



# “Konstitutivni narodi” i ustavne promjene

Zarije Seizović

# “Constituent Peoples” and Constitutional Changes

# **“Constituent Peoples” and Constitutional Changes**

Author  
Zarije Seizović

Sarajevo, December 2007

# **“Konstitutivni narodi” i ustavne promjene**

Autor teksta studije  
Zarije Seizović

Sarajevo, decembra 2007. godine

**“Konstitutivni narodi” i ustavne promjene**

**“Constituent Peoples” and Constitutional Changes**

Autor teksta studije /

Author:

**Zarije Seizović**

Koordinatori projekta /

Project Coordinator:

**Miroslav Živanović**

Izdavač /

Publisher:

**Centar za ljudska prava Univerziteta u Sarajevu**

Za izdavača /

For the publisher:

**Saša Madacki**

Fotografija na naslovnoj strani /

Cover photo:

**Sanja Gjenero**

Priprema za štampu i štampa /

Design and Printing:

**Magistrat d.o.o. Sarajevo**

ISBN 978-9958-9541-8-4

Studija je objavljena u sklopu projekta **Platforma Bosna i Hercegovina, Faza II – Doprinos ustavnoj reformi** koji je implementirao Centar za ljudska prava Univerziteta u Sarajevu uz finansijsku podršku Švajcarskog ureda za saradnju i razvoj (SDC)

This publication has been published as part of the project **Platform Bosnia and Herzegovina, Phase II: Contribution to Constitutional Reform** implemented by Human Rights Centre, University of Sarajevo with financial support of the Swiss Development Agency (SDC)

Ova studija ne mora obavezno sadržavati stanovišta Centra za ljudska prava Univerziteta u Sarajevu ili Švajcarskog ureda za saradnju i razvoj (SDC). Mišljenja iznesena u studiji predstavljaju stavove autora.

This publication does not necessarily reflect the views of the Human Rights Centre, University of Sarajevo or the Swiss Development Agency (SDC). Opinions expressed in this publication are those of the author.

## Sadržaj

<b>UVOD</b>	7
<b>1. Institucionalizovana diskriminacija</b>	9
1.1. Koncept “konstitutivnih naroda” u Ustavu BiH	9
1.2. Zaštita vitalnog nacionalnog interesa prema Ustavu BiH	10
1.3. Koncept “konstitutivnih naroda” prema odluci Ustavnog suda BiH	12
<b>2. “Državotvorni narodi” u komparativnoj praksi</b>	14
2.1. Koncept	14
2.2. Komparativna ustavna rješenja	15
2.2.1. Ustav Hrvatske	15
2.2.2. Ustav Slovenije	16
2.2.3. Ustav Španije	17
2.2.4. Ustav Francuske	18
2.2.5. Ustav Njemačke	18
2.2.6. Ustav Švicarske	19
<b>3. Zaključak i preporuke</b>	20
3.1. Zaključak	20
3.2. Preporuke	20
3.2.1. Opšte preporuke	21
3.2.2. Posebne preporuke	21
<b>Bibliografija</b>	23

## TABLE OF CONTENTS

<b>INTRODUCTION</b>	26
<b>1. Institutionalized discrimination</b>	26
1.1. Concept of “Constituent Peoples” in the Constitution of BiH	28
1.2. Protection of vital national interest in the Constitution of BiH	29
1.3. Concept of “Constituent peoples” in the Decision of the Constitutional Court of BiH	31
<b>2. “State-making nation” in the comparative view</b>	33
2.1. Concept	33
2.2. Comparative constitutional solutions	34
2.2.1. Constitution of Croatia	35
2.2.2. Constitution of Slovenia	35
2.2.3. Constitution of Spain	36
2.2.4. Constitution of France	37
2.2.5. Constitution of Germany	37
2.2.6. Constitution of Switzerland	38
<b>3. Conclusion and recommendations</b>	39
3.1. Conclusion	39
3.2. Recommendations	39
3.2.1. General recommendations	40
3.2.2. Specific recommendations	40
<b>Bibliography</b>	42

