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***THE PROTECTION OF MINORITIES IN THE FEDERAL  
STATE OF BOSNIA-HERZEGOVINA***

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ANNO ACCADEMICO 2018 – 2019

# Summary

<b>Introduction .....</b>	<b>1</b>
<b>I Bosnian Constitutional asset: From Dayton to the High Representative's role.....</b>	<b>3</b>
1.1 Historical background: a glance on the former Yugoslavia .....	3
1.1.2 The war years.....	5
1.1.3 The Vance-Owen Plan: a first peace attempt by the International Community .....	7
1.2. The Dayton Agreement as an “International Constitution”.....	11
1.2.1 The Annex 4 .....	<b>Errore. Il segnalibro non è definito.2</b>
1.2.1.1. Functions of the Parliamentary Assembly of Bosnia and Herzegovina	<b>Errore. Il segnalibro non è definito.3</b>
1.2.2 Characteristics of the Bosnian consociational democracy	<b>Errore. Il segnalibro non è definito.5</b>
1.3 The High Representative of the UN' role in the State.....	<b>Errore. Il segnalibro non è definito.8</b>
1.3.1 The Venice Commission opinion on the HR future .....	20
1.4 Prospects for a (possible) reform: what went wrong? .....	22
<b>II Protection of minorities and the problem of the “Others” in Bosnia. ....</b>	<b>25</b>
2.1 Lack of a clear definition of “minority” .....	25
2.1.1 Which majority? The Sentence U5/98.....	<b>Errore. Il segnalibro non è definito.6</b>
2.2 Structure of the Human Rights Protection in the Dayton Agreement	<b>Errore. Il segnalibro non è definito.9</b>
2.2.1 Article II of the Bosnian Constitution .....	30
2.2.2 HR protection inside the two Entities .....	31
2.3 Ethnic federalism and the exclusion of the “Others”.....	33
2.3.1 The composition of the Presidency as a motif of discrimination .....	34
2.3.1.1 Which kind of solutions? .....	35

2.4 The national minorities and their representation .....	38
2.5 The conflict between non-discrimination rules and the rules authorising ethnic differentiation	41
2.5.1 ECHR Article 3 of Protocol 1 .....	42
2.5.1.1 The Exclusion Criteria .....	44
<b>III Bosnia vs the EU: the impact of the ECHR case law on the minorities' rights in Bosnia and Herzegovina.....</b>	<b>47</b>
3.1. Status of the ECHR in the domestic legal order .....	47
3.1.1. Relationship between domestic and international law.....	49
3.2 The Court's case law in relation to the minorities in Bosnia-Herzegovina.....	51
3.2.1 The issue of the right to vote and the necessity of a reform: "Sejdic and Finci v. Bosnia ..	51
3.2.2 The failure in implementing the Court's obligations.....	55
3.2.3. The last chapter: "Pilav v. Bosnia and Herzegovina" .....	56
3.2.4. "Hamidović v. Bosnia and Herzegovina" .....	57
3.3 The road so far .....	59
3.3.1 The path toward Europe.....	60
<b>Conclusions.....</b>	<b>62</b>
<b>Bibliography .....</b>	<b>64</b>

## Introduction

This work aims to address the condition of minorities in the multi-ethnic state of Bosnia and Herzegovina. The Bosnian state in fact denotes many peculiarities from the legislative as well as from the institutional point of view on the issue of minorities in its own legal system. This work will begin first with a detailed analysis of the Bosnian state in the aftermath of the war that devastated it in the early nineties, following the disintegration of Yugoslavia, until the draft of the new Constitution.

Following the death of Tito, in fact, within the Yugoslav state, national leaders like Milosevic and Tadjman promoted ethnic regionalism, with consequent turbulence in the entire region. What happened in Bosnia was a massive ethnic cleansing by the Serbian troops, driven by the nefarious idea of creating a new Serbian state no longer tied to the borders of Serbia itself. Only in 1995, with the entry into force of NATO forces came the conclusion of one of the blackest pages in recent history. Following the conflict, a peace conference was held in Dayton, Ohio. During this conference the so-called "Framework Agreement for Peace in Bosnia and Herzegovina" was signed, consisting of eleven Annexes, of which the fourth became the current constitution of Bosnia and Herzegovina. This constitution therefore represents a sort of *unicum* in the international scene, being a Constitution not approved by any of the constituents of the state in question; an "Internationalized Constitution". The new legal text created a state based on the coexistence of three "Constituent peoples", namely the Bosnians, but also the Serbs and Croats, divided into two very distinct Entities: the Serbs in the Republika Srpska, the Bosnians and the Croats in the Federation of Bosnia and Herzegovina. Despite the efforts made, the power-sharing system created in Dayton has on one hand made possible the peaceful coexistence of the three constitutive peoples, on the other it has created a system based entirely on belonging to one of the three ethnic groups, as enshrined in a ruling by the Constitutional Court of Bosnia and Herzegovina (Sentence U5 / 98), leading to a substantial exclusion of any ethnic minority. The second chapter will deeply analyse the protection of minorities, defined as the "Others" by the Constitution itself, as they are not part of the three constitutive peoples in Bosnia and Herzegovina. The Constitution's Article II stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable within the 'state order, thus allowing a broader protection of human rights and fundamental freedoms. Therefore a clear contradiction appears within the Constitution itself: on the one hand it promotes a multi-ethnic state formed by the three "constitutive peoples", avoiding any form of discrimination based on belonging, while on the other there is continuous discrimination against ethnic minorities, which can not even be elected for the presidency (the tripartite executive of the country) as they are not part of the aforementioned peoples. This theme will permeate the entire third chapter: despite numerous rulings by the European Court of Human Rights have denounced a clear discrimination within the country towards the protection of the fundamental rights of the "Others", nothing has yet been done in years to solve this, by now, age-old question.

This work therefore aims to investigate the motivations that have pushed international actors to adopt a multi-ethnic cohabitation solution in Bosnia and Herzegovina, creating at the same time a gap between "first-class citizens" and "Others" in terms of protection of rights and freedoms.

## 1. Bosnian Constitutional asset: From Dayton to the High Representative's role.

### 1.1 Historical background: a glance on the former Yugoslavia

The current history of Bosnia-Herzegovina is the result of the desegregation of the former Yugoslavia, presenting some complexities based on territorial disputes, profound ethnic and religious cleavages and, above all, awful atrocities.

The Yugoslav state sprang as a political entity after the clash of the Austro-Hungarian Empire immediately before World War I. Established officially in 1918, the Kingdom of the Serbs, Croats and Slovenes was a constitutional monarchy that grouped together Slavs and Muslims once under the Habsburg rule with the independent kingdoms of Serbia and Montenegro<sup>1</sup>. The state presented itself immediately as an incredible “melting pot”: in addition to the peoples already cited, Germans, Magyars, Turks, Greeks and others dwelled in the new kingdom. About 47 percent of this diverse population adhered to Orthodox Christianity, about 40 percent to Roman Catholicism and about 11 percent to Islam<sup>2</sup>. In such divided circumstances, it was hard imposing a suitable parliamentary democracy that could represent every minority and overcome distrust and rivalries.

It would be impossible to understand the political and social turbulence of the nineties in Yugoslavia without contextualizing the events that national leaders used as a *Leitmotiv* in order to justify their actions and beliefs more than forty years before. During WWII in fact, the majority of the state (the Serbs), was in favour of an alliance with the Western countries, with whom they had fought in WWI. The second largest national group of the country, the Croats, didn't look favourably to the Yugoslav state and its Serb leadership, aiming to an alliance with the Germans and the Italians in order to achieve the Croatian independence. The new ally aided Hitler's plan in destroying the Yugoslav state. The Slovenian part was incorporated to the Reich; the Croats obtained an enlarged state of Croatia, aligned with Germany and Italy; Serbia was occupied militarily; Macedonia was divided and given to Bulgaria; Kosovo and Dalmatia were given to Italy. The new division of the state left millions of Serbs in the hands of the Croatian nationalists in their new puppet state. Easy to predict, the result was a macabre extermination, a genocide, carried out by the nationalist Ante Pavelic and his “Ustaša” movement: a militia analogous to the German “SS”. Probably, more than half a million Serbs died because of the Ustaša's crimes.

The resistance inside the country was headed by the communist partisan Josip Broz, also known as Tito. Son of a Croatian father and a Slovene mother, Tito was captured during WWI by the Russians. He managed to escape and found himself in St. Petersburg at the time of the overthrowing of the tsar. The Bolshevik revolutionaries thrilled him and he joined the Red Guard to fight in their behalf<sup>3</sup>. Once back in Yugoslavia,

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<sup>1</sup> W. I. Hitchcock, *The struggle for Europe. The turbulent history of a divided continent. 1945-2002*, London, Profile Books, 2004, p. 381.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., p.382.

Tito started working his way in the Communist party hierarchy up to become general secretary. During the war years, Tito's revolutionary bands were ready not only to fight against Germans, but even for the creation of a socialist Yugoslavia; as a matter of fact the Yugoslav leader declared in 1943 a provisional government and, together with the Red Army, took the city of Belgrade from the retreating Germans the following year. Tito inherited a country emerged from the war with two competing legacies: one was ethnic hatred, the product of the barbaric Croatian-Serb civil war and the partisan-*četnik* (guerrilla) rivalry; the other was that of the Communist "brotherhood and unity", the product of the people's struggle to drive out the foreign occupation<sup>4</sup>. Obviously, Tito based the new state's foundation on the latter ideal, but the former remained a vivid part of the Yugoslavia post-war period. Even so, Tito made a bold attempt to overcome Yugoslavia's historical ethnic, national, and religious division with the establishment of a new constitution in 1946. The new legal text provided the creation of a federation of six republics: Slovenia, Serbia, Croatia, Macedonia, Montenegro and Bosnia and Herzegovina, each with an equal status. Together with promoting unity within the country, Tito encouraged economic development and prosecuted his own way of socialist unity. The separation from Stalin in 1948 forced the communist leader to devise an alternative model of socialism from the one offered by the Kremlin. Tito's theorists outlined the idea of "workers' self-management", through which active participation in the organization and operation of factories and enterprises were granted to the workers; Tito hailed the model as genuine workplace democracy, though the League of Communist of Yugoslavia (hereafter LCY), as the Communist party was now known, remained the only political party in the country and Tito himself ruled with an iron hand for over two decades<sup>5</sup>. The two pillars of the Yugoslav model were therefore communism and nationalism, reason why it was described as federal "ethno-communism": on one hand, the supreme communist principle of concentration of power nullified the essential function of federalism as an instrument of the separation of powers, preventing democratic reforms or the introduction of the rule of law; on the other, the management of inter-ethnic relations was seen as the political *raison d'être* of Yugoslavia from the beginning. Following the Mitteleuropean approach that saw the "nation" as a group defined by linguistic, religious or ethnic criteria, only later as "*nomos*" of a territory, the Republics were considered as the "natural states" by their majority populations (with the obvious exception of multinational Bosnia Herzegovina). In 1974, in order to grant a long-term stability after Tito's death, a new constitution was drafted. A collective presidency was instituted, a cumbersome federal institution whereby each republic and province named a delegate to the presidency, the delegates in turn elected a president for a one-year term along a rotating list, so that each republic had a chance for the top office<sup>6</sup>. In sum, the 1974 federal constitution overhauled the system and devolved tremendous authority to the republics<sup>7</sup>; that could be regarded as

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<sup>4</sup> Ibid., p.383.

<sup>5</sup> Ibid., p.384.

<sup>6</sup> Ibid., p.385.

<sup>7</sup> James C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in L. Miller, *Framing the State in Times of Transition*, Washington, D.C., United States Institute of Peace Press, p. 333.

nation-states<sup>8</sup>. Notwithstanding the efforts made, the country began to revert to nationalist tensions immediately after Tito's death in 1980. The republics' quest for more power 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)<sup>9</sup> and the old system, into a struggle for independence of the respective republic<sup>10</sup>.

### *1.1.2 The war years.*

Between 1989 and 1990, the decisive events that led to the dissolution of Yugoslavia took place. As economic troubles mounted during the 1980s, canny politicians such as Slobodan Milosevic in Serbia and Franjo Tudjman in Croatia promoted ethnic nationalism, of pure opportunism or belief; given the threat that nationalism posed to Yugoslav cohesion, ethnicity had been a taboo subject, and it proved to be a potent factor in the disintegration of the state and the onset of civil war<sup>11</sup>. Throughout the 1980s, the Serbian government increasingly sought to dominate the federal institutions, while Slovenia and Croatia increasingly pursued a separatist trend: among other moves, in March 1989, Serbia effectively gained control of half the votes in the collective presidency, first, by pushing constitutional amendments through the system that virtually eliminated the autonomy of Kosovo and Vojvodina, and second, by co-opting Montenegro<sup>12</sup>. By mid-1991, the Yugoslav People's Army (JNA) was the last fully functioning federal institution. Even though the situation inside the federation worsened because of these nationalist stances and the reluctance of key characters to negotiate a peaceful dissolution, Yugoslavia's death spiral began with the declaration of independence made by Croatia and Slovenia in 1991, followed by Bosnia few months later (March 1992). While Slovenia had no problem in eradicating itself from the Serbian grip after just ten days' conflict with the JNA forces, Bosnia's and Croatia's path to independence had a worse fate. In Croatia, the rebellious Serbs declared the foundation their own state, called "Republika Srpska Krajina", with the intent of keeping it within Yugoslavia; the same happened in Bosnia with the creation of the Serb "Republika Srpska" by the will of the Serb Democratic Party's leader, Radovan Karadzic, and the "Herceg-Bosna" by the nationalist Croats. The drive to carve ethnically defined states out of territories with ethnically mixed populations, and the support that the breakaway nationalist groups received from Milosevic (who controlled the JNA) and Tudjman in Croatia, scuttled any possibility of a peaceful transition to independence for Bosnia and

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<sup>8</sup> 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.).

<sup>9</sup> During the 1950's, the Communist Party was renamed "League of Communist of Yugoslavia" (SKJ).

<sup>10</sup> J. Woelk, *The Constitutional Transition of Bosnia and Herzegovina Between Nationalism and European Conditionality*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 23.

<sup>11</sup> Central Intelligence Agency (CIA), *Office of Russian and European Analysis, Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995*, Washington, DC, CIA, 2002, p. 44.

<sup>12</sup> *Ibid.*, p. 45.



Croatia<sup>13</sup>. The war in Croatia began in summer 1991 and lasted until summer 1995, when Croatian forces defeated the Serbian Krajina republic; in the end, its backers in Belgrade abandoned it<sup>14</sup>. In Bosnia the effects of the conflict left even worse scars. The war lasted four years and left more than two hundred and fifty thousand people killed or recorded as missing. It led to the displacement of approximately 1.2 million people and to expensive physical and economic destructions that considerably aggravated the state's situation. 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 systematic use of concentration camps<sup>15</sup>. In fact, in July 1995, the Bosnian forces carried out the genocidal ethnic cleansing in Srebrenica. The small town, declared as a safe area by the UN in 1993, offered shelter to roughly forty thousand Muslims, living on food shipped by UN forces. In the first week of July, five thousand Serb forces converged to the town, bringing with them artillery, armoured personnel carriers and tanks, attacking the town on 6<sup>th</sup> -7<sup>th</sup> July with a huge military barrage<sup>16</sup>. If on one hand many Muslims tried to escape fleeing into the Bosnian government territory<sup>17</sup>, on the other the Serb troops, prepared for such an eventuality, trapped the majority of the fugitives. In the subsequent days executions followed; the corpses were hidden in mass graves nearby the town.

*“When the truck stopped, they told us to get off in groups of five. We immediately heard shooting next to the trucks... About ten Chetniks (Serbs) with automatic rifles told us to lie down on the ground face first. As we getting down, they started to shoot, and I fell into a pile of corpses. I felt hot liquid running down my face. I realized that I was only grazed. As they continued to shoot more groups, I kept on squeezing myself in between dead bodies<sup>18</sup>.”*

The account of this Muslim survivor of the Srebrenica's genocide is a proof of the crimes committed in those years moved by the nationalist claims of one ethnic group on the other.

Even though the world reaction to the events in Bosnia was one of shock and pain, why did the EU and US not operate more effectively in Bosnia together with the United Nations? From the US point of view both Bosnian Muslims, Serbs and Croats were all moved by a nationalist blood-thirst, equally guilty of such a ethnic hecatomb. From an European perspective the conflict was part of a long-time ethnic contest that had

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<sup>13</sup> James C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in L. Miller, *Framing the State in Times of Transition*, Washington, D.C., United States Institute of Peace Press, p. 334.

<sup>14</sup> L. Silber, A. Little, *Yugoslavia: Death of a Nation*, New York, Penguin Books, 2010, p 386.

<sup>15</sup> J. Woelk, *The Constitutional Transition of Bosnia and Herzegovina Between Nationalism and European Conditionality*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 23.

<sup>16</sup> W. I. Hitchcock, *The struggle for Europe. The turbulent history of a divided continent. 1945-2002*, London, Profile Books, 2004, pp.398.

<sup>17</sup> Srebrenica was approximately thirty miles away from the Bosnian enclave.

<sup>18</sup> W.J.Duiker, *The Essential World History*, Boston, Wadsworth, 2014, pp.739.

been under way for many centuries and whose real origins lay in the murky Balkan past; since all sides were guilty, the only solution was to mediate and compromise over territorial issues<sup>19</sup>. Even the UN had had its share of responsibility: in fact while UN placed all their hopes on negotiations as settlement to the war, the war went on. But at the end of 1994, the UN finally permitted NATO to join the conflict. After expressing its alarm concerning the grave situation in the Bosnian State, the UN adopted the resolution 836 on June 1993 and, acting under Chapter VII of the United Nations Charter, formally extending the mandate of the “United Nations Protection Force” (hereafter, UNPROFOR) in order to enable it to: “[...] to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population”<sup>20</sup>. In a few months the air strikes by NATO (together with UNPROFOR) aircrafts on strategic points (Operation Deliberate Force<sup>21</sup>), such as Sarajevo, permitted a Croat and Muslim’s counter-attack that in few days made the regain of the country possible<sup>22</sup>. Under the threat of a continuous attack by the NATO forces, the Serbs agreed to a cease-fire on October 1995 and the convening of an international peace conference to finalize a settlement for Bosnia<sup>23</sup>. The conference was held at the Wright-Patterson Air Force Base in Dayton, Ohio<sup>24</sup>, where the U.S. Assistant Secretary of State Richard Holbrooke led a team of American negotiators in a multiple round of shuttle diplomacy for the solidification of a final peace agreement. Although the Dayton Agreement – formally, The General Framework Agreement - went down in history as the best and certainly definitive endeavour to resolve the conflicts in the Balkans, they were not the only attempt carried on by the international community to end the conflict.

### *1.1.3 The Vance-Owen Plan: a first peace attempt by the International Community.*

The United Nations repeatedly tried to stop the hostilities with the draft of peace plans that turned out to be unsuccessful (Plans Carrington-Cutileiro, September 1991, Vance-Owen, January 1993, Owen-Stoltenberg, August 1993). Furthermore, the negotiations ended up aggravating the conflict rather than pacifying it. In 1993, after the failure of the Vance-Owen plan, which provided the division of the country into three ethnically pure parts, an armed conflict broke out between Bosnian Muslims and Croats on the virtual division of the national territory. The involvement of the Croatian government of Tudjman in this conflict has been demonstrated, which made it international (Zagreb in fact supported the Croatian-Bosnian

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<sup>19</sup> W. I. Hitchcock, *The struggle for Europe. The turbulent history of a divided continent. 1945-2002*, London, Profile Books, 2004, pp.396.

<sup>20</sup> United Nations Security Council, S/RES/836, 4 June 1993.

<sup>21</sup> Formally implemented with reference to the United Nations’s Resolution n. 836.

<sup>22</sup> The Serbs, who for three years had controlled seventy percent of Bosnia, held now only half the country.

<sup>23</sup> W. I. Hitchcock, *The struggle for Europe. The turbulent history of a divided continent. 1945-2002*, London, Profile Books, 2004, p.401.

<sup>24</sup> James C. O’Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in L. Miller, *Framing the State in Times of Transition*, Washington, D.C., United States Institute of Peace Press, p. 334.

militarily).

Although, as already stated, it was not approved, the Vance-Owen plan formed the basis for the approval of the General Framework Agreement of 1995<sup>25</sup>. Shocked by the violence stirred up in Bosnia, the European Community (hereafter EC) together with the United Nations established the International Conference on the Former Yugoslavia (ICFY). The chairmen of this conference, the former British Foreign Secretary Lord David Owen and the former U.S. Secretary of State Cyrus Vance were appointed for the establishment of a lasting cease-fire after the first episodes of ethnic cleansing. The mediators caucused with the parties about their aims and concerns, tried to find areas of overlapping interests and attempted to gain consensus on a common document<sup>26</sup>.

The Vance-Owen plan was formally revealed in 1993 in Geneva, pledging to reverse the trend of ethnic cleansing and divisions, realizing a country in which interdependence and cohabitation between the various peoples was the only possible choice. According to the plan, Bosnia and Herzegovina would be divided in ten “cantons”: two with a clear Croat majority, three each for the Muslims and the Serbs and one with a mixed majority of the three ethnicities; Sarajevo, the tenth and last canton, would be governed through power sharing among the three ethnic groups<sup>27</sup>. The Republic of Bosnia and Herzegovina would retain a weak central government, with each province keeping a significant degree of power<sup>28</sup>. The Vance–Owen Plan, as arranged, had relevant strengths and weaknesses. Starting from the positive side, Bosnia would remain untouched as a country and as a multi-ethnic state (even if divided into cantons), and no international borders would need to be modified. On the negative ones, the plan would reward the Serbs with more land than they had had before the war, meaning ethnic cleansing would have been rewarded; the plan would have to be enforced by military troops to oversee land swaps and to maintain the peace; and the central Bosnian government would likely be too weak to rule over the divided entity<sup>29</sup>. By March 1993, thanks to the intense international pressure on the Bosnian government, the Bosnian Croats and the Bosnian government agreed to the plan but with deep reservations: none of the parties really believed that it stood a chance, but signing the plan would win each of them valuable political points from the West. Bosnian Croats accepted the deal because it recognized a wide portion of land with a Croatian majority, directly contiguous to Croatia’s border. If the plan would have been approved, the western part of Bosnia would become de facto a new part of Croatia; if the plan failed, the Croatian military could move to annex the region into Croatia anyway<sup>30</sup>. The Bosnian Muslims initially were reluctant to sign the plan because it did not grant a strong central government and did not give back all of the land occupied by Serb regulars, towards which the Bosnians

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<sup>25</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.188.

