
DOI: 10.19266/1829-4286-2015-02-15-30

Transitional and Post-war Constitutionalism in Bosnia and Herzegovina Under International Control: National or International Failure*

NEDIM ADEMOVIC

University of Zenica, Bosnia and Herzegovina

The article discusses the national and international factors that affected the statehood formation of Bosnia and Herzegovina based on the Dayton Peace Agreement. The international community sought to strengthen the state's institutional capacity, improve the normative frames using the powers vested in the High Representative as well as the authority of the Human Rights Chamber with a major emphasis on State Constitutional Court. The Court was assigned a major role in the protection and support of the weak state, its constitutional system as well as in the process of democratization of state and society. The specific role attributed to three constituent communities in the Constitution – stemmed from the Dayton Agreement – has contributed to state strengthening. However, recently it hinders the processes of state development and full functioning of democracy. Particularly, the rights of the three constituent peoples significantly differ from those of other citizens. Thus, the Bosnian Constitution has exhausted all the possibilities of ensuring any progress. It needs serious reforms to stand in conformity with the European standards.

Keywords

Bosnian Constitution, Dayton Peace Agreement, constituent peoples, Human Rights Chamber, Constitutional Court

Introduction: from Transitional Socialism into the War

The former Yugoslavia, despite its specific and liberal socialist

* This is the revised and expanded text of a paper given at the international conference, entitled “The Impact of Constitutional Processes on Post- Communist Transformation” (Yerevan, 2-3 November, 2014).

regime, could be termed a communist regime and multinational state. The Communist Party, throughout its entire constitutional history from after World War II until the break-up of Yugoslavia, tried to balance two major principles: a single-party regime and worker self-management system on the one hand, and the principle of brotherhood and unity on the other.

The Socialist Republic of Bosnia and Herzegovina (BiH) – one of the six republics of the former Socialist Federal Republic of Yugoslavia – was a Yugoslavia “en miniature” with three peoples, the Muslims, Serbs, and Croats – none of them in an absolute majority position – and fifteen national minorities living intermingled throughout the entire territory until 1991. Many in both the West and the East viewed BiH as a model of multiethnic society with peaceful interethnic co-existence¹. Bosnia, as was generally the case for all other republics of the former Yugoslavia, was a peaceful and very prosperous country, with high employment, a strong industrial and export-oriented economy, and a good education system. Social and medical security was provided for every citizen².

After Josip Broz Tito’s death in 1980, the ethnic nationalism in the 1980s, slowly but surely, and ever more aggressively led to dissidence among the multiple ethnicities within the constituent republics. Therefore, one of the questions before the collapse of Yugoslavia was the concept of Yugoslav federalism within the multiethnic state³. This reform also called for the reform of the one-party-state regime. Finally, in the same period, the Yugoslav government began to chart a course away from the so-called planned economy typical under communism and attempted to transform to a liberal market economy model commonly used in Western European countries. The famous Prime Minister, Ante Marković, advocated and initiated the first methods of privatization of the Yugoslav economy. Nevertheless, bad results in economic reform and disappointment regarding the failed

¹ **Marco J.**, Post-conflict Reconstruction through State- and Nation-building: the Case of Bosnia and Herzegovina, European Diversity and Autonomy Papers, EDAP, 4, 2005, p. 5.

² For more on history, see **Malcolm N.**, Bosnia A Short History, New York University Press, 1994.

³ For more about the ethnic federalism in Yugoslavia, see **Banac I.**, The National Question in Yugoslavia: Origins, History, Politics, Cornell University Press, 1988.

decentralization of Yugoslav federalism brought on new requests for independence. The same problems were present in Bosnia and Herzegovina. In November 1990, the first multi-party parliamentary elections were held, resulting in a National Assembly where communist power was replaced by a coalition of three ethnically-based parties. Nevertheless, the three ethnic groups could not agree on the national policy regarding the future of Bosnia and Herzegovina: to stay within the Yugoslav federation or declare independence as Croatia and Slovenia did. The United Nations recognized BiH as an independent State on 1 March 1992. Only after Slovenia and Croatia had attempted to comply with the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*⁴ did the European Commission and its members finally decide to recognize BiH⁵. Prior to this, the majority of citizens of Bosnia and Herzegovina, in a referendum, voted for independence, autonomy and the sovereignty of the state. This decision was not accepted by a majority of Bosnian Serbs, who proclaimed an independent Republika Srpska, strongly supported by the rest of Yugoslavia and the former Yugoslav People's Army. A terrible war started and lasted almost four years. This was the worst conflict to occur after World War II: genocide, ethnic cleansing, concentration camps, urbicide, and tremendous economic damage.

