Asim Mujki, Zarije Seizović, Dino Abazović

Country Specific Report: Bosnia and Herzegovina
The Role of Human and Minority Rights in the Process of Reconstruction and Reconciliation for State and Nation-Building: Bosnia and Herzegovina
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The authors were affiliated to the University of Sarajevo (Bosnia and Herzegovina), one of the partners in this project.

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Asim Mujkić
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MIRICO: Human and Minority Rights in the Life Cycle of Ethnic Conflicts
# TABLE OF CONTENTS

1. Introduction ........................................................................................................ 2

2. Human and Minority Rights in Reconstruction, Reconciliation and State/Nation Building ................................................................. 5
   
   2.1. Key Players (Ex-Patriots) ................................................................. 5
       2.1.1. Office of the High Representative ........................................... 5
       2.1.2. United Nations Mission to Bosnia and Herzegovina........... 6
       2.1.3. Organization for Security and Cooperation in Europe ...... 7
       2.1.4. European Union .................................................................. 9

   2.2. Main Processes And Developments ...................................................... 10
       2.2.1. Discriminatory Concept of “Constituent Peoples” in the Constitution of BiH ................................................................. 10
       2.2.2. “Vital National Interest” in the Constitution of BiH as a Drawback to Effective Decision-Making ............................ 10
       2.2.3. The Concept of “Constituent Peoples” in the Decisions of the Constitutional Court of BiH .................................................. 13

   2.3. Concepts ............................................................................................. 14
       2.3.1. Bosnia and Herzegovina Between Ethnic and Ethical Equality .............................................................................. 15
       2.3.2. Between Individual and Collective Rights .............................. 18
       2.3.3. The Test of Justice and Troubles with Legitimacy ............. 20

3. A Bit More on the Role of the International Community ............ 22

4. Conclusion ................................................................................................. 24

References......................................................................................................... 27
1. Introduction

Prior to the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) and its declaration of independence in 1992, the Republic of Bosnia and Herzegovina was one of the six republics of the SFRY. It was characterized by the highly diverse ethnic structure of its population (three peoples - Muslims, Serbs and Croats none of whom constitute an absolute majority, as well as 15 national minorities). The war from 1992 until 1995 included “ethnic cleansing” on a massive scale and the formation of ethnically homogenous territories. This ultimately led to a great number of crimes, including crimes against humanity, war crimes, crimes against a civilian population and genocide, all of which severely influenced the composition of Bosnia and Herzegovina’s (hereinafter BiH) society. According to the General Framework Agreement for Peace in Bosnia and Herzegovina, regularly referred to as the Dayton Peace Agreement, the current structure of BiH is a state comprised of two Entities (the Federation of Bosnia and Herzegovina and the Republika Srpska), each of which has very high level of autonomy. The Federation of BiH comprises 10 cantons. The town of Brcko, the subject of international arbitration, now has the status of a district and is still under the direct supervision of a special international envoy.

Due to all these issues, BiH has been in desperate need of a transformation of its constitutional and legal framework from the arrangement drawn up in the GFAP.

All in all, over the past twelve years, BiH as constructed by Dayton has revealed itself to be an ineffectual creation based on the constant re-generation of crisis that serves as a basis for the political power of ethno-nationalist elites. We suggest that the practice of discrimination of the citizens rests at the very core of this situation. The ethical-political analysis that is to follow will suggest that from a minority perspective there are few alternatives to be found. Such alternatives stem from the reflection of the tension between collective and individual rights. These tensions arise from interpretations of history, key political documents, and practices that follow from such interpretations based on the primacy of the ‘collective’. From the perspective of legal philosophy, this tension should be viewed as tensions between different interpretations of the concept of self-determination: self-determination of the people, on one side, and self-determination of the citizen on the other. In other words the juxtaposition is between external and internal self-determinations viewed from the context of justice.

For this initial phase, it should be enough to view external self-determination in BiH as a conception that presupposes the full realization of this collective right to its final stage: territoriality, classical nation-state, and internationally recognized sovereignty. On the other side, internal self-determination presupposes “the possibility for citizens to participate in the choice of government and the formulation of their own policies; in other words, the democratic system”. The concept of self-determination in current public and political debates in BiH appears in many forms: consociationalism, ethno-territorial (con-)federalism, and civic republicanism that, at least roughly speaking, reflect the intentions of the ethno-political elites among BiH’s constituent peoples — Croat, Serb, and Bosniak.

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1 Negotiated in Dayton, Ohio, USA, and signed in Paris on 14 December 1995, the GFAP is most often referred as political compromise that brings the war to an end.
2 Federation of Bosnia and Herzegovina was created by Washington Agreement in April 1994 in order to stop the war between Bosniaks and Croats.
These current forms of ethno-political homogenization have become articulated political programs over the last few years. Consociationalism is the key idea of the BiH Croat ethno-political elite, or at least of a powerful fraction within Croat political elite (Croat Democratic Union 1990 – HDZ 1990). The conception of ethno-territorial federalism has been the main conception of Milorad Dodik’s Union of Independent Socialist Democrats (SNSD) for a year or so, as basic current political authority among Bosnian Serbs. On the other hand, civic republicanism, or “civic-option”, or “state-nation-option” is associated with the leadership of the Party for BiH (SzBiH). All of these forms in political practice homogenize their respective “populus” and are based on some concept of collective self-determination, on the primacy of collective rights, or on the primacy of collectively shared values.

In the text to follow it will be shown that neither of these collectivist options should serve as a means of democratic consolidation in BiH. Even worse, all three of them, which has become evident within BiH political context, only consolidate authoritarian, ethnically based orders within BiH, which the ethno-political elites hold in a peculiar balance of crisis and fear. In the end, what all three ethno-political orders manage to produce is a hegemonic concept of their respective ethnicities.

It is not the goal of this paper to challenge the legality of the present political order in any way. Rather, this paper aims to consider aspects of its legitimacy, that is, reinterpret the BiH political context from the aspect of justice:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.4

BiH’s tri-partite constitution has reached a critical junction. By placing a premium on collective rights, it can continue towards “triplication”, resulting in the formation of three national states within BiH. Alternatively, it can place greater emphasis on individual rights, and reconsidering its minority perspective, it can initiate a process of democratization and a final transition into a modern democratic state. This debate between collective and individual rights becomes very important for the current debate over constitutional changes in BiH. There is reason to fear that the current political figures, whom the International Community views as key figures in the debate about constitutional changes and who are exponents of “collectivist solutions”, will be doom justice to a marginal position. They base the whole debate on their own narrow self-interest.

On the other hand, without expanding the constitutional debate, it can be argued that:

[The reasons behind removing constitutional review from elected representatives and entrusting its future to such bodies that are insulated from partisan politics is exactly that dependence on electoral will is not favourable for the unbiased enforcement of constitutional principles.5]

One has to ask why every approach to solving BiH’s political and legal situation in practice and in principle ignores or excludes the possibility of finding a just solution for all citizens of BiH? At first glance, it is always opportune to “accept the facts of reality”, which imply that there are cultural differences among BiH peoples, and that any order that would not pay serious attention to them, that

5 Janos Kis, Constitutional Democracy, (CEU Press, Budapest, 2003), 111.
would practice a certain degree of blindness towards them, is doomed to failure. But what if we restate the “obvious” claim in the following way by posing the following question: what if we are blinded by cultural differences to such a degree that the main entrepreneurship of ethno-political elites is the very production of them?

Usually, the chain of inference has the following pattern — there are distinct, indigenous cultures with their own languages, histories, and certain territorial compactness. If these groups inhabit a common territory, the legal framework of such a multicultural state should reflect these differences if it seeks to be democratic and just political community. When it comes to BiH, what if chain of inference has been reversed: in the event of minor differences — common language, common history, common artistic culture — to be more precise in the event of ethnic differences that follow almost exclusively religious lines, the ethno-political elites utilize the existing legal order, reinforced by occasional crises, to produce cultural differences through various discriminatory practices such as segregated education, or by sensationalist journalism controlled by ethno-political tycoons.

The everyday lives of BiH citizens are overwhelmed by “ethnic hints”; their worldview is channelled in ethnic terms. Ethnic issues enter their homes, and persistently follow each and every communication between members of the BiH population, even the most benign. One can conclude that the ethno-political order in BiH is based on the political production and maintenance of the entire network of differences. There is no room for a citizen in such a network, especially not for his or her rights and freedoms. This is true to such devastating dimensions that the lack of individual freedoms and rights almost cannot even be posed as a problem. Somewhere along the way towards ethno-political supremacy a citizen has been lost, and this is no longer even a problem any more. Yet if something does not impose itself as a problem that does not mean that there is no problem. In other words, “the political authority of a group, however, does not justify the oppression of individuals within the group.”