<sup>26</sup> M.C. Greenberg, M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 47.

<sup>27</sup> *Ibid.*, p. 48.

<sup>28</sup> L. Silber, A. Little, *Yugoslavia: Death of a Nation*, New York, Penguin Books, 2010, p. 276. In comparing a partition of the country with the Vance-Owen Plan, Owen made an analogy to King Solomon’s decision: the unworthy parents, Serbia and Croatia, would have been happy to take a share of a mutilated child, but the plan kept the baby intact, in accordance with the wishes of the good parent, Bosnian President Izetbegovic.

<sup>29</sup> J. Mearsheimer, R. Pape, *The Answer: A Partition Plan for Bosnia in “The New Republic”*, 1993, p. 24.

<sup>30</sup> M.C. Greenberg, M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 48.

nurtured a certain rancour. For the Bosnian Muslims, the signature of the Vance–Owen Plan was perceived as an admission that they had no other options. The Bosnian Serbs were irate by the plan, which diminished their influence from 70 percent to an approximately 43 percent of Bosnia's soil. Furthermore, none of the areas with a Serb majority under the Vance–Owen Plan was directly contiguous with Serbia, and the crucial Posavina Corridor (a land bridge between Serbian-held territory in Bosnia and Serbia proper) fell outside their allocated regions<sup>31</sup>. To increase pressure on the recalcitrant Bosnian Serbs, who saw victory on the battlefield as preferable to the cantonment idea, Vance and Owen threatened Milosevic's Serbia: if the Bosnian Serbs did not sign the plan by April 26, Serbia would have been punished with even longer and tighter sanctions<sup>32</sup>; at the same time, NATO began a more aggressive enforcement of the “no-fly zone<sup>33</sup>.” In response, Milosevic played an astute game: on the one hand seeming to make concessions and agreeing to the plan, while on the other giving assurances to the Bosnian Serbs that the plan would never be implemented, calculating that, by signing the plan, he could convince the West to withdraw economic sanctions<sup>34</sup>. He was also certain that, even if the Bosnian Serbs failed in implementing the agreement, the West would not make recourse to military force.

During the negotiations with Owen, Milosevic asked for three compromises, concerning the Posavina Corridor, the voting procedures for the interim presidency and the nationality of personnel policing Serb-held land being turned over to the Muslims<sup>35</sup>. While he was convinced that he could escape from sanctions and gain benevolence in the international panorama by signing the plan, he was also secure that the Serbs could subscribe the agreement, but obstructing successively its application. Owen was able to make these tacit concessions to Milosevic because, even though they were not what the Bosnians thought they had signed, “it was in the nature of the Vance–Owen Plan [...] that it lent itself to radically different—even contradictory—interpretations<sup>36</sup>.” While some degree of ambiguity can often be helpful in peace agreements, the mediator's admission of the multiply perspectives and interpretation of this peace plan illustrates the shaky nature of the consensus and understanding behind the plan and the dubious viability of the plan if not enforced militarily. Milosevic induced Karadzic to accept the Vance–Owen Plan. Karadzic initially refused to sign the agreement, pressing for the approbation of the plan by the Bosnian Serb Assembly. Predictably, the plan was voted down by the Assembly. At a crucial meeting in Greece, Karadzic was forced by Milosevic to sign. Karadzic certainly signed, but with the condition, once again, that the Bosnian Serb assembly had to approve the plan. At this point, Vance announced his resignation from the ICFY process; he was then replaced by the Norwegian Thorvald Stoltenberg. Owen proclaimed that it was a “bright, sunny day” for the Balkans<sup>37</sup>.

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<sup>31</sup> S.L. Woodward, *Balkan Tragedy. Chaos and Dissolution after the Cold War*, Washington, Brookings Institution, 1995, p. 306.

<sup>32</sup> *Ibid.*, p.307.

<sup>33</sup> *Ibid.*

<sup>34</sup> M.C. Greenberg, M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 49.

<sup>35</sup> L. Silber, A. Little, *Yugoslavia: Death of a Nation*, New York, Penguin Books, 2010, p. 279.

<sup>36</sup> *Ibid.*

<sup>37</sup> D. Owen, *Balkan Odyssey*, San Diego, Harcourt Brace, 1997, p. 149.

But the initial euphoria disappeared in the blink of an eye. Following the Bosnian Serb rejection, the United States began a public campaign for an alternative process to the Vance–Owen Plan: the Vance–Owen Plan was officially dead, and with it the last hopes for a multi-ethnic state in Bosnia<sup>38</sup>.

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<sup>38</sup> M.C. Greenberg , M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 49.

## 1.2. *The Dayton Agreement as an "International Constitution"*.

As already mentioned, the Vance-Owen plan had a relevant importance for the approbation of the General Framework Agreement in 1995, serving as a starting point. Following the inter-ethnic conflicts between 1992 and 1995, ceased only thanks to international (military) intervention, the only possibility of guaranteeing peace, after the failure of the other already-mentioned attempts, was decided through a rigid institutional separation between the various ethnic groups. This was precisely the *leitmotif* of the General Framework Agreement (hereafter GFA). However, the imposition of forms of territorial governance based on the substantial separation of populations did not reconciled with the declared objective of the international community to favour the return to the multi-ethnic society that existed before the war of the nineties: this aspect still shows, more than twenty years after its ratification, the emergence and compromising nature of the agreement, totally unsuitable for a complete reconstruction of a state but rather as an instrument to stop the conflict. The International Peace Agreement of Dayton of 1995 ensured both the international continuity of Bosnia and Herzegovina as a multi-ethnic state, albeit delineated with a strong division of ethnic groups, and laid the constitutional basis for the reconstruction of the state, despite some perplexities. This agreement was negotiated in a few months in the American base "Wright-Patterson Air Force" in Dayton, Ohio, and subsequently confirmed by the signature of the three parties (Milosevic for the Serbian, Tudjman for the Croatian and Izetbegovic for the Bosnian) and the International Community. It's no wonder if there was a total absence of any form of democratic legitimization; there was never a referendum, nor a parliamentary ratification of the two pre-existing entities, the Serbian Republic and the Federation of Bosnia and Herzegovina<sup>39</sup>. The General Framework Agreement for Peace in Bosnia and Herzegovina had the merit of giving rise to the first real phase of democratic transition in the new state. A transition, however, "imposed"<sup>40</sup> by the international community that, according to part of the doctrine, wanted to establish clear rules for the sole purpose of ending the war, totally excluding the indigenous peoples of the new-born state. This also explains why the official version of the DPA, and even of the constitution, is in English and has never been translated into the "local language(s)", creating sometimes problems in interpretation<sup>41</sup>. The Dayton peace agreement consisted of a framework agreement and a series of annexes dedicated to the various problems resulting from the war and the need to ensure stability for the reconstruction of the country, in a clear discontinuity with military (ceasefire, international military intervention) and civilians means already widely used: the demarcation line between the two Entities to delimit the respective territory (Annex 2); the elections (Annex 3); the Constitution of the State (Annex 4); the arbitration as a method of resolving disputes between entities (Annex 5); the human rights protection

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<sup>39</sup> A federation founded on March 1994 in Washington that guaranteed the representation of the Croats and the Bosnian Muslims with the Serbian part. As long as Washington remained engaged and supportive of the Federation, the paper alliance led to some important changes on the ground: several joint military operations against the Serbs; the shipment of arms to Muslim forces through Croatian territory; and most important, a cessation of battlefield hostilities between the Muslims and Croats.

<sup>40</sup> J. Woelk, *The Constitutional Transition of Bosnia and Herzegovina Between Nationalism and European Conditionality*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 25.

<sup>41</sup> *Ibid.*

(Annex 6); the rights of refugees and displaced persons (Annex 7); the institution of a commission for the conservation of national monuments (Annex 8); public services (Annex 9); the civil implementation of the Peace Agreement (Annex 10); and finally the International Police Task Force (IPTF, Annex 11)<sup>42</sup>. To ensure the civil implementation of the Dayton Agreement and the reconstruction of the state, the following civil authorities were envisaged, all with a marked international component: the OSCE for the organization of elections (Annex 3); the Constitutional Court (Annex 4, Article VI, made up of three international judges); the Central Bank (Annex 4, Article VII, with an internationally appointed governor); the Commission for Human Rights (Annex 6, Article II: the majority of the 14 members was formed by international judges); the Real Property Claims Commission, (Annex 7, Article VII); the High Representative (Annex 10) and finally the International Police Task Force (Annex 11, articles I-II). A general obligation was also stated for the parties in order to cooperate on the implementation both with the High Representative and other international organizations and institutions (Annex 10, Article IV)<sup>43</sup>.

### 1.2.1 The Annex 4

In the Dayton Agreement, the Annex 4 therefore regulates the organization of the State of Bosnia and Herzegovina. Thus, the GFA defined the Bosnian state as a federation, divided along ethnic and territorial lines, of two different Entities: the “Republika Srpska”, with a clear Serb majority, plus the autonomous district of Brcko, and the “Federation of Bosnia and Herzegovina”, inhabited mainly by Bosnian Muslims and Croats. Within this framework, Dayton’s constitution introduced a detailed system of ethnic protections and power-sharing mechanisms to guarantee the Serbs, Croats, and Bosniacs (who were recognized as “constituent peoples”, with special group rights) a say in virtually every decision made at the state-level, drawing heavily on Arendt Lijphart’s consociational recipe (as will be successively described)<sup>44</sup>. An analysis on the "constitutive peoples" definition is now required. The peculiarities in the composition of the population, due both to the tradition of multi-ethnicity of Bosnia and Herzegovina and to the consequences of the war, reflect in the terminology adopted and in the solutions proposed in the Annex 4. The constitutional text in fact does not identify a unitary people as the holder of sovereignty, but indicates three "constituent peoples": the Bosniacs, the Croats and the Serbs. They are joined by "the Others", namely all those who do not belong to any of the three peoples mentioned. Contrary to what the preamble would lead to believe, the peoples considered are not the holders of the constituent power: in fact, they were mentioned for the sole purpose of giving legitimacy to that document and to facilitate its future

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<sup>42</sup> F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Padova, CEDAM, 2011, p. 283.

<sup>43</sup> *Ibid.*

<sup>44</sup> A. Lijphart, *Consociational Democracy in “World Politics”*, 1969, vol.21, No. 2, pp. 207-225. Though most of the clauses contained in the Dayton agreement fall into the consociational category, some integrative elements were also included. The Constitutional Court and the Central Bank are based on a parity representation, but decisions are taken on a simple majority basis. Bosnia thus represents a typical case of complex power sharing, borrowing from both the consociational and integrative models.

legitimization. The reference to the constitutive peoples, an expression of "ethnic sovereignty"<sup>45</sup> rather than national, shows the will to find solutions that sometimes stabilize democracy and peace in a country plagued by a violent ethnic conflict.

The article III of the Annex regulates the division of the competences between the federal state and the Entities. Fall within the competence of the former: politics and foreign trade; customs and monetary policy; the allocation of financial resources for the international institutions and obligations of Bosnia and Herzegovina; rules on immigration, refugees and political asylum seekers; the application of international and inter-entity criminal law; the establishment and functioning of common and international communication services; the regulation of inter-entity transport and air traffic control. All those functions not expressly reserved to the Federation fall within the competence of the Entities: the possibility of establishing relations with neighbouring countries, the right to enter into agreements with both States and International Organizations ratified by the Parliament of BiH, the faculty to provide for environmental security and ensure any possible assistance to the central government, the armies and police control, judicial and decision-making power over education and culture<sup>46</sup>. Thus it is clear that the central institutions are holders of limited competences, mainly linked to external representation, while the two Entities not only exercise their power over key areas such as justice and education but, *inter alia*, have the task of financially supporting the federal institutions, making the latter scarcely independent<sup>47</sup>.

#### 1.2.1.1. *Functions 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 BiH. 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"<sup>48</sup>.

The Parliamentary Assembly is composed by two chambers: the House of Representatives and the House of People, which together have to approve the legislation, appearing as a form of perfect bicameralism. It is responsible of three key activities: the legislative role, within the exclusive competence of the institutions of Bosnia and Herzegovina; the elective one for the approval of 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<sup>49</sup>; and the role in the international affairs, in the field of international relations. The Assembly has also the power to amend the Constitution, even though with some limits. The two houses of parliament are also extremely autonomous, as seen in the independent adoption of their internal working

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<sup>45</sup> See S.Yee, *The New Constitution of Bosnia and Herzegovina*, in "European Journal of International Law", 1996, vol. 7, Issue 2.

<sup>46</sup> GFAP, Annex 4, art. III.

<sup>47</sup> GFAP, Annex 4 art. VIII.

<sup>48</sup> Cit. in N. Ademovic, J. Marko, G. Markovic, *Ustavno pravo Bose i Hercegovine [Constitutional Law of Bosnia and Herzegovina]*. Sarajevo, Konrad-Adenauer-Stiftung, 2012, p.174.

<sup>49</sup> N. Kulenovic, J. Hasic, *The influence of Dayton Agreement On Institutions: Parliamentary Assembly of Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.65.



rules, which has led many commentators to conclude that, in a functional sense, the state parliament is not a single institution<sup>50</sup>. The peculiar state structure is thus reflected in the organization of the state parliament, which “expressed the principles of popular sovereignty, equality between three constituent peoples and the complex state structure, namely the fact that [Bosnia and Herzegovina] is composed by two entities”<sup>51</sup>.

The House of Representatives of the Parliamentary Assembly represents, according to the Constitution, the interests of all the Bosnian citizens. Forty-two members directly elected compose it: two-thirds elected from the territory of the Federation of Bosnia and Herzegovina, one-third from the Republika Srpska. 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”), due to a clear ethnic homogenization in two entities, and the fact that the electoral units for this chamber are such entities<sup>52</sup>. The Constitution did not regulate the duration of the elected representatives’ mandate, and the question was thus regulated in the Electoral Law of Bosnia and Herzegovina<sup>53</sup>. Decisions in the House of Representatives are generally taken by majority of the present and voting, but a two-third majority of the representatives of both entities can block a measure (territorial principle rather than ethnic): such a disposition was considered in order to prevent the possibility that the Bosniacs or the Croats could have enough votes to veto a decision in the House of Representatives. Together as a group, these two ethnic groups have veto power, as well as the Serbs of the Republika Srpska.

The other house of the Assembly, the House of People of the Parliamentary Assembly of Bosnia and Herzegovina, is composed by fifteen members, five per each ethnic group. The chamber combines ethnic and territorial representation, but unlike in many federal states, the second chamber is not principally a representation body for the constituent entities of the state, but, better, the representation body for the “constituent peoples”. Nine members comprehend the quorum, but only in the case that at least three members come from each of the dominant ethnic group: following this ruling, the abstention of only three delegates could block the entire Parliamentary Assembly of Bosnia Herzegovina, since the House of People enjoys full legislative power, co-deciding with the House of Representatives on all legislative acts. As for the House of Representatives, the House of Peoples also adopts legislation by simple majority even though in this case the majority has to include one-third of the delegates from both entities. Particular attention must be paid to the specific veto in the House of People, namely the procedure for the protection of the “vital national interests”. The Constitution in fact provides that the proposed legislative act can be declared to be destructive of a “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

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<sup>50</sup> Cit. in N. Ademovic, J. Marko, G. Markovic, *Ustavno pravo Bose i Hercegovine [Constitutional Law of Bosnia and Herzegovina]*. Sarajevo, Konrad-Adenauer-Stiftung, 2012, p.178.

<sup>51</sup> K. Trnka, *Ustavno pravo [Constitutional Law]*, Sarajevo, Fakultet za javnu upravu Sarajevo, 2006, p.288. In so far as Brcko 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.

<sup>52</sup> S. Hodzic, *Parlamentarizam i politicki pluralizam [Parliamentarism and Political Pluralism]* in “Pravna Misao”, 1998, p.24.

<sup>53</sup> K. Trnka, *Ustavno pravo [Constitutional Law]*, Sarajevo, Fakultet za javnu upravu Sarajevo, 2006, p.289. After the first three elections the mandate of the elected representatives was two years, now it is four.

of one ethnic caucus object to such invocation of the ethnic veto the Joint Commission is formed, comprising of three delegates from each of the constituent peoples, in order to resolve the issue: if no agreement is reached the matter is referred to the Constitution Court of Bosnia and Herzegovina, which has to review it “for procedural regularity”<sup>54</sup>. The lack of a definition of “vital national interest” allows the delegates to an indiscriminate use of such procedure; this method has been harshly criticized.

Thus, both chambers of the state parliament can make use of the territorial veto, namely the “entity voting procedure”, with the House of Peoples additionally endowed of a specific form of ethnic veto, based on the protection of the “vital national interests”<sup>55</sup>. Studies have shown that even though the ethnic veto is not frequently used, thanks to the judicial review, the territorial veto has really paralyzed the legislative output in the last years.

### *1.2.2 Characteristics of the Bosnian consociational democracy*

The Dayton Agreement did not only bring an end to a bloody conflict inside the Bosnian state, but has had also the merit to favouring the deep transformation in the structure and political regime of the country. Bosnia and Herzegovina in fact evolved from a unitary into a complex federal state; from a majoritarian into a consociational democracy. The two major power-sharing models that have been devised for divided societies, namely the consociational model<sup>56</sup> and the centripetalist or integrative approach, relying both on the inter-ethnic cooperation. Although the two basic models tend to achieve similar purposes (the organization of different groups within a single polity), they differ on how such organization should be translated into the political system. The model chosen for the Bosnian state was the former: the consociational model in fact recognizes and enhances group differences and provides groups with institutional guarantees that prevent the state from making any decision contrary to their interests<sup>57</sup>. This model is premised on the idea that elites are sensitive to inter-ethnic cooperation, provided their rights are protected.

The complexity of Dayton's ethnic-territorial compromise emerges above all in the main characteristic of the multilevel system of government created in Bosnia, which imposes a consociation democracy among the constitutive peoples. The State can work only with the participation of all three peoples. The Bosnian system of consociation democracy is based on the following elements:

- a) The participation of representatives of all groups in the government: according to the principles of consociation democracy, the executive power must be exercised with the participation of all the main groups. Consequently and in accordance with the principle of equal representation, the Constitution prescribes a Presidency of the State formed by three members of each constituent people, namely a

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<sup>54</sup> See Article IV/3.e-g) of the Constitution of Bosnia and Herzegovina.

<sup>55</sup> Only the later veto is subject to judicial review and potential neutralization.

<sup>56</sup> See A.Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven, Yale University Press, 1977; B. O'Leary, J. McGarry, *The Northern Ireland Conflict: Consociational Engagements*, Oxford, Oxford University Press, 2004.

<sup>57</sup> S. Sebastián-Aparicio, B. O'Leary, *Post-war statebuilding and constitutional reform in divided societies. Beyond Dayton in Bosnia*, Basingstoke, Palgrave Macmillan, 2014, pp.51-52.

Bosniac and a Croat, directly elected from the Federation (voters in the Federation can vote for either the Bosniac or the Croat member of the presidency irrespective of their ethnic origin), and a Serb from RS<sup>58</sup>. The presidency is provided with competences over issues of foreign affairs and other areas as outlined by the House of Representatives and the entities, including the authority to appoint the chair of the council of ministers, who “shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate<sup>59</sup>. The constitution also provides the creation of a “chair of the presidency”, which rotates every eight months among its members<sup>60</sup>;

- b) The principle of equal representation in political representation: the power sharing imposed by the Constitution of Dayton it is based on equality. In fact, the principle of the equality of the constitutive peoples is normally envisaged as an expression of their equal dignity, from a symbolic-political point of view, as well as their legal and constitutional equality. Consequently, the scheme of the election of the Chamber of Deputies at the state level is also repeated for the election in the House of Peoples (two thirds by the Federation of Bosnia and Herzegovina and one third by Republika Srpska); moreover, the representation of the three constituent peoples within both chambers is guaranteed with the classic rotation scheme (between a President and two Vice-Presidents). This is a perfect bicameral system with the necessary approval of every acts by both chambers;
- c) Autonomy for groups: a high degree of decision-making autonomy for the constituent peoples is guaranteed by the transfer of powers from the centre to the periphery, so to the two Entities and, within the Federation of Bosnia and Herzegovina, to the ten cantons. The inevitable consequence is a marked weakness of the state institutions: in Bosnia, in fact, most of the competences traditionally allocated to the centre in other federal legal systems (such as the Armed Forces, the police, etc.) are attributed to the entities and the hypothesis of negotiations for the transfer of additional powers to the institutions of the State envisaged in the Constitution did not occur in the first years after Dayton<sup>61</sup>. This attitude demonstrates the widespread political will in both entities to not allow any strengthening on the state level;
- d) The veto power to protect "vital interests": the main elements of the consociation democracy are normally completed by the veto rights of the groups, as an extreme guarantee for cases where ordinary cooperation mechanisms do not produce any result. Especially in the immediate post-war period, in a moment of total distrust between the parties, these last-resort mechanisms were used for guaranteeing a minimum level of security and stability.

The main elements of the Bosnian variant from the model of consociation democracy, which transform Bosnian federalism into a federalism of ethnic origin, are therefore the direct and separate election of the

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<sup>58</sup> Ibid., p.53.

<sup>59</sup> Constitution of Bosnia and Herzegovina, 1995, Article V.4.