*“... Podsjećajući se na Osnovna načela usaglašena u Ženevi, 8. 9. 1995. godine, i u Njujorku, 26. 9. 1995. godine, Bošnjaci, Hrvati i Srbi, kao konstitutivni narodi (u zajednici s ostalima) i građani Bosne i Hercegovine, ovim utvrđuju Ustav Bosne i Hercegovine...”*

(Ustav Bosne i Hercegovine, Preambula)

## UVOD

Ulazak Bosne i Hercegovine (BiH) u euroatlanske integracije, kao njen strateški cilj, podrazumijeva set vrlo složenih reformi od kojih je najvažnija ustavna reforma, koja predstavlja preduslov za izgradnju funkcionalne i efikasne države BiH. Neuspjeli pokušaji ustavne reforme 2006. godine, ovu su reformu odgodili do danas. Jedno od pitanja na koje uopšte nije obraćana pažnja kada se govorilo o izmjenama Ustava Bosne i Hercegovine (Ustav BiH) jeste pitanje “**konstitutivnih naroda**”.

Zaštita ljudskih prava u Bosni i Hercegovini predviđena je **Opštim okvirnim sporazumom za mir u Bosni i Hercegovini**, nazvanim još i Dejtonski mirovni sporazum (DMS).<sup>1</sup> Ustav BiH (Aneks 4 DMS-a) proklamuje jednakost Bošnjaka, Hrvata i Srba, tvrdeći da osigurava garanciju jednakosti za sve građane BiH. Međutim, ovakva jednakost ne samo da nije osigurana postojećim ustavno-pravnim okvirom, nego trenutna ustavna struktura predstavlja poseban pravni okvir za diskriminaciju: sistem vlasti u državi konstruisan je tako da osigura političku participaciju “konstitutivnih naroda”, marginalizirajući ostale građane BiH (one “nekonstitutivne”).

*Etnički nacionalizam*, bivajući nus-pojava poraza (eks)komunističkih autoritarnih režima, pokazao se kao glavna prepreka demokratizaciji svih multietničkih država u tranziciji, uključujući i BiH. Etnički kriterij onemogućava diobu političke, socijalne i ekonomske moći pod jednakim uslovima unutar građanskog (civilnog) društva, favorizujući u političkoj participaciji domenu zaštite ljudskih prava etničke grupe na štetu građanina kao pojedinca. Ovaj koncept omogućava da konstitutivni narodi među sobom raspoređuju i dijele gotovo svu vlast i moć u državi, sprječavajući primjenu jednakog tretmana za sve građane.

Iako su problemi koji se odnose na uključivanje nacionalnih manjina u socijalnu, političku i druge sfere života, u određenoj mjeri rješavani implementacijom velikog broja projekata, nikada nije poklonjena posebna pažnja bizarnom konceptu “konstitutivnih naroda” koji, *de iure*, predstavlja model zaštite *kolektivnih prava* i pravni osnov za diskriminaciju građana Bosne i Hercegovine kao pojedinaca.<sup>2</sup>

<sup>1</sup> Potpisan u SAD, Dayton, Ohio, 15. decembra 1995.

<sup>2</sup> *Kolektivna prava* su, bez obzira na činjenicu da je njihovo priznavanje u porastu, kako u teoriji, tako i praksi zapadnih zemalja, ipak podređena (na drugom mjestu) u odnosu na prava koja se zasnivaju na državljanstvu kao individualnom pravu. Jezička i kulturna prava nacionalnih manjina su zaštićena (i međunarodnim

