endowed with a rank comparable to the Constitution in the hierarchy of sources of law. As a consequence, the Court, recalling decision n. U 5/04, confirmed to be incom-

359. See in this sense the Report of the XIIth Congress of the Conference of European Constitutional Courts, *The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts. Report of the Constitutional Court of Bosnia and Herzegovina*, 15.

360. Constitutional Court of Bosnia and Herzegovina, decision n. U/05, 31 March 2006, § 14.

petent to adjudicate on the compatibility between this law and the European Convention of Human Rights.[361]

On the contrary, in the case of March 26, 2015,[362] the Constitutional Court declared for the first time that the electoral system based on ethnic federalism is in contrast with the principle of non-discrimination. The case arose from the request by Željko Komšić, then a member of the Presidency of Bosnia and Herzegovina. According to the claimant, Art. 80(2)(4) and 83(4) of the Constitution of the Republika Srpska, Art. IV.B.1, 2(1) and (2) of the Constitution of the Federation of Bosnia and Herzegovina, as well as Art. 9.13, 9.14, 9.16 ad 12.3 of the Election Law of Bosnia and Herzegovina, were not in conformity with the principle of non-discrimination – provided by Art. 1 of Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as Art. 2, 25 and 26 of the International Covenant on Civil and Political Rights – and the right to free elections, according to Art. 14 in conjunction with Art. 3 of Protocol no. 1 to the ECHR.

According to the claimant, in recognizing only the right of members of the constituent peoples to stand for presidential elections, these provisions – largely drawn on the model of the federal electoral system – discriminated against the Others, thus violating both the Constitution of Bosnia and Herzegovina and the European Convention in so far as the right to vote and the right to non-discrimination are concerned. The Constitutional Court, while dismissing the request as ill-founded with reference to the right to vote – arguing that the Presidency cannot be assimilated to a legislature in accordance with Art. 3 of Prot. No. 1 to the European Convention, concluded that the challenged Articles were in contrast with the principle of non-discrimination.

The relevance of the decision of March 26 is outstanding, since for the first time in a case concerning the Election Law the Constitutional Court of Bosnia and Herzegovina did not dismiss the case as inadmissible. However, its importance should not be overestimated, since the objects and the standards of review of the previous and the current cases were different. Indeed, the object of the case were the Constitutions of the Entities and the sections of the Election Law of BiH concerning the Entities, with regard to the Constitution of BiH as well as the European Convention of Human Rights. Therefore, as the Court argued, its task in this case was not to verify if the provisions of the BiH Constitution and the BiH electoral law were consistent with those of the European Convention, but if the provisions of the Constitutions of the Entities – that «are not identical to any provision of the Constitution of

361. Constitutional Court of Bosnia and Herzegovina, decision n. U/13 05, 26 May 2006, § 10. Thus, the Constitutional Court excluded to be competent to adjudicate on the constitutionality on constitutional laws. On this point see C. Grewe, *Le contrôle de constitutionnalité des lois constitutionnelles en Bosnie-Herzégovine, Cahiers du Conseil constitutionnel n. 27*, January 2010.

362. Constitutional Court of Bosnia and Herzegovina, decision no. U 14/12, 26 March 2015.

BiH» – were consistent with the Constitution of BiH. Moreover, according to the Court, it was admissible to review the conformity of this legislation also with the European Convention, since «in interpreting the term […] Constitution and the obligation of the Constitutional Court to uphold this Constitution, one must take into account 15 international human rights agreements referred to in Annex I to the Constitution of BiH, which are directly applied in BiH, and the position that the rights referred to in the European Convention and the Protocols thereto occupy in the constitutional order of the state».[363] This means that while the Court accepted that it would judge on the compatibility of the electoral systems of the Entities with both the constitutional and supranational principle of non-discrimination, it did not recognize any supra-constitutional value to the European Convention. Indeed, while the European Convention has a special position in the Bosnian system of the sources of law, it «cannot have a superior status in relation to the Constitution of BiH, given the fact that the European Convention entered into force on the basis of the Constitution of BiH».[364] Reading between the lines, it is therefore more than evident that in this opinion the Court did not modify its previous approach.

Therefore, it emerges that the Constitutional Court, despite being considered in general as one of the few functioning institutions in BiH.[365], decided not to expand its competences in order to verify if the system of ethnic federalism of Bosnia and Herzegovina is in compliance with the internationally recognised fundamental rights and in particular with the European Convention of Human Rights. The choice of the Court is understandable and even justified in the light of the need to protect the sovereignty of the State and it reflects a common trend all over Europe.[366] However, its detrimental effects on the rights of the Others are more than evident.

4.2. The interaction between domestic and supranational case-law

The self-restraint of the Constitutional Court of BiH on the issue of ethnic federalism has been counterbalanced by a strong judicial activism of the European Court of Human Rights.[367] This approach of the European Court proved to be extremely relevant in BiH since it exercised a strong influence on the development of the case-law of the Constitutional Court itself.

363. Constitutional Court of Bosnia and Herzegovina, decision no. U 14/12, 26 March 2015, § 49.
364. Constitutional Court of Bosnia and Herzegovina, decision no. U 14/12, 26 March 2015, § 48.
365. J. Marko, 2005, 7.
366. Indeed, Constitutional Courts are even reluctant, in some cases, to recognize priority to the European Convention of Human Rights over ordinary legislation. See in this sense G. Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 2 (23) *The European Journal of International Law* (2012), 401-424.
367. There is a wide debate among scholars not only on Constitutional Courts' judicial activism but also on this issue with reference to the European Court of Human Rights itself in the interpretation of the European Convention of Human Rights. See for example D. Sartori, *Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights*, 29 *The Tulane European and civil law forum* (2014), 47-77.

Indeed, the Constitutional Court of BiH performs its role in strict cooperation with the European Court of Human Rights. On one side, three of its members, as "international judges", are appointed by the President of the European Court. On the other, due to the peculiar position of the European Convention of Human Rights in the BiH legal system, the European Court's case-law is an important part of the Constitutional Court toolbox.[368] Therefore, it comes as no surprise that the decisions of the European Court of Human Rights can produce relevant effects on the following Constitutional Court's case-law, as it happened with the landmark *Sejdić and Finci* case, of December 22, 2009,[369] where it was stated that the ineligibility of candidates belonging to the group of Others to stand for election to the House of Peoples of Bosnia and Herzegovina was in contrast with article 14 taken in conjunction with and 3 of Protocol No. 1, as well as with article 1 of the Convention.

The case originated in the referrals made by two Bosnian citizens of Roma and Jewish origins, thus not recognising themselves in any constituent people. According to the claimants, art. IV and V of Annex IV to the Dayton Agreement as well as the Election Law of Bosnia and Herzegovina were in contrast with the right to stand for elections to the House of Peoples and the Presidency of the Republic of BiH, thus violating, in particular, the principle of non-discrimination (art. 1 Protocol n. 12 Convention) and the right to free elections (art. 14 in conjunction with art. 3 Protocol n. 1 Convention).

The Court, having declared the case admissible,[370] decided to uphold the complaint, arguing that the ethnic discrimination deriving from the implementation of the system of ethnic federalism in BiH was a form of discrimination on the ground of race, whose seriousness requires «special vigilance and a vigorous reaction». As a consequence, while in general some derogations to the principle of non-discrimination by the contracting states are admissible on the basis of an objective and reasonable justification, in the case of racial or ethnic discrimination «the notion of objective and reasonable justification must be interpreted as strictly as possible» and «no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures»[371].

368. See Report of the XVI Congress of the Conference of European Constitutional Courts in 2014, *Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives*, in part. 3-4.
369. European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, Appl. nos. 27996/06 and 34836/06. I commented this case in the article: M. Dicosola, *La rappresentanza dei popoli costitutivi in Bosnia ed Erzegovina tra identità nazionali e standard europei*, 3 *Rassegna Parlamentare* (2010), 727-745.
370. The Court considered the question admissible since Annex 4, despite being formally an international treaty, is nevertheless subject to the power of amendment of the Parliament. Therefore, even though the State of Bosnia and Herzegovina could not be held responsible of the adoption of the provisions thereof, was deemed responsible for maintaining them. European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, § 30.
371. European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, § 43-44.

In order to verify if this derogation was based on an objective and reasonable justification, the Court examined the progress made by BiH in the process of stabilization and democratic transition. According to the Court, while at the time of 1995 ceasefire the system of ethnic federalism was the only mechanism able to guarantee the pacific coexistence among competing ethnic groups, significant developments had been made since the Dayton Agreement. These developments, after all, included the ratification of the European Convention of Human Rights and Protocol no. 1 thereto. Therefore, limiting its competence *ratione temporis* to the period after the ratification of these documents, the Court concluded that at present there was not any reason to maintain such a system of power-sharing producing the adverse effect of the exclusion of minority groups by political representation. The Court acknowledged that there was «no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina». However, quoting the opinions of the Venice Commission on the BiH system, it stated that it was possible to introduce mechanisms that «not automatically lead to the total exclusion of representatives of the other communities».[372] It was therefore time, according to the Court, to amend the system of power-sharing provided for in Annex 4, with the aim of the inclusion of the discriminated minority groups. After all, this requirement was considered by the Court in line with the commitment that BiH itself had undertaken by becoming a member of the Council of Europe and concluding the Stabilisation and Association Agreement with the European Union. For all these reasons, the Court concluded that «the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1».[373]

Thus, following the *Sejdić and Finci* case, the Parliament of Bosnia and Herzegovina was required to amend the existing system of ethnic federalism, through a process of constitutional reform.[374] However, considering the peculiarity of the Bosnian constitutional system, what was required was, more than a simple constitutional reform, the adoption of a new, proper Constitution, expression of the sovereignty of the Bosnian people. But, as already extensively seen, the peculiar constitutional settlement provided by the Dayton agreement fostered ethnic fragmentation and made any process of reform – and even the identification of a unitary "Bosnian people" – extremely difficult. For these reasons, the *Sejdić and Finci* judgment has never been implemented,[375] notwithstanding the requests of the international community, including in particular the European Union institutions, that consider the implementation

372. European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, § 48.
373. European Court of Human Rights, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, § 50.
374. See in this sense S. Bardutzky, *The Strasbourg Court on the Dayton Constitution*, 6 *European Constitutional Law Review* (2010), 309-333.
375. As M. Milanovic argues, the implementation of the decisions of the European Court of Human Rights is particularly difficult when a constitutional text is at stake: M. Milanovic, *Sejdić and Finci v. Bosnia and Herzegovina*, 104 *American Journal of International Law* (2010).

of the European decision as an essential condition for the process of admission of BiH into the Union.[376]

In this context, the decision in the case of *Zornić v. Bosnia and Herzegovina*, of July 15, 2014, that confirmed the *Sejdić and Finci* decision, was not unexpected. The case of Zornić arose from the application lodged by Ms Azra Zornić, a citizen of Bosnia and Herzegovina who, not willing to declare any ethnic affiliation, was precluded from the right to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. The European Court, confirming the arguments already developed in *Sejdić and Finci*, declared that the system for the election of the Presidency and the House of People infringed the principle of non-discrimination[377] and the right to free elections.[378] In particular, the Court confirmed that, in the light of the progress made by Bosnia and Herzegovina in the process of democratic transition and consolidation, any derogation from the principle of non-discrimination could not be justified. Therefore, it was confirmed that Bosnia and Herzegovina had to adopt a constitutional reform, according to the case-law of the European Court and the requests of the supranational institutions. Moreover, according to the European Court, the reform was now a legal duty for Bosnia and Herzegovina, whose infringement would result in the violation of Art. 46 of the Convention, providing for the binding force of the European Court decisions and the duty of execution of judgments by member states.

Although neither the *Sejdić and Finci* nor the *Zornić* cases have never been implemented by the Parliament of BiH, they nevertheless exercised a strong influence on the following Constitutional Court's case-law. Indeed, not surprisingly, the Constitutional Court changed partially its position in the case n. U 14/12, of March 26, 2015, where it stated that the implementation of the decisions of the European Court concerning the system of ethnic federalism is a legal duty for the Parliament of Bosnia and Herzegovina.[379] As a consequence, according to the Court, a constitutional reform of the system of ethnic federalism is a binding condition to be fulfilled before the implementation of the Constitutional Court's decision.

However, the impact of this decision in the possible evolution of the Bosnian legal system should not be overestimated. Indeed, the cooperative attitude of the domestic Court with the European Court has been moderated by its will to find a balance with the role of the Parliament, as it will be showed in the following paragraph.

376. Parliamentary Assembly of the Council of Europe, Resolution 1725 (2010), *The Urgent Need for a Constitutional Reform in Bosnia and Herzegovina*, 29 April 2010; European Commission, *Joint Conclusions from the High Level Dialogue on the Accession Process with Bosnia and Herzegovina and the Road Map for BiH's EU Membership Application*, 2012.

377. Art. 1 Protocol no. 12 ECHR.

378. Art. 14 ECHR in conjunction with Art. 3 Protocol no. 1 ECHR.

379. Constitutional Court of Bosnia and Herzegovina, case n. U 14/12, March 26, 2015, § 74.

4.3. The interaction between the Constitutional Court and the Parliament

The 2015 decision of the Constitutional Court of BiH is undeniably an important step towards the reinforcement of the political rights of the Others in this peculiar constitutional system. However, in this framework, the dangers of judicial activism and consequent possible conflicts with the Parliament are evident.[380]. Indeed, the autonomy of the Parliament risks to be limited not only by the domestic Constitutional Court, but also by the European Court of Human Rights. The Constitutional Court, being aware of this risk, showed a high degree of deference towards the domestic Parliament, by nuancing the effects of its decisions. This approach, by preserving the principle of separation of powers, has nevertheless detrimental effects with reference to the rights of the Others, that, while having been formally declared, remain substantially "frozen", waiting for the future intervention of the Legislator.

This emerges clearly from the analysis of the effects of the sentence of 26 March 2015. Indeed, the Court upheld only the question of the compatibility between the Entities' legislation and the principle of non-discrimination, dismissing the complaint concerning the right to vote. It follows that the Court did not annul the provisions by a pure declaration of unconstitutionality, but applied the more nuanced proportionality test.

Moreover, and more importantly, the decision of the Court did not produce any direct effect in the BiH legal system. The Court in fact stated that, pending the implementation of the decisions of the European Court of Human Rights on the system of ethnic federalism of Bosnia and Herzegovina, according to which the BiH Constitution shall be amended, the declaration of unconstitutionality shall not take effect until the constitutional reform at the federal level has been completed.

In the words of the Court, «the Constitutional Court notes that it unambiguously follows from the Sejdić and Finci judgment of the European Court that the Constitution of BiH should be amended».[381] However, being aware that the process of constitutional reform is not an easy task, the Court finally stated that the «Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases».

The choice to leave the final word to the Parliament in the highly sensitive political issue of electoral legislation is without any doubt justified. However, when con-

380. Indeed, the issue of the conflict between judicial activism and judicial restraint in the framework of the interaction between Courts and Parliaments is a classical topic in constitutional law. For a comprehensive study, see: J. Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (Springer, Berlin – Heidelberg, 2010).

381. Constitutional Court of Bosnia and Herzegovina, case n. U 14/12, March 26, 2015, § 74.

sidering the failure of the BiH Parliament to respond so far to the continuous request of national and supranational institutions to amend the system of ethnic federalism, the decision looks much more as a declaration of principle than as a possible final word in this complicated dialogue.

5. FINAL REMARKS

Bosnia and Herzegovina provides a unique example of a both substantially and formally pluralistic legal order.[382] Indeed, on one side, the system of ethnic federalism, giving voice equally to three different constituent peoples, is a substantial implementation of the pluralistic principle. On the other, the constitutional system of BiH and Herzegovina, being regulated by a set of rules of both national and supranational level, is an intrinsically pluralistic legal order even by the formal point of view.

It clearly emerges that this system, despite being, in 1995, the best solution to put an end to the inter-ethnic hostilities, has nevertheless produced a number of adverse effects concerning the Others, who suffered both direct and indirect forms of discrimination. Directly, the Others are almost totally excluded by any right of political representation. Indirectly, the multilevel constitutional system entails complexities and contradictions, with the result of leaving the most discriminated minorities without any legal remedy.

As the analysis provided in this paper shows, indirect forms of discrimination against the Others derive from the self-restraint of the Constitutional Court of Bosnia and Herzegovina with regard to the effects of the European Convention of Human Rights in the domestic legal system (par. 4.a). Apparently, the dialogue between the Constitutional Court and the European Court of Human Rights works better (par. 4.b), but it is moderated by the deferent attitude of the Constitutional Court to the Parliament (par. 4.c). Giving the last word to the Parliament, after all, means accepting the risk of postponing for an undetermined time any concrete possibility of reform.

It is quite hard to shed any light on this pessimistic picture that seems to clearly reflect the effects of the extreme distance between "law in the books" and "law in action" and the excessive intervention of the international community in a State-building process.

382. O. Richmond, J. Franks, *Between partition and pluralism: the Bosnian jigsaw and an 'ambivalent peace'*, 1-2 (9) *Southeast European and Black Sea Studies* (2009), 17–38.