<sup>60</sup> S. Sebastián-Aparicio, B. O'Leary, *Post-war statebuilding and constitutional reform in divided societies. Beyond Dayton in Bosnia*, Basingstoke, Palgrave Macmillan, 2014, p. 53.

<sup>61</sup> Constitution of Bosnia and Herzegovina, 1995, Article IV.5b.

Presidency, the division of the electorate into two groups corresponding to the populations of the entities, the very wide autonomy of the entities and the numerous and invasive veto rights. In summary, the system created by the Dayton Agreement was based on "ethnic sovereignty" instead of popular sovereignty, producing the quasi-total exclusion of all the other minorities in the country from the political participation (as will be successively discussed in this work).

### 1.3 *The High Representative of the UN' role in the State*

The tenth annex of the Dayton Agreement attributed to the High Representative (hereafter HR), a body appointed in compliance with the main resolutions of the United Nations Security Council, the task of implementing the civil aspects of the Dayton Agreement and of rendering the final interpretation, supported by his office (the "Office of High Representative, hereafter OHR). The institution took place in 1995 through the Peace Implementation Council (PIC). During the first period of his mandate, the powers of the High Representative were not so incisive as to be able to counter the obstruction exerted by the ethno-nationalist Bosnian parties, thus being ineffective in modifying the circumstances in which the country concerned, which remained remarkably unstable. For this reason the PIC, at the "Peace Implementation Conference" of December 1997 in Bonn, decided to invest the High Representative with more powers, in order to avoid delays in the implementation of the agreements due to the incessant obstructionism. Among these new competences are enlisted: the adoption of acts with force of law, both at the federal and at the Entities level; constitutional revision and removal of state or public officials from the charge. In the Conclusions of the Conference it was stated:

*"The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:*

- a. timing, location and chairmanship of meetings of the common institutions;*
- b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;*
- c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions: such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation<sup>62</sup>."*

These new functions, known as the "Bonn Powers", gave rise to a massive intrusion of the HR in the legislation of the country, due to the reluctance of the state organs to accept those fundamental compromises in a power-sharing system. The main actions undertaken by the High Representative on this basis<sup>63</sup> were, on the one hand, to impose legislation both at state level and within the Entities, including amendments to the

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<sup>62</sup> 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, 2005, p.21.

<sup>63</sup> The decisions of the High Representative are accessible at the web site of OHR: <http://www.ohr.int>.

Entities' constitutions, and, on the other hand, to remove from office civil servants or elected public officials (including the President of one Entity and a member of the Presidency of BiH) who failed to co-operate in the implementation of the Dayton Agreement with a particular focus on lack of co-operation with the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>64</sup>.

It's remarkable, however, how the HR have found little opposition on its new role by the nationalist parties or the Bosnian public opinion. On numerous occasions, many political deadlocks were easily bypassed by the HR, and these violations were systematically forgotten. Not infrequently, the High Representative has intervened to pass essential legislation, not because it was caught in an insoluble political dispute, but simply because the responsible parliament was unable to adopt the measure in time<sup>65</sup>. With the legislative cycle of the Federation parliament taking more than a year, the High Representative has imposed laws that were agreed with the Federation government, but which were too urgent to wait for the usual legislative process<sup>66</sup>. Despite its decisive function for the fate of the country, the figure of the HR does not enjoy democratic legitimisation (such as the Dayton Agreement in general), nor does it constitute a jurisdictional authority. As a result, its decisions are final and not subject to appeal. The subjects against whom they are addressed cannot exercise the rights related to the principles of due process. The ordinary courts do not have jurisdiction and the Constitutional Court hitherto has challenged his powers in all cases submitted to it, declining to take jurisdiction<sup>67</sup>. Many cases are still pending before the European Court Of Human Rights (ECHR).

From a legal point of view, the judicial control on the constitutionality of the legislation enacted by the High Representative is exercised by the Constitutional Court of BiH in the same way as for the legislation adopted by the Parliamentary Assembly of the country: the Court however does not examine whether there was enough justification for the High Representative to enact the legislation instead of leaving it to the democratically elected organs of BiH<sup>68</sup>.

It is unquestionable that the need to expand the High Representative's powers certainly born in the first period following the conclusion of the Dayton Agreement: however such accord is definitely incompatible with the democratic characteristics of the State and the sovereignty of the BiH. With the passing of time it has become even more controversial. There is a strong risk of perverse effects: local politicians have no incentive to accept painful but necessary political compromises since they know that, if no agreement is reached, in the end the High Representative can impose the legislation<sup>69</sup>. So why should the latter take

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<sup>64</sup> Ibid.

<sup>65</sup> M. Cox, *State-Building and Post War Reconstruction: Lessons from Bosnia. The Rehabilitation of War-Torn Societies*, Geneva, Centre for Applied Studies in International Negotiations, 2001, p.13.

<sup>66</sup> 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, 2005, p.21.

<sup>67</sup> See in particular the decision by the Constitutional Court U 37/01 of 2 November 2001. However, in a recent decision on admissibility of 29 September 2004 a chamber of the Constitutional Court rejected an application against a dismissal by the High Representative for non-exhaustion of local remedies. This may indicate that judicial control will after all become possible.

<sup>68</sup> 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, 2005, p.22.

<sup>69</sup> Ibid.

responsibility and not leave it in the hands of the High Representative? This breadth of powers was thus considered incompatible with the democratic nature and detrimental to the sovereignty of Bosnia Herzegovina, thus leading the Venice Commission to hope not for an abrogation of the HR power, which would certainly seem premature, but for a gradual abandonment, together with a constitutional reform of the Bosnian legislative process.

### 1.3.1 The Venice Commission opinion on the HR future

The “European Commission for Democracy through Law”, also known as “Venice Commission”, is an advisory body composed by experts of constitutional and international law. It was set up in a very peculiar moment, after the collapse of the Soviet Union, when there were new countries emerging which were not having a clear path towards democracy. Its goal is to gradually embrace these countries within the Council of Europe. It doesn't have binding power, but its opinions have great authority. It is an advisory body entitled to provide legal advices upon request of: one of the Council of Europe's bodies, including the Secretary General or of one of the participating Member States. Generally, gives opinions on: fundamental rights protection; constitutional and ordinary justice; elections, referendums and political parties; new constitutions or constitutional amendments.

In the last years, the Commission has often issued opinions on the individual decisions of the High Representative. The HR in fact had removed from their office civil servants or politicians over the last decade, as a result of the numerous attempts of obstructing the implementation of the Dayton Agreement. Despite the HR never abused its powers, operating in full compliance with the so-called "Bonn powers", the Venice Commission has pointed out how the removal from office of a public official was a serious and deep interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal; the sanction has to be proportionate to the alleged offence<sup>70</sup>. The main concern is however that the High Representative does not act as an independent court and that there is no possibility of appeal: the High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of BiH, he just pursues a political agenda, agreed by the international community, which serves the best interests of the country and contributes to the realisation of Council of Europe standards<sup>71</sup>. As a matter of fact, it seems intolerable that judgments directly affecting the rights of people taken by a political body are not submitted to a fair trial by an independent court. It would have been unrealistic to believe that Bosnia and Herzegovina would immediately have succeeded in undergoing all international standards as a full-fledged democracy in a post-conflict situation; such statement is useful to understand how the HR's work was fundamental for a country that had been shattered by a bloody conflict. Still, this "jury, judge and executioner" condition cannot last forever. The Commission proposed as a solution the creation of a panel

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<sup>70</sup> Ibid., p.23.

<sup>71</sup> Ibid.

composed by international legal experts, which had to give its consent to any decisions of the HR. Despite the proposal, this panel was never created, but some steps forward have been made. The HR in fact is starting to rehabilitate many of the persons dismissed in the last few years, but this remedy still seems to be not enough to clarify the future role of the HR in Bosnia. Therefore, the High Representative is at the same time the EU Special Representative, if he were to retain only the role of EU Special Representative, this would allow the transformation of the role of the High Representative from a decision-maker into that of a mediator<sup>72</sup>.

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<sup>72</sup> Ibid.,p.24.



#### 1.4 Prospects for a (possible) reform: what went wrong?

The circumstances of Bosnian deficient constitution-making have engendered protracted discussions concerning the need for its reform and have inevitably included the proposals for the reform of the Parliamentary Assembly of Bosnia and Herzegovina<sup>73</sup>. The discussions about a possible reform of the state legislature have been concentrated on the structural failing of the two houses of the parliament: precisely the House of Representatives procedure known as the “entity voting” was seen as a real burden for the entire system, leading to chronic gridlocks in the parliament. Even though this proceeding is applied in the House of Peoples too, the problem appeared to be more relevant in the lower house of the parliament, because of its dimension and structure. Moreover the House of Peoples was confronted with more fundamental challenges, mostly after the ECHR’s judgments on the *Sejdic’ and Finci* and *Zornic’* cases. The critics have indicated that not only the composition of this legislative chamber is 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 and even incoherent<sup>74</sup>.

The first effective attempt in order to reform the state legislature occurred in 2006, with a series of constitutional amendments called the “April Package”. According to this reforms plan, the number of parliamentarians in the House of Representatives had to be increased up to eighty-seven, with three deputies for the representation of the “Others”. Furthermore, the perfect bicameralism would be abandoned, reducing so the competencies of the House of Peoples only on the observation of potential infringement of the vital national veto of the constituent peoples. 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, which would, legally at least, justify the continuing exclusion of the “Others” from the composition of the chamber<sup>75</sup>. Finally, the notion of the “vital national” veto would be now 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<sup>76</sup>. Because no agreement was reached due to the impossibility to eliminate the “entity voting” inside the House

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<sup>73</sup> V. Perry, *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*, London/New York, Routledge, 2015, pp. 15-40.

<sup>74</sup> See E. Hodžić, N. Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights in the Case of Sejdic’ and Finci v. BiH*, *Analitika*, Sarajevo, 2011, pp. 119-124.

<sup>75</sup> 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.

<sup>76</sup> N. Kulenović, J. Hasić, *The influence of Dayton Agreement On Institutions: Parliamentary Assembly of Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 79.

of Representatives<sup>77</sup>, the amendment had a narrow defeat by only two votes.

This constitutional reform plan was followed by an ulterior attempt in 2008, based on the cooperation between the leaders of the three main (ethnic) parties in BiH, namely: the “Party of Democratic Action” (SDA), a conservative Bosniac nationalist party; the “Alliance of Independent Social Democrats” (SNSD), the governing party in the Republika Srpska; and the “Croatian Democratic Union of BiH” (HDZ), the strongest political party of Bosnian Croats. Such reform initiative was known as the “Prud Process”. The new initiative revolved around the harmonization of the national Constitution with the ECHR; the creation of new competences in the hand of the state and the reorganization of the Bosnian territory. While the Serbian part was most interested in complying with the conditions aimed at closing down the OHR, the Croat and Bosniac ones were mostly concerned with addressing Dayton’s constitutional shortcomings: they were however ready to weight the prospect of OHR closure to overcome Serb reluctance to engage in constitutional negotiations<sup>78</sup>.

As it is easily predictable, the negotiations became unsustainable due to the instability between the parties involved: distrust and mutual accusations raised the political temperature. Ultimately, the Prud negotiations stalled after Dodik (the Serbian leader) walked out of a meeting in February and indicated that the resumption of talks would only be possible when recognition of the right of secession for RS was made explicit<sup>79</sup>.

A final attempt was made in 2009 by a US-EU joint initiative. The entire process was driven by the urgent sense of crisis derived from both the failure of the “Prud Process” and the increasing inter-ethnic conflicts of those years. Unlike the 2006 constitutional reform, the new initiative didn’t foresee the cooperation between political forces; rather it relied on the involvement of international officials, both from the US and the EU. The meeting was held in the NATO Training Centre in Butmir, near Sarajevo: for this reason it went down in history as the “Butmir Package”. As per the immediate rewards, Bosnian authorities were offered the opportunity to apply for EU candidate status by the end of the year, a speedier entry into the EU’s free visa regime and a faster process for NATO membership<sup>80</sup>. The meeting in Butmir, however, revolved around a mere discussion of constitutional principles, and when party leaders were offered a constitutional package in a second high-level meeting on October 19 (resembling the April Package with a few variations), much momentum was lost<sup>81</sup>.

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<sup>77</sup> This procedure in fact was seen as an untouchable part of the initial constitutional compromise by the Serbian political elite.

<sup>78</sup> S. Sebastián-Aparicio, B. O’Leary, *Post-war statebuilding and constitutional reform in divided societies. Beyond Dayton in Bosnia*, Basingstoke, Palgrave Macmillan, 2014, p.155.

<sup>79</sup> Ibid. It is reasonable to assume that Dodik’s mounting nationalist rhetoric following the February meeting was related to the emergence of new threats to Dodik’s political position in RS.

<sup>80</sup> S. Latal, *Talks Aimed at Breaking Bosnia’s Deadlock Continue* in “Balkan Insight”, October 9<sup>th</sup>, 2013. Available at: <http://www.balkaninsight.com/en/article/talks-aimed-at-breaking-bosnia-s-deadlock-continue>[Accessed 2 July 2018].

<sup>81</sup> See S. Latal, *Concerns Grow as Bosnians Reject Reform* in “Balkan Insight”, October 22, 2009. Available at: <http://www.balkaninsight.com/en/article/concerns-grow-as-bosnians-reject-reform-package> [Accessed 2 July 2018].

The initial idea was to launch a single conference with a specific proposal that would last for several days until an agreement was secured (International Crisis Group 2009a), much like what occurred in Dayton. Disagreements between the United States and the EU over the convenience of presenting a ready-made package may have served to alter the first meeting agenda and the overall Butmir strategy. As a result, a set of technical negotiations between external and local experts followed the first high-level Butmir meeting. The goal was to reach a compromise prior to the second high-level meeting.

Is important to underline how all those constitutional reform attempts converged on the same characteristic, namely on their non-participatory nature, in form of negotiations between elites and ethnic party leaders, often outside of the institutional structure and legal channels of the Parliamentary Assembly of Bosnia and Herzegovina.

With its small size and limited competences, the Parliamentary Assembly of Bosnia and Herzegovina is an institution far from being a dominant actor on the political scene of the country. 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<sup>82</sup>. Moreover, the Dayton Agreement created a complex power-sharing system based on compromises between the three constituent peoples, lacking totally the democratic principle of the representation of all those minorities that are not part of the aforementioned peoples. Several complaints have been brought before both national and international courts by the so-called "Others", being discriminated solely on an ethnic basis, contrary to what is prescribed in Annex 4, article II of the Dayton Agreement. According to this article, in fact, Bosnia and Herzegovina and both Entities ensured the highest level of internationally recognized human rights and fundamental freedoms, with the European Convention on Human Rights directly applicable to internal law, thus forming an integral part of the constitutional text.

A more in-depth analysis on the minorities issue will be developed in this work.

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<sup>82</sup> N. Kulenovic, J. Hasic, *The influence of Dayton Agreement On Institutions: Parliamentary Assembly of Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p...80.

## 2. Protection of minorities and the problem of the “Others” in Bosnia.

### 2.1 Lack of a clear definition of “minority”.

In order to be classified as a minority, and so to be able to make use of all those rights that they are granted, a group of people has to fit in a defined frame. As Pentassuglia notes, “the importance of a definition lies at a practical level, in its capacity to delimit the subject matter to be dealt with and at a theoretical level, in the fundamental demand for the clarity and the ability of the law to foresee and to remove any possible doubts regarding the beneficiaries of minority rights”<sup>83</sup>. According to Mancini and De Witte, most European constitutional systems do recognize the role that distinct groups play in forming and recognizing the identity of an individual. They use a twofold criterion in defining minority membership: a subjective one (the voluntary identification of a person with a minority); an objective one (the actual existence of such a minority)<sup>84</sup>.

Notwithstanding the numerous attempts to create a unique and final definition of minority, the most widely accepted has been the one of the former Special Rapporteur of the United Nations Francesco Capotorti. He referred to minorities as a group numerically smaller than the rest of the population of the State, holding a non-dominant position, whose members – belonging to the state – possess ethnic, religious or linguistic characteristics differing them from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language<sup>85</sup>. His definition contains objective and subjective elements as well: an objective element is the fact that the national minority is a part of the citizenship of a given State, numerically smaller than the rest of the population, in a non-dominant position, whose members have ethnic, religious or linguistic characteristics different from those of the rest of the population<sup>86</sup>. The Subjective element is the expression of solidarity of group members towards preserving their identity<sup>87</sup>. This definition, as Capotorti himself accentuated, is not aiming at universality, since it is intentionally limited in its objective<sup>14</sup> and based on the Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>88</sup>.

Another definition, made by the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities member Jules Deschenes cannot be left unnoticed. With regards of the national minorities, Deschenes defined them as: "a group of citizens of a State, constituting a numerical minority and

<sup>83</sup> Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study*, Flensburg, European Centre for Minority Issues, 2002, p. 56.

<sup>84</sup> S. Mancini, B. De Witte, *Language Rights as Cultural Rights – A European Perspective*, in Dorsen, N., Rosenfeld, M. et al. (eds.) *Comparative Constitutionalism – Cases and Materials*, St. Paul, MN, Thomson/West, pp. 819 – 844.

<sup>85</sup> Steven Wheatley, *Democracy, Minorities and International Law*, 2005, Cambridge, Cambridge University Press, p. 18.

<sup>86</sup> A. Kurtovic, *Political Rights of Minorities in Divided Societies*, Budapest, Central European University, 2016, p.7.

<sup>87</sup> K. Crnjaski-Vlajcic, *Position of National Minorities in Political System*, in Damir Banovic and Sasa Gavric (eds.) *State, Politics and Society in Bosnia and Herzegovina*, Sarajevo, IKD University Press, pp. 163 – 164.

<sup>88</sup> Article 27 of the ICCPR: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

in a non- dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity one to another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law”<sup>89</sup>. The difference with the Capotorti’s definition lies in the subjective element, that for Deschenes, it is the solidarity tending to reach factual (and even legal) equality with the majority.

As a consequence, the lack of a universal definition of national minority has limited the application of all those means aimed at the protection of their rights and freedoms.

### *2.1.1 Which majority? The Sentence U5/98.*

Bosnia and Herzegovina’s Constitutional Court has provided one of the most complex and inclusive sentences in issues related to the coexistence of different groups in a multi-national state, namely the sentence 1/7/2000 (U5/98), published in four partial decisions. Between these the most important is the third, known as the “Constituent People Case”, with which the Court examined the compatibility of the power sharing model with the protection of individual fundamental rights incorporated in Annex 4.

In February 1998, the former Bosniac leader and member of the Presidency Aljia Izetbegovic’, invoked the Constitutional Court’s jurisdiction on Article 1 of the RS and FBiH Constitutions, in which the former declared the Republika Srpska as the state of the Serb people and of all its citizens, the latter designed the Bosniaks and the Croats as constituent peoples.

In July 2000, the Court found that the challenged provisions were indeed in violation of the preamble of the BiH constitution where the principle of equality of all three constituent peoples throughout the Bosnian territory is asserted<sup>90</sup>. The Court’s pronouncement dealt in a detailed and extensive manner with the fragile balances in the relations between groups in Bosnia and Herzegovina, originating from the mechanisms of ethnic consociation imposed by the Dayton Constitution. The Court was called upon to rule on all the basic questions of a multi-ethnic democracy, such as: the prescriptivism of the Constitution, the concept of (constitutive) "people", the right to self-determination, the belongingness to a minority, the federal structure of the State and the political representation of groups and minorities. With reference to this last aspect, the Court was invested with the question of the constitutionality of those norms of the constitutions regarding the Entities that characterized them as ethically and homogeneously ordered, preventing the representation of those belonging to the constitutive peoples found in a minority condition in the respective entity<sup>91</sup>. The political question behind the appeal was clear: is a multinational system based on an absolute tripartition of power along territorial lines and, de facto, on three mono-ethnic systems legitimate?<sup>92</sup>. In order to solve the issue, the Court made a clear distinction between "constituent peoples" and minorities, from which derived the constitutional obligation to treat differently situations that had to be different. Therefore the Entities are

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<sup>89</sup> Jules Deschenes, *Proposal concerning a definition of the term “minority”*, UN Doc. E/CN.4/Sub.2/1985/31, 1985, p. 181.

<sup>90</sup> R. Belloni, *State Building and International Intervention in Bosnia*, London/New York, Routledge, 2007, p.59.

<sup>91</sup> F. Palermo, J. Woelk, *“Diritto costituzionale comparato dei gruppi e delle minoranze”*, Padova, CEDAM, 2011, p. 289.

<sup>92</sup> Ibid.

constitutionally bound to not discriminate those constitutive peoples who are in fact in a position of (numerical) minority within their respective territories (hence the Serbs in the Federation, the Bosnians and Croats in the Republika Srpska). The principle of non-discrimination is applied according to the Court not only to individuals but also to groups, even though preferential treatment against one or more of them in order to favouring another is not allowed. Consequently, the Court elaborated the concept of "collective equality" among the constituent peoples, which prevented any kind of treatment privileged for one or two of these peoples, every position of domination in governmental structures and any attempt of ethnic homogenization through the segregation based on territorial separation. The Court then specified that the territorial division of the country in two different entities couldn't justify in any way an ethnic domination in a given area. Therefore preferential rights for one group rather than another couldn't subsist, since none of the constituent peoples could not be considered a minority (in legal terms) and therefore not in need of special rights. This decision focused on the human rights violations in the Entities, frequent at that time, linked mostly with the rights guaranteed to refugees and expelled of "voluntary return and reintegration" foreseen by the Annex VII of the Dayton Agreement (article II.1.). The fundamental dilemma lied in the substantial confirmation of the territorial structures created during the war as the main reference of the post-war Bosnia's territorial structure which has been in contrast with the second fundamental principle characterizing the Dayton agreement: the right of refugees to return to the areas from which they had escaped or had been expelled. The right to return, guaranteed by the Dayton Agreement, aimed to achieve the reconstruction of the multi-ethnic character of Bosnia and Herzegovina as before the war. For these reasons the Court declared illegitimate all the constitutional provisions of the Entities that conferred the formal status of "constitutive people" of the respective entity to only one or two of the three main groups. The sentence was a real turning point in the evolution of post-war Bosnia: during the first years, with all the civil and military attention of the international community focused on the stabilization of the situation, the Bosnian case risked to become an emblematic example of how a multinational model could degenerate into segregation. The Court had basically two options: it could simply "confirm" the ethnic compromise with the territorial and ethnic separation, or privilege the other objective expressed in the Dayton Agreement, namely the return of the refugees in order to boost the rebuilt of a multi-ethnic society like the one that had existed before the war. Evaluating the Dayton system with the parameters of international law, the sentence went even beyond the text of the Constitution itself. In fact, the "fundamental law" in the Bosnian case was not constituted (only) by the Constitution, but also by its integration with international (and supranational) and possibly even sub-national sources<sup>93</sup>. Interpreting the reconstruction of the multi-ethnic society as a positive obligation, the provisions of Annex 7 of the Dayton Agreement on the return of refugees were used by constitutional judges as means to unhinge the constitution itself: the multi-ethnic system was imposed above all by the prevalence of the human rights and not by the Constitution, and the prescriptiveness of the

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<sup>93</sup> F. Palermo, J. Woelk, *"Diritto costituzionale comparato dei gruppi e delle minoranze"*, Padova, CEDAM, 2011, pp. 291.