The New Bosnian Constitution as a Part of an International Peace Agreement

On 14 December 1995, the Republic of Croatia, the Republic of Bosnia and Herzegovina, and the Federal Republic of Yugoslavia signed the *General Framework Agreement for Peace in Bosnia and Herzegovina*

⁴ With reference to Guidelines, compare also **Szasz P.**, Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals, *California Western International Law Journal*, 2, 25, 1995, 234-249; **Rich R.**, Recognition of States: The Collapse of Yugoslavia and the Soviet Union, *European Journal of International Law*, 1, 4, 1993, 40-52; contrary to **Hillgruber Ch.**, The Admission of New States to the International Community, *European Journal of International Law*, 9, 1998, 494-511, who, apart from the "the study of three elements", considers that the recognition by other states is another condition for acquiring international-legal personality.

⁵ **Hillgruber, C.**, Op. cit.

(GFA), known as the Dayton Peace Agreement (DPA). In addition, the Signatory Countries and the BiH Contracting Parties signed twelve Special Agreements designated as Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina. The Special Agreements were signed by the Signatory Parties, which were composed of different members and related to the civil and military components of the peace agreement. By signing this peace agreement, the adversaries put an end to the worst armed conflict in Europe since World War II.

The BiH Constitution, as per Annex 4 of the General Framework Agreement, is a constitutional act, which “through amendments substitutes and renders ineffective” the Republic of BiH Constitution⁶ and which entered into force when the General Framework Agreement was signed. The text of the BiH Constitution largely came into being during various peace negotiations in Bosnia and Herzegovina⁷, and its final version is the result of the closed-door negotiations held in Dayton.

As Annex 4 to the DPA, the BiH Constitution forms an integral part of that international legal agreement⁸. Unlike other annexes, the BiH Constitution was not created in the form of an agreement. Instead, representatives of the Republic of BiH, the Federation, and the Republika Srpska (two entities by which the state is composed) *approved* the text of the Constitution in the attached statement. When viewed formally, one could even ascertain that the Republic of BiH, as an internationally recognized state, established the text of the Constitution together with the dissident groups that had *de facto* control over a part of its territory⁹. However, a more realistic viewpoint is that, in enacting the Constitution, the International Community had substituted the people of Bosnia and Herzegovina, *i.e.*, peoples, as a sovereign constitutional authority¹⁰.

⁶ Article XII (1) of the BiH Constitution.

⁷ Overview by **Szasz P. C.**, The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia, *Fordham International Law Journal*, 2, **19**, 1995,.

⁸ Decision of the Constitutional Court of Bosnia and Herzegovina, no. U 5/98-III, paragraphs 19 and 73.

⁹ **Gaeta P.**, A Breakthrough for Peace and Justice? The Dayton Agreements and International Law, *European Journal of International Law*, 7, 1996, 157- 172.

¹⁰ **Maziau N.**, L'internationalisation du pouvoir constituant [The internationalization of the constituent power], *Revue Générale de Droit International Public*, 3, 2002, 560-577.

The Constitution was not a democratic one, but was a compromise between the need for peace on the one hand and the need for the protection of Bosnia and Herzegovina as an independent state on the other hand. This compromise resulted in a fragile state and strong federal units, *i.e.* so-called entities (the Republika Srpska and the Federation). The best indication for such an allegation is the constitutional provision on division of powers (Article III): paragraph I creates a small catalogue of competences, which specify in detail the substantive and legal fields falling within the responsibilities of the state. Paragraph III regulates the residual responsibilities of the entities¹¹.