CONSTITUTION AND HUMAN RIGHTS PROTECTION

LAURA MONTANARI

1. INTRODUCTION

Discussing about the possibility of introducing a (New) Constitution for Bosnia and Herzegovina can be challenging. I have often considered the Constitution of BiH, adopted at the end of the war, as a "scientific experiment" or as an interesting case study for scholars of international and constitutional law. In reality, though, it is possible to provide more concrete and tragic explanations. For example, professor Gélard in 1995 wrote that the solution adopted in BiH was a «*monstruosité juridique qui instaure un État invivable*»[383] or, more recently, in 2006 the Venice Commission in its preliminary opinion on the draft amendments to the Constitution of Bosnia and Herzegovina – I'm referring to the amendments written in 2006, but rejected by the Assembly by two votes – said that «Its main purpose [the purpose of the Constitution] was to end the bloody conflict in the country and not to establish a functional state».[384] The Venice Commission had also expressed the same criticism in its previous opinion on the "Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative" adopted in 2005.[385] Notwithstanding these evaluations, ten years after the Venice Commission opinion and twenty years after the Dayton agreements, we are still here discussing a (new) Constitution for Bosnia and Herzegovina.[386]

383. P. Gélard, *Actualité constitutionnelle en Europe de l'Est*, 24 *Revue française de droit constitutionnel* (1995), 863.

384. European Commission for Democracy through Law (Venice Commission), *Preliminary opinion on the draft amendments to the Constitution of Bosnia and Herzegovina*, Strasbourg, 7 April 2006, CDL (2006) 027, point 6; on this project see J. Marko, *Constitutional Reform in Bosnia and Herzegovina 2005-06*, 5 (1) *European Yearbook of Minority Issues* (2005), 207-218.

385. European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Venice, 11 March 2005, CDL-AD (2005) 004.

386. A comprehensive and critical analysis of the Bosnia and Herzegovina case, from a constitutional point of view, is given by J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008); see also E. Milano, *La Bosnia-Erzegovina a dieci anni dagli accordi di Dayton*, LXI(2) *La Comunità internazionale* (2006), 347-375 and Id., *La Bosnia-Erzegovina a venti anni da Dayton: un sintetico bilancio*, LXX(4) *La Comunità internazionale* (2015), 509-528.

I would like to focus on a specific aspect of the constitutional system of Bosnia and Herzegovina: the protection of human rights.

I will touch on three aspects of this topic: first, I'll give an outline of the current constitutional rules; then, I will provide some examples of constitutional amendments, looking at the reform project discussed in 2006; finally, I will express a critical opinion on the hypothesis of a constitutional reform in this field.

2. THE CURRENT CONSTITUTIONAL RULES

The Dayton Constitution presents a unique solution even in the field of human rights.

The point of reference is Article II, entitled Human Rights and Fundamental Freedoms. The first paragraph affirms that «Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms».

Nevertheless, unlike most other contemporary Constitutions, the Fundamental Law of Bosnia and Herzegovina doesn't contain a bill of rights. Paragraph three of Article II, entitled "Enumeration of Rights", includes only a list of rights, without any reference to their contents nor to their guarantees. Paragraph seven of the same Article refers to several international agreements on human rights (15), listed in Annex I of the Constitution, that could be used to give substantial meaning to the aforementioned provision.

Special attention is reserved for the European Convention of Human Rights. Paragraph two points out that the Convention rights shall apply directly in Bosnia and Herzegovina and «[These] shall have priority over all other law». This statement has been interpreted as granting to the Convention priority also over the Constitution, although the Constitutional Court has affirmed that the Constitution shall prevail.[387] In any case, it is interesting to note that thanks to this article the ECRH was applied in BiH also before the country's participation to the Convention. Indeed, BiH only became a part of the ECHR in 2002.

Finally, more detailed provisions are dedicated to the principle of non-discrimination in the enjoyment of rights provided by the Constitution and by the related international agreements.

Certainly, we are faced with a *sui generis* solution, characterized by strong cooperation between the national and international levels.[388] One should also recall that initially (until 2003) there was also a special body, the Human Rights Chamber, en-

387. Constitutional Court of Bosnia and Herzegovina, decision n. U-5/04, 31 March 2006 and n. U-13/05, 26 May 2006; the question was taken into consideration in the reform project in 2006.

388. See P.C. Szasz, *The protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 *American Journal of International Law* (1996), 301-303 and J. Sloan, *The Dayton Peace Agreement: Human Rights Guarantees and their Implementation*, 7 *European Journal of International Law* (1996), 207-225.

trusted with the task of verifying the ECHR violations and the cases of discrimination arising in the enjoyment of the rights and freedoms provided for in the international agreements the Constitution referred to.[389] The Chamber consisted mainly of international judges. After the closure of the Chamber, the last word also in the field of human rights is up to the Constitutional Court,[390] which once again is characterized by the presence of three international judges, in addition to six nationals.[391] Considering that Bosnia and Herzegovina is part of the ECHR, after the exhaustion of the national remedies, anyone can apply to the European Court of Human Rights challenging State conduct.

In the light of the rules I have just mentioned, it can be underlined that the BiH bill of rights is built upon the international treaties on human rights, and that the monitoring system also presents a significant participation of foreign people, appointed by the international organizations. I will consider these aspects later on, but it is useful to highlight that they are clearly connected with the unique context in which the Constitution was written in 1995.

3. The reform proposals

In my opinion, to reflect on a "New Constitution" for Bosnia and Herzegovina it would be important to examine the projects that have been debated over the years, in particular the project discussed in 2006 and rejected by the Assembly by just two votes, as I said before.[392] It was a vast and comprehensive proposal, which – ten years after the adoption of the Constitution – took into consideration the majority of the problematic aspects of the Dayton solution.

Nevertheless, even on this occasion it was difficult to modify the human rights

389. The Human Rights Chamber, along with the Office of the Ombudsman, forms the Commission of Human Rights settled in Annex 6 of the Dayton Peace Agreement, qualified as an Agreement on Human Rights and finalized to assist the Parties to secure to all persons «the highest level of internationally recognized human rights and fundamental freedoms». See E. Decaux, *La Chambre des droits de l'homme pour la Bosnie-Herzégovine*, 44 *Revue trimestrielle des droits de l'homme*, (2000), 709-728.

390. The Constitutional Court has a large spectrum of competences, inter alia it could be mentioned the appellate jurisdiction over constitutional issues under the Constitution arising out of a judgment of any other courts in Bosnia and Herzegovina and the incidental review concerning the compatibility with the Constitution, the ECHR and its Protocols, the laws of Bosnia and Herzegovina. See Article VI of the Constitution of BiH.

391. In this paper, I decided to use the formula "international judges", prevailing in scholars' works, but in reality, I think that it would be better to say "foreign judges appointed at international level". On the Constitutional Court composition see extensively L. Montanari, *La composizione della Corte costituzionale della Bosnia ed Erzegovina tra influenza del fattore etnico e garanzie internazionali*, in M. Calamo Specchia (ed.), *Le Corti costituzionali: composizione, indipendenza, legittimazione* (Giappichelli, Turin, 2011), 113-135.

392. The text can be read linked to the preliminary opinion of the Venice Commission, cited before at note 2; more recently we can remember the Joint Statement of the Presidents of BiH in 2008 and the Butmir meeting that took place in 2009, but no one initiative has had a result. On the complex road to accession to the European Union: J. Woelk, *La lunga transizione della Bosnia ed Erzegovina "da Dayton a Bruxelles"*, 2 *Studi sull'integrazione europea* (2010), 508-527.

rules. So when the public authorities asked the Venice Commission for an opinion, the amendments to Article II – the Article on human rights I cited earlier – had not yet been finalized.[393] In any case, the Venice Commission expressed its opinion, highlighting several problems, related to the content of the rights and their guarantees.

The project amended paragraphs 1, 2, 3, 4 of Article II, beginning with the General Provisions, which qualify Bosnia and Herzegovina as «a social state that guarantees civil and political rights; economic, social and cultural rights, ethnic/national?, and collective rights in accordance with international and European standards» [question mark found in the original text]. Furthermore, the new paragraph 1.c referred both to fundamental rights and freedoms guaranteed by the Constitution and to rights guaranteed by international agreements and conventions to which Bosnia and Herzegovina is a signatory. International standards maintained a key role, but there was also a constitutional catalogue of rights. Consequently, paragraph 3 was entitled "Catalogue of rights and freedoms". It presented three lists of rights: fundamental rights and freedoms; civil and political rights and freedoms; economic, social and cultural rights and freedoms. Each list contained a number of rights, but they were drafted in a synthetic manner, not much different from the enumeration of rights of the Dayton Agreement. Some provisions were better articulated, although they were drafted in general and vague terms. We can consider, as an example, the provision on personal freedom: «A person who is on reasonable grounds suspected of violation law may be arrested and detained only when this is necessary for conducting criminal proceedings, or for the safety of people» (paragraph 3, b, n. 13). Unlike other contemporary Constitutions – for example Article 13 of the Italian Constitution[394] – there were no specific provisions on the time limit of the freedom restrictions nor on the role of the judiciary, not even through a reference to ordinary legislation.

The structure of the bill of rights gave rise to other problems: for example, how can one distinguish between fundamental rights and civil rights or how does one determine in which list the right belongs and what are the resulting consequences?[395]

With reference to the guarantees, the Venice Commission recalled that it is quite

393. European Commission for Democracy through Law (Venice Commission), *Preliminary opinion on the draft amendments to the Constitution of Bosnia and Herzegovina*, cit., points 75 ff.

394. «Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. The law shall establish the maximum duration of preventive detention».

395. In its opinion, the Venice Commission criticized the distribution of rights among the lists: for example the freedom of religion that historically is one of the most important fundamental rights was qualified as a social right (see point 81).

problematic to write a rich and ambitious catalogue of rights if the State doesn't have the capacity to guarantee its implementation. This risk is further complicated by the imprecise drafting of the human rights provisions, which cannot offer to the courts adequate guidance for their decisions. Furthermore, the new bill of rights was very vague with regard to the limitations of rights, provided for in draft Article II, 6. In particular, it did not distinguish between rights that can be subject to limitation (for example freedom of association) and rights that have an absolute character, such as the right to life or the prohibition of torture.

4. Some critical considerations

I have just given some examples of the critical aspects of the amendments proposed in 2006. Neverthless, it is undeniable that having a bill of rights is a fundamental goal for a national State.

Also the Venice Commission noted that «It is however understandable that the people of Bosnia wish to have their own catalogue of human rights which would reflect a consensus within the country on human rights protection».[396]

As it is well known, this has been one of the key elements of modern constitutionalism ever since the time of the French revolution, as the famous Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen testifies: «Any society in which the guarantee of rights is not assured or the separation of powers not settled has no constitution».[397]

But the question is which rights? How can we write a bill of rights having all people's consensus? In Bosnia and Herzegovina, the reference to international treaties has made it possible to avoid the selection of rights. Indeed, the difficulties associated with a selection of rights were insurmountable, considering that in 1995 the Constitution was written by the international negotiators, not by the people. In effect at the end of the war, the situation was so tragic and the relationships among the different peoples were so damaged that it was impossible to imagine a consent on the fundamental choices for the restoration of the Country.

If we consider the Constitutions of the other Eastern European Countries (included those of the Western Balkans), adopted after the democratic transitions, we notice that they present lengthy catalogues of rights. The solutions are so similar that they were called "Xerox Constitutions". The bill of rights drew inspiration from the Constitutions of Western democratic Countries and from the international treaties on human rights. The catalogues have sometimes included provisions that have no constitutional character and, above all, that can create expectations that the States will not be able to respect, with the risk of dissatisfaction and social conflicts. When they

396. See point 77.

397. On the historical evolution of human rights protection: G.F. Ferrari, *Le libertà. Profili comparatistici*, (Giappichelli, Turin, 2011) and A. Facchi, *Breve storia dei diritti umani*, (il Mulino, Bologna, 2013).

were written, the main goal of the Eastern European Countries was to be accepted into the "club of democratic Countries" and to be eligible to the membership of the international and supranational organizations such as the Council of Europe and the European Union. So we were faced with an "external conditioning" that imposed in large part the constitutional solutions, even for the bill of rights.[398]

The situation would certainly be different at the end of the transition process. Without the pressure to establish a new form of State – i.e. the democratic one, following the Western legal tradition – taking a decision also in the field of fundamental rights could be more problematic. When in 2011 Hungary adopted a new Constitution – the first after the collapse of the socialist State[399] – some solutions related to constitutional principles and fundamental rights became the object of strong criticism at the European level. Both the European Union and the Council of Europe challenged the procedure used to approve the new Fundamental Law and underlined the necessity of large popular involvement in the key decisions for the life of the Country. Consequently, the decisions on national identity and on some fundamental rights, like freedom of expression, life and family protection, citizenship, appeared more as elements of division than as instruments of democratic consolidation.[400]

While reflecting on a new Constitution for the Bosnia and Herzegovina, one of the crucial questions is whether it is possible to write a common bill of rights for a society still divided by ethnic conflicts. In the 2006 opinion, the Venice Commission affirmed that «From the legal point of view, there seems no need to revise this Article [Article II] of the Constitution in an urgent procedure before the next general election» (in 2006 there was also the general election) and moreover that «Only a result of high quality would justify a revision».[401]

Without any doubt, writing a bill of rights would be a fundamental step for democratic consolidation after a transition process. However, it is necessary to evaluate the real situation of the affected Country. Some years ago, I expressed an optimistic viewpoint about the decision of Bosnia and Herzegovina "to bring rights home", writing a constitutional bill of rights.[402] Today my opinion is quite different: in fact, I agree

398. I use the formula "external conditioning" to indicate something different from the well known "[European] conditionality". The conditionality is characterised by specific mechanisms based on prize and penalty that dictate State's decisions, in the cases considered there were no direct consequences, but the general "mood" imposed similar solutions in all Countries. See on these aspects L. Montanari, *La tutela dei diritti nelle nuove Costituzioni dei Balcani occidentali*, in M. Calamo Specchia, M. Carli, G. Di Plinio, R. Toniatti (eds.), *I Balcani in Europa. Le Costituzioni della transizione*, (Giappichelli, Turin, 2008), 161-202; about conditionality, L. Appicciafuoco, *Integrazione dei Balcani occidentali nell'Unione europea e principio di condizionalità*, 2 *Diritto pubblico comparato ed europeo* (2007), 547-582.

399. During (and after) the transition process, Hungary did not adopt a new Constitution, but amended, several times, the socialist one dating back to 1949.

400. European Commission for Democracy through Law (Venice Commission), *Opinion on the New Constitution of Hungary, Strasbourg*, 20 June 2011, CDL-AD(2011) 016 and European Parliament resolution of 5 July 2011 on the Revised Hungarian Constitution.

401. See points 76 and 78.

with the problematic statement of the Venice Commission. I cannot say that constitutional reform in Bosnia and Herzegovina is unnecessary, but I do not think it is advisable in the field of human rights.

If we use as an example the experience of the United States – it seems a strange example but it could be useful – we can recall that originally the Constitution of 1787 did not include a bill of rights. The bill of rights with the first ten amendments was added some years later, once the Federation was born.

In Bosnia and Herzegovina, twenty years after Dayton, there are many problems regarding the functioning of the federal system. The Entities still have many powers and the constituent peoples continue to block the activities of the federal State. The solutions adopted by the international negotiators in 1995 – with the aim of guaranteeing the peace agreement and of restoring the conditions for different peoples to coexist – turn out to be absolutely unsuitable for governing the ordinary life of the Country. As it is well known, most of the fundamental deliberations, also in the legislative field, have been adopted by the High Representative, not by the national institutions. Once again, an international organism – the HR – plays a key role at national level. The institutional blockage and the underlying conflicts among the constituent peoples are the major problems for the BiH future and the reason why reform projects have failed until now.

In this context, it is impossible, in my opinion, to write a common bill of rights. As I have said before, it is important for national States to have their own bill of rights; nevertheless, for Bosnia and Herzegovina probably at this moment a confirmation of the Dayton solution would suffice, in the context of a more limited constitutional reform finalized to ensure a functioning institutional framework.

To conclude, I propose to compare the human rights systems with the organization of the Constitutional Court, in particular with the presence of the international judges. The international judges are another aspect of the interaction between national and international levels in the Constitution of Bosnia and Herzegovina. This formula was also introduced at the end of the war to deal with the divisions and the conflict between the constituent people. But, I wonder if it could become an "ordinary" solution for societies where conflicted pluralism exists. In the same way, also the international catalogue of rights probably could become an instrument for governing ethnic and social conflicts, just as the international judges have been used.

So, building the bill of rights on international treaties could be considered an opportunity rather than a limitation.

I know that this conclusion goes against the prevailing trend, where national issues are gaining more and more importance. The margin of appreciation for the European Convention or the constitutional identities for the European Union could be considered as examples of this trend, such as the current debate in the United Kingdom on the adoption of a British Bill of Rights to replace the Human Rights Act that

402. In particular, I expressed this opinion in L. Montanari, *La tutela dei diritti in Bosnia ed Erzegovina: il complesso rapporto tra Camera dei diritti umani, Corte costituzionale e Corte di Strasburgo*, in G.F. Ferrari (ed.), *Corti nazionali e Corti europee*, (ESI, Naples, 2006), 159-189.

has assured the incorporation of the ECHR until today.

The experience of Bosnia and Herzegovina seems to lead us down a different path: writing a constitutional bill of rights referring to international treaties could be considered an innovative solution. We usually look to old democracies as models but in this case – in my opinion – the solution adopted in Bosnia and Herzegovina could serve as a new model also to the old democracies to deal with emerging social and cultural conflicts.