Constitution derived from super- (and in this case also extra-) constitutional principles.

As Professor Zoran Pajic noted: “the preamble of the constitution defines Bosniacs, Croats, and Serbs as ‘constituent peoples’ of Bosnia and Herzegovina, while ‘Others’ and ‘citizens’ are mentioned only in passing. Thus the preamble takes away state sovereignty from the citizens and transfers it to three ethnic groups . . . A serious bi-product of this arrangement is largely ignored. Namely, all ‘Others’ who do not belong to any of the three constitutionally recognized ethnic groups are left in limbo, wondering about their status in this clearly designed ethnic country”<sup>94</sup>.

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<sup>94</sup> Z. Pajic, *A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina* in “Human Rights Quarterly”, 1998, vol.20, pp.134-135.

## 2.2 Structure of the Human Rights Protection in the Dayton Agreement.

The Bosnian Constitution is composed by a series of human rights provisions, but it also sets out a list of international human rights instruments in addition. The human rights provisions might be divided into substantive and procedural. The former can be found in Article II of the Bosnian Constitution and in Annex 6 of the Dayton Agreement (Annex on Human Rights). The GFA Annexes on Refugees and Displaced Persons as well as the one on Elections also contains provisions relevant to human rights protection<sup>95</sup>. But why were those human rights and fundamental freedoms provisions enlisted both in the Bosnian Constitution (Annex 4) and in Annex 6? It must be kept in mind that the rights and freedoms laid down in the Human Rights Annex were seen as an addition to those in the Constitution, and not just as a repetition. The procedural human rights provisions aim at securing implementation of the substantive rules<sup>96</sup>. The Human Rights Agreement sets up a Human Rights Commission, consisting of a Human Rights Ombudsman and a Human Rights Chamber (until 2003), the latter consisted of fourteen judges, two from Republika Srpska, four from the Federation and eight international judges appointed by the Council of Europe<sup>97</sup>. Article II (2) defined the competences of the two organs as:

- a. alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or
- b. alleged or apparent 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 arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ<sup>98</sup>.

The Human Rights Ombudsman, appointed by the OSCE, was given competence to investigate and consider allegations of violations of any of human rights contained in the Constitution and the Human Rights Agreement, while the Human Rights Chamber was given competence to make inter alia binding decisions in cases of such human rights violations<sup>99</sup>. After the closure of this organ in 2003, the last word in the field of human rights was given to the Constitutional Court: it was given competence to judge in cases referred to it by any court in any of the Entities regarding whether the laws on which court decisions were based are

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<sup>95</sup> Agreement on Refugees and Displaced Persons, Annex 7 to the General Framework Agreement; Agreement on Elections, Annex 3 to the General Framework Agreement.

<sup>96</sup> G. Nystuen, *Achieving peace or protecting Human Rights?* in "The Raoul Wallenberg Institute Human Rights Library", 2005, vol. 23, p.95.

<sup>97</sup> Agreement on Human Rights, Annex 6 to the General Framework Agreement.

<sup>98</sup> Article II (2) Annex 6 General Framework Agreement.

<sup>99</sup> Agreement on Human Rights, Annex 6, Article VIII (1).



compatible with the ECHR or any of the other instruments incorporated through the BH Constitution<sup>100</sup>.

### 2.2.1 Article II of the Bosnian Constitution

The Dayton Agreement was set with a unique solution on human rights. Unlike the majority of the contemporary constitutions, the Bosnian fundamental law doesn't contain any sort of bill of rights. The main reference in the field of human rights is certainly the Article II of the Constitutions itself. The article II, paragraph 1 affirms that the Federal State together with the two Entities is in charge of ensuring the highest level of internationally recognized human rights and fundamental freedoms. Special attention is reserved to the ECHR: the second paragraph in fact lays down that the rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina and have priority over all other law; this means that all the human rights listed in the European Convention and its additional protocols have been transformed into the Bosnian national legislation, and that those rights and freedoms shall prevail in case of conflict with other legislation<sup>101</sup>. This remark granted the priority of the European Convention on Human Rights over the state's Constitution, even though Bosnia and Herzegovina became part of the Convention only in 2002. Notwithstanding the implementation stated in the article, an analysis of what the term "all other law" means is necessary. The wording "all other law" indicates that the provision covers legislation on both the Entity as well as on State level, including clearly the Entity Constitutions<sup>102</sup>. The question now is if this provision refers also to the Bosnian Constitution itself. The Article X (2) of the same Constitution in fact states: "No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph", apart from this limitation, the Parliamentary Assembly of Bosnia and Herzegovina is endowed with the power to amend the Constitution freely<sup>103</sup>. If in the words "all other law" is included the Bosnian Constitution, the sole consequence could be the repeal of those constitutional provisions conflicting with the rights and/or freedoms protected by the ECHR. Many scholars tend to include the Bosnia's supreme law in the term. Manfred Nowak stated that: "By virtue of Article II (2) of Annex 4, it shall apply directly in BH and shall have priority over all other law, i.e. it has been fully incorporated into the domestic legal order on a level equally to or even above the Constitution<sup>104</sup>." Looking at the formulation of Article II (2), this affirmation appears correct under a purely linguistic point of view: the Bosnia and Herzegovina Constitution is actually included within the "all the other law" statement. The wording of the priority rule specifies that the rights and freedoms laid down in the ECHR and its Protocols shall have priority above all other law, and thus it is safe to say that these rights and freedoms do have a superior constitutional status in the legal system

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<sup>100</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p. 95.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, p. 99.

<sup>103</sup> Article X (2) of the Constitution of Bosnia and Herzegovina.

<sup>104</sup> M.Nowak, *Individual Complaints Before the Human Rights Commission for Bosnia and Herzegovina*, in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, pp. 783–784.

of Bosnia and Herzegovina<sup>105</sup>.

In Article II (3) the enjoyment of all those rights and freedoms referred to in the second paragraph was confirmed to all the persons within the state's territory. A list of some core rights is enlisted in sub-letters, from (a) to (m). Finally, more detailed provisions are dedicated to the non-discrimination principle contained in Article II (4), stating that the rights and freedoms provided for in Article II of the Constitution, or in any of the international agreements listed in Annex I to the Constitution, shall be "secured to all persons in Bosnia and Herzegovina 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"<sup>106</sup>. The sixth paragraph dealt with the implementation of the human rights assets. It specified that "Bosnia and Herzegovina, and all courts, agencies, governmental organs and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above"<sup>107</sup>.

Finally, the Article II (8) stated that "all competent authorities in Bosnia and Herzegovina" shall co-operate with and give unrestricted access to: international human rights monitoring mechanisms established for Bosnia and Herzegovina, the monitoring bodies of international human rights treaties, the International Tribunal for the Former Yugoslavia, and any other organisation authorised by the UN Security Council with a mandate concerning human rights or humanitarian law<sup>108</sup>. The use of the word "in" instead of "of" in reference to Bosnia and Herzegovina in this paragraph specifies how the responsibility in respecting this provision lies not only in the central authorities of the state, but also in all the competent Entity authorities.

### 2.2.2 HR protection inside the two Entities

Beyond the issues concerning the right to vote (and be voted), there are still few provisions concerning the protection of minorities' rights in both Entities' Constitution. In the one regarding Republika Srpska's, the preamble refers to the will of the constituent peoples and of the citizens in general to protect the minorities' rights; furthermore in it the principle of non-discrimination is proclaimed, without distinctions, inter alia, based on race, sex, language, national origin, religion, education, political and other beliefs, social status and other personal attributes: "Citizens of Republika Srpska shall be guaranteed equal freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection before the state and other authorities irrespective of their race, sex, language, national or social origin, religion, education, material standing, political or other conviction, social status or any other personal circumstance"<sup>109</sup>.

The Federation of Bosnia and Herzegovina's Constitution declared, under the human rights and the fundamental freedoms' provisions: "[...] the application of the highest level of internationally recognized

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<sup>105</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.100.

<sup>106</sup> Article II (4) of the Constitution of Bosnia and Herzegovina.

<sup>107</sup> Article II (6) of the Constitution of Bosnia and Herzegovina.

<sup>108</sup> Article II (8) of the Constitution of Bosnia and Herzegovina.

<sup>109</sup> Rep. Srpska Const., Art. 10.

rights and freedoms provided in the documents listed in the Annex to the Constitution”, extending this protection also to minorities and vulnerable groups<sup>110</sup>”.

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<sup>110</sup> Federation of Bosnia and Herzegovina Const., Art. 2, lett. r).

### 2.3 Ethnic federalism and the exclusion of the “Others”.

The coexistence among peoples, nationalities and minorities has been one of the biggest challenges for any State since the end of the XVII century and is crucial in contemporary “divided societies”<sup>111</sup>. The Bosnian case results emblematic: according to the Annex 4 of the Dayton Agreement, Bosnia and Herzegovina is a federal state with strong territorial and (above all) ethnic cleavages. The State’s Constitution is based on a peculiar form of principle of sovereignty, based in part on international and in part on ethnic elements: by the point of view of the sources of law, it is quite peculiar that the federal Constitution, the 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 aspiration of the three dominant peoples, namely the Bosniacs, the Croats and the Serbs<sup>112</sup>. Nevertheless, even the Entities’ constitutional texts were deeply “internationalized” because of several constitutional amendments adopted in order to fully carry out the Annex 4 and the case law of the Constitutional Court. With this mind, it is easy to understand how the ethnic federalism has been introduced as an emergency and above all as a transitory instrument in order to guarantee stability and effectiveness within the Bosnian state. However, the risk of the adverse effects of this peculiar form of federalism is more than evident: the rise of national movements and the consequent violation of the rights of the so-called “Others”, defined by the Annex 4 as all those peoples and minorities not belonging to any constituent people in Bosnia<sup>113</sup>.

The Bosnian ethnic federalism seems to be based on the classic theory of consociational power-sharing, however is obvious that the constitutional system, in excluding the Others from the exercise of most of the political rights, reflects only an imperfect or deviated form of consociationalism<sup>114</sup>. In Bosnia in fact all the institutions are drafted in order to represent the constituent peoples: the principle of equality between those peoples, even not explicitly outlined in the Annex 4, was affirmed by the Constitutional Court’s decision n. U5/98 on July 2000. In order to fulfil such principle of equality between constituent peoples, various adjustments to the Entities Constitutions’ were made, emphasizing the ethnic and territorial principles inside them according to the principle “three peoples, one State”.

According to the principle of equality of the constituent peoples, in all the institutions the three peoples are equally represented; the two Chambers of the Federal Parliament in fact are composed following this principle: five representatives for each ethnic group in the House of Peoples; two-third elected from the territories of the Federation and one-third from the Republika Srpska in the House of Representatives. The same principle of respect of the equality of the constituent peoples is present in the Entities’ Constitutions.

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<sup>111</sup> S. Choudry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divid Society*, in S. Choudry (ed.), *Constitutional Design for Divided Society: Integration or Accomodation?*, Oxford, Oxford University Press, pp. 3-40.

<sup>112</sup> S. Yee, *The New Constitution of Bosnia and Herzegovina* in “European Journal of International Law”, 1996, vol.7, no. 2, pp.176-192. The Constitutions 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.

<sup>113</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 97.

<sup>114</sup> *Ibid.*, p.98.

The Republika Srpska's Constitution in fact, according to Article 71, requires that at least four members of each constituent people be represented. The principle of equality of the three constituent groups inspires also the composition of the Presidency of the Republika Srpska; in fact, as stated in the article 83, "The Presidency of the Republic and the Vice-President of the Republic shall be directly elected from the list of candidates for the President of Republika Srpska, so that the candidate who obtains the largest number of votes is elected president, while the candidates from the other two constituent peoples who obtain the most votes are elected Vice-presidents of the Republic"<sup>115</sup>". Similar dispositions are present in the Federation of Bosnia and Herzegovina (FBiH), where both the Parliament's Houses follow the principle of parity in the constituent peoples' number, aiming at having the same number of representatives per group.

Is incontrovertible that this system, protecting the interests of only the constituent peoples, has produced a quasi-total exclusion of all minorities from the right of political participation<sup>116</sup>. 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 in a deeply divided society, it proved in the following years to be an instrument of further radicalization of ethnic rivalry and additional forms of discrimination against minorities in a "federation without federalism"<sup>117</sup>.

### *2.3.1 The composition of the Presidency as a motif of discrimination*

As it was already stated, the rights of the so-called "Others" are put in shade by the ethnical principle that permeates the Bosnian system. More precisely, the Bosnian electoral system for the Presidency doesn't allow an adequate representation for these groups. Indeed, the sections 1 and 2 of article 8 of the electoral law allow only Bosniacs, Croats and the Serbs of the Republika Srpska to run for the Presidency<sup>118</sup>. For this reason, citizens of ethnic groups that do not belong to any of the constituent peoples are excluded from the Presidency, hence suffering a direct discrimination in the exercise of the passive voting right, based on ethnic reasons.

The Constitutional Court, by the way, has never declared such a disposition unconstitutional, even though in 2006 it had declared the appeal as inadmissible, because the invoked parameter, namely article 3 of Protocol 1 of the European Convention on Human Rights and Articles 2 and 5 of the International Convention on the Abolition of All Forms of Racial Discrimination, has no supra-constitutional value<sup>119</sup>. In the same ruling the Court also argued that the restrictions on the election of institutional offices was justified by the transitional phase that Bosnia and Herzegovina was passing through and, in any case, such measures were proportionate

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<sup>115</sup> Ibid., pp.99.

<sup>116</sup> 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.

<sup>117</sup> M. Burgess, *Territorial and Non-Territorial Identities: Multinational Federalism in Multinational Federation*, paper presented for the conference *Multinational Federalism in Perspective: A Viable Model?*, Montreal, Université du Québec à Montreal (UQAM), 25-27 September 2009.

<sup>118</sup> Official Gazette n.20/2004.

<sup>119</sup> Sentence U-15/05, May 26<sup>th</sup> 2006.

to the general objective of peace and dialogue between the different ethnic groups.

The international judge Grewe, with a dissenting opinion, has entered into the matter: recalling the decision of the Constitutional Court on the Constituent peoples, the judge underlined how a strict identification with the territory of some ethnically connoted members of institutions is not always valid<sup>120</sup>.

In particular, the application of the composition system of the Presidency means that the Serb member is not only elected by the voters of Serbian ethnic origin, but also from all the citizens of the Srpska republic without one specific ethnic affiliation. It therefore does not represent only the Srpska Republic as an Entity or exclusively the Serbian people, but all the Srpska Republic's citizens as an electoral unit. The same applies to the election, in the Federation, of the Bosnian and Croatian members. So, the rules for the composition of the Presidency, in the opinion of judge Grewe, allow the consideration that "only the members of a specific ethnic group can be considered fully citizens of an Entity, capable of defending its interests. It is not admissible that only the Serbs can have the ability and the will to defend the interests of the Republika Srpska and only the Croats and the Bosnians the interests of the Federation. The identity of the interests in this ethnically dominated model prevents the development of a broad sense of national affiliation. Furthermore, the exclusion of the "Others" from the right to be elected to the Presidency is incompatible with the equality of the right to vote and to stand for election, pursuant to art. 25 (b) of the International Covenant on Civil and Political Rights<sup>121</sup> as well as with the principle of non-discrimination<sup>122</sup>. Without prejudice to such considerations of a general nature, it is necessary to verify if, in some specific cases, clearly exceptional, an hypothesis of discrimination could be admitted. The judge refers in this regard to the judgments of the European Court of human rights *Mathieu-Mohin and Clerfàyt v. Belgium*, of the March 2, 1987, and *Melnychenko v. Ukrainian*, of 19 October 2004, which leave a wide margin of discretion to the States in matters concerning electoral legislation. In this perspective, at the time of approval, the rules on the composition of the Presidency of Bosnia Herzegovina, albeit problematic from the point of view of the respect for the principle of non-discrimination, were nevertheless justified in order to guarantee peace and stability of the country<sup>123</sup>. However, the judge observes that Bosnia and Herzegovina, starting from the signing of the Dayton agreements, has made a lot of progress on the plan of pacification and stabilization: in particular, as a member of the Council of Europe, it is held to comply with Community standards. As a result, the Constitutional court should have considered that the provisions on the composition of the Presidency are incompatible with the European Convention on Rights of man, although formulated according to the art. V.1 of the Constitution of Bosnia and Herzegovina.

### 2.3.1.1 *Which kind of solutions?*

The Venice Commission itself has expressed many reservations with respect to the characteristics and the

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<sup>120</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.205.

<sup>121</sup> "To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

<sup>122</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.205.

<sup>123</sup> Ibid.

methods of election of the Presidency of the Republic. In particular, it judged the function to be neither functional nor efficient for collective nature of the organ, which threatens to duplicate the functions of the Council of Ministers. The Venice Commission, which had been asked by the Office of the High Representative to evaluate the draft election law, concluded as follows: “The Commission finds that for the most part, the Election Law provides an acceptable legal framework for holding democratic elections in BiH. However, some questions are raised by the constitutional and legislative provisions governing elections to the Presidency and the House of Peoples of BiH. As a consequence, the Commission finds as follows: [...] the provisions of the Election law governing elections to the Presidency and the House of Peoples of BiH raise questions as to their compatibility with international standards. Any deviations from the principle of equal right to vote and stand for elections are however due to explicit rules in the text of the Constitution. Curing such deviations would require amendments to the Constitution which will then have to be reflected in the electoral law.”<sup>124</sup>

According to the Commission, therefore, the most desirable solution it would consist of the concentration of executive power in the Council of Ministers, as a collegial body in which all ethnic groups are represented. The Head of State, instead, should be a unitary figure, elected on an indirect manner by the National Assembly, so that it would enjoy the trust of all peoples. The application of the principle of rotation would prevent them from the election time after time of more presidents all belonging to the same ethnic group<sup>125</sup>. Furthermore, regarding the composition and modalities of election of the Presidency of the Republic, the Commission stated: "in principle, in one state multi-ethnic like Bosnia, it seems legitimate to ensure that a state organ reflects the multi-ethnic character of the society. The problem, however, consists of the ways in which the territorial and ethnic principle are combined. The combination of these principles, in fact, means that the Serbs Federation and the Bosnians and Croats of the Republic Srpska cannot apply in the Entity in which they reside; furthermore, the "others" are always excluded from the Presidency<sup>126</sup>. These measures, justifiable considering the need to ensure peace and stability, although problematic as in respect to the principle of non-discrimination, are not more admissible following the entry of the country into Council of Europe, therefore, the Commission proposed two possible solutions: retain a Presidency collective, in which, however, no more than one member belongs to the same people or to the "others" and foresee a electoral system that ensures representation of both entities; that is, to abolish the collective Presidency and replace it with an indirectly elected President, with very limited powers<sup>127</sup>.

In implementing the recommendations, the Presidency of Bosnia and Herzegovina submitted three possible solutions to the Commission of Venice, none of which provides for the abolition of the principle of

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<sup>124</sup> European Commission for Democracy through Law, Strasbourg 24 October 2001, CDL- INF (2001) 12, *Opinion on the Election Law of Bosnia and Herzegovina*, Adopted by the Venice Commission at its 48<sup>th</sup> Plenary Meeting (Venice, 19–20 October 2001), par. 30.

<sup>125</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representatives*, para. 39-40.

<sup>126</sup> *Ibid.*, para. 68.

<sup>127</sup> *Ibid.*, para. 38-40.

collectivity: the first does not make substantial changes to the existing system; the second excludes the ethnic criterion for the selection of candidates and provides for the rotation of members; the third one includes an indirect electoral system. The Commission has appreciated, in general, that «political parties have found the courage to try to adopt a comprehensive constitutional reform ». As for the solutions proposed, it has considered only the second and third, considering the first a "failure of constitutional reform" and has expressed preference for the third proposal which, through the indirect election and reduction of the powers of the Presidency would ensure a balanced composition of the Presidency and would correspond better to the reason for being of this unusual, institution<sup>400</sup>. The reform, however, that was intended to change the system in view of the elections of 2006, has not yet seen the light.



#### 2.4 *The national minorities and their representation.*

From a system based on the equal representation of the various ethnic groups, the Bosnian system has passed to a detrimental system with respect of the rights of the so-called "Others". By ratifying the Framework Convention for the Protection of Ethnic Minorities of the Council of Europe in 2002, Bosnia and Herzegovina undertook to implement active policies, laws and other legal documents to ensure the realization of the principles set forth in the Convention<sup>128</sup>. The following year the Parliamentary Assembly published on the Official Gazette the law on the protection of the National Minorities. The 2003 "Law on Rights of National Minorities" defines a national minorities as "[...] a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics"<sup>129</sup>. Based on this law, with an approach strongly criticized by the international community, seventeen national minorities were recognized, from which the constituent peoples are always excluded, even in those areas where they are in a clear position of numerical inferiority. The 2003 law particularly protects linguistic and cultural rights (in particular). This regulation protects the right to adopt minority languages, both in written and oral form, and to retain names in the mother tongue<sup>130</sup>. Again with reference to linguistic rights, in municipalities or local entities where minorities constitute the majority of the population, the preservation of toponyms, inscriptions and symbols in the minority language is ensured and its use is assured in relations with public authorities<sup>131</sup>. Regarding cultural rights, members of national minorities have the right to found libraries, cultural centres, museums, archives and associations and to show symbols<sup>132</sup>.