The undemocratic character of the Bosnian Constitution is confirmed by the fact that it has never been officially translated from English into any of three local languages of the state, and it has never been published in the Official Gazette of Bosnia and Herzegovina. Indeed, the European Convention for Human Rights (ECHR), which forms an inherent part of the Constitution, and the instruments referred to in Annex I to the BiH Constitution, as an integral part, were translated by the Council of Europe into the state's local languages. However, the European Convention for Human Rights was only published in the Official Gazette of Bosnia and Herzegovina in 1999¹².

Transition under Post-War Conditions

One of the priorities for post-war Bosnia and Herzegovina was transitional justice. From a practical point of view, the only mechanism for overcoming the past in the initial years after the end of the conflict was the activity of the International Criminal Tribunal for the former Yugoslavia (ICTY)¹³. The leading role for prosecuting war crimes in the

¹¹ Speaking about the division of responsibilities, there is a notion that “the division of responsibilities between the State and the Entities” is firmly implanted in Bosnia and Herzegovina. This notion is not correct in legal terms as “the State” encompasses all administrative-territorial levels of authority, including local communities. It is obvious that this error arises from the disputed definition of the constitutional system of BiH, which is not explicitly mentioned in the BiH Constitution.

¹² *Official Gazette of Bosnia and Herzegovina* no. 6/99.

¹³ ICTY, www.un.org/icty.

country was taken over a few years ago by the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina¹⁴ because the entities' lower instance national courts had tackled that problem area indecisively and insufficiently¹⁵. Slow implementation of international humanitarian law regarding individual criminal responsibility has diminished the opportunity for the people to build a future state on proper foundations.

The recognition of Bosnia and Herzegovina as a continuing sovereign and independent state (Article I of the Constitution) was the price for the survival of a multi-ethnic state, which was necessary in order to not legitimize ethnic cleansing. The result of the four-year armed conflict in Bosnia and Herzegovina was the largest expulsion of a population in Europe after World War II. According to UNHCR and OSCE reports, more than 2.2 million persons had to leave their homes in Bosnia and Herzegovina. Out of that number, 1.3 million people found shelter outside Bosnia and Herzegovina in other countries, and the rest found refuge within Bosnia and Herzegovina. Despite the relative success regarding the process of repossessions of the refugees' and internally displaced persons' property, the international community and national authorities have not succeeded in annulling the consequences of ethnic cleansing¹⁶. The new demographic (homogenous ethnic territories) picture of the state is both an old and new constitutional challenge. The state still has an obligation to bring this new demographic situation into compliance with the landmark decision of the Constitutional Court of Bosnia and Herzegovina no. U-5/98 (of 1 July 2000) and other ECHR standards.

The new constitution also brought a new constitutional system. The former centralized Republic of Bosnia and Herzegovina became a

¹⁴ Overview by **Lauth M.**, Ten years after Dayton: War crimes prosecutions in Bosnia and Herzegovina, Helsinki, *Monitor*, 4, 2005.

¹⁵ Compare, **Garms U., Peschke K.**, War Crimes Prosecution in Bosnia and Herzegovina 1992-2002, *Journal of International Criminal Justice*, 4 (2), 2006, 258-282.

¹⁶ One of the major problems for annulment of the consequences of ethnic cleansing was the impossibility to reinstate displaced persons to their pre-war labor positions (see the Decision of the Constitutional Court of Bosnia and Herzegovina no. U-19/01, of 02. 11. 2001).

federalized state without any definition¹⁷. Additionally, the constitutional system is based on the power-sharing principle among the three constituent peoples (Bosniaks, Croats and Serbs), with full exclusion of the so-called ‘Others’. The European Court of Human Rights (ECtHR) has declared this system discriminatory¹⁸.