BOSNIA-HERZEGOVINA: IN SEARCH FOR THE CONSTITUTIONAL IDENTITY?

VALERIA PIERGIGLI

Discussing about a new constitutional arrangement for Bosnia-Herzegovina requires to solve some preliminary questions. Regardless of the ideology that always characterizes any constitution, what we need to ask is: what is or should be a constitution? What should it serve, what should be the goals, the functions of a constitution? In the frame of a sovereign state, only after this examination on the part of the social and political community that is going to write its own constitution, it is possible to plan the most appropriate process to use and the contents to be included in the constitution.

In the case of Bosnia-Herzegovina, it is well known that the constitution imposed by the 1995 Dayton Peace Agreements (Annex 4) was the product of a fully internationalized process, that such a constitution had the main purpose to end a conflict, to restore peace[403] and establish rules suitable to ensure an acceptable balance between the three constituent peoples, Bosniaks, Croats and Serbs. In this country, the issue of constitutional reforms has been on the agenda for years, but every attempt failed so far.[404] Twenty years after the Agreements, we wonder if Bosnia-Herzegovina is ready – today – to draft its own constitution. So, here is the preliminary question: what is the legal meaning of a constitution?

We can agree with the opinions, also recently expressed, by some scholars, who argue that a constitution is «*une autobiographie nationale*», a «*structure identitaire*»,[405] in other words a constitution «is not just a legal text or a toolbox of normative rules, but also the expression of a cultural evolutionary stage, a means of cultural self-representation of a people, the mirror of a cultural heritage and foundation of his hopes».[406]

403. E. Hay, *International(ized) Constitutions and Peacebuilding*, 1 (27) *Leiden Journal of International Law* (2014), 141 ff.

404. See, among others, J. Woelk, *La lunga transizione della Bosnia ed Erzegovina "da Dayton a Bruxelles"*, 2 *Studi sull'integrazione europea* (2010), 509 ff; S. Sebastiàn, *Constitutional Engineering in Post-Dayton Bosnia and Herzegovina*, 5 (19) *International Peacekeeping* (2012), 597-611; International Crisis Group, *Bosnia's Gordian Knot: Constitutional Reform*, Europe Briefing, no. 68, 12 July 2012.

405. See M.C. Ponthoreau, *La Constitution comme structure identitaire*, in D. Chagnollaud (ed.), *Les 50 ans de la Constitution 1958-2008* (LexisNexis, Paris, 2008), 31-42.

406. Translated from P. Haberle, *Costituzione e identità culturale. Tra identità e Stati nazionali* (Giuffrè, Milan, 2006), 11.

Long time ago, it was stressed that the constitution plays an integration role of a society and a state conceived as a political entity. In this regard Rudolf Smend, after the failure of the Weimar constitution, argued that a state is a process of continuous integration and the constitution must therefore be regarded as «the legal order of the state, more precisely of life in which the state finds its reality, namely its integration process».[407]

From these definitions, and of course many other similar could be added, some notions come out, such as those of people and state, which should be the pre-conditions of a whatsoever constitution-making process. The achievement – and awareness – of those concepts should precede the drafting of a constitution. The constitution aims to ensure the fundamental consensus requested for social cohesion, so it can be rightly conceived as a covenant, as a social contract, just to borrow the title of a famous work of Rousseau.[408] In this sense, a constitution has an integrating function, besides to a legal one. Every constitution is the legacy, the memory of the past, but at the same time it is aimed to regulate the future of a society and a state. It expresses and leaves to posterity a set of collective and shared values, the *constitutional identity* of a people,[409] which is composed of all the citizens of a state, regardless of memberships (that may also exist and are legitimate) to particular communities.

In the era of the so-called global constitutionalism, the values that compose the constitutional identity of a people are, among others, freedom, democracy, justice, rule of law, separation of powers. Those values, widely shared by the legal systems that are included within the framework of the Western liberal states, often try to find a peaceful coexistence – according to an accommodationist or integrationist vision[410] – with traditional or indigenous values, that express the peculiar – cultural, ethnic and religious – identities. In modern constitutions, all these identity values are usually enshrined in the Preambles or among the Fundamental Principles, they have a high symbolic meaning and are considered as unchangeable. In the case of Bosnia-Herzegovina, liberal and community values should be able to find a synthesis, possibly different from that suggested or imposed by the Dayton Agreements.

In fact, regardless of belonging to particular communities, all the citizens of a certain society should recognize a set of common values, of civic values. Only if a society is able to identify in the constitution, if it perceives certain values as common

407. Translated from R. Smend, *Verfassung und Verfassungsrecht* (1928), in *Staatsrechtliche Abhandlungen und Andere Aufsätze* (Duncke and Humblot, Berlin, 1968), 189.

408. J.J. Rousseau, *Du contrat social: ou principes du droit politique*, 1762.

409. M. Rosenfeld, *Constitutional Identity*, in M. Rosenfeld, A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, Oxford, 2012), 756 ff ; for reflections on the notion of "constitutional identity" and the 2014 Tunisian Constitution, see T. Groppi, *La Costituzione tunisina del 2014 nel quadro del "costituzionalismo globale"*, 1 *Diritto pubblico comparato ed europeo* (2015), 189 ff.

410. J. Marlo, *Ethnopolitics and Constitutional Reform in Bosnia-Herzegovina*, in O. Listhaug, S.P. Ramet (eds.), *Bosnia-Herzegovina since Dayton: civic and uncivic values* (Longo, Ravenna, 2013), 52.

and unitary values, it can be said that the constitution has a legitimacy and an integrating effect, that the constitution is the "cement" of the society. As Friedrich argued, «A constitution will have an integrating effect only if expresses the fundamental values and aspirations of the society and if the latter perceives that its own constitution precisely reflects the values in which it identifies and which are the source of its same nature».[411]

Therefore, a constitution should combine both civic and identity values, *demos* and *ethnos*. This is a difficult task, especially within divided societies, multi-ethnic, multi-national and multi-religious societies. In the geographic and political area of Western Balkans, in particular, the conciliation of *demos* and *ethnos* is very difficult to realize, mainly due to historical and cultural reasons. As everybody knows, the disintegration of Yugoslavia and the break-up of the socialist regime caused, since the '90s of the last century, the beginning of a complex transition to democracy, which was influenced – in addition to the role of the international community, as in the cases of Kosovo and Bosnia-Herzegovina – by the nature, from inside, of the previous regime which was strongly inspired by the tradition to link the linguistic, cultural, religious, ethnic heterogeneity of the population and the territorial self-government. At a first glance, this seems a tendency not alien even to ethnically composite states of consolidated democracy, in which indeed it is quite widespread the introduction of forms of territorial decentralization along the lines of a federal or regional state, in order to provide adequate guarantees to the autochthonous communities, especially if they are demographically large and settled within well-defined geographical areas. Nevertheless, as the history and the constitutional development show, often in a dramatic way, the situation is different within the framework of the Balkan countries. The prevailing of an ethnic, rather than civic, conception of nation tends to recognize to the majority ethnic group the sovereignty over the corresponding territory where the same group is settled with the marginalization, leaving aside the formal declarations, of the minority groups. In this geographic area the explosion of interethnic conflicts is always lurking and the aspiration to correlate territorial boundaries with linguistic, religious, ethnic belongings actually can suggest secessionist movements. Consequently, new states arise and a never ending escalation can incite disintegrations as well as fragmentations of territories with the creation of a myriad of theoretically mono-ethnic microstates. Not surprisingly, to designate phenomena that remind to chronic disorders, instability and geo-political fragmentations the eloquent word "Balkanization" is frequently used. Unless an authoritarian power, perhaps embodied in a charismatic leader who represents the strongest ethnic group in a certain historical moment, decides to get the upper hand, centralize the exercise of public functions and suffocate any request, even legitimate, coming from the communities that differ from the rest of the population for their specific identities. That is what happened, with ups and downs, in the countries of the former

411. Translated from C.J. Friedrich, *La démocratie constitutionnelle* (Presses Universitaire de France, Paris, 1958), 93.

Yugoslavia which experienced several autocratic regimes, until the advent of socialism. The fall of the multinational Austro-Hungarian and Ottoman empires, after the First World War, in fact, was followed by the constitution of the Kingdom of Serbs, Croats and Slovenes (1918) and, later, by the creation of the Kingdom of Yugoslavia (1929), from which Croatia detached to give rise to an independent state (1941). The abolition of the monarchy and the national unification were realized within the Federative Republic of Yugoslavia, led by the Communist Party and Marshal Tito (1946-1980).

In the succession of regimes that are briefly recalled an element remained substantially unchanged: the ethnic, cultural and religious diversity of this area and its communities continued to be artificially suppressed within the unitary and centralized state that, under the aegis of the predominant Serbian community, did not give up to practice discriminatory policies against the minority ethnic groups. Not even the federal solution – scheduled in the constitution of 1946 and reaffirmed in the constitutions of 1958, 1963 and 1974 – could realize, despite the name, a truly federal state, which requires a real political will to devolve power to local self-governing units, also in order to protect minority groups and minority rights, in accordance with the principles of rule of law and democracy. According to the Constitution of 1946, the Yugoslav version of ethnic federalism mentioned rights to self-determination and secession and formally sanctioned the equality of nations consisting of six republics (Serbia, Croatia, Slovenia, Macedonia, Montenegro, Bosnia-Herzegovina), while recognized to the other national minorities the right to cultural development and the use of their language. Nevertheless, in the system of one-party government, of the centralized and undemocratic Socialist Republic of Yugoslavia, the legal instruments able to implement the constitutional guarantees were absent. Therefore, it was inevitable that, after the death of Tito, the never extinguished nationalistic movements caught fire again.

The international intervention in Bosnia-Herzegovina and the Dayton Peace Agreements, twenty years ago, had no ambitions of conciliation among the different ethnic and religious groups or, at least, that intervention tried to pursue that goal only in a transitional way. The power-sharing mechanism, the consociational democracy as well as the mechanisms of quotas were not created to reconcile *ethnos* and *demos*, but rather to the restoration of peace after a civil war, according to a peace-keeping – rather than to a state-building or nation-building – approach. As a matter of fact, the process of state/nation-building should precede the constitution-making process.

But something more must be added. With regard to Bosnia-Herzegovina, it was said that, even before, what has been lacking was a sense of mutual trust at the social level. In fact, first of all, the process of trust-building should be favored, as a premise «for the development of a civic society and ... of a sustainable democracy».[412] With the territorialisation of ethnicity, both in the institutions and in daily life, Dayton con-

412. A. Correia, *Conclusion*, in Listhaug, Ramet (eds.), 2013, 394.

tributed to separation, intolerance, nationalism, in short, to the "distrust" among the different ethnic groups living within the society. In this context, the risk that a hypothetical new constitution could be just a piece of paper, a constitution "in the books", is very high. And a constitution without a constitutional culture, a constitution without constitutionalism[413] – as the history has taught – is condemned to failure.

Beside the need to combine civic and identity values, another aspect deserves to be analyzed, especially with regard to the situation of Bosnia-Herzegovina. In the case of external intervention in the constitution-making process, the following stage of appropriation of such a constitution is very important. This process should be a conscious and self-managed one, it should not be imposed from outside; otherwise, it may not be successful and the state which fails in this process of local ownership will be a weak state unless a failed state. The external intervention, both during the drafting and implementation of a constitution, as happened in Bosnia-Herzegovina, should not be such as to put at risk the internalization of the constitution itself.

In this perspective, it is worth to remind the UN Guidance Note for the assistance to constitution-making processes, which aims to create a strategic plan to aid, in the future, the constituent processes avoiding some mistakes committed in the past.[414] In fact, both the choice of the procedure and the definition of contents are vital for the effective success of a constitution. As indicated in the Guidance Note, an internationalized constitution-making process may actually facilitate, within certain countries, the exit from or prevent the rise of conflict situations («*Seize the opportunity for peace-building*») and, therefore, the United Nations should stimulate the respect of international norms and standards («*Encourage compliance with international norms and standards*»), as well as favor with adequate measures the implementation of the constitution after its adoption («*Promote adequate follow-up*»). Moreover, especially with regard to those countries which experiment a transition to democracy, the guidelines are directed to support inclusive, participatory, transparent constituent processes («*Support inclusivity, participation and transparency*»), as well as the actions to recruit and coordinate a wide range of skills, inside and outside the United Nations system («*Mobilize and coordinate a wide range of expertise*»).

In particular, one element seems to be the keystone for the future assistance to the constitution-making processes: the external aid should realize on request of the national bodies («*Ensure national ownership*»). The emphasis on local/national guide (in place of an international one) of the constituent power intends to dismiss the idea that domestic actors can perceive the assistance offered by the United Nations as a

413. In this sense, see among others, G. de Vergottini, *Costituzionalismo europeo e transizioni democratiche*, in M. Calamo Specchia, M. Carli, G. Di Plinio, R. Toniatti (eds.), *I Balcani occidentali. Le Costituzioni della transizione* (Giappichelli, Turin, 2008), 3; according to this Author "constitutions without constitutionalism" are the ones that provide for the organization of power without any form of guarantee for the popular legitimacy of rulers, their accountability, nor for the protection of fundamental rights.

414. *Guidance Note of the Secretary-General. United Nations Assistance to Constitution-making Processes* (https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf).

form of imposition or neo-colonialism. In short, the Guidance Note reveals that constitutions should be «carefully tailored to the local context, recognizing there is no "one size fits all" constitutional model or process, and that national ownership should include official actors, political parties, civil society and the general public». The international aid has to be tailored according to a case by case approach, because there is no universally valid model for all states and for all circumstances. In this sense, the Guidance Note remarks the sovereign and national character of the constitution-making process, where «national and transitional authorities may choose to engage international assistance, both in terms of the process and on substantive constitutional law. Each of those elements requires careful planning and expertise that the UN should be able to offer to the national actors as required».

In Bosnia-Herzegovina, not only the constitution-making process was fully internationalized, but also the process of national ownership was missing in the following stage.[415] The consequences of these facts are evident: the social pacification has not yet achieved and the building of a real democratic state is still far away.

Trying to be less abstract and more constructive (or realistic), looking back, at the Dayton process, what mistakes should be avoided,[416] if the "people" of Bosnia, after finding a sense of unity, decided to write a new constitution? It would be crucial:

a) that there are no external imposition any more. It is possible to imagine an external aid, a technical expertise at the request of the same political leaders of Bosnia-Herzegovina, but not foreign nor international impositions. If such an interference is required by the state itself, it would be important that the organizations involved could act in harmony with each other (it would be better a UN and EU intervention, rather than a US/EU one, as happened until now in an unsuccessful way). Moreover, the cooperation between national and international actors should be strategic;
b) that the constitution-making is inclusive and participatory, and this can be problematic in the Balkan context, as we saw, a few years ago, in Kosovo with the experience of the unilateral declaration of independence. A democratic state cannot successfully function without a strong support of citizens and among citizens, without a support from below (political parties, civil society, religious associations, intermediate bodies, and so on) and without the consent of a broad cross-section of the population;
c) that the drafting body is not compelled to respect tight deadlines, because the risk could be the sacrifice of priority needs, such as the building of national consent

415. For the importance of national/local ownership of an internationalized Constitution, with specific regard to Bosnia-Herzegovina, see among others: J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008), *passim* and Hay, 2014, 153 ff.

416. About the errors of the past and the possible roads ahead, see, for instance, International Crisis Group, *Bosnia's Future*, Europe Report, no. 232, 10 July 2012, 27 et seq.

and the overcome of internal divisions through a wide participation of citizens and social components to the constitution-making process.

Nevertheless, first of all, what is necessary is the internal raise of a sense of self-consciousness, of a collective will: the will of the people to stay together as citizens of a unitary state. If this desire should find a concrete expression, it will be possible to choose the suitable model of the state (a federal state, a confederation of states) and the contents of the constitution. In the case this will to stay together there isn't (or there isn't any more), maybe it should take note of this situation and choose another way: for example, the way experimented by Montenegro and Kosovo in recent years. In other words, we could not exclude the path to self-determination, as long as a negotiated, consensual and democratic process, since – as recognized by the Supreme Court of Canada in the famous reference on the referendum for the secession of Quebec – the «Constitution is not a straitjacket»[417](§150). In the situation of Bosnia-Herzegovina, it would be better to say that Dayton risks to be perceived as a "straitjacket". A divided society should not feel itself as constrained, nor forced through foreign pressure, by the constitution if the different parts of the society do not wish to share (any more) certain values, if they do not perceive (or cease to feel) certain values as "common values". In other words, as some scholars recently argued, self-determination and secession should not be demonized, but rather these phenomena should be normalised or domesticated.[418]

If Bosnia-Herzegovina is not able to overcome the stalemate that Dayton has contributed to create, perhaps the dissolution of the state and the redefinition of boundaries might be the solution: drastic but useful to prevent new conflicts. In short, *a divorce by mutual consent*, unless a *marriage of convenience* is not evaluated as a better choice. For example, a joint effort and the development of a common vision of the society could be worthy in order to enter into the EU. Perhaps, faced with this pragmatic goal, the confirmation of the unity of the Bosnian state, possibly preserving the model of consociational democracy, could be (or should be) a reasonable price to pay.[419] In any case, even in this respect, it is a question of trust: the trust in the EU institutions should grow, because it seems to be missing still now.