After the enactment of the law at the state level, the entity-level parliaments also enacted laws to protect the rights of ethnic minorities: the Republic Srpska in 2004 and the Federation of Bosnia and Herzegovina in 2008<sup>133</sup>.

On the other hand, the protection of political rights is almost all inconsistent. In fact, the right to political participation can be exercised by minorities only through the Council of National Minorities, made up of members of the Parliamentary Assembly belonging to national minorities. The Council has the function of transmitting opinions and proposals on all matters relating to the rights position and interests of national minorities. It may even delegate experts. Through this advisory body, the "Others" are recognized only an indirect right of participation to public life, on the contrary any direct one is denied to the Others, who are in

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<sup>128</sup> Ministry of Human Rights and Refugees of Bosnia and Herzegovina. (2012). Information on Activities to Protect the Rights of the Roma Ethnic Minority in Bosnia and Herzegovina. Available from [http://www.mhrr.gov.ba/ljudska\\_prava/Odbor\\_za\\_Rome/informacija\\_Romi\\_VM\\_doc\\_NOVA1.pdf](http://www.mhrr.gov.ba/ljudska_prava/Odbor_za_Rome/informacija_Romi_VM_doc_NOVA1.pdf). [Accessed 9 July 2018].

<sup>129</sup> Law on Rights of National Minorities, art. 3.

<sup>130</sup> Art.11.

<sup>131</sup> Art. 12.

<sup>132</sup> Art.14.

<sup>133</sup> V.Lalic', V. Francuz, *Ethnic Minorities in Bosnia and Herzegovina – Current State, Discrimination and Safety Issues* in "Balkan Society Science Review", 2016, Vol.8, p. 160.

general excluded by the exercise of the right to stand for election<sup>134</sup>. In fact, in the FBiH, the Others (as well as the Serbian constituent people) are precluded the possibility to stand for elections; while the right to vote is preserved for those groups: they are forced to vote for candidates who declare their affiliation with a different constituent people's party. Such disposition is similar in the Republika Srpska where the "Others" together with the Bosniacs and the Croats are excluded from the rights to stand for any kind of election. A general right to participation of national minorities in elections is only recognized at municipal level: according to article 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<sup>135</sup>. This exclusion of "others" from political participation seems to be of considerable significance because of the fundamental powers vested in the institutions to which they have no access: it is the constituent peoples that have the power to block decisions both in the Presidency and the Parliamentary Assembly<sup>136</sup>. Notwithstanding their political power, the "others" will always be subject to the limit of the ethnic veto from the House of People that can stop immediately any proposal from being passed.

There are no accurate estimates of the population distribution in Bosnia. The last census was completed in 1991; at the time the Bosnians represented almost 44 percent of the total population; the Serbs 31 percent and the Croats 17 percent. As for the group of the "Others", they constituted 8 percent. A new census was conducted in 2013: this time the "Others's" weight inside the country was diminished with a scarce 3%. According to this estimates the country's largest minority is the Roma one. The number of ethnic minorities in Bosnia and Herzegovina, according to unofficial estimates, can be divided into three categories: minorities with less than 1,000 members (Czechs, Italians, Hungarians, Germans, Poles, Romanians, Russians, Rusyns, Slovaks, Turks, Ukrainians); minorities from 1,000 to 10,000 members (Montenegrins, Jews, Macedonians, Slovenians); minorities over 10,000 members (Roma, Albanians)<sup>137</sup>.

The point now is the total exclusion of a portion of population from the participation in the political organs of the country. In the "Constituent Peoples" case the Court discussed also the theme of the exclusion of the "Others". The Court incredibly didn't find any violation of the ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) regarding the dispositions of the State's legislature, because of the presence of "reserved" seats available for the "others". The Court declared: "[...] as there is a bicameral parliamentary structure with the first chamber based on universal suffrage without any ethnic distinctions and the second Chamber, the House of Peoples, providing also for the representation and participation of others, there is prima facie no such system of total exclusion from the right to stand as a

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<sup>134</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.101.

<sup>135</sup> Art. 13.14 "Election Law of Bosnia and Herzegovina".

<sup>136</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.155.

<sup>137</sup> *Ibid.*, p.154.

candidate”<sup>138</sup>.

Conversely, it could be argued that in a system such as the one in Bosnia and Herzegovina, there is a total exclusion of the “others” both from the right to stand as a candidate and to vote; such exclusion would be certainly in contrast with the ICERD provisions.

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<sup>138</sup> Constituent Peoples case, U/58- III, BH Constitutional Court, para. 116.

## *2.5 The conflict between non-discrimination rules and the rules authorising ethnic differentiation*

In the previous pages it was already established that the Dayton Agreement works in matter of protection against ethnic discrimination thanks to the incorporation of several (international) human rights norms within the Bosnian Constitution and the Human Rights Agreement. It was furthermore established that there are several constitutional rules that prescribe differentiation on the basis of ethnicity. Only persons belonging to the three constituent peoples (Bosniacs, Croats and Serbs) may run for the Presidency or hold office in the vetoing chamber of the Parliamentary Assembly, and even persons belonging to these three groups may not stand for election for any of these offices if they live in the “wrong” Entity: these constitutional rules have been implemented through the relevant election legislation of Bosnia and Herzegovina. According to Article I (2) of the BH Constitution, “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections”<sup>139</sup>. The Constitution itself didn’t explain how such rule had to be implemented, but more detailed measures were found in the Annex 3 of the GFA, the so-called Agreement on Elections. The first article, paragraph one of this Annex specified that:

“The Parties shall ensure that conditions exist for the organization of free and fair elections, in particular a politically neutral environment; shall protect and enforce the right to vote in secret without fear or intimidation; shall ensure freedom of expression and of the press; shall allow and encourage freedom of association (including of political parties); and shall ensure freedom of movement.”<sup>140</sup>.

The Agreement on Elections set up a Provisional Election Commission with a mandate to adopt electoral rules and regulations and to organize the first elections after the entry into force of the Dayton Peace Agreement, following these elections, the Parties were to establish a Permanent Election Commission<sup>141</sup>. Responsibility was given to the parliament to adopt an election law. This was done, after a lengthy process, on 23 August 2001<sup>142</sup>. The new election law was thus permeated of the above-mentioned constitutional provisions on ethnic criteria. The provisions in the Election law on the election of the Presidency reiterate that the members of the Presidency to be elected from the Federation must be one Bosniac (Bosniak) and one Croat, and the member to be elected from Republika Srpska must be a Serb<sup>143</sup>. The provision on the election of delegates to the House of Peoples of Bosnia and Herzegovina says that: “Until the final regulation of the procedure for the election of the delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, their election shall be conducted in accordance with the Constitution of Bosnia and Herzegovina”<sup>144</sup>.

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<sup>139</sup> Article I (2) of the Constitution of Bosnia and Herzegovina.

<sup>140</sup> Article I (1) of the Agreement on Elections (Annex 3 to the GFA).

<sup>141</sup> Article V of the Agreement on Elections (Annex 3 to the GFA).

<sup>142</sup> Official Gazette of Bosnia and Herzegovina, 23/01.

<sup>143</sup> Article 8.1 of the Election Law of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 23/01.

<sup>144</sup> Article 18.16 and 9.1 of the Election Law of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 23/01.

### 2.5.1 ECHR Article 3 of Protocol 1

The Article 3 of the First Protocol to the ECHR states that: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature”<sup>145</sup>. Such provision is the only substantive one in all the ECHR and its protocols that has been conceived as a clear responsibility for States instead of as a right for individuals.

The duty of States to “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” thus translates into individual rights to take part in such elections<sup>146</sup>. The Venice Commission and the Court of Strasbourg have accepted to leave great room for manoeuvre in the Member States’ individual election system, even though the conditions laid down by the Article 3 must be respected as minimum requirements. This implied that some provisions must to be respected: the secrecy of the vote must be secured, as well as the absence of any form of pressure on the voters for who they should vote for, or the reasonable intervals in holding the elections. The individual right to take part in free elections means that everyone has the right to vote under these conditions, and that everyone has the right to stand for election and to be elected, this was stated by the European Commission for Human Rights in 1975, where it specified that Article 3 of Protocol 1 recognises universal suffrage, and that “Article 3 guarantees, in principle, the right to vote and the right to stand for election to the legislature”<sup>147</sup>. These rights may however be subject to certain restrictions, such as the requirements regarding age, citizenship or other criteria for the right to vote and to stand for election: such restrictions normally fall within the states’ “margin of appreciation” and are thus not inconsistent with the Convention<sup>148</sup>. In the *Mathieu-Mohin and Clerfayt* case, the Court stated that the rights laid down in Article 3 were “not absolute”, that there was “room for implied limitations” and that the states “have a wide margin of appreciation in this sphere”<sup>149</sup>.

The question is thus whether the provisions in the Bosnian Constitution regarding the electoral system may be found to be within Bosnia’s “margin of appreciation” or if they are in contrast with the ECHR dispositions. Let’s now focus on the second chamber of the Bosnian assembly, namely the House of Peoples, and the ethnic requisite for the eligibility for this institution.

First of all, the presence of a second chamber in the national legislature is nothing unusual. Generally, the second (or upper) chambers are less influent in the legislative process than the first (lower) chambers. These figures show that the political and democratic legitimacy of the second chamber are important factors in

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<sup>145</sup> Article 3 of Protocol 1 to the ECHR.

<sup>146</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.164.

<sup>147</sup> *W, X, Y and Z v Belgium*, Appeals 6745 and 6746/74, Yearbook XVIII (1975), p. 236.

<sup>148</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.164.

<sup>149</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, ECHR, para. 52.

most constitutional systems, and this implies that the powers of a second chamber must be seen in connection with the way in which their representatives are selected; as noted by Arend Lijphart in his book “Democracies”: “Second chambers that are not directly elected lack the democratic legitimacy, and hence the real political influence, that popular election confers”<sup>150</sup>. The Court builds on the assumption that the Article 3 of Protocol 1 does not require that second (or third) chambers of legislature be subject to election, as was made clear in the Mathieu-Mohin judgment (a case related with the prevention of French speaking electors from appointing French-speaking representatives in Belgium): “Article 3 (P1-3) applies only to the election of the ‘legislature’, or at least one of its chambers if it has two or more [...] The word ‘legislature’ does not necessarily mean only the national parliament, however; it has to be interpreted in light of the constitutional structure of the State in question”<sup>151</sup>. The election of just one of the chambers is thus enough. It may be noted that in a concurring opinion, one of the Judges expressed reservations on this point and said that in his opinion, if a legislature had two or more chambers, then it should be required that: “the majority of the membership of the legislature is elected and that the chamber or chambers whose members are not elected does or do not have greater powers than the chamber that is freely elected by secret ballot”<sup>152</sup>. Such result, had it been adopted by the majority, would have been clearly in contrast with the Article 3 of Protocol 1, since it stated that the House of Peoples was not elected and had greater powers than the elected chamber (in this case the House of Representatives). But since the majority of the judges didn’t endorse this specification, this result cannot be deduced.

Even if the Court has accepted a wide margin of appreciation in this sphere, it has also pointed out that it is relevant to assess the functions given to a legislative body: in the case of *Matthews v the United Kingdom*, the applicant claimed that the European Parliament should be considered a “legislature” in Gibraltar, and that his rights according to Article 3 were violated as he did not have the right to vote for this legislature<sup>153</sup>. The Court said that it must “have regard, not solely to the strictly legislative powers which a body has, but also to that body’s role in the overall legislative process”<sup>154</sup>. Applying this statement to the Bosnian state could be useful to understand the claim that it might be problematic that the House of Peoples has the power to veto the decisions made by the Parliamentary Assembly, thus playing a key role in the “overall legislative process”. With regard to such a body, it should therefore be especially important to secure “the principle of equality of treatment of all citizens in the exercise of their right to vote and stand for election”<sup>155</sup>. Based on the somewhat scarce case law from Strasbourg pertaining specifically to second chambers, it appears that it

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<sup>150</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Centuries*, New Haven, Yale University Press, 1984, p. 97.

<sup>151</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, ECHR, para. 53.

<sup>152</sup> *Ibid.*, Concurring opinion by Judge Pinheiro Fainha.

<sup>153</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.166.

<sup>154</sup> *Matthews v. the United Kingdom*, Judgement of 18 February 1999, unreported, REF00001927, ECHR, para. 49.

<sup>155</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, ECHR, para. 54.

cannot be firmly established that it is a violation of Article 3 of Protocol 1 in itself that the House of Peoples in Bosnia and Herzegovina is an indirectly-selected second chamber with vetoing legislative powers<sup>156</sup>. There is however, clearly a case for arguing that the role of the House of Peoples in the overall legislation process contributes to the possible conclusion that there is an inconsistency between the requirements of Article 3 of Protocol 1 and the rules on the House of Peoples in the BH Constitution<sup>157</sup>.

### 2.5.1.1 *The Exclusion Criteria*

Going deeper in the matter of the electoral rules in Bosnia, it could be functional to analyse if these are in accordance with Article 3 of Protocol 1 to the ECHR in “ensure the free expression of the opinion of the people in the choice of the legislature”<sup>158</sup>. The ECHR have dealt with a lot of cases pertaining to violations of Article 3 of Protocol 1, going as far as to affirm that the rights listed in the Article were not absolute, leaving a wide margin of appreciation to the States, even if this margin: “has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate”<sup>159</sup>.

The question of denying anyone the voting rights because of his/her ethnics belongings has never been brought before the Strasbourg Court. It could, however, be argued that this kind of exclusion is exactly the kind of condition that would be depriving the rights in question of their effectiveness, the Court has emphasised in fact that: “According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by an effective political ‘democracy’. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol no.1 is accordingly of prime importance in the Convention system”<sup>160</sup>. In light of this overall perspective of the rights enshrined in Article 3 of Protocol 1 as prerequisites for the exercise of the other rights and freedoms contained in the ECHR and Protocols, together with Article 14, which explicitly ensures the same rights without discrimination on such grounds as ethnicity, it seems highly unlikely that the Court in Strasbourg would accept an electoral system which excludes candidates, because of their ethnicity, from voting and standing for election for the vetoing chamber of the legislature of the state<sup>161</sup>. In the Mathieu-Mohin and Clerfayt cases, the applicants felt discriminated against because of the specific implications of the choice of language, which is one of the

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<sup>156</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.167.

<sup>157</sup> Ibid.

<sup>158</sup> Article 3 of Protocol 1 to the ECHR.

<sup>159</sup> Mathieu-Mohin and Clerfayt v. Belgium, ECHR, para. 52, Gitonas and others v. Greece, ECHR, para. 39, Ahmed and others v. the United Kingdom, ECHR, para. 75 and Labita v. Italy, ECHR, para. 201.

<sup>160</sup> See Mathieu-Mohin v. Belgium, ECHR, para. 47.

<sup>161</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.168-169.

criteria listed in Article 14, the Court, however, found that the actual limitations in the exercise of the electoral rights on the basis of language were not: “a disproportionate limitation such as would thwart ‘the free expression of the opinion of the people in the choice of the legislature’”<sup>162</sup>. In the case of Bosnia and Herzegovina, the “others” cannot participate in alternative organs similar to the ones they were excluded from, as in the Belgian system: “They [the French electors] are in no way deprived of these rights [the right to vote and the right to stand for election] by the mere fact that they must vote either for candidates who will take their oath in French and will accordingly join the French language group in the House of Representatives or the Senate and sit on the French Community Council or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council”<sup>163</sup>. In the Bosnian system, the group of the “others” is not treated equally in terms of active and passive voting rights as the rest of the citizens. The “equality of treatment of all citizens” stated by the ECHR seems not to be respected. So far it seems that the ethnically-based electoral criteria were inconsistent with the requirements of Article 3 of Protocol 1 together with Article 14, a question that needs to be raised is whether the ethnic requirements nevertheless could be justified because they were “imposed in pursuit of a legitimate aim”; and that the “means employed” were not “disproportionate”<sup>164</sup>. From a narrow perspective it might be said that the aim of the imposition of the ethnic rules was to secure a political balance between the three constituent peoples, particularly through the right to veto decisions from the Parliamentary Assembly; from a broader perspective, on the contrary, one could say that the aim of the ethnic requirements in the BH Constitution was to reach a settlement in order to stop the war and to secure peace in the foreseeable future<sup>165</sup>. Even if the aim of this exclusion could be considered legitimate, the means used could not. Talking about disproportionate means, the *Sadak and others v. Turkey* case could be an helpful example. The case pertained to the permanent dissolution of a political party, and the fact that its previous MPs were not allowed to engage in further political activities so that they could not fulfil their mandate: these measures, even if the aim might have been legitimate, were seen as disproportionate: The Court made it clear that “the extreme harshness of the measure in question” was an important factor<sup>166</sup>. The measures in the BH Constitution, denying the “others” of their voting rights (both active and passive), can be perceived as harsh, or harsher. The ethnic requirements in the BH Constitution may be deemed to pursue a legitimate aim, but that the measures, vis-à-vis the “others” who are subject to exclusion because they do not belong to the “right” ethnic group, are disproportionate; in the end, denying persons the right to participate on equal footing in the vetoing chamber of the state legislature because of their ethnic origin, should be seen

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<sup>162</sup> *Mathieu-Mohin v. Belgium*, ECHR, para 52.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Mathieu-Mohin v. Belgium*, ECHR, para. 57.

<sup>165</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.170.

<sup>166</sup> *Sadak and others v. Turkey*, ECHR, para. 38.



as contrary to Article 3 of Protocol 1 to the ECHR in conjunction with Article 14<sup>167</sup>.

In the end, the constitutional rules demanding a specific ethnicity for the holding of, and running for, certain political positions in Bosnia and Herzegovina should be considered inconsistent with certain requirements laid down in the core human rights instruments that are incorporated into the BH Constitution<sup>168</sup>. Even if the political rights in question are not absolute, and the monitoring bodies have accepted a wide margin of appreciation regarding how states parties organise their political systems, the exclusion of “others” from taking part in the selection of Delegates to the House of Peoples, from holding the position of a Delegate to the House of Peoples, or from running for and holding the position of members of the Presidency of Bosnia and Herzegovina, should be seen as inconsistent with the right to participate “in the choice of the legislature” or to “vote and be elected at genuine periodic elections which shall be by universal and equal suffrage . . .”<sup>169</sup>. Thus the Bosnian system is still established on ethnic privileges for the so-called “Constituent Peoples”, based on the discrimination based on ethnicity: “The House of Peoples institutionalizes at the constitutional level a strong relationship between ethnicity and citizenship, which results in discrimination based on ethnicity. The fact that a citizen of one of the Entities may be unable to become a member of a legislative body solely because of his or her ethnicity violates international prohibitions against discrimination and may also violate the right to governmental participation.<sup>170</sup>”

One might affirm that there are conflicts on the Bosnian constitutional disposition on human rights securing the right to vote and the possibility to stand for election without any kind of discrimination based on ethnicity and the constitutional provisions providing for ethnic exclusion. Clearly, the two sets of dispositions cannot be implemented simultaneously. From this, it can be inferred that there are conflicts between norms within the BH Constitution itself, as both sets of provisions are laid down in the BH Constitution<sup>171</sup>.

In the final chapter of this dissertation a more in-depth analysis of the contrast between the Bosnian national courts’ decisions and certain supra-national principles, that came out after different cases brought in front of the ECHR, will be carried out.

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<sup>167</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.171.

<sup>168</sup> *Ibid.*, p.180.

<sup>169</sup> Article 3 of Protocol 1 to the European Convention on Human Rights and Article 25 (b) of the ICCPR.

<sup>170</sup> Ronald C. Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity* in “The Yale Journal of International Law”, 1996, vol. 21, no. 2, p. 463.

<sup>171</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.181.

### **3. Bosnia vs the EU: the impact of the ECHR case law on the minorities' rights in Bosnia and Herzegovina.**

#### *3.1. Status of the ECHR in the domestic legal order*

Has real progress in the protection of human rights been made in Bosnia and Herzegovina from the adoption of representative democracy? And above all, how much has the "democratic spirit" pervaded the country? In order to respond these questions, consideration must be given to the impact of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the Court of Strasbourg. This assessment can be useful for providing an overview of human rights status in Bosnia and Herzegovina. There is a clear cleavage between the rights recognized and protected by international and regional bodies, and the ways in which these rights are implemented in practice. The Constitution of Bosnia and Herzegovina<sup>172</sup> provides primacy of collective rights — rights of constituent peoples (Bosniaks, Croats, and Serbs) over individual rights even though the European Convention has supremacy "over all other law" in Bosnia and Herzegovina. This in large scale leads to a negative estimation of the condition of human rights protection of citizens of Bosnia and Herzegovina and, consequently, the impact of the European Court, but the idea of necessity and legal possibility to seek protection by mechanisms provided by the European Convention is deeply present among legal professionals<sup>172</sup>. In a country that is still striving to become a member of the EU, many of its citizens, who do declare to be part of none of the constituent peoples, have certain (political) rights denied: this lack of protection for minorities has brought the Bosnian state before the European Court. To this day, the fight against this kind of discrimination remains one of the most challenging objectives for the state.