In the light of the current constitutional debates, all key players to the debates should be warned that:

[N]ationalism, whether writ large or small, does not justify absolute authority or violation of basic rights of individuals. Conversely, to limit the power of nations does not deny national groups self-governing authority. It denies them absolute authority, which no nation should have over individuals.

Indeed it can be speculated that such an imposition of basic rights could be counterproductive. In fact authors such as Kymlicka warn us that “in the end, liberal institutions can only really work if liberal beliefs have been internalized by the members of the self-governing society, be it an independent country or a national minority,” and “that group representation is not inherently illiberal or undemocratic, and indeed is consistent with many features of our existing systems of representation.”

But what if group representation in BiH is proven illiberal and undemocratic. In other words, what if group representation in BiH lacks basic

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7 Ibid. 54.
8 Ibid.
10 Ibid. 134.
legitimacy? What if current the ethno-political set-up, with its practices of fear, discrimination during the post-conflict period, and with its practices of the illegal use of force and genocide during war, in fact continually prevents the internalization of liberal beliefs? Should one go on to conclude, in a rather “orientalist” manner that a certain group of people is not fit for liberal democracy?

2. Human and Minority Rights in Reconstruction, Reconciliation and State/Nation Building

2.1. Key Players (ex-patriots)

2.1.1. Office of the High Representative

The Office of the High Representative (OHR), as an ad hoc international institution responsible for overseeing the implementation of civilian aspects of the Peace Accords that ended the war in BiH, was created under the GFAP. The High Representative, who recently also acts as the European Union Special Representative (EUSR) in BiH, together with the people and institutions of BiH as well as with the international community makes efforts to ensure that BiH becomes a non-violent and viable democratic country for all its citizens on its way toward Euro-Atlantic integration. The OHR is preparing to close. The EU has given similar mandate to EUSR, which will remain in the country after the OHR’s closure.11

BiH passed the period in which HR chaired a number of joint bodies (e.g. it brought together representatives of the ex-warring parties, conducted and supervised elections process in September 1996, etc.). After the initial phase, one of the OHR’s key tasks was to ensure that state institutions function effectively and in a responsible manner. These were difficult tasks given the above-mentioned political crisis in the country.

Although the OHR also focused on promoting the rule of law, as a crucial precondition for progress in all the other areas of reform, in the initial phase it was almost impossible to successfully take care of political processes in BiH. “[H]owever, the HR was a “toothless” tiger against the obstruction of the ethno-nationalist parties and politicians in the institutions of BiH due to the competencies given to him under Annex 10 of the GFAP. 12” Therefore the PIC Conference in Bonn (December 1997) granted powers to the OHR to remove from office public officials who acted counter to the DPA, and to impose laws as he saw fit if legislative bodies of different levels failed to do so.13 Nonetheless, “[d]espite a full or semi-

11 The Steering Board of the Peace Implementation Council (the international body guiding the peace process in BiH), concluded that the OHR should be closed on 30 June 2008. In the overruling period, the OHR is to work aiming its transition to the point when BiH would be mature to take full responsibility for its own affairs. It appears to be not easy to believe in the light of recent political and/or institutional power in BiH (Resignation of the Head of Council of Ministers, failure of police reform, overall frustration with current political leaders, etc.)


13 His almost unlimited powers HR proved when he removed from office President of the Republika Srpska Mr. Nikola Poplašen and Mayor of Bugojno Mr. Dževad Mlačo (see Zarije Seizović, „Ovlasti i uloga Ureda Visokog predstavnika za BiH (OHR) u implementaciji civilnih aspekata Daytonskog mirovnog sporazuma”, Pravna misao, Federalno Ministarstvo Pravde, Sarajev No. 9-12, (1988), 92-94, at 93, foot-note 7.
protectorate of the OHR, a self-sustainable economy and functioning state independent of external help do not yet exist.”

The High Representative’s Bonn powers - the “strong arm” of the international community - were significantly weakened during 2006, to the point that they are probably no longer seable for any but the most benign, lowest common denominator decisions - and certainly not tough interventions like forcing through laws, and removing or banning politicians.

The European Union’s General Affairs Council (GAC) appointed the HR the EU’s Special Representative (EUSR) in BiH (February 2007). The HR/EUSR continues to oversee the entire assortment of activities in the field of the rule of law, and provides advice to the EU Secretary General/High Representative and the Commission itself.

2.1.2. United Nations Mission to Bosnia and Herzegovina

Formed in 1995, the United Nations Mission to Bosnia and Herzegovina (UNMIBH) carried out a wide range of tasks relating to law enforcement and police reform in BiH. These included humanitarian relief and refugees, de-mining, human rights protection, elections and infrastructure and economic rehabilitation.

In the course of its mandate under GFAP and within the UNMIBH, the International Police Task Forces’ (IPTF) main tasks included: monitoring, observing and inspecting law enforcement activities and facilities, including associated judicial organizations, structures and proceedings; advising law enforcement personnel and forces; training law enforcement personnel; facilitating, within the IPTF mission of assistance, the parties’ law enforcement activities; assessing threats to public order and advising on the capability of law enforcement agencies to deal with such threats; advising government authorities in BiH on the organization of effective civilian law enforcement agencies; assisting by accompanying the parties’ law enforcement personnel as they carry out their duties.

UNMIBH was led by the Special Representative of the Secretary-General (SRSG), while the IPTF was led by the IPTF Police Commissioner. UNMIBH worked closely with the OHR as well as with the NATO-led multinational Implementation Force (IFOR), authorized by the United Nations Security Council (UNSC) to help ensure compliance with the military provisions of the Peace Settlement. It also continued cooperation with its successor Stabilization Force (SFOR).

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16 Since the London Conference (December 1995), the PIC held the ministerial level conferences five times reviewing progress and defining the goals of peace implementation for the (up)coming period: Florence (June 1996); London (December 1996); Bonn (December 1997); Madrid (December 1998); Brussels (May 2000).
17 Following its “successful” mandate it was terminated in February 2002 by UN Security Council Resolution 1423 (2002). The EUPM took over from UNMIBH from 1 January 2003.
18 S/RES/1035 (1995) on Establishment of a UN civilian police force to be known as the International Police Task Force (IPTF) and a UN civilian office for the implementation of the Peace Agreement for BiH, (21 December 1995).
19 This was the World’s precedent: a police forces were supervising work of the judicial authorities!
The UNSC gave UNMIBH additional responsibilities relating to the investigation of allegations of human rights abuses by police officers or other law enforcement officials of the various BiH authorities.\(^\text{20}\)

UNSC decided that in the framework of the current mandate, UNMIBH should be entrusted with the following additional tasks: the creation of specialized IPTF training units to address key public security issues, such as refugee returns; organized crime, drugs, corruption and terrorism; public security crisis management (including crowd control); training in the detection of financial crime and smuggling; and cooperation with the Council of Europe and OSCE, under the coordination of the High Representative, in a programme of judicial and legal reforms, including assessment and monitoring of the court system, development and training of legal professionals and restructuring of institutions within the judicial system.\(^\text{21}\)

The work of UNMIBH was broadened to include investigating or assisting with investigations into human rights abuses by law enforcement personnel.\(^\text{22}\) The main tasks of the Human Rights Office were to investigate human rights violations by law enforcement agents; design remedial measures to correct such violations, and monitor and ensure the implementation of corrective measures. Additionally, the Office made efforts to ensure that only those local police who met minimum eligibility requirements exercised police powers in BiH.

The UNMIBH was also involved in a judicial reform programme titled Judicial System Assessment Program (JSAP).\(^\text{23}\) The Programme was created in order to monitor and assess the BiH judicial system, and was part of a comprehensive programme of legal reform under the coordination of the OHR.\(^\text{24}\) UNMIBH also established the Criminal Justice Advisory Unit to reinforce cooperation between the police and the criminal justice system. The unit monitored high-profile court cases, liaised between police and the judiciary, and advised the IPTF on legal matters (procedural and substantive).

Eventually, UNMIBH also developed a Civil Affairs Unit that provided expert advice and assistance to all UNMIBH units on policy development, strategic analysis and programme implementation. The Public Affairs Office supported the UNMIBH through the development, management and implementation of a thorough public information strategy.