Glavna svrha ove studije je da istraži postojeći koncept (ustavno-pravni položaj) "konstitutivnih naroda" kao državotvornih nacija i odnos ovog koncepta prema ustavno-pravnoj poziciji "ostalih" koji su diskriminirani na osnovu same ustavne norme. Studija objašnjava poziciju "ostalih" koja bi trebala biti postignuta nakon ustavnih promjena koje se predlažu i/ili koje bi trebalo da budu usvojene, što bi garantovalo jednak tretman svih građana BiH bez obzira na činjenicu da li oni pripadaju trima "konstitutivnim narodima" ili "ostalima", kao posebnoj vrsti "manjine". Studija će se, također, usredsrediti na promociju i razvoj ljudskih prava kao individualnih prava, prava pojedinca, te primjenu principa zabrane diskriminacije, kao što predviđa Ustav BiH.<sup>3</sup>

Pitanje jednakosti građana u bivšoj Jugoslaviji bilo je regulisano u oba ustava: saveznom i republičkom. Ustav Socijalističke Federativne Republike Jugoslavije (SFRJ) garantovao je jednakost svih građana (član 154.) navodeći da su "[g]rađani [...] jednaki u pravima i dužnostima bez obzira na nacionalnost, rasu, pol, jezik, vjeroispovijest, obrazovanje ili društveni položaj." To je bila **klauzula zabrane diskriminacije**. Ista formulacija mogla se naći u članu 161. Ustava Socijalističke Republike Bosne i Hercegovine (SRBiH). U praksi, uvijek je postojao veliki nesklad "proklamovanog i realnog", odnosno neusaglašenost "normativnog i stvarnog".<sup>4</sup>

Da nacionalna homogenizacija, kojim slučajem, nije prikazana (i nažalost shvaćena i prihvaćena) kao jedini recept (biološkog) opstanka nacija u BiH, danas ne bi bilo niti potrebno ujedinjavati ono što je, samo po sebi, bilo ujedinjeno i jedno. Bosna i Hercegovina, pravno-politički i et(n)ički pocijepana, podvrgnuta je artificijelnoj državno-pravnoj i političkoj reanimaciji pod patronatom međunarodne zajednice, čime je, samo prividno, ponovo integrisana, ali ovoga puta u oblik neobične državne tvorevine - jedna država, dva entiteta, tri naroda, koju čine jedna "republika" i jedna "federacija". U toj državi, "[n]acionalna homogenizacija će još uvijek ostati glavna prepreka političkoj i ekonomskoj integraciji [...] društva i igrat će značajnu ulogu u kontinuiranim procesima dezintegracije širom zemlje dok će nacionalni identitet, izgleda, biti skoro jedini model identifikacije građana [...]"<sup>5</sup>

Očigledno, kod ovakvog stanja stvari, potrebno je poduzeti legislativne korake (mjere) za "ujednačavanje" ustavno-pravnog položaja svih građana BiH u svjetlu međunarodnih standarda za zaštitu ljudskih prava, u domenu građanskih i političkih prava, budući da je kristalno jasno da dejtonski ustav sadrži diskriminatorni koncept koji priznaje različit pravno-politički status građanima BiH.

konvencijama), dok domaći, autohtoni narodi (zavičajni, izvorni, starosjedilački) često ističu svoja (od ranije) postojeća prava. No, i oni su smatrani građanima država u kojima žive. (International Crisis Group, *Implementing Equality: The "Constituent Peoples" Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, str. 2, fusnota 5).

<sup>3</sup> Član 4. Ustava BiH glasi: "Ne-diskriminacija. Uživanje prava i sloboda, predviđenih u ovom članu ili u međunarodnim sporazumima navedenim u Aneksu I ovog Ustava, osigurano je svim licima u Bosni i Hercegovini bez diskriminacije po bilo kojem osnovu kao što je pol, rasa, boja kože, jezik, vjera, političko i drugo mišljenje, nacionalno ili socijalno porijeklo, povezanost sa nacionalnom manjinom, imovina, rođenje ili drugi status." (Navedeno prema *The Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14 December 1995, Office of Public Communication, Bureau of Public Affairs, U.S. Department of State).

<sup>4</sup> Statistika pokazuje da je, prema popisu iz 1991. godine, nacionalni sastav stanovništva u BiH bio 43,7% Bošnjaka (tada Muslimana), 31,3% Srba, 17,3% Hrvata i 7,7% ostalih.