417. *Reference re Secession of Quebec* (1998) 2 S.C.R. 217.

418. See, respectively, S. Mancini, *Ai confini del diritto: una teoria democratica della secessione* and A. Mastromarino, *Addomesticare la secessione: indipendentismo e integrazione europea in dialogo*, both in 3 *Percorsi costituzionali* (2014), 623 ff and 639 ff.

419. On the interrelations between the internal developments (federal or confederal model of governance) and the negotiations process with the EU bodies, see V. Perry, *Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?*, 5 (22) *International Peacekeeping* (2015), 490 ff.

THE ETHNIC KEY OF POLITY AND THE STATE-BUILDING FAILURE IN BOSNIA-HERZEGOVINA[420]

STEFANO BIANCHINI

Twenty years after the signing of the GFAP, the «primary ambiguity» of this Agreement does not seem to have been overcome.

The ambiguity we are speaking about, lays mainly on the ambivalence of the Agreement's *political* content. Shortly speaking, its entering into force has legitimised the existence of an independent State of Bosnia-Herzegovina, while establishing two Entities (called *Republika Srpska* and *Federation of Bosnia-Herzegovina*) with a so wide autonomy to appear the key components of a loose confederation.[421]

420. The research which has generated this article was realized in the framework of the TÁMOP 4.2.4.A/2-11-1-2012-0001 "National Excellence Programme – Elaborating and operating an inland student and researcher personal support system convergence programme". The project was subsidized by the European Union and co-financed by the European Social Fund. I am grateful to Zdravko Grebo, Zoran Paji and Francesco Privitera for their useful comments and remarks. Thanks also to Nidžara Ahmetaševi and the team coordinator of Media Center in Sarajevo, Dragan Golubovi, for their help in identifying and providing me some relevant sources from the local press.

421. This is one of the most relevant reasons why international agencies have suggested radical constitutional amendments. The Venice Commission has outlined a set of issues that require a change in the relations between the State and the entities to the detriment of the latter. The ESI has proposed to transform the Republika Srpska in the 10th canton of the State. Other proposals were suggested to be put on the agenda of policymakers since the Dayton Constitution is included in an international peace treaty and requires changes that should be agreed by the parties that signed that agreement. The USA administration and the EU made repeated efforts to convince Bosnian-Herzegovinian political parties to sign up to constitutional reforms and establish a reform agenda but all these attempts have miserably failed. See J. Marko, *Ethnopolitics and Constitutional Reform in Bosnia-Herzegovina*, in O. Listhaug, S.P. Ramet (eds.), *Bosnia-Herzegovina since Dayton: Civic and Uncivic Values* (Longo, Ravenna, 2013), 49-80 or from the same author *Defective Democracy in a Failed State? Bridging Constitutional Design, Politics and Ethnic Division in Bosnia-Herzegovina*, in Y. Ghai, S. Woodman (eds.), *Practising Self-Government. A Comparative Study of Autonomous Regions* (Cambridge University Press, Cambridge, 2013); F. Bieber, *Constitutional reform in Bosnia and Herzegovina: preparing for EU accession*, in *European Policy Center*, *Policy Brief*, April 2010, at http://www.epc.eu/documents/uploads/1087_constitutional_reform_in_bosnia_and_herzegovina.pdf; J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008), Z. Dizdarevic, *Ka novom Ustavu, Oslobodjenje*, 15 March 2005, 9; European Stability Initiative, *Making Federalism Work – A Radical Proposal for Practical Reform*, 8 January 2004, www.esiweb.org/pdf/esi_document_id_48.pdf or the proposal of the ACIPS Alumni, *Ustav Savezne republike BiH*, 3 *Novi Pogledi* (2004), 6-11.

Since then, the reached accommodation has remained ambivalent in defining the character of the State.

On the one hand, in fact, Bosnia-Herzegovina can be identified as a "*nation*" (similarly to the USA, Germany, China or Switzerland, and basically the States belonging to the "United *Nations*"…), if we look at the category of "nation" with a civic content. The Dayton Constitution, however, classifies «Bosniacs, Croats, Serbs as *constituent peoples* (along with Others), and citizens of Bosnia-Herzegovina».[422] Should these single peoples be considered part of a (civic) nation, or should each of them be identified with one (ethnic) nation remains contested. On the other, as a result, Bosnia-Herzegovina is *not* a nation, if nation is primordially conceived, as nationalists basically do. Rather, nations should be – in this case – identified with the constituent ethnic groups within the Entities. Still, the Constitutions of the Entities (established before the GFAP) declared that *Republika Srpska* was the State of the Serb people, while Croats and Bosniaks only were constituent peoples of the *Federation*.[423]

Accordingly, this rationale has given arguments to make the arrangement of the *Federation* contested. A widespread belief amongst nationalists actually retains that the *Federation of Bosnia-Herzegovina* is set up by two ethnic nations. In compliance with their vision, if the *Republika Srpska* is regarded as an ethnic nation, an unbalanced situation was established in the other Entity. As a result, a Croat nationalist mainstream – with the support of the local Catholic Church – asserted (and still asserts) that its people have been treated unequally, and persists to claim the creation of a third Entity.[424]

Furthermore, the European Court of Human Rights dealing with the *Sejdić-Finci* case recognized in 2009 that citizens not belonging to the constituent peoples (the so called "Others") were suffering from an evident form of discrimination in terms of eligibility to the House of Peoples and the Presidency. The Court decision had to be implemented through a Constitutional amendment, which have never been passed in the Parliament, despite the EU demands and the most recent Anglo-German initiative in support of institutional reforms of November 2014.[425]

422. See GFAP Annex 4, Constitution of Bosnia-Herzegovina, Preamble (emphasis added).

423. Compare: Ustav Republike Srpske, clan 1 and Okvirni sporazum o federaciji, I, in *Novi ustavi na tlu bivse Jugoslavije*, (Medjunarodna Politika, Beograd, 1995). The Constitution of the Federation is also available – along with all the basic legal documents of BiH – on the OHR web site www.ohr.int.

424. This is the position expressed by hardliners of the HDZ either in Bosnia-Herzegovina or in Croatia, as well as of the Catholic Church in Mostar and Sarajevo, whose authorities take advantage of any occasion in order to victimize the role of the Croats in Herzegovina and Posavina, as well as to criticize Croatian authorities for lacking support to their co-nationals in the neighbouring State. See, amongst the countless comments on this regards, D. Cizmic Marovic, *Biskupima BIH nema tko da pise, Slobodna Dalmacija*, 20 August 2005, 9 and I. Lovrenovic, *Cobanovina*, *Feral Tribune*, 19 August 2005, 22-23. A cultural description of the Bosnian Croats is in I. Lovrenovic, *Bosanski Hrvati* (Durieux, Zagreb, 2002).

425. See European Court of Human Rights, *Sejdić and Finci v. Bosnia and Herzegovina*, case n. 27996/06 and 34836/06, Decision of December 22, 2009 and European Commission,

Crucially, this intricate and contradictory situation is *the background* that explains the foundations of a controversial, but predominant and exclusive, ethnic key of polity in Bosnia-Herzegovina, which has influenced either the protection of collective rights or the governance in the State building process since the beginning of the 90s at least.

Such an outcome was, anyhow, the consequence of the political and military balance of powers established on the ground between 1992 and 1995: although the peace treaty dealt with Bosnia-Herzegovina, it was not signed by the representatives of the «ethnic groups» involved in a local (or civil) war, but by the representatives of Bosnia-Herzegovina, Croatia and Federal Republic of Yugoslavia, namely three Yugoslav successor States,[426] the latter two of them directly involved in the hostilities, via military supports to local armies, because politically interested in partitioning the former one.[427]

The main *ideological* assumption of the fighters was that an ethnic homogeneous State would offer a more consistent basis to power legitimacy, protection of the rights of their own ethnic group, and modernization policies rather than a multiethnic State, as Yugoslavia was. In other words, by re-drawing maps and loyalties nationalist leaders strongly believed that the long Yugoslav crisis of the 80s, whose reasons were expanded – in their arguments – from economics to the cultural and political legacies

Bosnia-Herzegovina – EU: Deep disappointment on Sejdić-Finci implementation, Press release database, http://europa.eu/rapid/press-release_MEMO-14-117_en.htm, 18 February 2014. See also: Inicijativa Philipa Hammonda i Frank-Waltera Steinmeiera, Institut za društveno-politika istraživanja, Studeni 06, 2014, http://www.idpi.ba/britansko-njemacka-inicijativa.

426. It is not wordplay. The term "Yugoslavia" has different meanings: the Federal Republic of Yugoslavia (FRY, or «ramp Yugoslavia») was a federation between Serbia and Montenegro, established by Milosevic in 1992 in order to pretend the legacy of Socialist Federal Republic of Yugoslavia (SFRY) in terms of properties and international recognition. This approach was harshly contested by the other 4 Yugoslav republics, which declared independence and were internationally recognized, namely Slovenia, Croatia, Bosnia-Herzegovina and Macedonia. As a result, the word "Yugoslavia" is here referred to the Yugoslav State, which existed from 1918 to 1991, not to the rump Milosevic's State, which is here mentioned under the abbreviation FRY.

427. In fact, nationalist leaders neither from Bosnian HDZ nor from SDS were a direct party in the Dayton negotiations. Serbs were represented by Milosevic, while Croats were partially represented by Tudjman and partially included in the Bosnian delegation led by Izetbegovic. The latter enjoyed an ambivalent position, since encompassed Muslim and Croat members: as a result, it dealt ambiguously sometimes as a delegation of Bosnia-Herzegovina and sometimes as a representative of the Federation only (the Federation was in fact established in 1994 with the "Washington Agreement"). As for the Serbia and Croatia's involvement in the war, see particularly the wide number of documents presented at the ICTY trials and the decisions made by the Appeals Chambers on the Tadic and Aleksovski judgements. A confirmation of the Croatian military involvement is extensively reported in the Bobetko's memoirs: J. Bobetko, *Sve moje bitke* (Vlastita Naklada, Zagreb, 1996). See additionally Predrag Lucic (ed.), *Stenogrami o podjeli Bosne* (Kultura & Rasvjeta-Civitas, Split-Sarajevo, 2005); the witnesses collected by M. Minic, *Dogovori u Karadjordjevu o podeli Bosne I Hercegovine* (Rabic, Sarajevo, 1998) and the documents included in S. Cekic, *The Aggression on Bosnia and Genocide against Bosniacs* (Institut za istrazivanja zlocina, Sarajevo, 1995).

of the Austro-Hungarian and communist rules, would be eventually overcome. This emphasis on ethno-national homogenisation led quickly to group polarisation. In addition, the process enjoyed the support of those religious authorities (catholics, orthodox and muslims) that identified religion and nationalism as a way for imposing their own prescriptions, rules and ethic vision of the humankind to the State legislation and the conduct of the society. As a result, and in spite of the reluctance of single ministers of worship, religions contributed to the dismemberment of the Yugoslav (and Bosnian-Herzegovinian) social structure.[428]

All in all, then, these claims of homogenisation – actively endorsed by different subjects – clashed not only with the ethnic and religious distribution of the population, but also with the territorial interests of nationalists, who contended the control over the access to the main natural resources regardless any local demographic configuration.

The merge of these beliefs have forged the "rationale" of the war, giving grounds for ethnic cleansing and genocide.

Meanwhile, and in spite of a general miscalculation, these beliefs have generated all over Yugoslavia a resistance of groups and individuals that wanted either to protect their *inter*cultural and interethnic relations within their family and their friends, or to support the development of a democratic intercultural society within the Yugoslav successor States. Truly, the trend suffered from a low level of visibility, a weak coordination and organization, as well as from a powerful intimidation, being marked as an expression of national betrayal by nationalists. Still, its courageous advocates, with their own behaviours and statements, were invalidating the reasons of the partition, even when – realistically – they accepted the *fait accompli* of the Yugoslav collapse. Lacking weapons and the access to media, they created transnational networks of relations, denounced war crimes and illegal treatments in their own countries, and met the liberal Western approach that basically contests an ethnic vision of the nation and of polity.[429]

Nevertheless, liberalism as ideology was powerless (and still is powerless) in dealing with collective rights, when they imply an ethno-cultural dimension that aims at informing the State governance. Not incidentally during the 90s theoretical efforts in elaborating a theory in this direction were registered by scholars: the works of Buchanan and Kymlicka are the best examples of these attempts of reconciling the collective and the individual dimension of rights in the liberal thought.[430]

428. See *Konfesije i rat* a special issue of *Nase Teme*, no. 2-3, 1994; the book edited by D. Janjic, *Religion and War*, (European Movement of Serbia, Beograd, 1994), the yearbook *Religija, rat, mir* (Junir, Nis, 1994). More recently: A. Babuna, *The Bosnian Muslims and Albanians: Islam and Nationalism*, 2 (32) *Nationalities Papers* (June 2004), 287-322.

429. On State partitions, its motivations, and consequences in a comparative approach, see S. Bianchini, S. Chaturvedi, R. Ivekovic, R. Samaddar, *Partitions, Reshaping States and Minds* (Frank Cass, London, 2005).

430. See A. Buhanan, *Secession* (Westview Press, Boulder, 1991) and W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995).

Meanwhile, the international diplomacy was increasingly involved in mediation between the parties, legitimising the forces of partition. Basically conservative in political culture, this diplomatic body addressed its efforts towards the fighting forces and the leaders of the Yugoslav republics who, however, shared – although dissimilarly – critical war responsibilities. In doing so, the international diplomacy followed the rooted praxis of negotiating with official representatives of States and warlords, without drawing attention to the claims of a wide part of the local civil societies, articulated in groups and associations that opposed war and the ethnic vision of nation.

In spite of that, however, international diplomats and policy makers could not ignore the views expressed by the public opinion in their own States, particularly when awareness of the war crimes raised and anti-nationalist approaches in the post-Yugoslav space became internationally appreciated, thanks to the support coming from transnational networks. In addition, Western diplomats particularly were culturally committed to support the main features of liberalism and democracy, as for the protection of human rights, individual liberties, freedom of press, mobility, security, and basically the access to the fundamental rights.[431]

The contradictory interactions of all these mainstreams in wartimes generated different views on the post-war potential arrangements, determining a variety of proposals – during the negotiations – that mirrored different visions of nation, according to nationalist, conservative or liberal formulations.

In the end, the GFAP (as well as the following accords that contribute to stop warfare in the territory of former Yugoslav federation) was the aftermath of a compromise reached, in a specific historical moment, by the International community and the involved *nationalist* parties, which nonetheless did not share a common view of the nation, while the local no-nationalist civil society was excluded from the negotiations.

Therefore, the treaty mirrors a situation where *nationalist* parties never perceived themselves as defeated either militarily, or in their own war aims and expectations. In turn, the mediators of the International Community remained ambiguous in their support to the integrity of Bosnia-Herzegovina. As a result of this situation, the political interpretation of the treaty (and its substantial implementation) has remained a contested story, summarized by a key dilemma, namely: should the treaty have been considered as a compromise preparing, in a further step, a Bosnia-Herzegovian partition along ethnic lines; or should have it been considered as the first step in stopping this scenario and starting a gradual reintegration of the country?

This is exactly the issue that condensed the «primary ambiguity» mentioned above, where the ambiguity is strictly connected to the controversy over the idea of nation. As a result, the protection of collective rights in ethno-cultural terms and the func-

431. Broadly and for the background see F. Privitera, *The Relationship between the Dismemberment of Yugoslavia and European Integration*, in J. Morton, P. Forage, C. Nation, S. Bianchini (eds.), *Reflections on the Balkan Wars* (Palgrave Macmillan, New York, 2004), 35-54.

tioning of the institutions in Bosnia-Herzegovina are undermined by the contested visions of the parties in the country.

To make the issue more complicated, the treaty has assigned a specific role to the United Nations, by establishing the figure of the High Representative, that is expected to fulfill a wide range of commitments whose implementation relies on a specific administrative body. As a supervisor of the governance in Bosnia-Herzegovina, the High Representative acts as a de facto governor of an international protectorate.[432]

By all means this decision marked the beginning of a systematic international involvement into the territory of the former Yugoslav federation: a set of different agreements was, in fact, signed since then, with the other subjects of the area. An intricate international architecture of peace accords, treaties, and protocols *reintegrated* the territory of Croatia, *detached* de facto Kosovo from Serbia, *saved the integrity* of Macedonia, redefined the rules within the Serbian-Montenegro Union…

Without writing a history of this system of accords – which exceeds the limits of this chapter –, the reader will however note that the aforementioned agreements have paved the way either to the *reintegration* or the *separation* in ethno-cultural terms, as well as in State building. Regardless to their normative details, it is evident that the Ohrid and Belgrade agreements (respectively signed in 2001 and 2002) outlined a process of integration via decentralization for Macedonia and the newly established Union of Serbia and Montenegro, while the 1244 UN resolution and the Kumanovo agreement on Kosovo (1999) clearly separated the administration of Kosovo from Belgrade, despite the formal recognition that Kosovo was still part of the rump Yugoslavia.[433]

The GFAP is, thus, inscribed in this regional context, where the content of nation remains unsettled. Still, the «primary ambiguity» based on the dichotomy *reintegration/separation* has not yet been overcome.