2.1.3. Organization for Security and Cooperation in Europe

GFAP assigned the OSCE Mission to Bosnia and Herzegovina (OSCE BiH) a mandate for elections, human rights and regional military stabilization, as well as democracy-building.\(^\text{25}\) These remain the key areas of the Mission’s work. A more complex view reveals that the long-term objective of the OSCE was (is) to provide effective support to the establishment of independent state institutions. Such political architecture was designed to create self-motivated and efficient governance at all levels. This would provide an institutional guarantee for human rights protection and the promotion of the rule of law. The OSCE BiH operates

\(^\text{20}\) UNSC Resolution 1088 (1996).
\(^\text{21}\) UNSC Resolution 1144 (1997).
\(^\text{22}\) UNSC Resolution 1088 (1996).
\(^\text{23}\) Established by the UNSC Resolution 1184 (1998).
\(^\text{24}\) At the end of 2000, this responsibility was transferred to the Independent Judicial Commission (IJC) within the OHR. On the IJC see more in Zarije Seizović, “Judicial Reform in Bosnia and Herzegovina - Legal Framework for the Reform in the Federation of BiH” in Bosnia and Herzegovina: Concord of Diversity - Compilation of Legal Essays, (Studio Flaš, Zenica, 2005), 110-132.
\(^\text{25}\) Annex 3, Elections.
through several departments: Education, Elections, Democratization, Human Rights and Regional Stabilization. Within education reform, the OSCE is co-ordinating the IC’s joint efforts to assist BiH authorities in implementing the education reform strategy adopted in November 2002. The ultimate idea is to bring BiH’s education system in line with the EU standards, by fostering changes to legislation, curriculum, teaching methods, funding and management structures.

The Democratization Department’s goal is to encourage the development of democracy by establishing professional and transparent political practices and by supporting the growth of democratic government institutions that discharge their responsibilities effectively and in an open and transparent manner. This requires that citizens become actively involved in the life of their country and are able to influence government policy development. This is done through a number of projects, which the OSCE’s field offices implement. The Parliamentary Support Project (PSP) provides technical support and training to strengthen the work of members and staff in the Parliamentary Assembly of BiH. The Department became involved in Public Administration Reform (PAR) by launching the Municipal Infrastructure and Finance Implementation (MIFI) programme in 1999. This was followed by the Cantonal Administration Project (CAP) in 2001.

The OSCE Human Rights Department promotes and protects the human rights of all citizens, preventing and solving human rights violations throughout the country, and building awareness of human rights and the rule of law. The OSCE HR also facilitates returns, which means ensuring that returnees come back to a safe and secure environment, without facing discrimination in terms of employment, access to services, utilities and pensions, while their children have access to education. The OSCE HR supports legal and judicial reform and the rule of law by monitoring trials and other activities. The HR Department worked in close cooperation with indigenous human rights institutions, including the Ombudsman for BiH, the Entity Ombudsmen, the Human Rights Commission of the BiH Constitutional Court and the BiH Ministry of Human Rights and Refugees.26

The overall aim of the OSCE’s Regional Security Co-operation Department27 was to create conditions so that military forces did not represent a viable means of resolving internal conflict. It was done by implementing and verifying confidence-building agreements adopted by BiH, Croatia and Serbia and Montenegro under the auspices of the OSCE in 1996. The 1996 agreements establish more openness, transparency and co-operation between the armed forces of the two Entities, and

26 Human Rights Chamber (HRC) was a sui generis HR institution shaped up after the European Court to cure massive violations of human rights occurred in BiH during the war. The Chamber has the mandate to consider alleged or apparent violations of human rights as provided in the ECHR and the Protocols thereto, and alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international agreements listed in the Appendix to Annex 6. Particular priority is given to allegations of especially severe or systematic violations, as well as those founded on alleged discrimination on prohibited grounds. According to the Agreement Pursuant to Article XIV of Annex 6 to the GFAP entered into by the Parties on 22 and 25 September 2003, the HRC’s mandate expired on 31 December 2003. This Agreement established the Human Rights Commission to operate between 1 January 2004 and 31 December 2004 within the Constitutional Court of Bosnia and Herzegovina. The Human Rights Commission had jurisdiction to consider pending cases received by the Human Rights Chamber on or before 31 December 2003. Ever since 1 January 2004, new cases alleging human rights violations are to be decided by the Constitutional Court.

impose arms limitations on the BiH Entities, Croatia and Serbia and Montenegro.\textsuperscript{28} The Department was involved in the adoption of a new state-level law on defence, the appointment of the country’s first State-level Minister of Defence in April 2004, as well as the restructuring of the entity armed forces into the Armed Forces of BiH.\textsuperscript{29}

The Elections Department was to organise, conduct and supervise elections as well as establish a Permanent Election Commission.\textsuperscript{30}

\subsection*{2.1.4. European Union}

The delegation of the European Commission to BiH (EC Delegation) was given its mandate in 1996. At the time, its primary goal was to manage only two areas of assistance: reconstruction and humanitarian aid. Later, the EC Delegation main task became providing assistance to BiH’s integration processes by offering advice on reforms to be undertaken and/or in the pipe-line, as well as monitoring progress and expressing its opinion to the European Council. The European Commission manages significant EU financial assistance to the country, with which the EU supports democratic transformation, institution-building, economic development and the overall reconstruction of the country.

The EC Delegation is helping to consolidate the peace process and foster inter-entity cooperation and ethnic reconciliation. It facilitates the return of refugees and displaced persons. It also assists in establishing functioning institutions and democracy, and in promoting the rule of law and respect for human rights. In addition to providing support, it lays the foundations for sustainable economic development and growth and makes efforts to bring BiH closer to EU standards and principles.

Operation “Althea”, i.e. the EU Force’s engagement in BiH, denoted the beginning of a new period in BiH’s recovery. Practically speaking, it marked country’s transition from the Dayton to the Brussels era. The EU Force work together with the EUSR (HR), the EUPM, the EUMM, and the European Commission’s Delegation to BiH on programmes supporting the Stabilisation and Association process and the OHR Mission’s Implementation Plan. The EU Force’s own work actually supports BiH’s progress towards EU integration. It has full authority to fulfil the role specified in Annexes 1A and 2 of the GFAP, and it contributes to the creation of a safe and secure environment in the entire country. It is interesting that the date for the end for the EU force deployment was not specified. Rather, the Council of the EU reviewed its mandate over the course of 2005, in light of security and political developments achieved in the country.

The European Union Police Mission (EUPM)\textsuperscript{31} makes up part of a general approach to the rule of law in line with the general objectives provided in Annex

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\textsuperscript{28} Following significant progress, in June 2004, the “Agreement on Confidence-and Security-Building Measures in Bosnia and Herzegovina” (Article II of Dayton’s Annex 1-B), was suspended in September 2004.

\textsuperscript{29} “Although it is politically popular in both Washington and Brussels, the success of the new security set-up cannot be taken for granted. Should NATO and the EU go ahead as planned, they must address the real security needs of both Bosnia and the international community. EUFOR’s arrival must not leave a vacuum in vital areas. Many shady local actors are waiting for their chance on stage. The international community’s post-war achievements in Bosnia could be lost if the EU and NATO apply a misguided security policy.”, International Crisis Group, EUFOR-Ia: Changing Bosnia’s Security Arrangements Europe Briefing, (Sarajevo/Brussels, 29 June 2004), 9.

\textsuperscript{30} Under Annex 3 of the GFAP.

\textsuperscript{31} EUPM is, actually, the first civilian crisis management operation under the common European Security and Defence Policy.
11 of the GFAP). These objectives specify establishing sustainable police forces in BiH that conform to EU and international best practices. EUPM monitors and inspects the higher level of local police management. Its mission in BiH was scheduled close at the end of 2005.

2.2. Main Processes and Developments

2.2.1. Discriminatory concept of “Constituent peoples” in the Constitution of BiH

The very notion of constitution developed from the Latin word constitutio, meaning “organization”, “system”, “frame”, etc. Accordingly, the Latin word constitutus means “made” or “created”. The term “Constituent” might be roughly translated into local languages (B/C/S) as “creative” or “the one that creates/makes/does”. “Constituent peoples” therefore are those (peoples) who make up that state’s social quintessence.

Despite its [GFAP’s] outstanding ‘ceremonial achievements’ in the field of human rights protection of individuals, the entire political structure of BiH is based on the principle of exclusive ethnic representation of the three ‘constituent peoples’ which, de facto, constitutes a disadvantage to the functioning of State and Entity institutions, whenever minority members of a constituent people feel like obstructing decision-making processes.32

The Constitution of BiH affirms the absolute right of all citizens to basic “Human Rights and Fundamental Freedoms”. Article II obliges the institutions of the state and its two Entities to “ensure the highest level of internationally recognised human rights” and freedom from any discrimination. Bosnian institutions had certainly not succeeded in delivering these fundamental entitlements provided for under the Constitution.33

The Venice Commission expressed its opinion on “constituent peoples” vis-à-vis individual and collective rights as following: “[T]here is [...] a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II. 3 and 4 of the Constitution of Bosnia and Herzegovina”34 (emphasis added). The purpose of the ECHR is also to secure individual rather than group rights.35

2.2.2. “Vital national interest” in the Constitution of BiH as a drawback to effective decision-making

The right to invoke a vital national interest as a means of stopping legislation in its tracks is already incorporated in the structures of the state and the Federation of Bosnia and Herzegovina (Federation of BiH). In particular, this is done through the

second chambers of their parliament, known in both cases as the House of Peoples. But what constitutes a “vital national interest” has not been defined precisely. It can be a list of standards, such as to be adequately represented in legislative, executive and judicial bodies, or to have equal rights in the decision-making process. It could also involve issues related to education, cultural or religious identity and tradition, language, national symbols and flags, cultural heritage, etc. Nevertheless, those standards have yet to be defined. There are a number of issues that can be placed under each of these standards. The challenge is to compose a list of issues that is not so broad as to give a small number of deputies “licence to kill off” any and all legislation they disapprove of, but leaves scope for the national caucuses to prevent legislation that perpetuates ethnically based discrimination.