The key question of an efficient protection of human rights in Bosnia and Herzegovina is reflected in the legal nature of the Constitution, as well as in the relation between the Constitution and ratified international treaties for the protection of human rights, primarily the European Convention: from the answer to this question also stems the answer to the question as to the effectiveness of institutional protection of human rights in a substantive sense, as well as the psychological aspect that is reflected in the confidence of citizens in the state institutions and, above all, in the institutions whose primary task is the protection of human rights and rule of law<sup>173</sup>. At the same time, the question of the harmonization between the Bosnian system in matter of human right protection with the international documents showed the state's position towards all those commitments coming from the country accession in the Council of Europe. Bosnia and Herzegovina signed the European Convention on 2002<sup>174</sup>. The Parliamentary Assembly of the Council of Europe, in its Resolution No. 234 (2002) on the acceptance of Bosnia and Herzegovina into the membership of the

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<sup>172</sup> F.Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, pp. 81-82.

<sup>173</sup> *Ibid.*, p. 82.

<sup>174</sup> The European Convention entered into force on July of the same year.

Council of Europe, analysed the progress made by Bosnia and Herzegovina since the signing of the Dayton Peace Agreement in all fields, and it accepted, inter alia, the commitments made by the Presidency of Bosnia and Herzegovina, the Parliament of Bosnia and Herzegovina, and the prime ministers to honour the following commitments:

iii. Related to the Convention:

iv. Continuous control of the compatibility of the legislation with the European Convention for the protection of human rights and fundamental freedoms<sup>175</sup>. Taking into account what has just been described, Bosnia and Herzegovina has established, together with the Council of Europe, a special expert team in charge of analysing the compatibility of all Bosnia and Herzegovina's regulations with the international obligations undertaken, especially with the European Convention. The Compatibility Study was published on 16<sup>th</sup> September 2008<sup>176</sup>.

The Constitution of Bosnia and Herzegovina can be easily considered as a transitional document based on its main characteristics. First, the country's constitution has not been drafted by a national constituent; on the contrary, it is the result of international agreements aimed at permanently ending the war. Secondly, as already specified, the text has never been translated into the official languages of the country, remaining permanently in English and therefore making it unreachable for citizens. Third, annex IV contains some provisions contrary to international law and the protection of human rights in general, such as the legitimization of discrimination. In the end, the territorial division perpetrated in the creation of the "new state" following the Dayton accords, has somehow given legitimacy to the ethnic cleansing carried out during the war years.

Among the most important aspects of the Bosnian constitutional text is certainly the one concerning human rights and their protection. Without proper protection, human rights appear as something ephemeral and totally stripped of any relevance. However, the Constitution itself, despite placing human rights as a cardinal point of one of its fundamental pillars, contains several provisions that certainly violate the protection of human rights itself, as also confirmed by the European Court on different occasions. For all of these reasons, the issue of the relation between the Constitution arises, as the supreme legal and political act of a country, and the European Convention, as an act that contains a minimum of common will of the Member States in terms of the substantive human rights it protects, as well as the mechanisms of the protection of those rights, including obligations that must be respected by the Member States in order for those substantive rights to be implementable not only at a supranational level, but also within each particular legal system<sup>177</sup>.

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<sup>175</sup> Resolution of the Parliamentary Assembly of the Council of Europe, No. 234, 2002.

<sup>176</sup> F. Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, p. 83. Findings were divided into three separate headings: 'must do'; 'should do'; and 'could do'. It corresponds to the priority given by the study. The most relevant findings under the heading 'must do' relates to guarantees in military justice proceedings, restrictions on access to a court, reasonable time guarantees in judicial proceedings, judicial independence and impartiality, existence of death penalty in the Constitution of Republika Srpska, and prison conditions and health treatment.

<sup>177</sup> *Ibid.*, pp. 85-86.

### *3.1.1. Relationship between domestic and international law*

As previously explained, the Bosnian constitution is composed by the many obligations derived from international law, especially in the human rights field, probably because the drafters of the Constitution undoubtedly wanted to achieve the automatic application of international treaties, ratified by Bosnia and Herzegovina. This option was chosen perhaps in consideration of the complexity of the decision-making system in the legislative bodies, especially in the Parliamentary Assembly of Bosnia and Herzegovina due to different, almost always opposed (ethnic) interests<sup>178</sup>. Notwithstanding these premises, the main question is if the Bosnian constitutional system is accepting the commitment deriving from international agreement; in order to answer this question it is necessary to analyse the provisions in the Constitution treating with the conclusion of international accords and the way in which those agreements enter into force (and their effects) in the country's legislation. In this sense, Article II and III of the Annex 4 seem to be particularly explanatory: Article II states:

“Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above” (paragraph 6); “Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution”(paragraph 7); “All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law”(paragraph 8)<sup>179</sup>. Article III reads as follows: b) “Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization”(paragraph 2); c) “The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate” (paragraph 2); (b)... The general principles of international law shall be an integral part of the law of Bosnia

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<sup>178</sup> Ibid.

<sup>179</sup> Annex 4, Article II, par. 6-8.

and Herzegovina and the Entities (paragraph 3)<sup>180</sup>.

Analysing those constitutional provisions it appears clear how a strong emphasis on the respect of the human rights is posed. Moreover, it must be kept in mind that according to the Bosnian constitution the general principles of the international law are part of the Constitution, having the same legal force as any other constitutional provisions.

It is now necessary to analyse the nature of the legal system in Bosnia and Herzegovina and its relationship with international agreements. It is necessary to discern whether the provisions that come from international agreements are directly applicable in the legal system of the country (monistic system) or if they must be transformed as acceptable legal norms into the legal system in order to be applied (dualistic system). In the Bosnian Constitution there are no articles about the transformation of international agreement into the legal order of the state, but many dispositions on the direct applicability of the international law are present in the constitution. Another argument in determining the nature of the legal system in Bosnia and Herzegovina and its relation to international law is already mentioned in Article II of the Constitution, which provides the direct applicability of the European Convention<sup>181</sup>.

In the end, the Bosnian constitutional text seems to be a clear example of a monistic approach in the application of international law, so the European Convention's obligations that the Constitution recognizes and accepts, have to be considered at the same level with the Constitutional dispositions, even though the argument is still unclear from a legal point of view<sup>182</sup>.

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<sup>180</sup> Annex 4, Article III, par. 2-3.

<sup>181</sup> See F. Vehabovic, *Relationship between Constitution of Bosnia and Herzegovina and the European Convention on Human Rights and Fundamental Freedoms*, Sarajevo, ACIPS, 2006.

<sup>182</sup> It is not yet completely clear whether the word "over all other law" of Article II of the Constitution refers to the supremacy of the international sources mentioned in the article also with respect to the Constitution itself or if it refers only to the ordinary law.

### 3.2 *The Court's case law in relation to the minorities in Bosnia-Herzegovina*

Yet the direct applicability of international norms (especially that of the European Convention) has not saved Bosnia and Herzegovina from the lack of representation of national minorities. Despite the multi-ethnic structure of the country, the Constitution defines only the Bosnians, Serbs and Croats as "constituent peoples", while every other ethnic group falls into the category of "Others". The main problem is the institutional discrimination that is carried out against minorities, through the systematic exclusion from political representation as not affiliated with any of the three main ethnic groups. The state based on three different dominant ethnic groups that came out in the aftermath of the famous case on constituent peoples has produced a clear differentiation among Bosnian citizens, who now are entitled to more or less rights according to their ethnicity. In this way the "Others" are considered as "neutral" from the ethnic point of view, thus seeking to strengthen the civil elements of the state as a counterweight to the ethnic ones. While it is true that on the one hand the instruments of political representation, in multi-national systems, can in some cases foresee derogation from the principle of equality, on the other hand serious violations of the right to active and passive voting have been found in the country from the early 2000s. In the case of Bosnia it must also be taken into account that the term minorities does not only identify those who show no affiliation with the three constituent ethnic groups, but also those who, being part of it, are in one of the two Entities where its ethnic group is in a minority position.

In 2006, in fact, the (Bosnian) member of the presidency, Sulejman Tihic, applied to the Constitutional Court on the violation of the passive right to stand for election (right protected by the Article 14 of the ECHR and Art. 3 of the Third Additional Protocol)<sup>183</sup>. In this case the Court was called to pronounce over a discrepancy between the aforementioned ECHR' dispositions and–Article V of the Bosnian constitution, which prescribed that only those who have declared the belonging to one of the constituent peoples can run for the Presidency or the House of Peoples<sup>184</sup>. The Court, in order to save the ethnocentric institutional system and deciding not to affect in any way the balance implemented in Dayton between individual rights and institutional collective guarantees<sup>185</sup>; doing so, it also avoided commenting on the question of the supremacy of the ECHR on the Constitution.

Judgments of the European Court against Bosnia and Herzegovina on the violation of the prohibition of discrimination will follow.

#### 3.2.1 *The issue of the right to vote and the necessity of a reform: "Sejdic and Finci v. Bosnia Herzegovina"*

Many problems have risen in the compatibility between the decisions of the Dayton Agreement decisions and some European principles, for example between the Bosnian electoral system and the European Court of Human Rights (hereafter ECHR). Moreover, the Bosnian request of joining the European Union in 2016 has

<sup>183</sup> Bosnian Constitutional Court, case U5/04 (27.01.2006).

<sup>184</sup> Annex 4, Article V.

<sup>185</sup> J. Woelk, *The Constitutional Transition of Bosnia and Herzegovina Between Nationalism and European Conditionality*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.46.

raised many doubts about the compliance with the Copenhagen criteria. In particular, the recognition of equal conditions of access to the right to vote still remains under the scrutiny of the international community. In many multi-ethnic states, in order to establish forms of balance between the equality of the right to vote and the rights of minorities, special representation instruments were provided for minority groups<sup>186</sup>. However, in certain states like Bosnia-Herzegovina, this kind of balance appears quite complex. The combination of the ethnical and territorial principle, if on the one hand has served to guarantee a rapid pacification at the end of the conflict in the 90s, on the other has reduced the active and passive voting rights of many categories of citizens residing inside the country. The consequences of such decisions are not only for those who reside inside another Entity as in respect of the personal ethnicity, but also for the already mentioned Others' category, namely those citizens who are not part of any Constituent People.

After more than twenty years since the draft of the Dayton Agreements and the Annex 4, the electoral system of the state is still questioned by a ruling of the ECHR. On 9th June 2016, the fifth section of the Strasbourg's court, pronouncing on the *Pilav v. Bosnia and Herzegovina* case, issued a verdict against the Bosnian state, adding another chapter to the previous pronounces of *Sejdic and Finci and Zornic v. Bosnia and Herzegovina*. The content of the more recent pronounce doesn't change what was already underlined in the past: the methods of election of the Bosnian Parliament and Presidency are in contrast with the prohibition of discrimination required by ECHR's article 1 of the Protocol 12. With the mentioned pronounce *Sedjic and Finci v. Bosnia and Herzegovina* in 2009 the Court of Strasbourg had shown for the first time the violation of ECHR's norms.

The two applicants were both significant public figures. Mr Sejdic, a Bosnia and Herzegovina's citizen of Roma ethnicity was the Roma Monitor of the Organisation on Security and Cooperation in Europe (OSCE) Mission in Bosnia and Herzegovina, having previously served as a member of the Roma Council of Bosnia and Herzegovina (the highest representative body of the local Roma community) and a member of the Advisory Committee for Roma (a joint body comprising representatives of the local Roma community and of the relevant ministries); Mr Finci is now serving as Ambassador of Bosnia and Herzegovina to Switzerland, having previously held positions including Chair of the Constitutional Commission and the Head of the Civil Service Agency<sup>187</sup>. As both applicants do not declare affiliation with any of the "constituent peoples" perceiving themselves to be of Roma and Jewish origin, they were unable to be eligible to stand for election to the House of Peoples and the Presidency, as prescribed in the Bosnian Constitution. Originally the two applicants brought their cases in front of the ECHR individually but, since both cases were related to the same discrimination, the Court decided to consider them as a unique entity from that point onwards. The applicants argued that, despite possessing experience comparable to the highest elected officials, they are prevented from being candidates for the presidency and the House of Peoples solely on the grounds of their race/ethnicity and, in the case of Mr Finci, his religion: they submitted

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<sup>186</sup> M.M.Bruno, *La corte europea dei diritti dell'uomo dichiara nuovamente il sistema elettorale della Bosnia-Erzegovina in contrasto con la CEDU. Quali prospettive per l'adesione all'Unione Europea?* in "Osservatorio Costituzionale", 2016 fasc. 2, p.2.

<sup>187</sup> Grand Chamber, *Case of Sejdic et Finci v. Bosnia and Herzegovina*, Applications n.27996/06, 22-12-2009, Par. 8.

that the country's electoral provisions infringe their rights, as citizens of Bosnia and Herzegovina, to participate fully and effectively in public life in their own country<sup>188</sup>. 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 free election (Article 14 and 3 of Protocol 1 of the European Court of Human Rights) and the right of non-discrimination (Article 1 of Protocol 12 of the ECHR)<sup>189</sup>. Unlike Article 14, which prohibits discrimination only in conjunction with other rights protected by the Convention, the Protocol 12 (that became effective on 1 April 2005) is a stand-alone provision which extends the right to equal treatment to all legal rights. This case was the first in which the ECHR has taken in consideration the application of such Protocol<sup>190</sup>. The applicants also claimed the violation of Article 13 of the ECHR, namely the "Right to an effective remedy" before a national court, as the Bosnia and Herzegovina's Constitutional Court, the only organ able to judge whether the national law is compatible with a state's obligation under the ECHR, admitted it did not have the power to hear such a case, leaving the applicants without any "national remedy". Moreover, Mr Sejdic pointed out that this kind of discrimination was in violation of Article 3, the one dealing with the prohibition of degrading treatment. According to Mr Sejdic, this discrimination against the Roma community, as well as the members of any other national minorities, created a sort of "second-class citizens", holders of reduced rights as compared to the "constituent peoples"- The applicants' case drew on previous ECHR case law which establishes that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'<sup>191</sup>. Mr Sejdic and Mr Finci claimed that Bosnia and Herzegovina had to reach a higher standard in the treatment of the "Others" in matter of active and passive voting rights. In response, the government of Bosnia and Herzegovina relied on two main arguments: first, it claimed that the election rules were not discriminatory, denying that the Constitution effectively barred the applicants from participating in the democratic process, since they were eligible to register to vote and also to stand for election to the House of Representatives (the lower house of Parliament): furthermore it stated that even if the provisions were discriminatory, there were objective and legitimate justifications for the limitations on their democratic rights<sup>192</sup>. Second, the government proclaimed that the current election rules were part of the Dayton Peace Agreement, namely an international agreement, and so it did not have the authority nor the power to amend them in order to remove the offending provisions.

The Court, having declared the case admissible, 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

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<sup>188</sup> L. Claridge, *Discrimination and political participation in Bosnia and Herzegovina: Sejdic and Finci v. Bosnia and Herzegovina*, Minority Rights Group International, 12 March 2010, p.3. Available at: <http://www.refworld.org/docid/4b9e17b92.html> [Accessed 25 August 2018].

<sup>189</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.109.

<sup>190</sup> Ibid.

<sup>191</sup> European Court of Human Rights, *Timishev v. Russia* ( Resolution No. 55762/00 and 55974/00), 13 December 2005.

<sup>192</sup> L. Claridge, *Discrimination and political participation in Bosnia and Herzegovina: Sejdic and Finci v. Bosnia and Herzegovina*, Minority Rights Group International, 12 March 2010, p.3. Available at: <http://www.refworld.org/docid/4b9e17b92.html> [Accessed 25 August 2018].



discrimination on the ground of race, whose seriousness requires "special vigilance and a vigorous reaction"<sup>193</sup>. 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"<sup>194</sup>. In order to verify if this kind of derogation was made according to a reasonable and objective justification, the Court examined the progress made by the Bosnian state in matter of democratic stabilization; following the Court's opinion, even though after the 1995 ceasefire the ethnic federalism was rightly perceived as the unique mechanism able to ensure the pacific coexistence between different ethnic groups, important progresses had been made since then, including the ratification of the ECHR and Protocol no.I. 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<sup>195</sup>. Furthermore the Court admitted that there were no obligations under the Convention to totally abandon the Bosnia-Herzegovina's power-sharing system; however, the Venice Commission acknowledged, with another opinion, that the introduction of another power-sharing model not based on the total exclusion of representatives of another ethnic groups would have been possible in the country.

Following the Court's opinion, it was time to amend the system created by the Annex 4, in favour of a more inclusive system with respect of the minorities, because of the incompatibility between an ethnical and territorial based federal system and the guaranties of equal access to the active and passive voting right. The need of a revision of the electoral law within a year by the ratification of the Convention and the related Protocols with the supervision of the Venice Commission was underlined, a priority obligation considering the participation of Bosnia and Herzegovina as a member of the Council of Europe: "*By becoming a member of the Council of Europe in 2002 [and concluding the Stabilization and Association Agreement with the European Union] and by ratifying the Convention and the Protocols thereto without reservations, the respondent State has voluntarily agreed to meet the relevant standards. It has specially undertaken to review within one year, with the assistance of the [Venice Commission], the electoral legislation in the light of the Council of Europe standards, and to revise it where necessary*"<sup>196</sup>.

For all these reasons, the Court pointed out the violation of the principle of non-discrimination prescribed in

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<sup>193</sup> 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 Sejdic and Finci v. Bosnia and Herzegovina, par. 30.

<sup>194</sup> Ibid., par. 43-44.

<sup>195</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.110.

<sup>196</sup> European Court of Human Rights, Case of Sejdic and Finci v. Bosnia and Herzegovina, *Par.* 49.

the Protocol 12 in denying citizens not pertaining to the “Constituent peoples” category the possibility to stand for election to the Presidency or the House of Peoples, together with the violation of Article 14 and the article 3 of the Protocol 1 of the ECHR. It should however be mentioned that the court found no violation of article 13 of the ECHR for any of the applicants, nor of article 3 in relation to Mr Sejdic.

The sentence of the Court condemned the Bosnian state inasmuch as, although it had not independently adopted his own constitution, it was still responsible for a failure to modify it later on. In fact, following the Court’s pronouncement, the Parliament of Bosnia and Herzegovina was required to amend the existing system of ethnic federalism, through a process of constitutional reform<sup>197</sup>. Still, relating to the Bosnian constitutional system, more than just a constitutional reform, the adoption of a new (and autochthonous) constitution is required, a constitution symbol of the sovereignty of the Bosnian people as a unique entity. However, the singular characteristics of the Bosnian constitutional settlement produced by the Dayton Agreement promoted ethnic fragmentation, making any possible reform attempt unsuccessful. For these reasons, the Sejdic and Finci judgment has never been implemented, notwithstanding the requests of the international community, including in particular the European Union institutions, that consider the implementation of the European decision as an essential condition for the process of admission of BiH into the Union<sup>198</sup>.

### 3.2.2 *The failure in implementing the Court’s obligations.*

In 2014 a new controversy started following the appeal of Ms Azra Zornic who denounced a violation of her passive right to vote for the House of People and for the Presidency. Ms Zornic declared her belonging to the “Bosnian people” without identifying herself in any of the three Constituent ethnical groups. The high frequency of mixed marriages, mostly in Tito’s Yugoslavia, created a category of autochthonous people without a clear classification inside any of the Entities. Pronouncing on the case, the European Court expressed the same sentence as five years before, pointing out a violation of the non-discrimination principle and the right to free elections, as expressed in article 3 of the Protocol 1 and article of the Protocol 12 of the ECHR, adding the violation of article 46 of the ECHR, according to which the Contracting States are obliged to fulfil the Court's decision in all cases in which they were relevant. In fact, there was a real legal obligation to comply with the decisions of the judicial body through the adoption of measures to guarantee the right of the claimant considered violated<sup>199</sup>. According to the sentence, the violation of the non-discrimination principle and the right to free elections constituted the direct consequence of the failure of the State’s authorities to introduce the measures requested in the Sejdic and Finci judgment: “*The finding of a violation in Ms Zornic’s case had been the direct result of the national authorities’ failure to introduce*

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<sup>197</sup> S. Bardutzky, *The Strasbourg Court on the Dayton Constitution* in “European Constitutional Law Review”, 2010, vol. 6, issue 2, pp. 309-333.

<sup>198</sup> Parliamentary Assembly of the Council of Europe, Resolution 1725, *The Urgent Need for a Constitutional Reform in Bosnia and Herzegovina*, 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.

<sup>199</sup> Art.46, Par. 1 and 2 of the European Convention on Human Rights.

*constitutional and legislative measures to ensure compliance with the judgement in the Sejdic and Finci case*<sup>200</sup>”.

### 3.2.3. The last chapter: “*Pilav v. Bosnia and Herzegovina*”.

A third appeal was brought to the ECHR by a Bosniac resident in RS, Mr Ilijaz Pilav, who was denied the right to run for the position of member of the presidency from RS in the 2006 elections by the Central Election Commission. Following the Commission’s article 8, the candidate, a Bosniac citizen resident in the Srpska Republic, didn’t have either the right to run for the Presidency or the right to vote another Bosniac for the same office. According to Mr Pilav this discriminatory treatment was in discordance with article 1, Protocol 12 of the ECHR. The case was first judged by the Bosnian Constitutional Court then, following a new candidacy attempt in 2010, was presented in Strasbourg, where a third violation perpetrated by the Bosnian state was recognized, as already highlighted in the previous sentences.

The Court, in reiterating the concept of discrimination as "a different treatment of subjects in similar situations, without an objective and justified justification", motivated the sentence by focusing in particular on the requirement of the applicant's residence<sup>201</sup>. The defence, in fact, argued in support of its thesis that the applicant was not completely deprived of the right to active and passive electorate, unlike what was recognized in the *Sejdić and Finci judgment v. Bosnia Herzegovina*. Effectively, according to the electoral law, if the applicant wished to exercise his right to active and passive voting he would had to move his residence to the Federation of Bosnia and Herzegovina. On this point the Court makes a broad reasoning, recalling some jurisprudential precedents on the subject (*Hilbe c. Lichtenstein*, *Ali Erel e Mustafa Damdelen c. Cipro*)<sup>202</sup>. It was highlighted that the requirement of residence in the country in which someone was applying - to be understood as a condition for access to the right to active and passive electorate - was not absolutely irreconcilable with the principle of free elections and any restrictions imposed by the country were not to be considered arbitrary and therefore in violation of art. 3 Protocol No. 1 of the ECHR. According to the Court, the enjoyment of the right in question could be legitimately conditioned by the effective connection between the citizen and the legislation of the country. A link which, in the two Court rulings above mentioned, is expressed according to well-defined parameters: “[...] The residence requirement which prompted the application is justified on account of the following factors: firstly, the assumption that a non-resident citizen is less directly or less continually concerned with his country’s day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programs;

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<sup>200</sup> European Court of Human Rights, *Zornic v. Bosnia and Herzegovina*, (Application no. 3681/06), 15 July 2009.