There is no doubt, in fact, that Bosnia-Herzegovina has been constitutionally constructed on the "separation" of Serbs from Croats and Bosniaks, although this fact, as seen, has encouraged a Croat nationalist mainstream (with the support of the local catholic Church) to claim systematically the invalidation of the Washington agreement (reluctantly reached by Tudjman and Izetbegovic in 1994 under the auspices of Clinton presidency[434]) and the creation of a "Third Entity".[435]

432. M. Zucconi, *'Protectorates' in the Balkans: Defining the Present Status and Looking at the Future of Bosnia-Herzegovina and Kosovo*, in S. Bianchini (ed.), *From the Adriatic to the Caucasus. The Dynamics of (De)stabilization* (Longo, Ravenna, 2001), 169-178 and C. Sadikovic, *Protektorat ili supsidijarna uloga: o ulozi medjunarodne zajednice u ustavnom sistemu BiH*, 3-4 *Ljudska Prava* (2001), 68-71.

433. About conflicting approaches of the peace treaties among Yugoslav successor states see S. Bianchini, J. Marko, C. Nation, M. Uvalic (eds.), *Regional Cooperation, Peace Enforcement, and the Role of the Treaties in the Balkans* (Longo, Ravenna, 2007).

434. See K. Begic, *Bosna i Hercegovina od Vanseove misije do Daytonskog sporazuma* (Bosanska Knjiga, Sarajevo, 1997) and P. Shoup, S. Burg, *The War in Bosnia-Herzegovina* (Sharpe, Armonk, 1999).

435. In fact, since the status of Brcko could not be agreed in Dayton, its future was bound to an

Meanwhile, the inconsistency between the Dayton and the Entities Constitutions became evident. In their own ethno-national rights, citizens were not treated equally in principle: in fact, if Serbs, Croats and Bosniaks – according to GFAP – were "constituent peoples" in Bosnia-Herzegovina as a whole, Entities provisions could not treat Serbs as a minority in the *Federation*, as well as Croats and Bosniaks in the *Republika Srpska*. Nonetheless, the harmonization of the Entities Constitutions to the Dayton's provisions required a long time for the implementation, since resistances deferred the decisions of the Constitutional Court of July 2000, and nationalist media campaigns opposed the changes. Later, cantons and municipalities had to adapt their own statutes: still, at the end of 2004 the municipality of Sarajevo was discussing consistent amendments in order to recognize the Serbs as a constituent people of the city, alongside with Croats and Bosniaks.[436]

Eventually, although formal changes were introduced in the Entities' Constitutions equalizing peoples, ethnicity strongly institutionalised norms and regulations: consequently, it affected either the governance or the democratic praxis of the country.

Ethnicity, actually, has been institutionalised in a strict connection with *territory* (identified with the *Entities*). Definitely, during the negotiations that led to Dayton, this was a requirement stemming from the nationalist mainstreams of the parties, which identified the access to the rights of their own group *with* the protection of their territory. The principle was basically accepted and determined the rules that defined the inclusion of the three main ethnic subjects into the new institutional system of Bosnia-Herzegovina.

As a result, the political representation at the level of the government and the Assemblies has been bounded strictly to the ethnic belonging in one specific territory (namely, the Entity). In order to guarantee an equal treatment for Bosniaks and Croatian in the *Federation*, this Entity has been articulated in 9 cantons, where devolution was mainly connected to ethnicity and territory than to geoeconomic resources or historical links and interests. On the opposite, *Republika Srpska* remained a strong centralized Entity.

The participation into the government was regulated on the basis of a balanced representation of the 3 main groups. Initially, even the premiership was based on ethnic rotation, but later, in 2002 a four-year mandate has stabilized the office. Nonetheless, ethnic ratio and rotation have informed the presidential body of the country (the system being still in force): the collective presidency, in fact, was set

international arbitration. As a result, it should be noted that a third entity has been established de facto in August 1999 when the Brcko International Tribunal issued its Final Award, rejecting the claims of both Entities and establishing an autonomous District of Brcko. Accordingly, the demand of a Croatian Entity, if put into practice, would create a fourth Entity.

436. See the *Partial Decision of the Constitutional Court of Bosnia-Herzegovina*, 1 July 2000; the *Agreement on the Implementation of the Constituent Peoples' Decision of the Constitutional Court of Bosnia-Herzegovina*, both in www.ohr.int/ohr-dept/legal/const and V. Popovic, *U Statutu samo Bosniaci i Hrvati*, *Nezavisne Novine*, 30 November 2004, 4.

up by 3 members, each of them representing an ethnic group. All of them rotated in the office of the president of the presidency. They were selected among the candidates from the two Entities, so that a Serb from the Federation could not be a candidate to the presidency because Serbs were supposed to be represented by the Republika Srpska and, vice versa, Bosniaks or Croats were supposed to be represented by members of the Federation.

Additionally, the 3 main ethnic groups enjoyed an enhanced veto mechanism, as a "guarantee of their own collective rights" (which nationalist mainstreams understood as "protection of national interests", in compliance with their vision of what "national" means).[437]

In the *Federation* the equality of representation has been restructured, after the harmonization of the State/Entities Constitutions, by assigning to each of the three main ethnic groups two positions amongst the six most prominent positions (namely, that of the president of the Federation, the prime minister, the presidents of the two chambers of the Parliament, the president of the Appeal Court and the president of the Constitutional Court). In the event that this distribution of these positions is not respected, the legitimacy of the decisions is immediately questioned.[438]

In few words, legitimisation has a double basis, since it requires not only the citizens' vote, but also an ethno-national equal distribution of the positions, once the polls are over. At the same time, the right to vote (active and passive) is not always equally guaranteed to the members of the 3 main ethnic groups, because – under certain circumstances – its access depends on the residence of the citizens. As a result, the protection of "collective" (or, ethno-group), instead of individual interests, became the priority of a "territorialized" ethnic polity based on the exclusiveness. This priority, however, was embodied into the constitutional requirements, which were defined under the mediation and the help of the international community.[439]

Paradoxically, this ethnic construction of the governance in Bosnia-Herzegovina emulated, under many respects, the provisions adopted in Tito's Yugoslavia: strong identification of ethnicity and territory; veto mechanism; collective presidency; rotations; ethnic ratio in representation... Under many respects, the liberal approach to ethnic rights access and representations showed to be powerless in offering – during the negotiations in Ohio – convincing alternatives to the rigidity of ethnic rights mechanisms experienced under communism.

Definitively, however, the establishment of a democratic system with competing parties, plurality of media, a room for developing NGO's and civil societies, the in-

437. See Z. Pajic, *A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia-Herzegovina*, 1 (20) *Human Rights Quarterly* (1998), 125-138, particularly 135-137.

438. See for instance R. Cengic, *Po znakom pitanja odluke parlamenta*, *Nezavisne Novine*, 30 November 2004, 4.

439. Compare: F. Bieber, C. Wieland (eds.), *Facing the Past, Facing the Future: Confronting Ethnicity and Conflict in Bosnia and Former Yugoslavia* (Longo, Ravenna, 2005) and Z. Papic (ed.), *International Support Policies to South-East European Countries. Lessons (not) learned in B-H* (Müller, Sarajevo, 2001).

troduction of the ombudsman, and different autonomous authorities, embodied the most radical news injected into the political arena of Bosnia-Herzegovina and represented an effective potential alternative at least to the ideological homogenisation, requested either by communists or nationalists.

In other words, the ethnic key of polity in a formally (however young) democratic society, such as the post-Dayton Bosnia-Herzegovina, allowed a free criticisms that stressed the contradictions between, on the one hand, the need of institutional inclusion and protection of ethnic groups (whose reasons laid mainly on mutual resentments and fears that required a process of appeasement) and, on the other, two main distortions generated by the prevailing of an ethnonationalist form of governance.[440]

The first distortion was connected to the "selective" protection of ethnic rights. In fact, the Dayton Constitution provided protection and political representation, although territorially based, to the three main ethnic groups of Bosnia-Herzegovina. The others, instead, suffered from wider exclusion. Minorities such as Jews, Yugoslavs (more than 5% of people declared themselves as Yugoslav in the 1990 census), Roma, people from mixed marriages, did not enjoyed similar rights as the Serbs, Croats and Muslims/Bosniaks did. The mentioned *Sejdić-Finci* case has blatantly confirmed and emphasized this distortion at the international level.

The educational system, furthermore, was highly ethnicised: pupils were invited to attend courses and schools according to their own ethnic belonging, but such schools were provided for the three main groups only, and the teaching – particularly in the field of humanities – was deeply determined by the opposite nationalist *primordialist* visions of culture and civilization. Scholars at the international level tried to contribute the writing of new textbooks, unbiased and with a civic orientation: nevertheless, they were never accepted into the school system, since the selection of the textbooks were made by a commission appointed by the government and whose task was precisely that of checking the ideological orientation of the textbooks.[441]

Similarly to education, the access to other rights (property, for example) was affected by ethnic priorities while, basically, all institutes, including the judiciary and the police, were ethnically biased.

As a result, people were forced to take side with one of the three main ethnic groups, in order to take advantage of their access to the rights. At the beginning, this behaviour was also constrained by the ethnic majority in the territory (an Entity, a canton, a municipality…), so that the rights of individuals were mainly depending on the ethnic group's majority in a specific district of the country. Later, when the

440. F. Bieber, *The Challenge of Institutionalizing Ethnicity in the Western Balkans: Managing Change in Deeply Divided Societies*, 3 *European Yearbook of Minority Issues* (2003/2004), 89-107.

441. See for instance T. Emmert, C. Ingrao (eds.), *Resolving the Yugoslav Controversies: A Scholars' Initiative*, Special Issue, 4 (32) *Nationalities Papers* (2004); S.M. Waine, *When History is a Nightmare* (Rutgers University Press, New Brunswick, 1999); In Italy a comparative analysis of textbooks has been made by S. Bahto, G. Bonduri, A. Konomi, *Piccoli balcanici crescono*, 3 *Limes* (1998), 181-215.

harmonization of the Entities Constitutions took place and a certain number of refugees came back home under the encouragement of international agencies, the strict connection "ethnicity-territory-access to the rights" softened, but never released outsiders from the 3 main groups to express freely their identity and enjoy same rights.

In conclusion, the life – for those who resisted the homogenisation with one of the 3 privileged ethnic groups – became difficult.

Actually, individuals were deprived of their rights of defining their identities freely; by contrast, they were requested to belong to a group, while the selection of groups was restricted to three. As a result, any attempt at *secularising* the sense of belonging was discouraged, while cultural homogenisation continued to be stimulated by other means. Instead of violence, the access to the rights became the key that, in peaceful times, regulated the ethnic balance within the State.

The second distortion, partly embodied in the previous one, was connected to the forms of governance that were exacerbated by a prevalence of ethnonationalist confrontation, mutual blackmail, and bargaining.

Actually, the applied mechanism of a *triple* ethnic representation created the best conditions for strengthening the supremacy of three oligarchies as the expression of the *three* ethnic groups. In other words, *three* new elites emerged in the Entities during the war. Later, when a peace status was restored in the country, they took advantage from the new system of triple representation extended to all sectors of social life, and particularly from privatisation policies, when the bargaining concerned resources and their distribution. Meanwhile extremely high costs were imposed to the public administration, in order to multiply bodies and offices at all institutional levels, from the State to the municipalities, and accommodate the requests of the parties and their clients.

Still, put under constrain by international agencies, the political life within Entities and cantons gradually had to accept an active participation of parties representing other ethnic groups than those considered "constituent one(s)" before Dayton. Mainly, these delegates were elected by former refugees (that decided to went back to their home), or – from the distance – by those who still were living in another Entity. In most cases they were involved in the local governments (inclusive of the Entity level). Under certain respect, this change culturally overthrew the war aims, since those excluded (and persecuted) in wartimes where again encompassed in the institutional life. Nonetheless, the "methodology of inclusion" was determined by a strict ethnic ratio. As a result, this new situation offered rooms for mutual influence, interdependence, and blackmails, as a political crisis originated by the request of excluding parties of another ethnic group from a coalition in one Entity (or canton) was followed by similar demands, although opposite in terms of "ethno-political colours", in other public offices.[442] Similarly, any request of reform or change in

442. An example is that of the request that came from SDS and PDP (two relevant parties in the Republika Srpska) in June 2005 in order to exclude SDA (the Bosniak party) from the government of the Entity: immediately, the presidency of this party in Sarajevo claimed, in return, the exclusion of SDS and PDP from the government of the State. See *Mikerevic: narednih dana smjena ministara iz SDA*, *Nezavisne Novine*, 21 July 2004, 2.

the status of Bosnia-Herzegovina or Entities trigger emotional and over-dramatized reactions within nationalist parties, revealing how fragile is still the institutional balance and mutual trust in the country.[443]

Basically, an obsessive ethno-territorial representation created a double problem: on the one hand, confrontation and bargaining that determined the negotiations amongst the three main ethnic groups led to an ineffective decision-making process, by postponing for long time any relevant and even marginal settlement; on the other, any efforts made in implementing and deepening the praxis of ethnic ratio in the everyday life provoked unexpected and unpleasant consequences. Applied in sectors as the public administration, police, employment strategies, public assistance, the ethnic ratio weakened, under many respects, the quality of services, frustrated competencies, opened grounds to corruption and facilitated in the population a sense of resignation, which evolved in a form of disappointment towards democracy, while becoming at the same time, a source for reproducing, although in a restricted arena, the ethno-national political consensus. Even when, for a short period, between 2000 and 2002, the opposition parties (with pro-European and civic orientations) had the opportunity to experiment the governing, the ethnic ratio showed its predominance in the decision making process. Under this respect, a substantial distinction between the new coalition and the previous remained at the distance. Accordingly, the ethnic ratio showed to be so deeply embodied in the political life of the country that the "classic" liberal differentiation between majorities and minorities, left and right, softened (sometimes even vanished) in terms of ideological contrasts and political programs, while shifting to the ethnic balance of the parties, their proportional consistence, and their distribution on the territory.

In conclusion, this framework – in spite of the fact that it was designed in order to protect identities and ethnic groups – did not nurtured the flourishing of people's satisfaction, a functioning institutional system and an effective decision-making process enjoying a wide support. The EU was expected to offer convincing, efficient and transparent institutions, able to make decisions and not to postpone them because the mechanism is in its turn fragile and undefined. So far however, EU failed to achieve these goals to a large extent because the local political leaderships are interested to maintain the status quo which appears to be convenient for them. As a result, twenty year after the peace treaty was signed the Balkan weakness is meeting the European irresolution on the implementation of its political project, stemming from the political crisis that dates from the failure of the constitutional treaty in 2005 and the persistence of the economic and financial crisis since 2008. Increasingly, we can expect that the enduring hesitancy and outlet of the latter will deeply determine the evolutions of the former.

443. See for instance 3 articles published in the same day and in the same page by *Dnevni Avaz*, the first one entitled *Covic: ako ostane RS trazit cemo treci entitet* (reporting a HDZ reaction on some requests of changes of the GFAP), the second: *SDS ce saradjivati ili ce biti unisten* (reporting OHR reactions to the SDS resistance to reforms) and the third one *Najavljena tuzba protiv Asdauna* (reporting an SDS reaction to a OHR decision). See *Dnevni Avaz*, 27 September 2005, 2.

RELIGIONS AND ETHNO-RELIGIOUS DIFFERENCES IN BOSNIA AND HERZEGOVINA. FROM LABORATORIES OF HATE TO PEACEFUL RECONCILIATION

FRANCESCO ALICINO

1. INTRODUCTION

Even though the war ended about twenty years ago, Bosnia and Herzegovina (hereinafter BiH) is still struggling to find its way of reconstruction and reconciliation that would result in a better life for its citizens. After so much time, it is clear that the political and institutional design made up by the 1995 Dayton agreement does not work to contribute fully to that aim. In particular, not much has been done to improve social and economic well-being.[444]

One of the decisive factors behind this situation is the lack of cultivate relationship and mutual respect between moral agencies operating within the Country. Not for nothing this situation is normally defined as absence of war than by peace and reconciliation: negative peace, in terms of the absence of war, is achieved; divisions, however, persist. Moreover, this situation is at times sustained by a religious context that still feeds ethno-national conflicting positions.[445] Which proves the fact that, as in the past, religion is playing a significant role in many sectors of today's BiH, including those referring to institutional and political framework.

It would be wrong to understand the Bosnian war, the main source of the Country's current problems, only in terms of a religious war: the tragedy in the first half of the 1990s was in large part a consequence of the processes taking place in the second half of 1980s, such as growing economic crisis and gradual decomposition of the legitimacy of the Socialist political system. Yet, it would also be wrong to adopt the explanation that religion had no role in BiH's catastrophe. Of course, some dimensions of that sort cannot be neglected. But they cannot mask the ethnic-religious aspects of the conflict.

As a matter of fact, the misfortunes that occurred in the region during the first half of 1990 were in many respects the result of the abuse of the people's religious identity, relieved through myth and tradition that even today remains an important

444. M. Koinova, *Conclusions: Building on Regional Trends to Develop New Mechanisms for Political Change*, in D. Abazović, M. Velikonja (eds.), *Post-Yugoslavia New Cultural and Political Perspectives* (Palgrave MacMillan, New York, 2014), 198-203.