The European human rights standards, including the non-discrimination clause (on any grounds) are human rights instruments that have been binding for judicial and administrative authorities in the Federation of BiH ever since the Federation Constitution entered into force (March 1994). GFAP had incorporated directly into the Constitution of BiH rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) as well as other 15 international human rights instruments. The Constitution of BiH gives these rights and freedoms “priority over all other (national) laws”. Article 14 of the Convention guarantees that:

[T]he enjoyment of the rights and freedoms set forth in ... (the) Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion [...] national or social origin, association with national minority..." (Emphasis added).

The Convention provides protection to individuals, not to social, religious, or ethnic groups as such. Unfortunately, as already stated above, the entire political structure of BiH is based on the principle of exclusive ethnic representation of the three “constituent peoples”, at the expense of individual rights.

The Preamble of the Constitution of BiH defines Bosniacs, Croats and Serbs as “constituent peoples” of BiH, while “others” and “citizens” are merely mentioned. It is evident that individual rights are given to three ethnic groups, and not to citizens. The Entities’ Constitutions ensured that this discriminatory concept was applied throughout the country: Bosniacs and Croats were not considered to be

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37 In its opinion on the Constitutional Court decision, the Venice Commission specifically argued that any solution that opened the possibility for the exercise of such a liberum veto was not in the spirit of democratic compromise. See International Crisis Group, Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina, (ICG Balkans Report No. 128, Sarajevo/Brussels, 16 April 2002), 16, foot-note 45.

38 The Constitution of the Republika Srpska (Constitution of the RS) was not up-to-date at a time as it was not imposed by the international community. It was adopted by the National Assembly of the Republika Srpska (RSNA).

39 It is known as hierarchy of norms (legal documents) which, if looked at from “above”, create system that begins with international documents, followed by national Constitution and Laws, Decrees, etc, and ends up with “individual” legal documents (such as, for example, judgments). Pursuant to Article II (2) of the BiH Constitution, as said above, the Convention takes priority over national law. Their provisions have quality of direct applicability and are considered to be an integral part of national law. Consequently, all provisions of national law that are not in harmony with the Convention are not legal and are not to be applied. N.B. The term priority (translated as prioritet) is an imprecise translation of English word priority, which is not common to bh. Legal environment and tradition - the term „priority“, that has different meaning in local languages, should have been translated as primat.
constituent peoples in the Republika Srpska (RS), and Serbs were similarly left without that status in the Federation. All three peoples were constituent nations only at the level of the State of BiH. As a result, these rights unfortunately hardly existed at all, since state prerogatives, such as police and the administration of justice, were handed over to the two Entities. All “others” who did not belong to any of the privileged, constitutionally recognized ethnic groups, were “lost along the road”. Denying the status of constituent peoples to Bosniaks and Croats in the RS and/or to Serbs in the Federation of BiH is both in discord with the Constitution of BiH and has no historical justification. It is well known that BiH had always been a multiethnic society *sui generis* and paradigm of “unity and tolerance”. The principle of “constituent peoples” is reinforced in many other provisions of BiH’s Constitution, whereas one cannot come across even one official reference to “others” or “citizens”.

Hence it is clear that members of any of the three distinguishing ethnic groups are protected only as members of collective based on ethnic/national characteristics. This concept leaves no place for all those who do not “fit” into the group of either Bosniacs, Croats or Serbs, or who would simply prefer not to belong to any of those groups.

Given this situation, it can be noted that concept of “constituent peoples” inherently contains the exclusive connotation of “non-constituent”. Thus this concept per se constitutes discriminatory treatment against those who are “non-constituent”, and/or others, citizens. As is well known, the Convention guarantees the same catalogue of human rights to all (citizens). This is simply negated by concept of “constituent peoples”. It was therefore necessary to restore the human rights protection system in BiH politically and constitutionally through a systematic review of all provisions of the Constitution of BiH as well as of the Entity/Cantonal Constitutions. This review aimed to affirm elements that were civil as opposed to national/ethnic. It is indispensable to emphasize that the decision to harmonize legislation with European standards was not at the State of BiH’s discretion; rather it was its international obligation. Apparently, discussing a civil state in which the concept of constituent people forms central point of the political system, is a *contradictio in adjecto*. The protection of “national interest” in BiH should reflect the interest of all its citizens, not of a particular nation (more precisely: ethnic group). The very idea necessitates the establishment of a “Bosnian-Herzegovinian supra-national identity”, which clearly does not yet exist.

The alternative of “ethnic” versus “civic” is not only a problem of institutional structures and elites, but also of the population at large. There is almost no overarching “Bosnian” identity and loyalty to the state of BiH, not only because of the ethnic cleavages. Paradoxically enough, almost only the foreigners in the institutions of BiH (The Central Bank, the Constitutional Court, the Human Rights Chamber) developed a “Bosnian” identity.

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40 The situation changed by virtue of the above-mentioned Constitutional Court decision.  
41 The composition of all state-level institutions (such as the Parliamentary Assembly, the Presidency, the Council of Ministers, etc.) is set up on the “one state - two entities - three nations” *modus operandi*. N.B. *Stricto sensu*, there are no “joint institutions” (translated as *zajedničke institucije*). It is, again, an imprecise translation as there are state institutions (*državni organi*).  
43 See more in International Crisis Group, *European vs. BiH Human Rights Standards*, (Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14 April 2000).  
It seems that we are a long way away from making the shift from nation/ethnic affiliations to an affiliation with the state.

2.2.3. The concept of “constituent peoples” in the Decisions of the Constitutional Court of BiH

The issue of a selective approach to the concept of constituent peoples was resolved de iure by the Decision of the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH)\(^45\). This is estimated to be a historical breakthrough that underlines and re-affirms traditional BiH “togetherness” and “inseparability”.

The term “re-affirms” is being used? The three BiH peoples were already constituent in all parts of BiH, so this Decision merely has a declaratory effect. It confirms and makes public a situation that already existed even before the aforementioned Decision was taken. From the legal perspective, the Federation Constitution and the Constitution of BiH were shaped as result of real-political and practical compromises made using this selective approach to the concept of constituent peoples. These Constitutions inaugurated an official state in which the autochthonous BiH citizens were granted, in some parts of their (own) country, the degrading and legally imprecise status of “national minority”, “others”, “non-constituent”. It was an excellent legal path towards the later process of BiH’s political-territorial decomposition.

In July 2000, the Constitutional Court of BiH made a ruling that imposed a duty upon the Federation of BiH and the RS to amend their constitutions in order to ensure full equality of the “constituent peoples” throughout the state territory. Dayton’s discriminatory concept of one state, two entities, and three constituent peoples was politically unsteady. The decision put an end to the idea of recognising Bosnian Croats’ rights to establish their own small quasi-state, as it required both Entities to be really and efficiently multinational. Adversaries of the single Bosnian state announced the decision to oppose the DPA. Supporters of the single state idea considered the decision a breakthrough that institutionalized improvements to the existing Dayton political architecture, which they believed needed to undergo constitutional changes.

Nevertheless, even though the Decision marked a significant step forward in recognizing the equal constitutional position of all constituent peoples in every part of territory of the state, it did nothing to improve the position of the non-constituent population of BiH. With or without the Decision, the constitutional position of the non-constituent peoples remained the same: they were still non-constituent throughout the country.

It is clear that neither individually nor collectively understood “national affiliation” to the BiH political actuality can be exclusively situated in any particular part of the BiH territory. Bosniakhood, Croatianhood and Serbianhood cannot be limited to one or just some parts of BiH’s territory. Presumption of being Bosniak, Croat or Serb does not automatically presume association with a specific part of BiH territory where members of that particular ethnicity (used to) live.