<sup>201</sup> European Court of Human Rights, *Andrejeva v. Latvia* (Applications no. 55707/00), 18 February 2009.

<sup>202</sup> European Court of Human Rights, *Hilbe v. Lichtenstein*, (Application no. 31981/96) – Decision No. 10, December 1999; European Court of Human Rights, *Erel Damdelen v. Cyprus* (Application no. 39973/07), 14 December 2010.

thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country”<sup>203</sup>.

In this case the applicant was not deprived of the exercise of the voting right, as in the Sedjic and Finci’s case. As a matter of fact, it would have been enough for Mr Pilav to change his residence in the Federation of Bosnia and Herzegovina to fully exercise the right to vote. The Court outlined that the residence requirement in the country in which someone was applying was not irreconcilable with the free elections principle and eventual restrictions posed by the Country were not to be considered arbitrary, therefore in violation of Article 3 Protocol 1 of the ECHR. The enjoyment of such a right, following the Court, could be legitimately conditioned by an effective link between the citizen and the Country’s legislation; being Mr Pilav resident on the Bosnian soil and being subjected to the acts and decisions of the Presidency, there was an evident link between the applicant and the competences of the Bosnian organ, so the residence requirement cannot be invoked as a justification of a simile restrictive treatment.

#### 3.2.4. “*Hamidović v. Bosnia and Herzegovina*”.

A further case to be taken in consideration is the 2012 “*Hamidović v. Bosnia and Herzegovina*”. It concerned the refusal of the applicant, Mr Husmet Hamidović, a Bosnian-Herzegovinian citizen, to remove his skullcap before the criminal court during a case on the attack of the US embassy in Sarajevo the year before. As member of a local group advocating the Wahhabi/Salafi version of Islam, Mr Jasarevic, attacked the US Embassy in Sarajevo, he was eventually convicted during the proceedings of terrorism and sentenced to 15 years’ imprisonment; two other defendants were acquitted<sup>204</sup>. The accused all belonged to the same religious community, opposed the concept of a secular State and recognising only religious law and court<sup>205</sup>. In September 2012 Mr Hamidović, who belonged to the same religious community, was summoned during the trial as a witness. Because he was standing before the court, the presiding judge ordered him to remove his skullcap because wearing such a headgear was contrary to the dress code for judicial institutions, since no religious symbols or clothes were permitted in court. Refusing to do so, claiming that wearing a skullcap was a religious duty for him, Mr Hamidović was then expelled from the courtroom, convicted of contempt of court and sentenced to a fine. In October 2012 the first-instance decision was upheld, an appeals chamber of the Court of Bosnia and Herzegovina holding that the requirement to remove headgear on the premises of public institutions was one of the basic requirements of life in society and that in a secular State such as

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<sup>203</sup> M.M.Bruno, *La corte europea dei diritti dell'uomo dichiara nuovamente il sistema elettorale della Bosnia-Erzegovina in contrasto con la CEDU. Quali prospettive per l'adesione all'Unione Europea?* in “Osservatorio Costituzionale”, 2016 fasc. 2, pp.8-9.

<sup>204</sup> European Court of Human Rights, *Hamidovic v. Bosnia and Herzegovina* (Application no. 57792/15), 5 December 2017.

<sup>205</sup> European Court Of Human Rights, *Convicting a witness of contempt of court for refusing to remove his skullcap was not justified*, Press Release, 2017. Available at: [https://www.globalgovernancewatch.org/library/doclib/20180102\\_ECtHRHamidovicvBosnia.pdf](https://www.globalgovernancewatch.org/library/doclib/20180102_ECtHRHamidovicvBosnia.pdf) [Accessed 4 August 2018].

Bosnia and Herzegovina any manifestation of religion in a courtroom was forbidden<sup>206</sup>. Because of the impossibility of Mr Hamidović of paying such a fine, the sentence was commuted in 30 day's imprisonment. In July 2015, the Bosnian Constitutional Court accepted the domestic courts' reasoning, finding out that fining Mr Hamidović for contempt of court was fully lawful and didn't breach his right to manifest his religion. On November 2015 Mr Hamidović took the case before the European Court of Human Rights. Relying on Article 9 (freedom of religion) and 14 (prohibition of discrimination), he complained in particular that punishing him for contempt of court had been disproportionate. First of all the Court sentenced that Mr Hamidović's case had to be distinguished from cases concerning the wearing of religious symbols and clothing at the workplace, notably by public officials. Public officials, unlike private citizens such as Mr Hamidović, could be put under a duty of discretion, neutrality and impartiality, including a duty not to wear religious symbols and clothing while exercising official authority<sup>207</sup>. The Court had no reason to doubt that Mr Hamidović's refusal was inspired by his sincere religious belief. In those circumstances, the Court ruled that Mr Hamidović's punishment for contempt of court just because his refusal to remove his skullcap was not subsistent. The domestic authorities had exceeded the "room for manoeuvre" accorded to them, so violating Mr Hamidović's fundamental right under Article 9 of the European Convention on Human Rights to manifest his religion; the Court by the way found that there was no need to examine the case under the standpoint of Article 14 of the same Convention.

Finally, the Court sentenced Bosnia and Herzegovina to pay compensation to the applicant in respect of non-pecuniary damage.

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<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

### 3.3 The road so far

Following the judgments already cited, it is clear that from a legal point of view the minorities in Bosnia Herzegovina do not find full and omni-comprehensive protection of their rights. The multiple judgments issued by the European Court on Human Rights highlighted how the Bosnian system born in the aftermath of the Dayton Accords failed to combine a multi-ethnic system with the classic protection of minority rights. The fault of the Bosnian state does not lie in the constitutive system created in Dayton, which was necessary to carry the state out of a bloody conflict and allow the peaceful coexistence of Serbs, Croats and Bosnians, but in the failure of amending the same constitutional text more than twenty years after its draft. Today, many years after the Court ruling, Bosnia and Herzegovina has yet to amend a single sentence of its constitution<sup>208</sup>. European Union-backed reform talks have floundered<sup>209</sup>. And the pressure from the international community has not met the hoped effects, despite this endangers the accession of the country to the European Union. As the “Human Rights Watch” reported: “Today it is the constitution itself that threatens peace in Bosnia”<sup>210</sup>. Certainly, however, the sentence "Sejdic and Finci v. Bosnia and Herzegovina" showed some incongruence in the European Convention' Protocol 12 and in its notion of “reasonable discrimination”. Sejdic and Finci, a 2009 trial” that put 1995-era institutions on the stand, revealed that the European Conventions antidiscrimination clause can hinge on an individual court's subjective reading of historical events<sup>211</sup>.

The ECHR' decision on such case has offered the possibility of a general evaluation on the legislation of the European Court of Human Rights: the Sejdic and Finci case has brought to light some limits in the European jurisprudence about the consociational government models; limits that must necessarily be overcome before a new use of Article 14 and of the Protocol 12<sup>212</sup>. Perhaps in the coming years the Bosnian policy-makers will come to a conclusion to the problem of the treatment of "Others", succeeding on the one hand in granting the members of this group equal access to any public office without any discrimination based on ethnicity, sex or religion; maintaining on the other hand the same balance present today in a so ethno-cratic power-sharing system. Would this solution be in accordance with the requirements of the European Convention of Human Rights – democracy, rule of law and protection of individuals – and moreover how can an ethnicity-based model be fair to all parties?<sup>213</sup>. Taking into account the reasonable discrimination allowed by the ECHR Article 14 and Protocol 12, then the fundamental problem of defining which rate of discrimination is allowed and what is not comes out: to what extent is it possible to talk of “the right limit to

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<sup>208</sup> F.Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, p. 95.

<sup>209</sup> S.Woehrel, *Bosnia: Current Issues and U.S. Policy*, Washington, DC, Congressional Research Service, 2011, p.9.

<sup>210</sup> A. McRae, *Second Class Citizens Discrimination against Roma, Jews, and Other National Minorities in Bosnia and Herzegovina*, New York, Human Rights Watch, 2012, p.16. Available at: [https://www.hrw.org/sites/default/files/reports/bosnia0412ForUpload\\_0\\_0.pdf](https://www.hrw.org/sites/default/files/reports/bosnia0412ForUpload_0_0.pdf) [Accessed 16 August 2018].

<sup>211</sup> F.Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, p. 95.

<sup>212</sup> Ibid. Emphasis added.

<sup>213</sup> Ibid.

equal access” and when of discrimination? The two legal texts in fact don’t exclude discrimination *tout-court*. Instead they assert on a “reasonable proportionality between the means employed and the aim sought to be realized” – thus tepidly allowing discrimination in pursuit of a legitimate aim<sup>214</sup>. The burden is so now on the state, to prove “whether the treatment pursues a legitimate aim”<sup>215</sup>.

The Court itself didn’t want to censure the Bosnia’s ethnic power-sharing model totally, rather, it tacitly acknowledged that the discriminatory electoral model was necessary in 1995, in the post war context<sup>216</sup>: “When the impugned constitutional provisions were put in place there was a very fragile cease-fire in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and ethnic cleansing. The nature of the conflict was such that the approval of the constituent peoples (namely Bosniaks, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of other communities (such as local Roma and Jewish communities) at the peace negotiations...”<sup>217</sup>. The Court indeed affirmed that the ineligibility of candidates not belonging to one of the Constituent peoples for the Presidency or the House of Peoples was completely without any sort of justification. In other words, the Court ruled that enough time has passed to render Dayton-era discrimination unnecessary<sup>218</sup>.

In the end, in Dayton, Bosnia and Herzegovina began a process of transition towards those values of democracy so dear to the European Union, led entirely by the international community, cutting all those who were not belonging to the constituent peoples outside the institutional and political scene. As Decaro and Piazza said: “In order to consolidate democracy, a new Constitution is needed, adopted by all the Bosnian citizens, through a regular constituent process and based on the sovereignty of the people rather than on an international agreement; a Constitution that should correct the weaknesses and the adverse effects of ethnic federalism and of the institutional context designed at Dayton”<sup>219</sup>.

### 3.3.1 *The path toward Europe*

The question about the future of Bosnia is far from closed. On the one hand, the international community, and minority political sectors in Bosnia, push for a re-elaboration of the constitutional pact, which operates a different balance between ethnic and democratic dimension in constitutional design, supported in this by a constitutional jurisprudence now consolidated in the tread with the pronouncement on the constitutive peoples of 2000; on the other hand, the support of the majority of the Bosnian political class continues to be lacking,

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<sup>214</sup> Y. Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Antwerp, Intersentia, 2002, p.164.

<sup>215</sup> L.E. Wakely, *From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdic v. Bosnia* in “North Carolina Journal of International Law and Commercial Regulation”, 2010, vol. 36, issue 1, pp.240-243.

<sup>216</sup> F. Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, p. 97.

<sup>217</sup> Grand Chamber, *Case of Sejdic et Finci v. Bosnia and Herzegovina, Applications n.27996/06, 22-12-2009, Par. 45*.

<sup>218</sup> *Ibid.*, par 49.

<sup>219</sup> C. Decaro Bonella, F. Piazza, *Framing Dayton Agreements: Introduction Remarks*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p 19.

still linked to nationalist categories that are still strong from an electoral point of view<sup>220</sup>.

Following the recent changes and constitutional developments in the entire Balkan area, the regional context offers new opportunities to the Bosnian state: the prospect of European integration has become the cornerstone of the stabilization process of the entire region, redefining especially new perspectives in the management of relationships between the various ethnic groups present in the state. Notwithstanding the efforts made by the EU both with the numerous political initiatives carried out and with the intervention of financial and economic assistance, the process of harmonization between national laws and European law does not seem to work perfectly, as already amply demonstrated above. The European integration therefore appears to be the most attractive prospect for the Bosnian state, taking also in consideration the enormous pressure that the EU exerts on the country. In the last few years a "conditioned" transition has been carried out in Bosnia from the perspective of EU membership<sup>221</sup>. Indeed, Bosnia, following the signing of the Association and Stabilization Agreement in 2005<sup>222</sup>, is currently a potential candidate for entry into the European Union. It is precisely in relation to this transition that minority rights are an important indicator of progress towards the integration into the European Union<sup>223</sup>. The verification of the fulfilment of the conditions set by the European Union takes place through a "conformity examination" based on four verifiable operational elements: democratic principles, human rights and the rule of law, reforms in the sense of the market economy and finally, the respect for minorities and their protection<sup>224</sup>. Despite this, since its independence, Bosnia and Herzegovina has not made much progress on the protection of minority rights, as claimed by the European Commission in its 2018 Progress Report, where it expressed a negative judgment regarding the lack of constitutional reform, with particular reference to the electoral system of the Presidency, which still does not provide any form of representation of minorities<sup>225</sup>.

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<sup>220</sup> F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Padova, CEDAM, 2011, p. 293.

<sup>221</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.209.

<sup>222</sup> The agreement followed Bosnia's accession to the Council of Europe on 24 April 2002.

<sup>223</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.209.

<sup>224</sup> F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Padova, CEDAM, 2011, p. 294.

<sup>225</sup> European Commission, Commission Staff Working Document, *Bosnia and Herzegovina 2018 Progress Report*, 17 April 2018.



## Conclusions

More than twenty years have passed since the signing of the Dayton Agreement. The Treaty certainly had the enormous merit of putting an end to a conflict that upset the whole area once called Yugoslavia. Certainly, the Bosnian state has made considerable progress in recent years in guaranteeing peace and democracy required by the European Union to the candidate states as a possible member. Despite these advancements, Bosnia and Herzegovina still presents numerous inconsistencies with the parameters of the so-called "acquis communautaire".

The cohabitation of the three dominant ethnic groups in the country (Bosnians, but also Serbs and Croats), however, from a mere temporary solution due to the post-war situation, has become an irremovable reality, so that now the differences from the ethnic point of view has been institutionalized into two distinct Entities. This has led to a poor feeling of belonging to the Bosnian state, generating numerous requests for forms of self-government, especially by the Serbian Entity. The division of the country along these ethnic and territorial lines has led to a clear division of the Bosnian population on the basis of belonging to a specific ethnic group. We can mention the example of the city of Mostar, where Bosnian Muslims and Croat Catholics live on both sides of the Neretva river<sup>226</sup>.

Although Bosnia has taken important steps towards the European Union, such as the signing of the Stabilization and Association Agreement or the submission of a formal request for membership in 2016, the EU is still monitoring the Balkan state about the limited level of guarantees in the human rights. The protection of human rights is a subject of increasing importance in all the countries of the region. However, Bosnia has some peculiarities in the matter of the protection of human rights, as already extensively discussed in the course of this work. Within the Bosnian state there is a double kind of discrimination: the first towards citizens belonging to one of the three "constituent peoples" residing in an Entity where one's ethnic group is in the minority (Serbs in the Federation of Bosnia Herzegovina or the Bosniacs and Croats in the Republika Srpska); the second to all those citizens who do not belong to any of the three constituent peoples. The Bosnian Constitutional Court, to solve the issue of discrimination between the three constituent peoples, with a famous ruling<sup>227</sup> elaborated the concept of "collective equality" among these peoples, thus preventing any possible ethnic domination in a given Entity, although in recent years there have been further cases of discrimination in this regard<sup>228</sup>. The more complicated issue is certainly the one concerning minorities not belonging to the three peoples mentioned. The same Preamble of the Bosnian Constitution emphasizes Bosniacs, Croats, and Serbs as 'constituent peoples' of Bosnia and Herzegovina, mentioning only the other "citizens". According to this constitutional provision it is the preamble itself that defines the three ethnic groups as the sole holders of sovereignty in the country. All those who are not belonging to these groups are put in a secondary position, bringing to light a clear discrimination on an ethnic basis. Despite this, the Constitution of Bosnia, in Article II, presents a rather unique solution regarding the protection of human rights. By not including any type of Bill of Rights, the Constitution refers completely to international codes, such as the European Convention on Human Rights and its Protocols, in order to ensure the highest level of human rights (and fundamental freedoms) protection. It is therefore clear that violations of

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<sup>226</sup> See B. Romano, *Bosnia Paese candidato alla U: strada ancora lunga con molti nodi*, Il sole 24 ore, 20 september 2016. Available from <https://www.ilsole24ore.com/art/mondo/2016-09-20/bosnia-paese-candidato-ue-strada-lunga-molti-nodi-174725.shtml?uuid=ADaX35NB>. [Accessed 10 September 2018].

<sup>227</sup> Bosnian Constitutional Court, case U5/98.

<sup>228</sup> Grand Chamber, *Case of Pilav v. Bosnia and Herzegovina*, Application n. 41939/07, 09-6-2016.

human rights in Bosnia are on the one hand "conceded" by the Constitution, while on the other they are forbidden by a document that finds direct applicability in the Constitution itself. For too long Bosnia and Herzegovina has justified itself using the principle of "legitimate justification" for the limitation of democratic rights. The Bosnian government itself has proclaimed that the same discriminatory dispositions (such as the election rules, which does not allow citizens who do not belong to the three constituent peoples to participate in elections for the presidency) are part of the Agreements signed in Dayton: provided their international nature, these agreements can not be changed or removed by the national authorities because they do not have the authority to do so. It seems clear that the resolution of this question must take place by overcoming the Constitution signed in Dayton. It is time for Bosnia Herzegovina to autonomously acquire a constitutional text of its own,. To do this, Bosnia needs a constitutional text that primarily reduces the nationalistic and ethnic divisions that are still present in the country; trends that can certainly be dampened by a possible accession to EU. As Professor Vachudova puts it: "The" road towards Brussels "has a tendency to stimulate the modernization and moderation of nationalist party platforms, and to focus nationalist voters on the future"<sup>229</sup>. The prospect of joining the European Union certainly represents a great chance for the Bosnian people to prosper and remain stable after years of political instability. But the adhesion must certainly pass by a new formulation in terms of protection of human rights for minorities, now too long ignored. This represents a true weakness of Bosnia Herzegovina in the eyes of the international scene.

After numerous rulings by the European Court of Human Rights on the numerous violations committed, the Bosnian state is now under pressure to amend its provisions on the protection of human rights, in order to grant a protection of collective and equal rights no longer tied to ethnic bases. The ethnic requirement must therefore be replaced, thus removing any discrimination based on ethnicity, in favour of a chart of rights that includes the Bosnian people in its entirety and no longer divided in "Constituent Populations" and "Others".

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<sup>229</sup> G.Toal, J. O'Loughlin, D. Djipa, *Bosnia-Herzegovina Ten Years after Dayton: Constitutional Change and Public Opinion* in "Eurasian Geography and Economics", 2006, vol. 47, issue 1, p. 74.

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# Abstract

## Introduction

This work will begin first with a detailed analysis of the Bosnian state in the aftermath of the war that devastated it in the early nineties, following the disintegration of Yugoslavia, until the draft of the new Constitution.

Following the conflict that devastated the country, a peace conference was held in Dayton, Ohio in November 1995. During this conference the so-called "Framework Agreement for Peace in Bosnia and Herzegovina" was signed, consisting of eleven Annexes, of which the fourth became the current constitution of Bosnia and Herzegovina. This constitution therefore represents a sort of *unicum* in the international scene, being a Constitution not approved by any of the constituents of the state in question; an "Internationalized Constitution".

The second chapter will analyse in depth the protection of minorities, defined as the "Others" by the Constitution itself, as they are not part of the three constitutive peoples in Bosnia and Herzegovina. The Constitution's Article II stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable within the state order, thus allowing a broader protection of human rights and fundamental freedoms. Therefore a clear contradiction appears within the Constitution itself: on the one hand it promotes a multi-ethnic state formed by the three "constitutive peoples", avoiding any form of discrimination based on belonging to one of the constitutive peoples, while on the other hand there is continuous discrimination against ethnic minorities, which can not even be elected for the presidency (the tripartite executive of the country) as they are not part of the aforementioned peoples. This theme will be the subject of the third chapter: despite numerous rulings by the European Court of Human Rights have denounced a clear discrimination within the country towards the protection of the fundamental rights of the "Others", nothing has yet been done to solve this, by now, age-old question.