The new constitutional system, which combines territorial and ethnic federal elements, does not develop any culture of dialogue between the major political figures. It serves as a legal basis for deepening animosities among the three major ethnic groups and expanding of the long lasting crisis. All constituent peoples have a right to stop adoption of any legal act in the state by initiating the so-called procedure of protection of vital national interests¹⁹. So, after decades of non-alignment and non-affiliation, throughout which Yugoslav socialism had generously supported both the East and the West, and the average citizen enjoyed a certain standard of living and privileges that had been almost non-existent in the countries of the Eastern Bloc, a great many people are unable to comprehend the real meaning of reform leading towards democracy and a market economy. Authoritarian “master minds” and the system of Communist Party nomenclature²⁰ further consolidated themselves during the multi-year conflict, and were adapted by the nationalist parties to fit their goals and turned into instruments as such. The effect of this is that ethnic collective interests have suppressed the interests of the individual – who, regardless, has always come after the public interest – now relegated to the third place²¹.

The lack of rule of law in Bosnia and Herzegovina and such constitutional and legal deviations provide a good basis for corruption

¹⁷ The Constitution does not define the state's constitutional order.

¹⁸ The Judgment of the ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, of 03. 06. 2009, Applications no. 27996/06 and no. 34836/06

¹⁹ Article IV and V of the BiH Constitution.

²⁰ *European Stability Initiative*, Reshaping international priorities in Bosnia and Herzegovina. Part One: Bosnian Power Structures, European Stability Initiative (pub.), 14.10.1999, p. 4 *et seq.*

²¹ **Bagshaw S.**, *Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina*, San Domenico, 1997.

and other forms of crime, which are a great hindrance to the market economy²².

The Bosnian Constitutional System under International Control

The inability of institutions to responsibly control the fate of the country on their own meant that the international community²³ had to come to their assistance by taking concentrated and wide-ranging substitute measures. Indeed, such large-scale engagement of the international community was also necessary due to the usual “childhood diseases” of countries in transition, which were additionally intensified by the massive economic damage and social breakdown caused by the armed conflict²⁴.

The international community, personified by institutional actors in mixed authorities (such as the Constitutional Court and the Human Rights Chamber), and through the large number of non-governmental organizations, has invested a great deal in the civil implementation process, which cannot be exclusively measured in financial terms.

For example: the OSCE was in charge of the first democratic elections; the UNHCR was in charge of humanitarian aid and refugees (including internally displaced persons); and the Office of the High Representative, the OSCE, the UNHCR and the Commission for Real Property Claims were in charge of the Property Laws Implementation Plan (PLIP). International participation was also provided for in the form of the Commission to Preserve National Monuments, which was established under Annex 8 to the DPA, the Office of the High Representative was in charge of the civil implementation of the DPA (Annex 10), etc.

²² United Nation Office on Drugs and Crime, *Business, Corruption and Crime in Bosnia and Herzegovina: The impact of bribery and other crime on private enterprise*, Vienna, 2013.

²³ The “international community” is composed of a group of different international organizations and *ad hoc* institutions with different obligations under the DPA to protect peace and the civil development of the state.

²⁴ **Steiner C., Ademovic N.**, et al, *Commentary on the Constitution of Bosnia and Herzegovina*, Konrad Adenauer Foundation, Sarajevo, 2010, p. 19.

Some of the national institutions were under strong influence of the international community through the financing system, its compositions, or other elements.

The two highest judicial institutions (the Human Rights Chamber as according to Annex 6 to the DPA and the Constitutional Court of BiH) have (and/or had) a mixed composition. The same was the case, for example, with the first Governing Board of the Central Bank (Article VII of the Constitution)²⁵.

All these organizations and institutions have had some kind of link with the very Constitution of Bosnia and Herzegovina either by direct constitutional norm²⁶, or by the systematic interpretation of the formal Constitution, which also includes other Annexes to the DPA²⁷. Therefore, the DPA has introduced an (inter)national constitutional system with the so-called “dual functionality” of national and international authorities. In order to come to this conclusion, the Constitutional Court of Bosnia and Herzegovina had to adopt a decision and to determine this. In case no. U-9/00, the Constitutional Court of Bosnia and Herzegovina, addressing the issue of whether or not the High Representative is allowed to issue a law replacing the Parliament, stated:

“5. The Law on State Border Service was enacted by the High Representative on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as an agent of the international community, is not unprecedented, but similar functions are known

²⁵ The first Governing Board of the Central Bank consisted of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members appointed by the Presidency (two from the Federation - one Bosniak, and one Croat - who shared one vote, and one from the Republika Srpska). All of these individuals served a six-year term.