The ethnic, cultural, traditional, habitual and other components of BiH’s complex social milieu are composed of a sophisticated net of the Bosnian concord of diversity. Thus using the territorial principle as a base to form an opinion on someone’s ethnic affiliation has neither a theoretical nor a practical rationalization. Any idea and/or theory of “ethno-cantonisation” or any other “ethno-regionalisation”, whether coming from “outside” or “inside”, is absolutely incompatible with the multiethnic concept of BiH’s society and entails a latent

\(^45\) Constitutional Court of Bosnia and Herzegovina, Partial Decision, Case No U 5/98 III, July 1 2000 (Official Gazette of BiH No. 23/00).
threat to the survival of the State of BiH. Cantonization, of course, might relate to the internal institutional structure of the multi-ethnic state, on the condition that it is a civilized state in which no form of diversity can form the grounds for any human rights violations whatsoever. On the other hand, cantonisation and/or regionalisation based on natural and geographical distinctiveness, as model of “de-entitetization” of BiH seems to be the reasonable and logical constitutional solution for BiH’s internal state organization.

[I]t was and remains impossible on the basis of the Dayton Constitution to find an alternative between ethnically structured consociational democracy and an ethnically indifferent democratic state based on the rule of law in the form of a strict separation of state, law and ethnicity.46

2.3. Concepts

Paraphrasing Roger Friedland, we suggest that ethno-politics puts forward a particular ontology of power. This ontology is revealed and affirmed through its politicized practices and the central object of its political concern. These are practices that locate collective solidarity in ethnic affiliation tied to particular religions, as opposed to contractual and consensual relations between individual citizens.47

The political narrative and practice intended to justify this ethnically-based social construct is ethno-politics.

The word ethnos implies that there exists a pre-political category of people.48 A “people” is defined in terms of its blood origin, its heritage, and its traditions; it is used to refer to “an imagined community of membership and filiations.” The basis of ethnicity is at best described as kinship. In contrast, politics implies public activities performed by citizens who utilize a network of institutions and procedures. Politics presupposes demos, the people “as collective subject of representation, decision making, and rights.”50 Very crudely put, ethno-politics, at least in the case of BiH, is a political set-up in which a person’s citizenship is predetermined by his or her kinship, by his or her belonging to this or that group of imagined common origin. The subversive mechanism of ethno-politics consists in presenting ethnos as demos. Ethnos pretends to be demos. It constitutes, to paraphrase Balibar, an imaginary community of membership and filiations that is the collective subject of representation, decision-making, and rights. The functions of representation and decision-making, and the establishment of the legal framework, are permeated by discrimination on the basis of kinship. For example, Article 5 of the GFAP given Constitution of BiH provides that “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak,

47 Friedland’s original definition is: “Religious nationalism offers a particular ontology of power, an ontology revealed and affirmed through its politicized practices and the central object of its political concern, practices that locate collective solidarity in religious faith shared by embodied families, not in contract and consent enacted by abstract individual citizens.”, in Roger Friedland, “Religious Nationalism and the Problem of Collective Representation” 27 Annual Review of Sociology, (2001) 125-52, at 126.
48 Ethnic: “designating or of a population subgroup having a common cultural heritage, as distinguished by customs, characteristics, language, common history, etc.” Third College Edition of Webster’s New World Dictionary of American English.
49 Etjen Balibar, Mi, gradjani Evrope, (Beogradski krug, Beograd, 2003) 8.
50 Ibid., 8.
one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.” This provision is extremely discriminatory. In particular, it is anti-Semitic, in that it prevents a Jewish citizen of Bosnia from becoming president. 51

In Bosnian case, a more accurate description of an ethnic group, or a “constituent people” could perhaps suggest that an ethnic group represents a social construct based on religious and political background that ensures politically and culturally opportune feelings of belongingness only upon encountering the other and the different. Such a construction undermines the freedoms of a BiH citizen by ascribing a narrow socially and politically structured role to him or her. 52

This construction is characterized by phrases, metaphors and discursive patterns that take pre-political form only upon first glance because they are expressed in terms of blood origin, predestination by birth, etc. Indeed, they appear to be very effective tools of political domination.

2.3.1. Bosnia and Herzegovina between Ethnic and Ethical Equality

The twelve years spent under Dayton were sufficient to establish an entire, specific ethno-political discourse consisting of phrases, terms, metaphors, thought-patterns in politics, science and culture, and even in everyday life. The BiH population then uses these to express its judgments, assessments, interpretations and analyses of the social situation, and even articulates its own self-understanding. These models of judgment-making and understanding have become ossified, and are well their way to becoming a self-contained doctrine with its own “untouchable postulates.” Now one could almost describe this as a process of forming an entire “Dayton ideology” network. This network establishes its own power structures and dictates economic and cultural relations by imposing itself as a natural given, as “natural kinds.” Worse still, these prevailing normative patterns pervade every sphere of society and have begun significantly to disrupt the “normal pulse” of the plurality of interactions in society by making them pointless.

Twelve years of Dayton and a full seventeen years of ethno-nationalist party rule have brought negative consequences for this country. This justifies the need to investigate alternative spaces for meaning and self-understanding. In this regard, debates on amending the GFAP could go two ways: The priority of the people’s right to self-determination: This model of essentialist multiculturalism focuses on consolidating the position of an ethno-cultural community as the holder of fundamental rights. This option is the legacy of almost two decades of the rule of ethno-politics, which were focused on constructing the state on the basis of ethnic identity. The essentialist multicultural approach is the premise for introducing a consociational regime in BiH, of the type being promoted of late. However, the premise is questionable from the outset for a number of reasons. Above all, a consociational regime in BiH means “the uncritical adoption of the categories of ethno-political practice” as “categories of social analysis” that are already established facts. Nevertheless, it is difficult to say explicitly in BiH that there are three different, compartmentalized cultures, as substances, as things-in-the-world, even though the entire nexus of ethno-political power is engaged in producing them. A superficial glance at the building blocks of culture — language, history, art, tradition, confession — is sufficient to call into question the rigid ethno-political view that there are different cultures.

51 Asim Mujkić: „We, the Citizens of Ethnopolis“, 14(1) Constellations 2007, 112-128 at 117.
52 Within present ethno-political framework a citizen of BiH is politically relevant only as a member of this or that constituent group.
The Dayton constitutional framework is already largely consociational — in the sense “in which communities, not individuals, are bearers of many important rights”.53 This framework is designed to produce culturally compartmentalized entities, and is applied here to ethnicities in the process of production, of hyper-political emergence. It is designed for “not-yet-entities” and is therefore structured to facilitate this kind of evolution of difference. It blocks the development of a civic, democratic mindset and initiatives by encouraging ethno-political identity reductionism. We are now to accept the products of this reductionism — individual practices, taken in isolation from the broader social context and hypostasized, “markers of difference,” and “we-coagulation points” — as given, as substantial, as “things-in-the-world,” as new points of commensuration of “our” compartmentalized, particular collective being-in-the-world. The consociational elements of the Dayton constitution, imposed at a time when a common culture existed, are now used as the legitimate, institutional warrants for different, walled-off, crystallized cultural hybrids. The initial prerequisite for resorting to a consociational constitutional arrangement — the existence of separate cultural collectives in BiH — is in fact to be the outcome of this arrangement. As Gray notes, let us not forget that “consociational institutions may still be useful as ways in which collective identities can be embodied”,54 where the entire illogical roots of the rough-and-ready mechanism of ethnic group-making lie hidden. The major drawback to consociational arrangements, indeed, “is that they are often unstable. . .  They do not survive for long unless they are underwritten by an external power.”55 In Gray’s view, the regrettable result of this “mediatory” endeavour in a conflict that arose as an anaemic compromise with “attempts to establish ethnically homogeneous nation-states [that] have occasioned gross violations of rudimentary human rights”56 looks like this:

The regimes that have been established in Bosnia and Kosovo are hybrids - part liberal, part consociational and partly involving de facto partitions. . . . They do not depend on consent. They are protectorates, whose security is guaranteed by the powers which established them. . . . What we are witnessing in the Balkans at the turn of the twenty-first century may prove to be the reinvention of the institution of empire as a remedy for the evils that flow from the attempt to construct ethnic nation-states. Yet it is far from clear that the imperial institutions that are under construction can recreate multi-ethnic societies.57

One may conclude that “we do not need common values in order to live together in peace. We need common institutions in which many forms of life can coexist.”58

What we need, then, is a constitutional and institutional arrangement that will dare to move beyond the ethno-political mechanism of the production of difference. On one hand, we regard the alternative of essentialist multiculturalism as the legalization of the genocidal actions carried out during the war. On the other, despite the presence of democratic procedures, we regard it as a profoundly non-democratic form, in line with the views of Jürgen Habermas, for whom “a legal system is legitimate when it guarantees the autonomy of all citizens to the same degree. Citizens are autonomous only if those whom the law concerns can see themselves as the authors of that law”. 59

54 Ibid., 129.
55 Ibid.
56 Ibid.
57 Ibid., 130.
58 Ibid., 6.
59 Jürgen Habermas, “Borbe za priznanje u demokratskoj pravnoj drzavi” u Ejmi Gutman (ed.) Multikulutralizam, (Centar za multikulturalnost, Novi Sad, 2003), 93-122, at 103.
It is superfluous to note here that it is impossible for a collective—particularly if it regards itself as primordial, existential, substantial—to consider itself the author of a law. We are thus left without the subject of law, or else, in line with proto-fascist and organicist theories, we shall have to ascribe to the “national collective” individual characteristics such as will and desire (as is to be seen in the ethno-political motto “the will of the people!”).