445. See *ex plurimis* X. Bougarel, E. Helms, G. Duijzings, (eds.), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society* (Ashgate, Aldershot, 2007).

inspiration for the future.[446] In this article I will first analyse the genesis of this situation and, in particular, the radical nationalism of BiH, which since the collapse of socialist Yugoslavia has been strictly related to the processes of politicization of religion and religions creeds. This will make it easier to understand the place and the role of religion and confession in the Country's current legal system. For this purpose, it will be worth focusing the attention on concrete issues, like those referring to the constitutional right to freedom of religion, the principle of secularism, the ethnic-religious oriented tripartite structure of BiH's political institutions, the education system, and the legal status of Churches and religious communities.

It is undeniable that religion and religious actors contributed largely to the bloodshed in the former Yugoslavia. For the same reasons, though, it is also unquestionable that, either for the better or worse, they have an important part to play in the existing reconstruction process.

2. THE POLITICIZATION OF RELIGION AND THE NATIONALIZATION OF CONFESSIONS

As is widely known, confessions were marginalized in public life throughout the period of socialist Yugoslavia. This brought hope to many that in future religion would have not risen significant problems in the Balkan region. Conversely, during the harsh reality of the war religion was used as a tool in empowerment of national agendas, increasing the distance between the major ethnic groups.[447] From here two reciprocal processes stemmed: the politicization of religion[448] and the nationalization of confessions,[449] which reduced religious creeds to mere nationalized symbols celebrating a God that loved and preferred one national group to other factions.[450]

Under these approaches, the Bosnian war was preceded and accompanied by an aggressive propaganda campaign, based on adapting ancient myths and religious

446. V. Tismaneanu, *Fantasies of Salvation: Democracy, Nationalism, and Myth in Post-Communist Europe* (Princeton University Press, Princeton, N.J., 1998), 15.

447. See S. Vrcan, *Proselytism, Religion and Ethnicification of Politics. A Sociological Analysis*, 5 (17) *Religion in Eastern Europe* (1997), 1-20; N. Andjelic, *Bosnia and Herzegovina, the End of a Legacy* (Frank Cass, London, 2003); P. Mojzes, *Balkan Genocides. Holocaust and Ethnic Cleansing in the Twentieth Century* (Rowman and Littlefield, Lanham, 2011).

448. D. Abazović, *Reconciliation, Ethnopolitics and Religion in Bosnia-Herzegovina*, in Abazović, Velikonja (eds.), 2014, 35-56.

449. See *ex plurimis* M. Sells, *Serbian Religious Nationalism, Christoslavism, and the Genocide in Bosnia, 1992-1995,* in P. Mojzes (ed.), *Religion and the War in Bosnia* (Scholars Press, Atlanta 1998), 201-202.

450. G. Shenk, *God With Us? The Roles of Religion in Conflicts in the Former Yugoslavia* (Life and Peace Institute, Uppsala, 1993); G. Powers, *Religion, Conflict and Prospects for Reconciliation in Bosnia, Croatia and Yugoslavia*, 1 (50) *Journal of International Affairs* (1996), 62-67; P.H. Liotta, A. Simons, *Thicker than Water? Kin, Religion, and Conflict in the Balkans*, in *PARAMETERS, US Army War College Quarterly - Winter 1998*, http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/98winter/liotta.htm (last accessed 17 September 2016).

doctrines to current ideologies.[451] This way, laboratories of hate renewed ancient atrocities.[452] Take, for example, the Bosnian Islamic tragedy, based on the fact that they were too Muslim for the West and not Muslim enough for the Islamic world; they were in effect caught in between the nationalist interests and the most distinctive thing about them, their religious component. Conversely, the support of the Muslim world to the war efforts of the Bosnian side was prominent: despite the embargo, Iran and other Muslim-majority Countries sent arms and military advisers to the Bosnians; Saudi Arabia and other Gulf States provided financial aid; nongovernmental religious organizations and institutions offered everything from humanitarian help to recruiting Muslim volunteers for the fighting in Bosnia.[453]

Not to mention Radovan Karadžic, who said that forcing Serbs and non-Serbs to live together would be like doing the same to "cats and dogs", adding that «Bosnia had never existed and it will never exist».[454] In this perspective one may explain, without justifying, the destruction of historical recollection. So, it is not by chance that the initial targets of Serbs and other nationalists were cultural-religious monuments and that the first goals of their aggression in BiH were religious leaders:[455] fifty-four Muslim clergymen had been killed by mid-June, 1992, while about two hundred person were interned in Serbian and Croatian camps for prisoners, including many active imams.[456]

In this manner, the return of religious-national integrationists produced tensions and intolerance, on the one hand, and the exclusion of the considerable atheistic population within each nation, on the other. The three main religious hierarchies in BiH were sending open or veiled appeals to people of their denomination to support the respective party of their nation. The strongest political parties of the Bosnian Serbs and Croats tried to exploit the Orthodox and Roman Catholic churches as a means of acquiring support and legitimacy. The rhetoric of other party's leaders was influenced by religious references, such as Koranic inscriptions and biblical texts.[457]

The major religious organizations were in other terms voluntarily involved in the war, even though in different ways and to different degrees. Some religious authorities went so far as to bless warring activities that resulted in persecution and killing. Oth-

451. M. Velikonja, *Liberation Mythology: The Role of Mythology in Fanning War in the Balkans*, in P. Mojzes (ed.), 1998, 38; B. Anzulovic', *Heavenly Serbia: From Myth to Genocide* (C. Hurst & Co. Ltd, London, 1999).

452. M. Velikonja (translated from Slovenian by Rang'ichi Ng'inja), *Religious Separation and Political Intolerance in Bosnia-Herzegovina* (Texas A&M University Press, College Station, 2003), 245.

453. X. Bougarel, *L'Islam bosniaque, entre identité culturelle et idéologie politique*, in X. Bougarel, N. Clayer, *Le Nouvel Islam balqanique: Les musulmans, acteurs du post-communisme, 1990–2000* (Maison and Larose, Paris, 2001), 103-104.

454. Velikonja, 2003, 254.

455. M. Sells, *Crosses of Blood: Sacred Space, Religion and Violence in Bosnia–Hercegovina*, 3 (64) *Sociology of Religion* (2003), 309-331.

456. Sells, 2003.

457. L.J. Cohen, *Bosnia's Tribal Gods: The Role of Religion in Nationalistic Politics*, in Mojzes (ed.), 1998, 43-69.

ers were silent about crimes committed in the name of their God.[458] To this respect, what was going on was a religious genocide, through which individuals were generally classified, and at times persecuted if not killed, on the basis of their religious identity.[459] The violence was grounded in a religious mythology, used to describe the targeted persons as race traitors and the extermination of "others" as a sacred act.[460]

On the other hand, denial was present everywhere, which means that some parts of the population denied the facts, others replaced them with myths as countermemory. The only thing they had in common was that they considered religion as a hard national-ethnic subject and confessions as crucial *differentia specifica*. This explains why political ideologies demanded the support of organized religious doctrines in order to legitimize new establishments; which implied the exploitation of religions for national purposes.[461] And, from this point of view, there was no significant difference between the major religious organizations; namely the Islamic community, the Roman Catholic Church, and the Serbian Orthodox Church.

All this mirrors the fact that the collapse of socialist and Yugoslav State left room for the de-privatization of religion, feeding various national mythical constructs embedded in the minds of the population.[462] One of these constructs referred to the "chosen people" that (by chance?) broadly coincided with the suitability of the dominant confession for the nation, the demonization of other creeds, and the mythologizing of important religious-national figures from the past and present. In addition, those constructs supported visions of an imagined future infused with religious integrism,[463] which was melded almost perfectly with national integrism.[464]

Thus, nationalists on all three sides often denounced non-integrist individuals as atheistic and antinational. Correspondingly, the socialist regime was perceived as being responsible for the outbreak of hatred and violence because of its desertion of the Bible-Koran, and because of its religious immorality and anti-Serb-Croat-Muslim orientation. Seemingly, the public sites of dramatic religious events from the past became the destinations of national pilgrimages and rituals: Ajvatovica for the Bosnians, Medjugorje for the Croats, and the tombs of Ustasha victims for the Serbs. Religious feasts (such as the Bajram, commemoration of the Battle of Badr, Easter, Assumption, Christmas, St. Vitus Day) were also turned into national holidays and celebrated in public buildings.

458. M. Bax, *Warlords, Priests and the Politics of Ethnic Cleansing: A Case-Study from Rural Bosnia Hercegovina*, 1 (23) *Ethnic and Racial Studies* (2000), 16-31.
459. M. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (University of California Press, Berkeley, 1998).
460. Velikonja, 2003, 260.
461. I. Cvitkovic, *Religions in War: The Example of Bosnia and Herzegovina*, 6 (21) *Occasional Papers on Religion in Eastern Europe* (2001), 32-45.
462. V. Perica, *Balkan Idols: Religion and Nationalism in Yugoslav States* (Oxford University Press, Oxford, 2004), 4-11.
463. Abazović, 2014, 37.
464. D. Abazović, *Rethinking Ethnicity, Religion and Politics: The Case of Bosnia and Herzegovina*, in *European Yearbook of Minority Issues* (Brill NV, Koninklijke, 2007), 317-326.

Briefly, national divisions ended up sustaining conflicting differences in religious identities and *viceversa*.

The result of such collective process on a largely secularized population soon became evident. Public opinion polls in 1988 showed that only 55.8% of Croats, 37.3% of Bosnians, 18.6% of Serbs and 2.3% of Yugoslavs declared themselves to be believers. The situation changed completely in 1999: 89.5% of Croats and 78.3% of Bosnians declared to be believers. A year later, research in the Doboj region showed that 88% of Croats, 84.8% of Bosnians, 81.6% of Serbs and 16.7% of those nationally undefined declared themselves "very religious" or "medium religious".[465] In our time, according to the 2013 census of BiH (whose final results were published in June 2016)[466] 50.7% of BiH's population identify religiously as Muslim, 30.75% as Serbian Orthodox Christian, 15.19% as Roman Catholic, 1.15% as other, and only 1.1% as agnostic or atheist.[467]

This demonstrates that, although in a less bloody way than during the war, within the Country the role and the place of religion and religious communities has continued to increase. As a matter of fact, in BiH religious identity still emerges as one of the most important form of collective conscience with the capacity to address fundamental concerns and existential questions, and to provide protective-collective cohesion. As such, it has been influencing political narratives and practices that, in turn, are being used to justify ethnically based constructions and institutions.

3. THE PLACE OF RELIGION AND RELIGIOUS CONFESSION

Religion in BiH is not confined to religious denominations or official leaders. It also involves local traditions, distinctive customs, peculiar value systems and unique practices, with or without specific doctrinal knowledge. It remains that religion is always a social phenomenon manifesting at different levels, from individual to community. Religion is perceived as a faith-based community with its doctrinal teachings, moral norms, symbols, and rituals. Besides, religion implies the level of institutions, as relevant bodies that include leadership and specific types of hierarchy.

In this sense, it may be said that the life of the majority of BiH citizens is overwhelmed by ethnic-religious modes, and their worldview channelled in ethnic-religious terms. The institutional and political milieu, in turn, is fully aware of this social situation. So, if a religious doctrine – that is norms, values and practices of a given confession – is the soil in which the ethnic differences are imbedded, then religions appear as one of the most important sources of legitimization in politics. This

465. Velikonja, 2003, 261.

466. This census is based on the Law on Census of Population, Households and Dwellings in Bosnia and Herzegovina in 2013, *Official Gazette of BiH*, 10/12 and 18/13).

467. Agencija za statistiku Bosne i Hercegovine, *Popis stanovništva, domaćinstava i stanova u Bosni i Hercegovini*, 2013. *Rezultati popisa/ Census of Population, Households and Dwellings in Bosnia and Herzegovina*, 2013. Final results, Sarajevo, 2016, 68-81, http://www.popis2013.ba/popis2013/doc/Popis2013prvoIzdanje.pdf (last accessed 17 September 2016).

also explains why in the experience of BiH denominations and religious leaders are playing an important role in term of transitional justice. Many people still vividly remember religious leaders' ambivalent role during the war. However, if a majority of members of religious groups are struggling with past and present injustices, their respective leaders have a moral obligation to provide a forum for the public articulation of needs;[468] a forum that can serve both members of a religious group and, in order to establish a peaceful coexistence within the Country, non-members.[469]

From the juridical point of view, all this leads to focus the attention on the way BiH's law system regulates the relationship between the State and confessions, which implies the legal status of Churches and religious communities, starting form the major ones.

These issues have been, in fact, addressed by the legal reasoning of the Dayton Peace Accords (DPA) and the Constitution of Bosnia-Herzegovina (Annex IV of DPA).[470] And, to this respect, it should be first noted that, although most of the provisions of the Constitution of the Federation of BiH are devoted to institutional architecture, Part II of this Charter does not fall under that category. It is in effect dedicated to human rights and fundamental freedoms, which include the obligation of the Federation to ensure the highest level of internationally recognized standards in this field.[471] It means, for example, that rights and freedoms that the Federation shall ensure are those set out by the European Convention on Human Rights (ECHR), such as the right to life, the right to liberty and security of person, the right to property, the right to education, the right to freedom of expression, the freedom of peaceful assembly, and the rights to the freedom of thought, conscience and religion.

In addition, BiH's Constitution explicitly contains a non-discrimination clause, which secures the equal treatment of all people, irrespective of their «sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».[472] It is important to underscore that the content of this clause is also reflected into the provisions of the 2003 Law on the Protection of National Minorities,[473] which not for nothing has been published in *Official Gazette of BiH*[474] in three official languages; so that the Law is available not only to all public institutions, but also to other users, such as media and academics. In particular, the Act has been translated into English and Romany languages,[475] and its copies printed and distributed to various addresses. No authori-

468. D. Philpott, *What Religion Brings to the Politics of Transitional Justice*, 1 (61) *Journal of International Affairs* (2007), 93-110, see in particular 101.
469. J.N. Clark, *Religion and Reconciliation in Bosnia & Herzegovina: Are Religious Actors Doing Enough?*, 4 (62) *Europe-Asia Studies* (2010), 671-694.
470. Abazović, 2014, 36.
471. Article 2 of the Constitution.
472. Article 4 of the Constitution.
473. This Act was passed and came into effect in May 2003.
474. No. 12/03.
475. That is the first translation of a law into the Romany language in BiH is deemed extremely important for the emancipation of the Roma national minority in BiH and considered an example of positive affirmation of Roma.

ty in BiH has thus justification or excuse for any failure to be informed about its content.[476]

As can easily be seen, these provisions are theoretically fully in line with the basic principles of a constitutional democracy. Yet in BiH their execution is highly problematic, as demonstrated by BiH's institutional architecture, which is based on power-sharing mechanisms affirming the equal representation of the constituent ethnic-national components. And, once again, it is important to stress that these components correspond to major religious denominations (the Islamic community, the Roman Catholic Church, and the Serbian Orthodox Church).

4. The constituent (chosen) people and religious power-sharing mechanism

In the Preamble of the Constitution, Bosnians, Croats and Serbs are described as "constituent peoples", whose political representation reflects almost perfectly the composition of both the House of Peoples (the second chamber of the State Parliament)

476. In late 2003 the entities in Bosnia and Herzegovina (Republika Srpska and the Federation of BiH) began activities to enact their own laws on the rights of national minorities, as required by the Act on the Protection of National Minorities at the state level. The Act on Amendments to the Law on the Protection of National Minorities adopted in October 2005 (*Official Gazette of BiH* no. 76/2005) was more specific and set a statutory deadline of 60 days of the date of enactment of this Law for the establishment of the Council for National Minorities within the Parliamentary Assembly of BiH. Finally, a decision establishing the Council for National Minorities within the Parliamentary Assembly of BiH was adopted and published in May 2006 (*Official Gazette of BiH* no. 38/2006), according to which the advisory body was established for the purpose of raising awareness about the importance of the establishment of the body for promoting and protecting rights and resolving outstanding issues of both all national minorities and Roma in particular as the largest and most vulnerable minority in our country. On 27 September 2005 the Roma Board within the Council of Ministers issued a conclusion to publish the strategy in a booklet in official languages of Bosnia and Herzegovina (Serbian, Bosnian and Croatian) and to translate and publish it in English and Romani. The expansion of network of non-governmental organizations of national minorities, particularly of Roma, and their networking continues at the level of BiH. In this sense, the implementation of The Action Plan on the Educational Needs of Roma and Other National Minorities in BiH has been intensified. There has been a rise in the number of Roma children and children of other ethnic minorities enrolled in schools at all levels of education in the Country. Depending on the capabilities of municipalities, cantons and the entities they were given school supplies, textbooks and monetary aid for transportation and meals. See Ministry for Human Rights and Refugees of BiH, *Answers to the questionnaire on the International Convention on the Elimination of all Forms of Racial Discrimination* (Cerd), 16 July 2014, http://www.ohchr.org/Documents/Issues/Racism/AdHoc/5thsession/Bosnia_Herz.pdf (last accessed 17 September 2016). See also Permanent Mission of Bosnia and Herzegovina to the United Nations Office at Geneva, *Information on the implementation of UN Resolution Named: "promoting human rights and fundamental freedom through a better understanding of tradition values of humankind": The best examples in Bosnia and Herzegovina*, 18 February 2013, http://www.ohchr.org/Documents/Issues/HRValues/BosniaHerzegovina.pdf.

and the House of Representatives: the first is composed of five Bosnians and the same number of Croats from the Federation of BiH and five Serbs from the Republika Srpska, while a minimum number of 4 representatives of one constituent people shall be represented in the House of Representatives.[477] In addition, there is the Presidency (the collective Head of State) composed by three members with a Bosnian and a Croat from the Federation of BiH and a Serb from the Republika Srpska. It follows that only persons declaring affiliation with a constituent people are entitled to run for the House of Peoples and the Presidency.