<sup>5</sup> Zarije Seizović, *Human Rights Protection in Bosnia and Herzegovina, within the Framework of the the*



## 1. Institucionalizovana diskriminacija

### 1.1. Koncept "konstitutivnih naroda" u Ustavu BiH

Termin "konstitucija" derivira od latinske riječi *constitutio*, što znači uredba, ustroj, ustrojstvo. Riječ *constitutus* znači "sazdan". Termin "konstitutivan" bi se, u duhu našeg (B/H/S) jezika, mogao prevesti sa "tvoran" ili "tvoriteljski" ili deskriptivno "onaj koji nešto tvori, čini". Tako bi "konstitutivni narodi" jedne državne zajednice bili oni koji je tvore, odnosno od kojih je socijalna supstanca te države "sazdana".

"Uprkos njegovim [DMS] istaknutim 'ceremonijalnim dostignućima' u oblasti zaštite ljudskih prava pojedinaca, cjelokupna politička struktura u BiH zasnovana je na principu ekskluzivnog etničkog predstavljanja samo tri 'konstitutivna naroda', a na štetu prava pojedinca, što, *de facto*, predstavlja nedostatak funkcionalnih državnih i entitetskih institucija, kad god određeni broj pripadnika konstitutivnih naroda želi opstruirati postupak donošenja odluka."<sup>6</sup>

Ustav Bosne i Hercegovine afirmiše apsolutno pravo svih građana da uživaju "ljudska prava i osnovne slobode". Član II Ustava BiH obavezuje sve državne i entitetske organe da "osiguraju najviše standarde međunarodno priznatih ljudskih prava" i slobodu od svake vrste diskriminacije. Institucije Bosne i Hercegovine, čije je formiranje predvidio Ustav BiH, sasvim sigurno, nisu uspjele osigurati ova osnovna prava.<sup>7</sup>

Venecijanska komisija je dala svoje mišljenje o "konstitutivnim narodima" *vis-à-vis* individualnih i kolektivnih prava na slijedeći način: "[P]ostoji [...] jasna ustavna obaveza *ne povređivati individualna prava na diskriminatoran način* koja očigledno proizlazi iz člana II 3. i 4. Ustava Bosne i Hercegovine..."<sup>8</sup> (kurziv dodan). Također, cilj Europske konvencije za

*Dayton Peace Accords with Special View to Non-Discrimination Policy*, rad nastao u okviru obaveza autora kao participanta VI Ljetne škole "Postkomunistička tranzicija i evropski integracioni procesi", u organizaciji Instituto per l'Europa Centro-Orientale e Balcanica – International Network Europe and the Balkans i Ministarstva pravde Republike Italije u Cerviji, 4.-16. septembar 2000. godine, str. 12.

<sup>6</sup> Esej "Civil State and Concept of Constituent Peoples" ("Građanska država i koncept konstitutivnih naroda") u: Zarije Seizović, *Bosnia and Herzegovina: Concord of Diversity – Compilation of Legal Essays*, Studio Flaš, Zanima, 2005, str. 11.

<sup>7</sup> International Crisis Group, *Implementing Equality: The "Constituent Peoples" Decision in Bosnia & Herzegovina (Implementacija jednakosti: Odluka o "konstitutivnim narodima" u Bosni i Hercegovini)*, 16. april 2002., ICG Balkans Report No. 128, Sarajevo/Brussels, str. 1.