In this regard, the legitimacy of the GFAP tailored constitution is already questionable, not de jure, but de facto, given its systematic marginalization of the rights and fundamental freedoms of our citizens. A consociational regime would be completely illegitimate, since it would undermine the very structure of the law, and eradicate all differences between law and politics. Rather than essentialist multiculturalism, the society of BiH as a whole, as a late modern plural society:

[...]Is not the consensus on values that communitarians imagine they find in past communities. It is common institutions within which conflicts of interests and values [the ethnic and confessional values are but one among many] can be negotiated. For us, having a life in common cannot mean living in a society unified by common values. It means having common institutions through which the conflicts of rival values can be mediated.60

The priority of the citizens’ right to self-determination: This “priority” calls for the position of the citizen, the individual, as the bearer of rights and fundamental freedoms to be strengthened. The only plausible alternative to a consociational arrangement is liberal democracy. To take this idea literally would mean believing that to give priority to the citizen’s right to self-determination, politically speaking, is to express one’s respect for the dignity of all human beings. As Amy Gutmann observes, failure to acknowledge this right is always based, to a greater or lesser degree, on “the assumption of the fundamental inferiority of others” 61 and as such is invariably “hate speech.” In the political life of a community that is so constituted, one is faced with a chronic “problem of disrespect and the absence of constructive communication between the spokesmen of ethnic, religious and racial groups - and that is a problem that too often leads to violence”.62

Morality in a community of ethnic equality is “external,” since it does not derive from the choices made by free individuals. Given that it is external, its point of reference is the manifestation of the mechanisms of ethnic distinctiveness, which, in our case, are almost solely of a religious nature. By contrast to such concepts:

[M]ulticultural societies and communities that stand for freedom and equality for all are based on mutual respect for reasonable intellectual, political and cultural differences. Mutual respect calls for widespread will and the ability to articulate disagreement, to defend our views to those with whom we disagree, to differentiate between valid and invalid respect and to be open to changing our minds when we meet well-founded criticism.63

Although it is true that individuals do not create themselves in a vacuum, acquiring one’s own identity through dialogue with others may be problematic if it takes place in a repressive context, a context of de-socialization and educational indoctrination. What kind of identity will individuals acquire if they are simply interlocutors, reduced to a position of inequality by their “name” or some other “marker” of their alterity? Or what if they simply have to be interlocutors — if they are unable of their own free will to choose their own interlocutors and subjects of discussion? A culture without free individuals, without recognized individuals in

60 John Gray, op. cit. note 53, 121.
61 Amy Gutmann, op. cit. note 6, 31.
62 Ibid., 29.
63 Ibid., 31.
general, is a chimera, a “fossil” ready for archiving and conservation. The same is true of the identity of an ethnic group. In this regard, let us consider the entire problem from another angle, with a complete “paradigm shift” from “ethnic to ethic equality”, and “the right of the nation to self-determination to the right of the citizen to self-definition”.

One could begin by agreeing with Nerzuk Ćurak, who writes that “political liberalism in BiH is possible as a relatively successful political project if we liberate the public arena from ethnic oppression,” though he cannot see any forces that might sign up to such a project. This would entail making a better and wiser choice, for the sake of the well-being of every citizen of BiH, by replacing the constituent nature of its peoples with key elements of constitutive liberalism: the rule of law, separation of powers, institutional redesign, especially in terms of election law on the national level and mechanisms of control, and the protection of individual rights. But how is one to free the public arena of ethnic repression? How can one reject the ethno-political matrix as the ultimate reality? How are we to get rid of what Ćurak calls the “longing for non-freedom” of the citizens of BiH?

The crucial question for the future of BiH is whether the citizens of BiH have the right not to be discriminated against on ethnic principles in public and political life. Does the citizen have the right to break out of the imposed context of “ethnic equality” and demand “ethic equality,” in which everyone would be equal with every other citizen of BiH in human dignity and freedom of individual choice concerning matters of public and private interest, matters important for his or her individual self-development and group affiliation? The right of the individual, or even of the majority within a given community, to put their religious or ethnic affiliation in first place, as the starting point of their personal identity, does not entail the right of such a view of self-understanding to be imposed as the only legitimate one, particularly in the political sense.

Consequently, we need to debate whether it is right to protect the ethnic groups (constituent peoples) of BiH constitutionally as collectives only after we consider whether country’s Constitution and its laws properly protect individual rights and freedoms and the dignity of the citizen. Regrettably, the category of the citizen is essentially absent from BiH’s Constitution. The calculation of quotas and proportionality, the delicate mechanisms of collective protection without prior protection of the individual citizen’s “constituent nature” is undemocratic, since “the cause of democracy is the moral cause of dignity and the worth of the individual.”

It is high time we understood that every constitutional protection of collectives in BiH must be preceded by the constitutional protection of the citizen, and not the other way around, as is now enshrined in the BiH Constitution. A liberal democratic re-composition of the constitutional order, a paradigm shift towards the individual, would weaken the ethno-political matrix and destroy its narrative of the collective good, leaving it as one of many alternative voices forming the general hubbub of society. The public arena so democratized would pave the way for various forms of individual and group self-understanding to emerge, without the possibility of the ‘right to pass’ of any of such forms.

2.3.2. Between Individual and Collective Rights

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64 Nerzuk Curak, *Dejtonski nacionalizam*, (Baybook, Sarajevo, 2003), 173.
65 Ibid., 173.
Under what circumstances is a collective entitled to ‘group rights? Most human rights doctrines are based on the assumption that “to say that someone has a right is to acknowledge her autonomy as a moral agent capable of making choices.”

Given that collective rights are derived from individual rights, it should be concluded that any collective right, any right to belong to this or that group in general sense, presupposes the background of individual autonomy as a moral agent. Yet, the ethno-political conception starts from a very different principle: based on the assumed substantiality of a group, some form of ‘moral autonomy’ is now attached to this collective. Ethno-politics constructs the ethnic collective as a ‘moral agent’ that chooses its members (by the very fact of birth), instead being chosen by them.

Should the priority of collective rights then be accepted under any circumstances? The answer is yes, however only if their violation is reasonably justified. Yet in this case, it should be noted that when one refers to collective rights, there are no authoritative collectives to which protective measures should be applied. This means that ethnic collective rights should go ‘hand in hand’ with those of e.g. sexual minorities, as fair competitors for protection. There is no viable epistemological justification for discrimination between collectives, just like there is no such justification for discrimination between individuals. In fact should there be such a justification, it could then be reasonably concluded that a situation of apartheid is in place – which, is indeed the case in BiH.

Therefore, when certain collective rights of some social group are violated, it is justified to demand protection of this group in the form of affirmative actions to rehabilitate the original (for example, after the ethnic cleansing, genocide, or institutional racism) or just (just according to criteria applied in patterns of public justification of beliefs) situation, or balance. The demand should be reasonably justified, and it should have a temporal projection in mind (in the sense that the measures of affirmative action are temporary, and last until the previous situation is restored). Any other understanding of collective rights in the context of ethno-politics showed ‘absolutizing’ tendencies and tendencies of political instrumentalization that presuppose the violation of both the individual rights and the collective rights of others. The liberal-democratic position suggests that authorities should be entitled to establish special measures to promote the same equality between social groups that exists among individual citizens as members of those collectives. Such measures presuppose special plans and programs of protection that will be used to improve, for example, ethnic representation in branches of government, and to reduce or totally eradicate certain discriminatory practices in all societal areas such as politics, education, culture, economy etc.

Given this situation, political representatives who claim to speak on behalf of ethnic groups should not be the only ones to participate in public deliberation and dialogue about such protective measures. On the contrary, deliberation and public debate should reflect societal plurality. The members of the ‘discriminated collective’ should be allowed to speak about the violations and discrimination to which they have been exposed. Privileging only the ‘people’s representatives’ to speak about ethnic discrimination leads to what Seyla Benhabib calls ‘group essentialism’, which shares the hegemonic assumption that all members of a (ethnic) group necessarily share exactly the same world view.