In other words, these institutions only include people from three ethnicities, factually excluding and discriminating against the group of "Others", as expressly defined by the Preamble of the Constitution (*Bosniacs, Croats and Serbs as constituent peoples, along with Others …*). It means that, despite being citizens of BiH, a person may be denied any right to stand for election to the House of Peoples and the Presidency on the grounds of his/her ethnic-religious belonging. And we should not forget that the Constitution specifically provides that no legislation can be adopted without the approval of both the House of Peoples and the House of Representatives.[478]

For these reasons, in 2009 the Grand Chamber of the European Court of Human Rights (ECtHR) held that BiH's power-sharing mechanism is not capable of being objectively justified in a contemporary democratic State, built on the principles of pluralism and respect for different cultures and religions. This is due to the fact that the power-sharing mechanism allows unequal treatment, which is based exclusively on a person's ethnic-religious origin. As a result, BiH's constitutional provisions, which render a person ineligible for election because of his/her belonging, must be considered discriminatory and a breach of the ECHR's provisions.[479] In particular, they are in contrast with Article 14 ECHR taken in conjunction with Articles 3 of Protocol no. 1 and Article 1 of Protocol no. 12, in the light of which free elections are those held under two basic conditions:

- the free expression of the opinion of the people;
- the right to elect and stand for election shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[480]

477. The House of Representatives shall consist of ninety-eight delegates.
478. Article 17 of the Constitution.
479. ECtHR, Grand Chamber, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, 22 December 2009.
480. *Ibidem*. See S. Bardutzky, *The Strasbourg Court on the Dayton Constitution*, 2 (6) *European Constitutional Law Review* (2010), 309-333; M. Milanovic, *Sejdić and Finci v. Bosnia and Herzegovina*, 104 *American Journal of International Law* (2010), 1-12; L. Claridge, *Sejdić and Finci v. Bosnia and Herzegovina in Minority rights group international*, 12 march 2010, http://minorityrights.org/publications/discrimination-and-political-participation-in-bosnia-and-herzegovina-march-2010/ (last accessed 17 September 2016).

It is important to underline that the constitutional provisions regulating the power-sharing mechanism were not included in the Agreed Basic Principles that constituted the first outline for what the future Dayton Agreement would contain.[481] Moreover, the international mediators reluctantly accepted these arrangements at a later stage because of strong demands to this effect from some of the parties to the conflict.[482] When these constitutional provisions were put in place, a very fragile ceasefire was on the ground. The provisions were thus designed to end a brutal war marked by genocide and ethnic-religious cleansing.

The nature of the conflict was such that the approval of the constituent peoples – Bosnians, Croats and Serbs – was necessary to ensure peace. This explains the absence of representatives of the other communities at the peace negotiations and the participants' preoccupation with effective equality between the constituent peoples in the post-conflict society.[483]

But this also explains the importance of the 2009 ECtHR's decision, capable of highlighting two conflicting aims of BiH's peace process in general and the Dayton Agreement in particular. On the one hand, the tripartite structure of that mechanism was and is necessary to establish and maintain peace within the Country; which underlines the fact that religion and religious communities still remain as powerful sources for reconciliation, giving meaning, identity and spiritual strength to believers and bring people together around common causes in local communities.[484] On the other hand, based on the major ethnic-religious components, that tripartite structure is in contrast with the basic elements of a constitutional democracy, by which BiH claims to be inspired.

481. See paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of 26 September 1995.
482. G. Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers, Leiden, 2005), 192. See also J. O'Brien, *The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation*, in I. Zartman, V. Kremenyuk, *Peace versus Justice: Negotiating Forward – and Backward – Looking Outcomes* (Rowman & Littlefield Publishers, Lanham, 2005), 105.
483. Nevertheless, fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered them to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out. Article 2 of Part II of the Constitution was therefore inserted establishing that the rights and freedoms set forth in the ECHR and its Protocols shall apply directly in BiH. Moreover, these rights and freedoms shall have priority over all other law. For example, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of Bosnia and Herzegovina and approves a budget of the State institutions.
484. To this respect, it is important to note that since 1997 in BiH there is the Interreligious Council of BiH, which contributes to truth and reconciliation as well as to linking of diversities with the aim of living together, respecting each other and cooperating. It is no coincidence that the Council has printed the Glossary of Religious Terms, in order to promote better understanding of the cultural diversity of society of BiH. At the same time, the Council has condemned any violence against all human being, «because any human rights violation is a violation of God's laws». Its goal is in other words to promote dialogue and cooperation between BiH's religious communities in order to build a multi-ethnic and multi-religious democratic soci-

In this respect, it should be recalled what the 2004 Law on Freedom of Religion and Legal Status of Churches and Religious Organisations in BiH (hereinafter the Act on Freedom of Religion)[485] affirms in its Article 4.1:

> Churches and religious communities shall not, when teaching religion or in other actions, disseminate hatred and prejudices against any other Churches and religious communities or its members, or against the citizens of no religious affiliation, or prevent their freedom to manifest in public their religion or belief.[486]

This provision must be read in conjunction with the 2003 framework laws, namely the Law on Preschool Upbringing and Education in BiH (FPUE)[487] and the Law on Elementary and Secondary School Education in BiH (FESSE),[488] which were approved by the State in order to ensure compliance with minimum standards of human rights, including the prohibition of discrimination.

Concerning the FPUE, it does not refer expressly to religious education at preschool level. It nonetheless affirms that the preschool upbringing and education must be conducted without any discrimination, taking into serious account the generally accepted universal values of a constitutional democracy.[489] In addition, the FPUE remarks the importance of the value systems concerning ethnic, historical, cultural and religious tradition of the peoples who live in the Country.[490] In particular, languages and cultures of all constituent peoples of BiH shall be respected and included in the preschool institution in accordance with the Constitution, the ECHR, the Framework Convention for the Protection of National Minorities, and the Convention on

ety. To this end, the Interreligious Council works with local leaders of BiH's major religions and members to build awareness of each other's beliefs, customs, and practices and to foster joint activities at the local level. In particular, the Council works directly with local community leaders, theology students, women, and young people to raise awareness and promote constructive interreligious dialogue. During the last years, the Council has: organized several meetings for theological students from all faiths; assisted women believers to organize community activities; organized activities for young people to learn about different religious customs and traditions.

485. *Official Gazette of BiH*, no. 5/04, *ZAKONO SLOBODI VJERE I PRAVNOM POLOŽAJU CRKAVA I VJERSKIH ZAJEDNICA U BOSNI I HERCEGOVINI*.

486. On the educational system in BiH see J. Woelk, *Freedom of Religion in the Educational System of Bosnia and Herzegovina*, in N. Ademović et al. (eds.), *Freedom of Religion and Inter-Religious Dialogue: Individual-Community-State. Scientific Study: Doctrinal and Practical Aspects of the Relationship between the State, Churches/Religous Communities and Individuals* (Evropska akademija za primijenjena istraživanja i obrazovanje u Bosni i Hercegovini, Skenderija-Sarajevo, 2012), 67-88.

487. *Official Gazette of BiH* no. 88/07.

488. *Official Gazette of BiH* No. 16/03.

489. Article 6 of the FPUE.

490. Article 8 of the FPUE.

the Rights of the Child.[491] In brief, the preschool institutions shall develop, promote and respect ethnic and religious freedoms, customs, tolerance and culture of dialogue.[492]

Likewise, the FESSE states the obligation to enhance and protect religious freedoms, tolerance and culture of dialogue, the prohibition of undertaking any measures or activities to limit the freedom of expressing one's own beliefs and of receiving knowledge about different religious beliefs. It also affirms the possibility of introducing religious classes for children, in accordance with their beliefs or beliefs of their parents.[493]

More generally, in BiH religious education is largely decentralized and it falls under the competence of the Cantons. Public schools offer religious education classes in the municipality's majority religion, with some exceptions granted. Representative of the various religious communities must be responsible for teaching religious studies in all public and private preschools, primary schools, and universities. Individuals teaching religious education are employees of the schools in which they work; they however receive accreditation from the religious body, which in fact governs the curriculum. Normally, students have the right to opt out of religion classes, as do primary school students at their parents' request. When a sufficient number of students of a minority religious group attend a particular primary or secondary school (i.e. 20 in the Republika Srpska and 15 in the Federation of BiH), the school is required to organize religion classes on their behalf. In rural areas, though, qualified religious representatives are typically not available to teach minority religion courses.

In the Federation's five Bosnian-majority cantons, primary and secondary schools offer Islamic religious instruction as a twice-weekly elective class. In cantons with Croat majority, Croat students attend once a week an elective Catholic religion class in primary and middle schools. But, in 13 Croat-majority primary and secondary Catholic schools in the Federation, parents can choose between the elective Catholic religion class and a course in ethics.

As far as the Sarajevo Canton is concerned, religious education is regulated by three Cantonal laws: the Law on Preschool Upbringing and Education,[494] the Law on Primary Upbringing and Education,[495] and the Law on Secondary Upbringing and Education.[496] Schools shall secure conditions for students to either attend religious education classes or take classes in ethics, whose curricula are passed by the Cantonal Ministry. At the beginning of each school year, with consent of their parents,

491. Article 10 of the FPUE.
492. Article 11 of the FPUE.
493. Article 9 of the FESSE. Besides, the 2004 Act on Freedom of Religion gives also the possibility of establishing private schools, from preschool to secondary level of education, stating the equality of these schools with public schools. See Article 29 and Article 10 of the Act on Freedom of Religion.
494. *Official Gazette* of the Sarajevo Canton nos. 26/08 and 21/09.
495. *Official Gazette* of the Sarajevo Canton nos. 10/04, 21/06, 26/08 and 31/11.
496. *Official Gazette* of the Sarajevo Canton no. 23/10.

students choose one of the aforementioned classes. They can change the choice at the beginning of each school year. Marks obtained by a student in these kinds of classes shall be included in the calculation of the student's average mark. Yet, on 22 April 2001 the Minister of Education and Science of the Sarajevo Canton passed a decision establishing that marks obtained for religious education should not be included in the calculation of the average mark.[497]

6. THE LEGAL STATUS OF CHURCHES AND THE STATE-RELIGIONS RELATIONSHIP

Some parts of BiH's legal system point in the direction of upholding the principle of secularism, in the strict sense of the word, like that promoted by the French *laïcité*. This is the case of Article 14 of the Law on the Freedom of Religion, which declares that the State may not accord the status of established Church to any religious community[498], nor it have the right to interfere in the affairs and internal organization of Churches and religious communities.[499] On the contrary, when reading other parts of the same legal system, the later conclusion cannot endure a test of generalisation. This is the case of rules regulating education, which are profoundly influenced by religious organizations, especially the major ones.

It is sufficient to mention the Preamble of the Constitution or Article 4 of the Law on the Freedom of Religion which affirms the right of Churches and religious communities to religious education, provided solely by persons appointed to do so by a religious official body. At the same time, though, both the Constitution and the 2004 Law guarantee the right of all to freedom of conscience and religion in conformity with the highest international standards of human rights, including those referring to the supranational Declarations and Conventions, being an integral part of the Country's law.[500]

More specifically, the 2004 Law guarantees freedom of religion and belief in public and private,[501] enforces equality before the law and forbids discriminations based on religion and religious belonging.[502] Here is one of the reasons why it states that

497. See J. Woelk, N. Ademović, *General about Secularism and the Relationship between the State and Religious Communities*, in N. Ademović *et alii* (eds.), 2012, 23-24.
498. Article 14.1 of the 2004 Law on Freedom of Religion.
499. Article 14.2 of the 2004 Law on Freedom of Religion.
500. Article 1 of the 2004 Law on Freedom of Religion.
501. Articles 4, 5, 6, and 7 of the 2004 Law on Freedom of Religion.
502. Articles 2.1 of the 2004 Law on Freedom of Religion: «[d]iscrimination on the grounds of religion or belief means any exclusion, restriction, preferential treatment, omission or any other form of differentiation on the grounds of religion or belief having for its purpose or which may bring about – directly or indirectly, intentionally or unintentionally – the revocation or diminution of the recognition, equal enjoyment and exercise of human rights and fundamental freedoms in civil, political, economic, social and cultural matters». See also Article 5.1: «[a]ll discrimination based upon religion or belief as defined in Art. 2.1. of this Law is prohibited».

any group of 300 or more adult citizens may apply to form a new Church or religious community through a written application to the Ministry of Justice. The Ministry must issue a decision within 30 days of receipt of the application, and a group may appeal a negative decision to the State-level Council of Ministers.[503] This Law, therefore, allows minority religious organizations to register and operate potentially without restrictions: new churches and religious communities acquire the status of legal person in the way prescribed in details by the Guidelines on Rulebook on Establishing and Keeping the Uniform Register of Churches and Religious Communities, their Unions and Organizational Forms in BiH.[504] But, once again, these provisions must be read in conjunction with other religious-oriented rules, such as those related to Article 15 of the Law on Freedom of Religion, which establishes that

> [t]he matters of common interest for Bosnia and Herzegovina or some or more Churches and religious communities can be governed by an agreement made between the BiH Presidency, the Council of Ministers, the governments of entities and Churches or religious communities.

In other words, this Article legitimizes the bilateralism method, through which issues concerning religious denominations are essentially regulated by legislations based on agreements between the State and specific confessions. In this manner, religious denominations that have signed an agreement have the guarantee that their legal status cannot be altered without considering their will.[505]

Not for nothing the major religious groups of BiH intensely support that method, also because it is a part of a legal strategy aiming to preserve their special status and privileges within the State. The other parts of this strategy is based on political, historical and social discourse that, as saw before, tend to underscore the traditional connection between some areas of BiH and specific creeds (Islam, the Roman Catholic Church, and the Serbian Orthodox Church).

The best example of that is given by the 19 April 2006 Basic Agreement Between the Holy See and Bosnia and Herzegovina (hereinafter the 2006 BA) that, as stated in the Preamble, recognises «the centuries-old presence of the Catholic Church in Bosnia and Herzegovina and of her current role in social, cultural and educational fields».[506] Based on Article 15 of the 2004 Act on Freedom of Religion, one of the main characteristics of the 2006 BA is that it has status of international agreements. By

503. Article 15.1 of the 2004 Law on Freedom of Religion.
504. *PRAVILNIK O USPOSTAVI I VOĐENJU JEDINSTVENOG REGISTRA ZA UPIS CRKAVA I VJERSKIH ZAJEDNICA, NJIHOVIH SAVEZA I ORGANIZACIONIH OBLIKA U BOSNI I HERCEGOVINI - Official Gazette of BiH*, no. 46/04.
505. G. Cimbalo, *Religione e diritti umani nelle società in transizione dell'Est Europa*, Rivista telematica, February 2009, 19-22, http://www.statoechiese.it/images/stories/2009.2/cimbalo_religione2.pdf (last accessed 18 Septemper 2016).
506. See *Acta Apostolicae Sedis. Commentarium Officiale*, 3 November 2007, no. 11, 939-946, http://www.vatican.va/archive/aas/documents/2007/novembre%202007.pdf (last accessed 18 September 2016).

this way, the BA guarantees more rights to the Catholic Church than those normally prescribed by BiH's general laws. It is not for nothing that similar agreements exist with both the Serbian Orthodox Church and the Islamic Community.[507]

Article 8 of the 2006 BA, for instance, states that, in the case of a judicial inquiry into alleged offences against the penal code on the part of a cleric (a religious man or woman), the judicial authorities of BiH will inform the competent ecclesiastical authorities; in any circumstance, the seal of Confession is inviolable.

Likewise, under the 2006 BA BiH not only recognizes the public juridical personality of the Catholic Church and all ecclesiastical institutions,[508] but it also undertakes to restore to the Church all immoveable goods nationalized or seized without adequate compensation. This must be done within ten years from the entry into effect of the Agreement; for goods that cannot be restored, BiH will give just compensation, to be agreed upon by the authorities and those with legitimate title to the properties.[509]

Concerning education, in the light of the principle of freedom of religion, BiH recognizes the fundamental right of parents to see to the religious education of their children guarantying (within the framework of the academic programme and in conformity with the wishes of parents or guardians) the teaching of the Catholic religion in all public schools. Although teachers of religious education are full members of the teaching staff of the State's institutions, the programmes, the content, the textbooks must be prepared and approved by the Episcopal Conference of BiH.[510]

Finally, the Catholic Church has the right to establish its own educational institutions at all levels and to administer them according to its norms. To this respect, BiH will accord to such institutions the same rights that are guaranteed to public schools, including financial treatment and the recognition of academic degrees and any university qualifications obtained. In sum, BiH's authorities will guarantee to pupils and students of the Catholic Church's educational institutions the same rights as pupils and students of State institutions of the equivalent level.[511]

507. The Agreement with the Serbian Orthodox Church was signed in 2007 and ratified in 2008, but the Government has not established a commission for its implementation. The Islamic Community was the third organization in BiH that started (March 2008) negotiating this similar type of agreement with the Bosnian State: the Council of Ministers of BiH adopted the Agreement in September 2015, but it has not been signed yet.