²⁶ For example, Art. II/4 of the constitution refers to Annex VII of the DPA and its Commission for Real Property Claims; Art. II/1 of the constitution refers to Annex VI of the DPA; Art. VI regulates the mixed (international and national) composition of the Constitutional Court of Bosnia and Herzegovina.

²⁷ For more, see **Marko J.**, *Friedenssicherung im 21. Jahrhundert: Bosnien und Herzegovina als europäische Herausforderung* [Peacekeeping in the 21st Century: Bosnia and Herzegovina as a European challenge], *Ginther, Konrad et al. (pub.), Völkerrecht und Europarecht. 25 sterreichischer Völkerrechtstag*, Vienna, 2001.

from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.

Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative – *whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court* – has intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.”²⁸

However, the implementation process was in no way facilitated by international actors, as their fields of activity often overlapped to a great extent and, unfortunately, were completely uncoordinated and unharmonized; additionally their mutual struggle to justify their very presence in the country has in no way facilitated the implementation process²⁹. Ever since the era of High Representative Wolfgang Petritsch, the international community has tried to withdraw and remove the decision-making of a foreign factor, the effects of which have been earlier cautioned against³⁰. Despite all this criticism, during the *first area*, the international community did the most for the state. For instance, it

²⁸ The Decision of Constitutional Court of Bosnia and Herzegovina no. U-9/00.

²⁹ **O’Flaherty M., Gisvold G.**, Post-war Protection Of Human Rights In Bosnia And Herzegovina, The Hague, London, Boston, 1998.

³⁰ **McEvoy J.**, From Dayton to Brussels?, Chapter 6 in: *Power-Sharing Executives Governing in Bosnia, Macedonia, and Northern Ireland*. The National and Ethnic Conflict in the 21st Century series, University of Pennsylvania Press, 2014

strengthened the state's institutional capacity, improved normative frames, fought against Bosnia and Herzegovina's unacceptable officials, etc. Since shifting the ownership process to the national authorities, Bosnia and Herzegovina has not made any progress. The best example of this is the implementation process of the quoted ECtHR judgment in the case of *Sejdic and Finci versus Bosnia and Herzegovina*.

Impact of the Human Rights Chamber and the Constitutional Court

The Human Rights Chamber (HRCh) was a special court for the protection of the human rights and freedoms established under Annex 6 of the DPA. The HRCh was established as a part of the Commission on Human Rights. The competences of the HRCh are similar to those of the ECtHR, so that its competences overlap with those of the Constitutional Court of Bosnia and Herzegovina in the field of protection of constitutional human rights and freedoms as stipulated by the ECHR. Unlike the Constitutional Court of Bosnia and Herzegovina, the HRCh, which operated under that name as an independent institution and whose activities ended on 31 December 2003, was composed of a majority of international judges – eight foreign judges and six national judges. The HRCh solved more than 15,000 individual cases. The resolution of many of these individual cases provided solutions for systematic problems in Bosnia and Herzegovina³¹. The HRCh was called a “European Court in microcosm” The HRCh had a huge impact on the successful institutional protection of human rights in the post-war and transitional period. The Human Rights Chamber presents one of the best examples of how to do “transitional justice”. The legacy of the HRCh lies not only in its affirmative case law. The legal, technical and organizational mode was transferred to the State Constitutional Court. Moreover, very well trained personnel were overtaken by the Constitutional Court of BiH. The HRCh ceased to exist in 2003, at which time, the State Constitutional Court overtook all competences of the HRCh.

³¹ Problems with so-called military apartments, problems with foreign currency savings, repossession of the property of refugees and internally displaced persons, etc.