What is worse, the privileged conception of the ‘equality of peoples’ in BiH, as prescribed by the Dayton Constitution and as implemented in everyday ethno-political practice in BiH, leads to the flagrant inequality of these peoples. It leads to flagrant discrimination of both the collective and individual rights of the citizens.

of BiH. This occurs because in reality, the imperative of constituent people’s equality has nothing to do with the equality of peoples itself. If it had, then the Bosniak and Croat vice-presidents of the Republika Srpska could have taken the office of President in the event of the President’s death.

We believe that a consequent refocus on individual rights and freedoms, democratic practices and the rule of law could help to emancipate the public sphere from the ethno-political framework. It could help citizens, as members of many different social groups, to acquire one more comprehensive, less politically manipulated understanding of their collective identities in their fuller sense. This strategy might help re-contextualize the existing narratives of national identities into a wider Bosnian context, rendering them an integral part of a wider plurality of the group-narratives of the entire country.

2.3.3. The Test of Justice and Troubles with Legitimacy

In terms of justice, one could infer that BiH is faced with a choice between the reorganization of its political community towards providing either ‘justice to its peoples’ or ‘justice to its citizens’. This is a false dichotomy because ‘collective’ rights are derived from ‘individual’ rights. Both aspects are vital to creating a complete picture, and a test of justice for the Bosnian political community will be to incorporate both accounts.

In light of the current political and academic debates in BiH, let us accentuate the issue of so called ‘ethno-cultural justice,’ which is based on prioritizing collective rights. Generally, the task of ethno-cultural justice would be to ensure the equality of peoples and citizens through the promotion of democratic and symmetric principles accompanied by the best available framework for the protection and affirmation of individual rights and freedoms. Unfortunately, the experience of BiH’s ethno-political practice leads us to the conclusion that the present collectivist symmetric representation neither protects nor affirms individual rights and freedoms; indeed it contradicts them.

The ethnic construction of democracy contradicts the very essence of democracy: ethnos eliminates sovereign citizen as bearer of democracy. […] Nationalists think that constitutional and legal protection of ethnic collectivity automatically presupposes both protection of the other collective affiliations of people, and protection of their individual rights and freedoms of individuals. Only then when it is transformed in an absolute regulative and self-regulative principle of the state and civil society, the ethnic becomes something that is principally against the principle of sovereign citizen.68

In a philosophical sense we think it is plausible to claim that every development of an absolute regulatory and self-regulatory principle of the state — either in terms of individuality or ethnicity — opens up the road to authoritarian political practice. Let us return to the idea of the ‘absolutization’ of ethnicity, that is, to the issue of ethno-cultural justice, for a moment. What does it mean to be just to the three peoples of BiH? Ideally, the fulfilment of ethno-cultural justice for the constituent peoples of BiH would consist of creating their respective national states. Justice, however, is moral category, and the fulfilment of ethno-cultural justice in the form of the national state manifests itself as basic injustice. The national state is formed on the basis of the illegal use of force and genocide during the war and on the basis of various discriminatory practices put in place after the war. This post-war phase, as a final phase of the realization of the “equality of the peoples” or

ethnic equality in BiH is essentially immoral. Lumping together the worst war criminal and the greatest humanist as members of the same collective in the context of ethnic equality negate their internal differences. In such a context — as clearly shown in the post-war years in BiH — the worst criminal can become the biggest “national” hero, while the biggest humanist can become the greatest “national” traitor. Boris Buden suggests that:

[I]t is not the ignorance about crimes what prevents catharsis of a nation, but concordance with them. All of them who wanted to know about crimes could have known, and knew. In Croatia it was shown, that nation as such does not want to deliver their criminals to the Hague Court; nation as such believes that it can go on with it unproblematically, their own crimes do not appear as a problem.69

This describes the foundations of the projects of mini national states within BiH and in the Balkans in general. It is the greatest black hole in their narratives of legitimacy. The realization of a “national project” in BiH presupposes a life with “our own crimes”, crimes committed in our name. The nation as such believes that it can move forward with its own criminals and that they do not represent any problem to the nation. In that case, the nation is the problem.70

Thus from the perspective of ethno-cultural justice, the famous ruling of the Constitutional Court of BiH on the constituency of constituent peoples within the entire Bosnian territory, for example, is highly unjust because it further delays the process of fully creating the nation-state. It delays completion of the process of ethnic territorialization, etc. Furthermore, in order to create a multiethnic, ethno-culturally just community it is above all necessary to have a few “particular” or distinct societies. But is that really the case in BiH?

The advocates of prioritizing collective rights actually start from the position that the existence of three distinct nations-cultures is a “factual given”. That project is to be reached through the perpetuation of discriminatory practices (a generation or two need to be socialized according to the new values of distinctiveness), the further violation of human rights, and the further strengthening of the economic and political power of the new ethno-political elites. The question is: why is something that has yet to be realized taken as substantive? Territory conquered in war does not yet entail the presence of a complete, particular culture. Is the worst nightmare of the ethno-nationalist not the fact that members of all constituent peoples and others speak a language that everyone can understand, that we all share the same history, and that citizens of this country regularly enter into a network of various social interactions that even GFAP cannot follow?

Let us conclude that to be just to the peoples of BiH in the ethno-political context means in effect to be just to their elites who intend to ensure their absolute authority. In fact every reference to ethno-cultural justice in this context implies a reference to the survival of these small tyrannies of the ‘people’s’ oligarchies. On the contrary, justice for all the peoples of BiH is existentially tied to justice for all of the citizens of BiH — literally all of them! This justice could be called a democratic, functional social state of equal peoples and citizens, yet it cannot be reached by the prioritization of the collective to the detriment of individual rights.

70 Ibid.
3. A Bit More on the Role of the International Community

As it turns out, in post-Dayton BiH the strategies promoted by the international players (particularly the OHR) to foster institutional building by imposing legal preconditions from the outside, yielded modest results.

The law has been imposed against the will of the population in the belief that the legal framework is the basis on which post-conflict reconstruction and nation-building can be shaped and guided. The experience of Bosnia would suggest that this legal idealism undermines the political process, the standing of the law and the transition to self-government.\(^\text{71}\)

A general outline of the periods of international participation in BiH can be presented through the prism of the developments that occurred within the “institution of institutions”, the Office of the High Representative, from 1995 to 2000, and from 2000 until today.

As for the “external” factor, i.e. the decision-makers within the international community, primarily the Peace Implementation Council, one of the key features remains “but with little clear policy direction or end point for the ad hoc international administration.”\(^\text{72}\)

The second period was and remains the period of alignment towards the European Union, and thus the realignment of forces towards “Brussels” as the focus of all decision-making.

In early 2002, the Council of the European Union expressed its willingness to appoint the High Representative in BiH as EU Special Representative to BiH. During the same year, the EU Police Mission (EUPM) succeeded the UN Police Mission in BiH (IPTF). Two years later, the EU introduced a military operation (Operation Althea) replacing all the remaining international military stabilisation forces (SFOR) with EUFOR.

It should be underscored that all these key processes took place with no formal consultations with those whom they impacted most, i.e. the BiH public. Formal bodies of the state did, however, \textit{volens nolens}, send formal requests to the European Union (e.g. inviting the EU to assume responsibility for the mission succeeding the UN IPTF). Nevertheless, just as in Dayton, except for the narrow circle of the establishment, there were no representatives of the general public. The issue of relations between civil society and the so-called international community will be considered below.

Still, most analysts would agree that one of the key moments in the international engagement was the 1997 conference of the Peace Implementation Council held in Bonn, Germany. Although the conclusions of the Bonn conference gave a totally new character to the powers of the OHR (and later the EU Special Representative to BiH) and solidified considerably the position and implementation powers of the “ruler-who-is-not-a-ruler” (OHR), the Dayton “logic” continued to generate paradoxes. Thus, for example, “the flexibility of external mechanisms of regulation has been a central factor in ‘sucking-out’ the capacity of BiH’s political institutions and undermining the legitimacy of the Bosnian state.”\(^\text{73}\)

Although the Bonn powers of the High Representative served to accelerate the peace agreement implementation process, the High Representative was also


\(^{72}\) David Chandler, “From Dayton to Europe”, 12(3) International Peacekeeping (2005), 336-349, at 337.

\(^{73}\) Ibid.
called upon to use his ultimate powers to remove from office any local official, including directly elected politicians, whom the Office held to be obstructing the peace process.

After 1997 the High Representative was equipped with additional powers, which transformed him from a facilitator to an integral institution of the current system of government in Bosnia. Equipped with both legislative and executive powers, the High Representative (HR) has emerged as the most influential institution in Bosnia—and the only one not formally based on power-sharing.74

To date, the High Representative has removed or suspended more than one hundred persons, including a member of the state Presidency, mayors, governors, deputy ministers, ministers and prime ministers at all levels, one entity president, one head of an entity intelligence service, judges, civil servants, company managers, etc. Except for the short-term effects, and excluding the specific individual disqualifications, this has generated few or no systemic changes. Increasing local officials’ dependence on the international community and its proponents of power was merely a by-product of such interventionism. It did not nurture official’s accountability towards those who had originally elected them75, the population of BiH.