508. Institutions that possess such juridical personality in conformity with the norms of canon law. Article 2 of the 2006 BA.

509. Article 10 of the 2006 BA. «The restitution of immoveable or nationalized goods seized without adequate compensation, including the term of their restitution, will be implemented in conformity with the law that shall regulate the matter of restitution in Bosnia and Herzegovina. For the identification of immoveable goods to be transferred to ecclesiastical ownership or to be adequately compensated, a Mixed Commission will be established, composed of representatives of the two parties» (Additional Protocol to the 2006 BA).

510. Article 16 of the 2006 BA.

511. The same rule also applies to the teaching and non-teaching staff of such institutes. Article 14 of the 2006 BA.

7. CONCLUSION

Before the 2004 Law on Freedom of Religion entered into force, BiH's Courts of first and second instance dismissed an appellant's request, who claimed that her former husband owed her a *mahr*/dowry, a type of compensation payable in the event of dissolution of a *Shari'a* marriage: the marriage has been concluded under the Islamic precepts and not under the State's family law[512] which, in any case, contains no reference to the dowry, the Courts declared. The Constitutional Court of BiH went further saying that the claim of the appellant was ill founded, as she had not acquired "possession" within the meaning of the ECHR:[513] the *mahr* property-related mechanism is unknown in the positive legal regulations in BiH, the Judges stated.[514]

In this occasion, though, the Constitutional Court also pointed out that the State and its judicial authorities have no right to interfere with autonomous rights of religious communities, such as those relating to arrangement of religious marriages and rights and obligations stemming from such marriages. In doing so, the Court made clear that this is a result of the principle of separation between the State and Churches/religious communities;[515] a principle that few years later (2004) was expressly affirmed in Article 14 of the Law on Freedom of Religion.[516]

However, one should not underestimate the fact that the 2004 Law confirms the continuity of legal personality of the «historically based churches and religious communities» (namely the Islamic Community, the Serbian Orthodox Church, the Roman Catholic Church, and the Jewish Community of BiH).[517] And there is more: article 2.1 of the same Law states that

> making of distinctions or *preferences* by Churches and religious communities when the State judge it necessary to comply with religious obligations or needs *shall not be considered as discrimination* on the grounds of religion or belief.[518]

As one might expect, these provisions can be fully justified and understood under the role and influence exercised by major religions in BiH that, as said before, remain important political and legal points of reference within the Country. And this, once again, underscores a specific characteristic of BiH's legal system, especially when related to religion and religious creeds.

If you simple read some provisions of that system, you may visualize its institutional design as a form of contemporary secular liberalism.[519] If, on the contrary,

512. *Official Gazette of BiH*, nos. 21/73 and 44/89.
513. In particular Article 1 Protocol no. 1 ECHR.
514. Constitutional Court of BiH, case no. U 62/01 of 5 April 2002.
515. *Ibidem*.
516. *Supra*, para. 6.
517. Article 8.
518. Article 2.1, emphasis added.
519. See Decision of the Constitutional Court of BiH No. U 5/98-IV, 18-19 August 2000. In the Constitution of BiH no explicit rule about secularism can be found". Nevertheless, the Constitutional

the attention is focused on the other provisions, you see a different attitude. This is an attitude of a more traditional, group-oriented society, in which individuals communicate with the State through their membership in an ethnic-religious community. As a result, in BiH's legal system we find a co-mixture of different voices, which we have to comprehend if we are to appreciate and understand the current challenges and future scenarios in a Country whose stability, reconciliation and development are crucial for the destiny of the Balkan region, if not of all Europe.

Court of BiH pointed out that any public privileging of Churches and/or religious communities by public authorities must not lead to the marginalisation of freedom of religion. In addition, it is particularly important to take into account the sense of pluralism, which is required both by the European Convention of Human Right and the Constitution of BiH, as a necessary precondition for a constitutional democracy.

FISH SOUPS, CHICKENS AND EGGS, MIRRORS AND MINIATURES: THE BOSNIAN QUESTION TWO DECADES AFTER DAYTON. CONCLUDING REMARKS

FRANCESCO PALERMO

During the second Yugoslavia, Bosnia was commonly defined "Yugoslavia in miniature". A famous partisan formulation prophetically stated that «without Bosnia there is no Yugoslavia and without Yugoslavia there is no Bosnia».[520] Indeed, multiethnic Bosnia has ceased to exist when multiethnic Yugoslavia collapsed. At the same time, Yugoslavia has been a Europe in miniature, and it has equally been prophesized that «Europe will die or be reborn in Sarajevo».[521] In fact, for a number of historical reasons and partly even by coincidence, Bosnia has always been a miniature of Europe. Current Bosnia is similar to today's Europe when it comes to the overall political and institutional stalemate, and European circles whisper that, if the stalemate continues, tomorrow's Europe might look like yesterday's Bosnia. Be it as it may, it is undisputed that relations between Bosnia and Europe – intended in all its concentric geo-juridical spheres, from the OSCE to the Council of Europe to the European Union[522] – have always been problematic and unresolved, but at the same time extremely intense.

The preceding chapters, while different in focus and approach, show how convoluted the legal, political and societal evolution of Bosnia and Herzegovina has been in the past twenty years, after the adoption of the Dayton Peace Agreement. Two main questions epitomize the open wounds of such evolution and of the relation between the country and Europe. Such questions do not and will never have a clear-cut answer. However, it is essential to reflect upon them as they go at the heart of some key constitutional and more broadly even societal issues, far beyond the Bosnian and the European scenario.

The first question relates to the internal dimension of such evolution: is it possible at all to re-establish a working multiethnic society after a process of multiple ethnic cleansings such as the one that took place in the country in the early 1990s?[523]

520. G. Toal, C.T. Dahlman, *Bosnia Remade: Ethnic Cleansing and Its Reversal* (Oxford University Press, Oxford, 2001) 46.

521. A. Langer, *La terra vista dalla luna*, 1991, in: http://www.alexanderlanger.org/it/34/163.

522. R. Toniatti, *Los derechos del pluralismo cultural en la nueva Europa*, 58 *Revista vasca de administración pública* (2000), 17 ss.

523. On the use of the term genocide in the Bosnian context see ICJ, judgment from 26 February 2007 (*Bosnia and Herzegovina vs. Serbia and Montenegro*), ICJ Reports, 2007, 43. The Court acknowledged that in Srebrenica a genocide took place, although Serbia was not responsible for it under international law.

Can constitutional and international imposed changes set a virtuous process in motion? Can institutional segregation be overcome once entrenched in a constitutional setting that was indispensable to stop the war but has become the greatest barrier to its own change? The second question affects the external dimension of the Bosnian dilemma and in particular its relation to "Europe": are such relations failing because of the domestic standstill or is the domestic blockade also a consequence of the European stalemate? How similar are Bosnia and Europe after all?

1. THE FISH SOUP: BOSNIA AND ITS INTERNAL DILEMMAS

The first question can be exemplified by the paradox of the fish soup. Accordingly, it is relatively easy to turn an aquarium into a fish soup, but it is impossible to do the opposite. In other words, once a multiethnic society has exploded and conflicts have erupted, it is utopian to expect legal instruments to re-establish it. Some degree of pessimism is induced by the retrospective observation of the past twenty years. Despite several attempts by international actors (from the High Representative to the Venice Commission,[524] from the European Court of Human Rights[525] to the EU) as well as by domestic institutions (in first place the Constitutional Court), changes in the legal and socio-political sphere remained very limited and did not address structural deficits. Even when externally imposed (such as in the case of the use of the so called Bonn powers by the High Representative[526]), such changes have produced little effect, have not been metabolized and sometimes have been explicitly resisted by the overall political and societal system, that still remains by and large the one designed (rather: ratified) by the Dayton Peace Agreement.

In more specific legal terms, it is true that institutional segregation has been the underlying principle of the Dayton constitution, but such constitution nevertheless contains some provisions that could be used in order to force the establishment of an integrated society, as already the Constitutional Court has tried to do in its seminal decision on the constituent peoples in 2000.[527] In particular, the constitutional provision on the return of refugees and displaced persons (Art. II.5 and Annex VII to the General Framework Agreement), combined with the supra-constitutional rank of international human rights law (Art. II.2) and with the principle of collective equality while prohibiting individual discrimination (Art. II.4), was seen by the Court as

524. *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, March 11-12, 2005 [http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf], as well as Opinion no. 483/2008, Strasbourg 22 October 2008, *Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina*.

525. Especially in the landmark ruling *Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06).

526. As conferred by the Peace Implementation Conference in Bonn in December 1997.

527. Constitutional Court of Bosnia and Herzegovina, U 5/98 Partial Decision III, of 1 July 2000, in *Službeniglasnik* (Official Gazette) no. 23/2000.

the tool to set a change in motion. Such change, however, has been resisted by the elites and possibly also by the population. Despite (scattered) forced implementation of such principles, a multiethnic society could not be re-established.[528] Neither the numerous Court rulings, nor the imposed changes in the entities' constitutions,[529] neither the removal of officials nor the opinion of the Venice Commission, neither the case law of the European Court of Human Rights nor the perspective of European integration have been able to facilitate a serious institutional reform. The rule of law was never enforced and the normalization (including some degree of de-ethnicization) of the political system never took place.

The only tangible consequence has been a more subtle, less blatant but not less dangerous use of the apparently liberal principle of formal equality to introduce indirect forms of discrimination. Put differently: while formally paying more or less explicit lip service to the "Western" values, the policies of segregation are perpetuated and even re-enforced. The clearest example is represented by the recent plebiscite in Republika Srpska on the national day, held in September 2016. Since its inception, the entity celebrates its national day on 9 January, a date that is both an Orthodox feast (St. Stephan) and the day when the Republic was declared in 1992, as a breakaway state from Bosnia and Herzegovina (which itself just declared independence from Yugoslavia). The story thus is old. In 2006, the Constitutional Court annulled the coat of arms, anthem, patron saints and church holidays of the Republika Srpska, because they reflected Orthodox symbols and holidays only, instead of mirroring identity, culture and traditions of all three constitutive peoples in the country.[530] The ruling was implemented with considerable delay and only partially. In particular, the national day of the Republic remained the entity's holiday. In 2015, the Constitutional Court of Bosnia and Herzegovina ruled that the holiday was unconstitutional,[531] since it resulted in a discrimination against non-Serbs in the entity, and gave the entity's parliament six months to choose a different day. Despite the ruling, on 9 January 2016 an "unconstitutional celebration" was held and when the deadline for changing the law expired, the government called a referendum on the national day which unsurprisingly resulted in 99.8% of the votes in favour of keeping the date.

This is just but the last example of a per se democratic decision on an item that is in principle perfectly in line with European standards: the right of national minorities to celebrate their holidays. Once put in the Bosnian context, however, the impact of such a vote is explosive: because it confirms ethnic borders and cleavages; because it abuses democratic instruments to oppress minorities; because it upsets the very concept of multiethnicity by imposing ethnically loaded decisions misus-

528. See International Crisis Group (ICG), *Implementing Equality: The 'Constituent Peoples' Decision in Bosnia & Herzegovina*, ICG Balkans Report No. 128 (2002) [www.crisisweb.org].
529. uropean Stability Initiative (ESI), *Imposing constitutional reform? The case for ownership* (2002) [www.esiweb.org].
530. U-4/04.
531. U-3/13.

ing liberal principles. In doing so, it sadly demonstrates that the fish soup paradox perfectly fits the Bosnian reality. This is not to say that such reality is simply to be accepted as unchangeable, but the example somewhat indicates that the aspiration to return to the original aquarium is perhaps utopian and some solution "in between" is likely to be more realistic than the attempts to normalize interethnic relations and the institutional framework in the country, as they have all failed so far.

2. CHICKEN AND EGG? OR A TWO-SIDED MIRROR? BOSNIA AND EUROPE

Not surprisingly, the European reaction to the mentioned referendum was almost non-existent, besides the usual alarmed statements of concern and regret. More generally, and even more worryingly, so far any attempt to redress the dysfunctional institutional, political and societal system from the outside has failed, despite good intentions. The acknowledgement of such repeated failures leads to the second question, that can be exemplified by the dilemma of the chicken and the egg. What is the source and what the consequence of the difficult, unresolved but still close relation between Bosnia and Europe? Which one comes first? Does Europe anticipate and influence the legal, political and societal developments in Bosnia and Herzegovina, or is Bosnia the laboratory of the growing divisions along national lines in the European space?

This might sound like a provocative question, especially considering how apparently one-sided the relations between small, devastated, poor and fragmented Bosnia and big, powerful, rich and united Europe has been over the past two decades. Well the reality might look different below the surface, especially having in mind the most recent developments.

The lacking effectiveness of "European" policies largely depends on the capacity of the recipient society (including its institutions and political system) to absorb the underlying principles of the overall European (not only EU) acquis. When it comes to some of the structural elements of the Western (European) legal tradition, such as a liberal – while balanced – approach to multiethnicity, the dialogue between international (European) actors and local institutions has so far been rather a double monologue between two deaf persons. From the early cases of the Bosnian Constitutional Court (which often acts as an international institution due to the determinant role of the international judges) such as the one on the Committee of Ministers[532] or the one on the constituent peoples[533] and many subsequent ones on sym-

532. U-1/99 (ruling of 14 August 1999), in which the Court found the law on the composition of the Committee of Ministers in breach of the Constitution of Bosnia and Herzegovina, especially with regard to the ethnically defined Co-Chairs and the Vice-Chair of the Council of Ministers.

533. U-5/00, cit.

bols[534], to all judicial[535], para-judicial[536] and legal intervention by international/European bodies,[537] the enforcement of liberal principles and the de-ethnicization of structures and institutions have been constantly and consistently put forward. However, such calls remained frustrated, in all stages of the constitutional developments of the country since the Dayton Peace Agreement.[538]

It thus may seem that there is a sort of ideological incompatibility between the "European values" and the "local practice". The consequence being that the more "local ownership" is encouraged, the more such "European" values are disregarded. One may superficially conclude that the country is simply allergic to such principles and values and that there is a cultural obstacle that makes any effort ultimately vane. This is indeed what a number of actors are explicitly or implicitly believing, when stubbornly repeating the same messages with decreasing enthusiasm.

But perhaps such lack of mutual understanding is a self-realizing prophecy and thus itself one of the reasons for the apparently parallel development of two deaf discourses and rationales. The "Europeans" tend to believe that the local society is "underdeveloped" and not "ripe" enough to embrace the modernizing values. The "locals" (i.e. the local elites) seem to please the international community on which considerable part of their resources depend, but in fact continue to support their own agenda that is based on the capitalization of ethnic separation.

Digging below the surface, however, one may wonder whether in recent times "Europe" (and its constituent states) has really been following a much different path than Bosnia in its development. Faced with diminishing resources (economic and then monetary crisis) and with growing challenges (security threats, migration), the responses have been a growing conflictual attitude among states, the rise of nationalism (including in the elections) and intolerance, a much stronger suspicion towards the "European rules" (and "bureaucrats"), and even a trend to prefer the "own rules" as opposed to the European ones[539]. Reactions are thus not so dissimilar, af-

534. Including the one on the insigna of entities (U-4/04), the one on the name of cities (U-44/01), the one on the removal of the prefix "Bosnian" from names of the municipalities (U-2/09), and others.

535. See in particular the European Court on Human Rights.

536. Especially the Venice Commission but also the various monitoring bodies of the Council of Europe, such as the Advisory Committee on the Framework Convention for the Protection of National Minorities or the European Commission on Racism and Intolerance (ECRI).

537. In particular the decisions by successive High Representatives.

538. See for a profound analysis of the different phases of Bosnia's constitutional transition, J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?* (Cedam, Padua, 2008) as well as J. Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, in M. Burgess, G. A. Tarr (eds.), *Constitutional Dynamics in Federal Systems: sub-national perspectives* (McGill-Queen's University Press, Montreal & Kingston, London – Ithaca, 2012), 109 ff.

539. The last examples are the upcoming Swiss popular initiative "Swiss law instead of foreign judges" (mainly targeting the European Convention on Human Rights) and of course the "Brexit" referendum in June 2016.

ter all. What "Europe" often criticizes about Bosnia in terms of going its own way and impermeability to European values and standards is very similar to the path European societies are following, especially in recent times. This could reinforce the accusations of double standards that are so widespread in the Balkans vis-à-vis the European institutions, i.e. that they are not able to comply with what they want to impose to others in their neighboring policy.

The necessary but difficult dialogue thus resembles the dilemma of the chicken and the egg or, using a different metaphor, a double mirror in which each party sees itself while believing to look at the other. As a mirror of Europe, Bosnia and Herzegovina reflects the image that Europe does not want to see. Both in sociopolitical and in legal terms. It reminds Europe of its past, of its present mistakes and insecurity as well as of its not unlikely future. This might be one of the reasons why the relation between these two realties is so convoluted and unresolved, but at the same time permanent and unavoidable.

Two decades of strong links have produced two parallel discourses rather than a common one. The challenge for the years to come will be to learn from each other rather than teaching one another, and to realize that – paraphrasing the old partisan saying – "without Bosnia there is no Europe and without Europe there is no Bosnia".