The State Constitutional Court (Article VI of the Constitution) was created as a court with a mixed composition (6 national and 3 international judges), strong independence and a very ambitious mandate. With its seven jurisdictions, the court has the role of protecting and supporting the weak state and its constitutional system. It is responsible for the integration of the stated single market system, as well as improving the living conditions for a pluralistic society. The Constitution of Bosnia and Herzegovina includes a huge catalogue of international human rights and fundamental freedoms that are to be protected by this court through its appellate jurisdiction. The State Constitutional Court is the most important national institution. On the basis of its jurisprudence, the court has been the primary influencer of the democratization of the state and society, the main promoter of standards of rule of law, the protector and promoter of human rights, and the primary actor responsible for the elimination of inter-entity economic barriers. For example:

- The court decided that all decisions made by the High Representative through which the state had been strengthened, are in accordance with the Constitution (for example case no. U-9/00);
- The court declared that all three constituent people are absolutely equal on the entire territory of the state. It further decided that the ethno-national concept of state power is unconstitutional and that territorial and ethnic federalism should be developed (case no. U-5/98);
- The court declared that all previously socially-owned property belonging to the former Republic of Bosnia and Herzegovina belongs to the new federal state, and not to the entities (case no. U-1/11);
- The court decided that the vital interest of a constituent people can not prevail over the principle of a functional state (case no. U-10/05);
- In thousands of cases, the court protected the human rights and freedoms of citizens applying the ECHR, and thus has very successfully replaced the Human Rights Chamber.

Impact of the European Court of Human Rights on the Bosnian Constitution

At this point, the DPA's major role of 'securing the peace' has run its course. One of the tools for securing the peace was ethnic balance in accordance with the power-sharing principle and a veto mechanism for ethnic groups. The democratic deficit of the BiH Constitution is legitimized by this role. Nevertheless, this tool has obviously become an obstacle for shifting the state *from Dayton to Brussels*. Why?

Bosnia's ethno-national politicians are not able to reach consensus regarding the future of the state, its further democratization, the creation of a functional system, and the effective protection of both collective and individual human rights. Solutions for difficult and systematic problems are blocked by the constitutional veto mechanism. The Constitution has not only become an obstacle to the creation of a functional state; it has become discriminatory. The Grand Chamber of the ECtHR, in its 2009³² judgment "*Sejdić and Finci versus Bosnia and Herzegovina*," ruled that the Bosnian Constitution is not in accordance with the ECHR. The legal and constitutional ethno-national system discriminates against all citizens who are not members of the three constituent peoples. From 2009 to present, Bosnia has not been able to implement this judgment.

Two citizens of Bosnia and Herzegovina of Roma and Jewish ethnicity, respectively, namely *Dervo Sejdić* and *Jakob Finci*, filed applications in 2006 with the ECtHR. The applicants sought that a judgment be adopted against Bosnia and Herzegovina for depriving them of their right to be elected. In its *amicus curiae* opinion, the Venice Commission of the Council of Europe adopted a position in favour of the applicants, stating that the deprivation of members of the constitutional and legal category of "Others" of the right to be elected does not necessarily follow the principle of collective equality of the constituent peoples and, thereby, it is in violation of the obligation to comply with the principle of proportionality, which was developed by the ECtHR as a measure to be used in examining whether or not an interference with the

³² ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications no. 27996/06 and no. 34836/06.