Therefore, in many cases David Chandler has unfortunately been proven right when he stated that:

Dayton’s flexibility has been the key factor enabling external powers to permanently postpone any transition to Bosnian ‘ownership’. The only transition which has taken place has been from the ad hoc policy-ownership of self-selected members of the Peace Implementation Council (PIC) to direct regulatory control under the aegis of the European Union (EU). This transition has been brought about through informal and unaccountable mechanisms of external regulation, and has been imposed ‘from above’ without any debate or genuine involvement of the people or elected representatives of BiH.76

Still, the results achieved could be interpreted as positive signs of moderate optimism. This can primarily be seen through an analysis of issues such as the integration of entity armies into a single armed force, the establishment of a state border service, however good or bad, and the partially successful judicial reform. All other achievements, starting from the structure and size of the Council of Ministers of BiH, reforms of the security sector, and the establishment of a public broadcasting system, depend on the (preliminary) issue of reforming the BiH Constitution and guaranteeing their implementation.

All the previous interventions into the constitutional system tried to influence a change. This led to the Constitutional Court of BiH issuing its already

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75 Even Wolfgang Petritsch (High Representative from 1999 to 2002) indicated in several public addresses the “syndrome of dependency” of local officials, developing negatively due to increased frequency of utilisation of the wide powers of the High Representative. Petritsch has also said the following: “Aware of the powers of the High Representative to impose laws and remove obstructive officials, both [...] Bosnian intellectuals and international observers [...] demanded that I extensively use such powers [...] ‘You have to impose the right solutions’, I heard over and over again. But to my mind ‘imposing’ democracy and civil society seemed a contradiction in terms. However, during the first one-and-a-half years of my mandate I indeed had to act as the most interventionist High Representative ever.” Cited from Sumantra Bose, “The Bosnian State a Decade after Dayton”, 12(3) International Peacekeeping, (2005), 322-335, at 322.
76 David Chandler, op.cit. note 72, 337.
mentioned Decision in 2000. Nevertheless, all the subsequent amendments to entity Constitutions in 2002 (following the so-called “Mrakovica-Sarajevo Agreement”), further expanded the ‘ethnification’ of the political system and shrunk the free space left to the individual for non-ethnic identification. Until the adoption of the “Decision on Constituent Status”, the principal belief was that the equality of groups was a replacement for the non-discrimination of individuals.

Neither in terms of norms, nor in terms of practice in application and interpretation of some of its provisions the current constitutional system of BiH does not provide possibilities for further societal development of BiH. There is evident presence of insurmountable shortcomings in the text of the BiH Constitution, but also of the problem of application of constitutional principles. Still, three essential problems may be identified: (1) lack of understanding of basic constitutional principles and its adequate valuation; (2) lack of political will to accept common constitutional values; (3) wrong practice in applying constitutional provisions. Additional damage was caused by the (deliberate?) wrong interpretation of the already limited possibilities provided by the text itself, totally ignoring the clearly legitimate interest of any state to ensure normal functioning of its institutional system, respecting the principles of transparency of action and government as a service for the citizens.77

Therefore, in addition to reforms of the constitutional system, or rather, to very specific changes to the BiH Constitution, critical areas of action include reforms of the education system and of the police, as well as the arrest of indicted war criminals (first of all, Radovan Karadžić and Ratko Mladić). This these actions must be undertaken together with local actors, which would open a separate issue of new partnerships that would respect both the duties and the responsibilities of the parties.

4. Conclusion

The proper question is: what, at least in very general sense, would sketches of a just BiH political community look like? Perhaps the model of “original position” by John Rawls could be helpful. The “original position” experiment involves placing citizens in the hypothetical situation of a “veil of ignorance” in order for them to choose the best principles of justice for their political community. The veil of ignorance enriches reflections on the first principles of justice by constraining

participants in the experiment to a set of restrictions. These restrictions lead citizens to ignore knowledge about everything that makes them who they were in “real” life. This means that they are obliged to ignore their class status, talents, age, sex, religious world views, and conceptions of good life. From such a position, Rawls suggests that it is possible to reach an agreement about the basic principles of just and egalitarian society. In the experiment, participants will adopt a strategy of the least possible risk, since none of them could possibly know who they are to become in the “new community”, with what inclinations will they be born, in what surroundings they will live, etc.

According to Rawls, the principles of agreement between free and rational individuals, in other words the principles of justice, will be the following:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.  

In this situation, members of the community are placed behind a veil of ignorance. This veil is necessary to conduct further deliberations on the basic principles of justice that are to be fundamentally important to the community. In fact, “ignorance dooms them to impartiality. Everyone will be voting as though they were voting for everyone else.” What about the issue of morality? Unlike the example of the ethno-cultural justice, these:

[C]ircumstances of the hypothetical contract do indeed satisfy the requirement of morality because the radical filtering of available information creates symmetrical and egalitarian relations between the hypothetical decision makers. In this way, no one may be able to tell whether, when privileging one of the alternatives, he is giving advantages to himself, his own group, or to others, as the case may be.

So, the question is: which principles of justice we would want for such a political community? As individuals, Rawls' argument and the perspective of ignorance indicate that we would want to ensure ourselves the widest possible access to the set of human rights and liberties, which would warrant the just treatment of ourselves as citizens and as members of a political community. Furthermore, it follows that, according to the principle of difference, we would desire equal access to public services. With regard to redistribution of resources, we would certainly support inequalities that would benefit those who are worse off. The veil of ignorance would prevent us from knowing to which ethnic community we would belong — to a constituent or to a non-constituent group, or whether we will live in those areas of the country where our group is a majority or minority. In this case, the principle of justice would suggest the following: we would not want a political community in which citizenship is exclusive; we would want a community in which citizenship would not be viewed as something substantial, would not be understood in the background of some myth of “basic peoples” or “state-building peoples”, or upon a narrative from which we and our group could be excluded.

So, as members of one or more social groups (this experiment should not be reserved only for ethnic grouping), bearing in mind that we do not know to which group we will be affiliated, we will not want to be discriminated against because of our affiliations. In case our group turns out to be a minority, we would want to ensure the implementation of all available and adequate mechanisms of positive discrimination. The principle of justice would suggest that we would opt for a

78 John Rawls, op.cit. note 4, 60.
79 Janos Kis, op. cit. note 5, 77.
80 Ibid., 94.
multiethnic political community in which no a single group would dominate, or have “right to pass”.

Perhaps the principle of justice as fairness in a multicultural society could be stated as follows:

1. Equality in the widest access to basic rights and liberties for every citizen of BiH;
2. Ethnic inequalities are just only if they result in balanced benefits for everyone, and especially for the worst off members of society – minorities, be they non-constituent, or constituent;

In other words, it is not unjust to improve the position of the worst off people – those who are in a marginalized position due to their group affiliation – through affirmative action in a multicultural society. Indirectly, one can argue that these measures would improve the position of all citizens because they create a single advanced, secure and democratic environment. To reach toward this hypothetical strategy would confirm our readiness, or better, our political maturity. These “rules of the game” would establish one liberal-democratic framework within which one could advocate the plurality of social forms without invoking a “right to pass”. This would demonstrate that liberal democracy does not annul differences, but that such differences can only attain full reach within such a framework.

Acronyms:

BiH - Bosnia and Herzegovina
ECHR - European Convention on Human Rights
ESDP - European Security and Defence Policy
EUFOR - European Union Force
EUPM - European Union Police Mission
EUSR - European Union Special Representative
FBiH - Federation of Bosnia and Herzegovina
FRY - Former Yugoslav Republic
GFAP - General Framework Agreement for Peace in Bosnia and Herzegovina
HDZ - Croatian Democratic Union
HRHB - Croatian Republic of Herzegovina
IC - International Community
ICFY - International Conference on the former Yugoslavia
ICTY - International Criminal Tribunal for the former Yugoslavia
ICRC - International Committee of the Red Cross
IFOR - Implementation Force
IPTF - International Police Task Force
JNA - Yugoslav Peoples Army
NGO - Non-governmental organisation
RS - Republika Srpska
SAP - Stabilisation and Association Process
SAO - Serb Autonomous Provinces
SCR - Security Council Resolution
SDA - Democratic Action Party
SDS - Serb Democratic Party
SNSD - Party of Independent Social-Democrats of RS
SFRY - Socialist Federal Republic of Yugoslavia
SzpBiH - Party for BiH
UNMBIH - United Nations Mission to Bosnia and Herzegovina
UNPROFOR - United Nations Protection Force
UNSC - United Nations Security Council

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