## 1. Bosnian Constitutional asset: From Dayton to the High Representative's role.

Between 1989 and 1990, the decisive events that led to the dissolution of Yugoslavia took place. Canny politicians such as Slobodan Milosevic in Serbia and Franjo Tudjman in Croatia promoted ethnic nationalism; given the threat that nationalism posed to Yugoslav cohesion, ethnicity had been a taboo subject, and it proved to be a potent factor in the disintegration of the state and the onset of civil war<sup>230</sup>. Yugoslavia's death spiral began with the declaration of independence made by Croatia and Slovenia in 1991,

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<sup>230</sup> Central Intelligence Agency (CIA), *Office of Russian and European Analysis, Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990–1995*, Washington, DC, CIA, 2002, p. 44.



followed by Bosnia few months later (March 1992). While Slovenia had no problem in eradicating itself from the Serbian grip after just ten days' conflict with the JNA forces, Bosnia's and Croatia's path to independence had a worse fate. In Bosnia there was the creation of the Serb "Republika Srpska" by the will of the Serb Democratic Party's leader, Radovan Karadzic, and the "Herceg-Bosna" by the nationalist Croats. The drive to carve ethnically defined states out of territories with ethnically mixed populations, and the support that the breakaway nationalist groups received from Milosevic (who controlled the JNA) and Tudjman in Croatia, scuttled any possibility of a peaceful transition to independence for Bosnia and Croatia<sup>231</sup>. The war in Croatia began in summer 1991 and lasted until summer 1995, when Croatian forces defeated the Serbian Krajina republic; in the end, its backers in Belgrade abandoned it<sup>232</sup>. The United Nations repeatedly tried to stop the hostilities with the draft of peace plans that turned out to be unsuccessful; however, the Vance-Owen plan formed the basis for the approval of the General Framework Agreement of 1995<sup>233</sup>. The European Community together with the United Nations established the International Conference on the Former Yugoslavia. The chairmen of this conference, the former British Foreign Secretary Lord David Owen and the former U.S. Secretary of State Cyrus Vance were appointed for the establishment of a lasting cease-fire after the first episodes of ethnic cleansing. According to the plan, Bosnia and Herzegovina would be divided in ten "cantons": two with a clear Croat majority, three each for the Muslims and the Serbs and one with a mixed majority of the three ethnicities; Sarajevo, the tenth and last canton, would be governed through power sharing among the three ethnic groups<sup>234</sup>. The Vance-Owen Plan, as arranged, had relevant strengths and weaknesses. Starting from the positive side, Bosnia would remain untouched as a country and as a multi-ethnic state (even if divided into cantons), and no international borders would need to be modified. On the negative ones, the plan would reward the Serbs with more land than they had had before the war, meaning ethnic cleansing would have been rewarded; the plan would have to be enforced by military troops to oversee land swaps and to maintain the peace; and the central Bosnian government would likely be too weak to rule over the divided entity<sup>235</sup>. The Bosnian Croats and the Bosnian government agreed to the plan but with deep reservations, while the Bosnian Serbs were irate by the plan, which diminished their influence from 70 percent to an approximately 43 percent of Bosnia's soil. Following the Bosnian Serb rejection, the United States began a public campaign for an alternative process to the Vance-Owen Plan: the Vance-Owen Plan was officially dead, and with it the last hopes for a multi-ethnic state in Bosnia<sup>236</sup>. The only possibility of guaranteeing peace was decided through a rigid institutional separation between the various ethnic groups. This was precisely the *leitmotif* of the General Framework

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<sup>231</sup> James C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in L. Miller, *Framing the State in Times of Transition*, Washington, D.C., United States Institute of Peace Press, p. 334.

<sup>232</sup> L. Silber, A. Little, *Yugoslavia: Death of a Nation*, New York, Penguin Books, 2010, p 386.

<sup>233</sup> M. Dicosola, *Stati, nazioni e minoranze: la ex Jugoslavia tra revival etnico e condizionalità europea*, Milano, Giuffrè, 2010, p.188.

<sup>234</sup> M.C. Greenberg, M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 48.

<sup>235</sup> J. Mearsheimer, R. Pape, *The Answer: A Partition Plan for Bosnia in "The New Republic"*, 1993, p. 24.

<sup>236</sup> M.C. Greenberg, M.E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in M.C. Greenberg, J.H. Barton, M.E. McGuinness, *Words Over War: Mediation and Arbitration to Prevent Deadly Conflict.*, Lanham, Md., 2000, p. 49.

Agreement (hereafter GFA). The International Peace Agreement of Dayton of 1995 ensured both the international continuity of Bosnia and Herzegovina as a multi-ethnic state, albeit delineated with a strong division of ethnic groups, and laid the constitutional basis for the reconstruction of the state, despite some perplexities. The Dayton peace agreement consisted of a framework agreement and a series of annexes. The Annex 4 therefore regulates the organization of the State of Bosnia and Herzegovina. The GFA defined the Bosnian state as a federation, divided along ethnic and territorial lines, of two different Entities: the “Republika Srpska”, with a clear Serb majority, plus the autonomous district of Brcko, and the “Federation of Bosnia and Herzegovina”, inhabited mainly by Bosnian Muslims and Croats. The peculiarities in the composition of the population, due both to the tradition of multi-ethnicity of Bosnia and Herzegovina and to the consequences of the war, reflect in the terminology adopted and in the solutions proposed in the Annex 4. The constitutional text in fact does not identify a unitary people as the holder of sovereignty, but indicates three "constituent peoples": the Bosniacs, the Croats and the Serbs. They are joined by "the Others", namely all those who do not belong to any of the three peoples mentioned.

The parliamentary Assembly of Bosnia and Herzegovina is one of the six institutions provided for in the Constitution of BiH. It is composed by two chambers: the House of Representatives and the House of People, which together have to approve the legislation, appearing as a form of perfect bicameralism. The two houses of parliament are also extremely autonomous, as seen in the independent adoption of their internal working rules, which has led many commentators to conclude that, in a functional sense, the state parliament is not a single institution<sup>237</sup>. The House of Representatives of the Parliamentary Assembly represents, according to the Constitution, the interests of all the Bosnian citizens. Forty-two members directly elected compose it: two-thirds elected from the territory of the Federation of Bosnia and Herzegovina, one-third from the Republika Srpska. The other house of the Assembly, the House of People of the Parliamentary Assembly of Bosnia and Herzegovina, is composed by fifteen members, five per each ethnic group. The chamber combines ethnic and territorial representation, but unlike in many federal states, the second chamber is not principally a representation body for the constituent entities of the state, but, better, the representation body for the “constituent peoples”. As for the House of Representatives, the House of Peoples also adopts legislation by simple majority even though in this case the majority has to include one-third of the delegates from both entities. Particular attention must be paid to the specific veto in the House of People, namely the procedure for the protection of the “vital national interests”. The Constitution in fact provides that a proposed legislative act can be declared to be destructive of a “vital national interests” of the relevant constituent people. The lack of a definition of “vital national interest” allows the delegates to an indiscriminate use of such procedure. The tenth annex of the Dayton Agreement attributed to the High Representative (hereafter HR), a body appointed in compliance with the main resolutions of the United Nations Security Council, the task of implementing the civil aspects of the Dayton Agreement and of

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<sup>237</sup> Cit. in N. Ademovic, J. Marko, G. Markovic, *Ustavno pravo Bose i Hercegovine [Constitutional Law of Bosnia and Herzegovina]*. Sarajevo, Konrad-Adenauer-Stiftung, 2012, p.178.

rendering the final interpretation, supported by his office (the “Office of High Representative, hereafter OHR). During the first period of his mandate, the powers of the High Representative were not so incisive as to be able to counter the obstruction exerted by the ethno-nationalist Bosnian parties. For this reason, new functions were given to the HR, known as the "Bonn Powers", giving rise to a massive intrusion of the HR in the legislation of the country, due to the reluctance of the state organs to accept those fundamental compromises in a power-sharing system. Despite its decisive function for the fate of the country, the figure of the HR does not enjoy democratic legitimisation nor does it constitute a jurisdictional authority.

The “European Commission for Democracy through Law”, also known as “Venice Commission” has often issued opinions on the individual decisions of the High Representative. The HR in fact had removed from their office civil servants or politicians over the last decade, as a result of the numerous attempts of obstructing the implementation of the Dayton Agreement. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal; the sanction has to be proportionate to the alleged offence<sup>238</sup>. As a matter of fact, it seems intolerable that judgments directly affecting the rights of people taken by a political body are not submitted to a fair trial by an independent court. This "jury, judge and executioner" condition cannot last forever. The Commission proposed as a solution the creation of a panel composed by international legal experts, which had to give its consent to any decisions of the HR. Despite the proposal, this panel was never created. The circumstances of Bosnian deficient constitution-making have engendered protracted discussions concerning the need for its reform and have inevitably included the proposals for the reform of the Parliamentary Assembly of Bosnia and Herzegovina<sup>239</sup>.

## **2. Protection of minorities and the problem of the “Others” in Bosnia.**

In February 1998, the former Bosniac leader and member of the Presidency Alija Izetbegović, invoked the Constitutional Court’s jurisdiction on Article 1 of the Republika Srpska and the Federation of Bosnia and Herzegovina Constitutions, in which the former declared the Republika Srpska as the state of the Serb people and of all its citizens, the latter designed the Bosniaks and the Croats as constituent peoples. In July 2000, the Court found that the challenged provisions were indeed in violation of the preamble of the Bosnian constitution where the principle of equality of all three constituent peoples throughout the Bosnian territory is asserted<sup>240</sup>. The Court was invested with the question of the constitutionality of those norms of the constitutions regarding the Entities that characterized them as ethnically and homogeneously ordered, preventing the representation of those belonging to the constitutive peoples found in a minority condition in the respective entity<sup>241</sup>. In order to solve the issue, the Court made a clear distinction between "constituent peoples" and minorities. Consequently, the Court elaborated the concept of "collective equality" among the

<sup>238</sup> 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, 2005, p.23.

<sup>239</sup> V. Perry, *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*, London/New York, Routledge, 2015, pp. 15-40.

<sup>240</sup> R. Belloni, *State Building and International Intervention in Bosnia*, London/New York, Routledge, 2007, p.59.

<sup>241</sup> F. Palermo, J. Woelk, “*Diritto costituzionale comparato dei gruppi e delle minoranze*”, Padova, CEDAM, 2011, p. 289.

constituent peoples, creating so the conundrum of the “status” of the minorities in Bosnia and Herzegovina. The Bosnian fundamental law doesn’t contain any sort of Bill of Rights. The main reference in the field of human rights is certainly the Article II. Special attention is reserved to the ECHR in the second paragraph: in fact it lays down that the rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina and have priority over all other law; this means that all the human rights listed in the European Convention and its additional protocols have been transformed into the Bosnian national legislation, and that those rights and freedoms shall prevail in case of conflict with other legislation<sup>242</sup>. This remark granted the priority of the European Convention on Human Rights over the state’s Constitution. More detailed provisions are dedicated to the non-discrimination principle contained in Article II (4), stating that the rights and freedoms provided for in Article II of the Constitution, or in any of the international agreements listed in Annex I to the Constitution, shall be “secured to all persons in Bosnia and Herzegovina 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”<sup>243</sup>.

The State’s Constitution is based on a peculiar form of principle of sovereignty, based in part on international and in part on ethnic elements: by the point of view of the sources of law, it is quite peculiar that the federal Constitution, the 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 aspiration of the three dominant peoples, namely the Bosniacs, the Croats and the Serbs<sup>244</sup>. Nevertheless, even the Entities’ constitutional texts were deeply “internationalized” because of several constitutional amendments adopted in order to fully carry out the Annex 4 and the case law of the Constitutional Court. The Bosnian ethnic federalism seems to be based on the classic theory of consociational power-sharing, however is obvious that the constitutional system, in excluding the Others from the exercise of most of the political rights, reflects only an imperfect or deviated form of consociationalism<sup>245</sup>. In order to fulfil the principle of equality between constituent peoples, various adjustments to the Entities Constitutions’ were made, emphasizing the ethnic and territorial principles inside them according to the principle “three peoples, one State”. Is however incontrovertible that this system, protecting the interests of only the constituent peoples, has produced a quasi-total exclusion of all minorities from the right of political participation<sup>246</sup>. An example of this exclusion can be seen in the composition of the Presidency. Indeed, the sections 1 and 2 of article 8 of the electoral law allow only Bosniacs, Croats and the Serbs of the Republika Srpska to run for

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<sup>242</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.95.

<sup>243</sup> Article II (4) of the Constitution of Bosnia and Herzegovina.

<sup>244</sup> S.Yee, *The New Constitution of Bosnia and Herzegovina* in “European Journal of International Law”, 1996, vol.7, no. 2, pp.176-192. The Constitutions 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.

<sup>245</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p. 98.

<sup>246</sup> 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.

the Presidency<sup>247</sup>. The Constitutional Court, by the way, has never declared such a disposition unconstitutional. The Venice Commission itself has expressed many reservations with respect to the characteristics and the methods of election of the Presidency of the Republic: "in principle, in one state multi-ethnic like Bosnia, it seems legitimate to ensure that a state organ reflects the multi-ethnic character of the society. The problem, however, consists of the ways in which the territorial and ethnic principles are combined. The combination of these principles, in fact, means that the Serbs Federation and the Bosnians and Croats of the Republic Srpska cannot apply in the Entity in which they reside; furthermore, the "others" are always excluded from the Presidency<sup>248</sup>. Only persons belonging to the three constituent peoples (Bosniacs, Croats and Serbs) may run for the Presidency or hold office in the vetoing chamber of the Parliamentary Assembly, and even persons belonging to these three groups may not stand for election for any of these offices if they live in the "wrong" Entity: these constitutional rules have been implemented through the relevant election legislation of Bosnia and Herzegovina. The first article, paragraph one of Annex 3 of the GFA (the so-called Agreement on Elections) specified that: "The Parties shall ensure that conditions exist for the organization of free and fair elections, in particular a politically neutral environment; shall protect and enforce the right to vote in secret without fear or intimidation; shall ensure freedom of expression and of the press; shall allow and encourage freedom of association (including of political parties); and shall ensure freedom of movement."<sup>249</sup>. The Article 3 of the First Protocol to the ECHR states that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature"<sup>250</sup>.

The Venice Commission and the Court of Strasbourg have accepted to leave great room for manoeuvre in the Member States' individual election system, even though the conditions laid down by the Article 3 must be respected as minimum requirements.

Going deeper in the matter of the electoral rules in Bosnia, it could be functional to analyse if these are in accordance with Article 3 of Protocol 1 to the ECHR in "ensure the free expression of the opinion of the people in the choice of the legislature"<sup>251</sup>.

The "equality of treatment of all citizens" stated by the ECHR seems not to be respected. So far it seems that the ethnically-based electoral criteria were inconsistent with the requirements of Article 3 of Protocol 1 together with Article 14. The measures in the BH Constitution, denying the "others" of their voting rights (both active and passive), can be perceived as harsh, or harsher. The ethnic requirements in the BH Constitution may be deemed to pursue a legitimate aim, but that the measures, vis-à-vis the "others" who are subject to exclusion because they do not belong to the "right" ethnic group, are disproportionate; in the end, denying persons the right to participate on equal footing in the vetoing chamber of the state legislature

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<sup>247</sup> Official Gazette n.20/2004.

<sup>248</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representatives*, para. 68.

<sup>249</sup> Article 1 (1) of the Agreement on Elections (Annex 3 to the GFA).

<sup>250</sup> Article 3 of Protocol 1 to the ECHR.

<sup>251</sup> Article 3 of Protocol 1 to the ECHR.

because of their ethnic origin, should be seen as contrary to Article 3 of Protocol 1 to the ECHR in conjunction with Article 14<sup>252</sup>.

### **3. Bosnia vs. the EU: the impact of the ECHR case law on the minorities' rights in Bosnia and Herzegovina.**

The Bosnian constitution is composed by the many obligations derived from international law, especially in the human rights field, probably because the drafters of the Constitution undoubtedly wanted to achieve the automatic application of international treaties, ratified by Bosnia and Herzegovina. The main question is if the Bosnian constitutional system is accepting the commitment deriving from international agreement; in order to answer this question it is necessary to analyse the provisions in the Constitution treating with the conclusion of international accords and the way in which those agreements enter into force (and their effects) in the country's legislation.

Yet the direct applicability of international norms (especially that of the European Convention) has not saved Bosnia and Herzegovina from the lack of representation of national minorities. Despite the multi-ethnic structure of the country, the Constitution defines only the Bosnians, Serbs and Croats as "constituent peoples", while every other ethnic group falls into the category of "Others". The state based on three different dominant ethnic groups that came out in the aftermath of the famous case on constituent peoples has produced a clear differentiation among Bosnian citizens, who now are entitled to more or less rights according to their ethnicity. In the Bosnian case it must also be taken into account that the term minorities does not only identify those who show no affiliation with the three constituent ethnic groups, but also those who, being part of it, are in one of the two Entities where its ethnic group is in a minority position.

After more than twenty years since the draft of the Dayton Agreements and the Annex 4, the electoral system of the state is still questioned by a ruling of the ECHR. On 9th June 2016, the fifth section of the Strasbourg's court, pronouncing on the *Pilav v. Bosnia and Herzegovina* case, issued a verdict against the Bosnian state, adding another chapter to the previous pronounces of *Sejdic and Finci and Zornic v. Bosnia and Herzegovina*. In the *Sejdic and Finci* case, both applicants do not declare affiliation with any of the "constituent peoples" perceiving themselves to be of Roma and Jewish origin, they were unable to be eligible to stand for election to the House of Peoples and the Presidency, as prescribed in the Bosnian Constitution. 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 free election (Article 14 and 3 of Protocol 1 of the European Court of Human Rights) and the right of non-discrimination (Article 1 of Protocol 12 of the ECHR)<sup>253</sup>. The Court, having declared the case admissible, decided to uphold the complaint, arguing that the ethnic discrimination deriving from the implementation of the system of ethnic

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<sup>252</sup> G.Nystuen, *Achieving peace or protecting Human Rights?* in G. Alfredsson, J. Grimheden, B. Ramcharan, A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jacob Th. Möller*, The Hague/Boston/London, The Raoul Wallenberg Institute Human Rights Library, p.171.

<sup>253</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.109.

federalism in BiH was a form of discrimination on the ground of race, whose seriousness requires "special vigilance and a vigorous reaction"<sup>254</sup>. 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<sup>255</sup>. Therefore, the Court pointed out the violation of the principle of non-discrimination prescribed in the Protocol 12 in denying citizens not pertaining to the "Constituent peoples" category the possibility to stand for election to the Presidency or the House of Peoples, together with the violation of Article 14 and the article 3 of the Protocol 1 of the ECHR. It should however be mentioned that the court found no violation of article 13 of the ECHR for any of the applicants, nor of article 3 in relation to Mr Sejdic.

In 2014 a new controversy started following the appeal of Ms Azra Zornic who denounced a violation of her passive right to vote for the House of People and for the Presidency. Ms Zornic declared her belonging to the "Bosnian people" without identifying herself in any of the three Constituent ethnic groups. Pronouncing on the case, the European Court expressed the same sentence as five years before, pointing out a violation of the non-discrimination principle and the right to free elections, as expressed in article 3 of the Protocol 1 and article of the Protocol 12 of the ECHR, adding the violation of article 46 of the ECHR, according to which the Contracting States are obliged to fulfil the Court's decision in all cases in which they were relevant. In fact, there was a real legal obligation to comply with the decisions of the judicial body through the adoption of measures to guarantee the right of the claimant considered violated<sup>256</sup>. A third appeal was brought to the ECHR by a Bosniac resident in RS, Mr Ilijaz Pilav, who was denied the right to run for the position of member of the presidency from RS in the 2006 elections by the Central Election Commission. Following the Commission's article 8, the candidate, a Bosniac citizen resident in the Srpska Republic, didn't have either the right to run for the Presidency or the right to vote another Bosniac for the same office. In this case the applicant was not deprived of the exercise of the voting right, as in the Sedjic and Finci's case. As a matter of fact, it would have been enough for Mr Pilav to change his residence in the Federation of Bosnia and Herzegovina to fully exercise the right to vote. The Court outlined that the residence requirement in the country in which someone was applying was not irreconcilable with the free elections principle and eventual restrictions posed by the Country were not to be considered arbitrary, therefore in violation of Article 3 Protocol 1 of the ECHR.

The multiple judgments issued by the European Court on Human Rights highlighted how the Bosnian system born in the aftermath of the Dayton Accords failed to combine a multi-ethnic system with the classic protection of minority rights. And the pressure from the international community has not met the hoped effects, despite this endangers the accession of the country to the European Union. The ECHR' decision on

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<sup>254</sup> 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 Sejdic and Finci v. Bosnia and Herzegovina, par. 30.

<sup>255</sup> M. Dicosola, *Ethnic federalism and political rights of the Others in Bosnia and Herzegovina*, in L. Benedizione, V.R. Scotti (ed.), *Twenty Years after Dayton. The Constitutional Transition of Bosnia Herzegovina*, Rome, LUISS University Press, p.110.

<sup>256</sup> Art.46, Par. 1 and 2 of the European Convention on Human Rights.

the Sejdic and Finci case has offered the possibility of a general evaluation on the legislation of the European Court of Human Rights: the Sejdic and Finci case has brought to light some limits in the European jurisprudence about the consociational government models; limits that must necessarily be overcome before a new use of Article 14 and of the Protocol 12<sup>257</sup>. Perhaps in the coming years the Bosnian policy-makers will come to a conclusion to the problem of the treatment of "Others", succeeding on the one hand in granting the members of this group equal access to any public office without any discrimination based on ethnicity, sex or religion; maintaining on the other hand the same balance present today in a so ethno-cratic power-sharing system.

## **Conclusions**

The Bosnian state has made considerable progress in recent years in guaranteeing peace and democracy required by the European Union to the candidate states as a possible member. Despite these advancements, Bosnia and Herzegovina still presents numerous inconsistencies with the parameters of the so-called "acquis communautaire". The cohabitation of the three dominant ethnic groups in the country (Bosnians, but also Serbs and Croats), however, from a mere temporary solution due to the post-war situation, has become an irremovable reality. Although Bosnia has taken important steps towards the European Union, the EU is still monitoring the Balkan state about the limited level of guarantees in the human rights. The more complicated issue is certainly the one concerning minorities not belonging to the three constituent people. By not including any type of Bill of Rights, the Constitution refers completely to international codes, such as the European Convention on Human Rights and its Protocols, in order to ensure the highest level of human rights (and fundamental freedoms) protection. For too long Bosnia and Herzegovina has justified itself using the principle of "legitimate justification" for the limitation of democratic rights. The Bosnian government itself has proclaimed that the same discriminatory dispositions are part of the Agreements signed in Dayton: provided their international nature, these agreements can not be changed or removed by the national authorities because they do not have the authority to do so. It seems clear that the resolution of this question must take place by overcoming the Constitution signed in Dayton. After numerous rulings by the European Court of Human Rights on the numerous violations committed, the Bosnian state is now under pressure to amend its provisions on the protection of human rights, in order to grant a protection of collective and equal rights no longer tied to ethnic bases.

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<sup>257</sup> F. Vehabovic, *Impact of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in I. Motoc, I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge, Cambridge University Press, p. 95. Emphasis added.