rights and freedoms safeguarded by the ECHR is justified. The Venice Commission of the Council of Europe put forward an argument that the FBiH Constitution may serve as an example proving that the deprivation of the right to be elected exists and, thereby, is in violation of Article 1 of Additional Protocol No. 12 to the ECHR. This may be avoided by incorporating the constitutional category of “Others,” in addition to the constituent peoples, into the provisions on a proportionate composition of the Presidency of BiH. The case was taken over by the Grand Chamber of the ECtHR, which held a hearing on its admissibility and merits on 3 June 2009, and adopted a final decision on this issue on 22 November 2009. It was established that the provisions of the BiH Constitution relating to the House of Peoples of the BiH Parliamentary Assembly discriminate against so-called “Others” within the meaning of Article 14 in conjunction with Article 3 of Additional Protocol No. 1 to the ECHR (paragraph 50). The Grand Chamber of the ECtHR concluded that, given the progress that the state has made since signing the Dayton Peace Agreement (paragraph 47), it is no longer justified in entirely depriving the members of the so-called “Others” of the right to be elected to this legislative house. There are no reasonable and justified reasons to support something like that. The ECtHR also concluded that the ECHR does not require complete abolition of the principle of parity power-sharing and the introduction of a principle that would simply reflect the principle of “majority,” nor has the time come for such a situation in Bosnia and Herzegovina. However, the ECtHR referred to the opinion of the Venice Commission, which offered a modality of retaining the principle of parity power-sharing without excluding certain groups at the same time (paragraph 48). The ECtHR resorted to the same reasoning when it came to the deprivation of the so-called “Others” of the right to be elected to the BiH Presidency, whereby the court referred to the provision of Article 1 of Additional Protocol No. 12 to the ECHR (paragraph 56 in conjunction with paragraphs 47-49)³³.

Therefore, the ECtHR referred to the obligation of the state to make further steps towards democratization. This also includes the highest normative act in the state: the very Constitution. The ECtHR, in

³³ Steiner C, Ademovic N. *et al*, Op. cit.

its Judgment “*Sejdić and Finci versus Bosnia and Herzegovina*,” sent a clear message: what was acceptable some years ago it not anymore. If Bosnia and Herzegovina wants to be a real partner in the EU, the state and its politicians have to place more attention on education about democracy, human rights and freedoms, and the role of citizens in the state. They must strengthen independent media and the civil sector, and advance infrastructure capable of combating corruption and criminals. Put simply, Bosnia and Herzegovina has to accept European standards.

Conclusion

The Dayton Peace Agreement attached a special status to all three constituent peoples to maintain a unitary Bosnia and Herzegovina. It resulted in the establishment of specific political institutions and legal norms the results and development trends of which demonstrates that

1. The drafting and adoption of the Constitution was carried out using specific mechanisms due to a complex situation and the attempts of preserving territorial integrity. The Constitution was drafted during peace talks and Dayton negotiations, became an integral part of it and endowed international community with the decision-making power together with or instead of the Bosnian people.
2. The Constitution was built with an ultimate aim of establishing peace and maintaining an independent, unitary state resulting in the undemocratic character of the Constitution and in a fragile state and strong federal unites. The four-year armed conflict – the largest one in Europe after World War II accompanied by ethnic cleansing and unprecedented flow of refugees – significantly influenced the constitutional order as well as the system of government. The insurance of the coexistence of three constituent peoples – previous parties to the intractable conflict – turned into a major state problem.
3. Granting the power of veto to three constituent peoples in the adoption of legal acts was aimed at ensuring the separation of powers between them and creating the basis for their coexistence. However, it led to the infringement of the rights of other ethnic

groups and hindered the development of any culture of dialogue between the major political figures.

4. The Constitution allowed the international community to be directly involved in state governance with a higher authority than the national institutions did. The High Representative was allowed to issue a law and the laws he enacted were not subject to any review; the Human Rights Chamber consisted of only 6 national judges out of 14 members, while the Constitutional Court – of two third of all members.
5. Another feature of the Constitutional Court was a wide range of issues it dealt with. Replacing the Human Rights Chamber, the Court deals with the protection of rights and freedoms under the European Convention on Human Rights (Convention has been recognized as an integral part of the Constitution), the determination of the powers vested in state authorities (legitimacy of the decisions made by the High Representative, state-constituent people relationship, etc), as well as the rights of the constituent peoples (equal status, etc).
6. Although the above mentioned features of the Constitution enabled to overcome a difficult post-war situation, it turned into an obstacle to a full state functioning and development, as well as entrenched a discriminatory behavior towards those that did not belong to three constituent peoples. EctHR registered that what was acceptable some years ago is not anymore. The Constitution of Bosnia and Herzegovina needs to adopt the European standards if it wants to become a full-fledged democratic state. To this end the state should not only improve the Constitution, but also guarantee the constitutionality of state functioning.