<sup>8</sup> European Commission for Democracy through Law – Venice Commission, *Opinion on the implications of*

zaštitu ljudskih prava i osnovnih sloboda (Evropska konvencija) je osiguranje zaštite individualnih, a ne grupnih prava.<sup>9</sup>

## 1.2. Zaštita vitalnog nacionalnog interesa prema Ustavu BiH

Pravo pozivanja na zaštitu **vitalnog nacionalnog interesa** kao sredstva za sprječavanje donošenja zakona, inkorporisana je u institucionalne strukture države Bosne i Hercegovine i Federacije Bosne i Hercegovine (Federacije BiH), posebno posredstvom drugog doma njihovih parlamenata, poznatih pod nazivom Dom naroda. No, šta je to što, ustvari, predstavlja “vitalni nacionalni interes” nije precizno definisano. To može biti lista standarda, kao npr. biti na odgovarajući način predstavljen u legislativnoj, izvršnoj i sudskoj vlasti, imati jednaka prava u procesima donošenja odluka, pitanja koja se odnose na obrazovanje, kulturni i vjerski identitet, tradiciju, jezik, nacionalne simbole i zastavu, kulturno naslijeđe itd. Ipak, radi se o standardima koje tek treba preciznije definisati, budući da postoji veliki broj pitanja koja se mogu smatrati sadržajem ovih standarda.<sup>10</sup> Čini se da je veliki izazov sastaviti listu pitanja koja nisu tako apstraktna kako bi se malom broju delagata dalo ovlaštenje za ometanje postupka donošenja bilo kojeg, ili svih zakona, sa kojima se ne slažu, ostavljajući prostora nacionalnim vijećima (klubovima) da spriječe donošenje zakona čije bi donošenje, prema njihovom mišljenju, predstavljalo diskriminaciju na osnovu nacionalne pripadnosti.<sup>11</sup>

Evropski standardi zaštite ljudskih prava, uključujući i *zabranu diskriminacije* (po bilo kojem osnovu), postali su obavezujući za pravosuđe i organe (javne) uprave u Federaciji BiH od momenta stupanja na snagu Ustava Federacije BiH (mart 1994.)<sup>12</sup>. DMS<sup>13</sup> je inkorporisao prava i slobode navedene u **Evropskoj konvenciji o ljudskim pravima i osnovnim slobodama** i njenim Protokolima, kao i 15 drugih međunarodnih instrumenata o ljudskim pravima, direktno u Ustav Bosne i Hercegovine. Ustav BiH, ovim pravima i slobodama daje “prioritet nad svim drugim zakonima”.<sup>14</sup> Član 14. Evropske konvencije garantuje da će

*Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the “Constituent Peoples”*, (Evropska komisija za demokratiju putem zakona – Venecijanska komisija, *Mišljenje o implikacijama Djelomične odluke III Ustavnog suda Bosne i Hercegovine u predmetu U5/98 u pravnoj stvari “Konstitutivni narodi”*) usvojeno na 46. Plenarnoj sjednici, Venice, 9-10. mart 2001., par. 59.

<sup>9</sup> J. Harris – M.O. Boyle – C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, 1995, str. 487.

<sup>10</sup> V. International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, str. 16-17.

<sup>11</sup> U svom mišljenju o odluci Ustavnog suda BiH, Venecijanska komisija je posebno istakla da rješenje koje je otvorilo mogućnost ulaganja *a liberum veto*-a, nije bila u duhu demokratskog kompromisa (v. International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, str. 16, fusnota 45.).

<sup>12</sup> Ustav Republike Srpske (Ustav RS) u to vrijeme nije bio “osavremenjen”, jer on nije bio nametnut (oktroiran) od strane međunarodne zajednice, nego je bio usvojen od strane Narodne skupštine Republike Srpske (NSRS).

<sup>13</sup> Kolokvijalno poznat pod nazivom *Dejtonski mirovni sporazum/i.*

<sup>14</sup> Radi se o tzv. *hijerarhiji pravnih akata (normi)* koji, gledano “odozgo”, tvore sistem koji počinje međunarodnim dokumentima, nastavlja sa domaćim ustavom i zakonima, podzakonskim pravnim aktima, i završava tzv. pojedinačnim pravnim aktima. Prema članu II 2. Ustava Bosne i Hercegovine, Evropska konvencija ima *prioritet* nad nacionalnim [domaćim] zakonodavstvom. Njene odredbe imaju kvalitet tzv. “direktne primjenjivosti” (*Direct applicability*) i smatraju se integralnim dijelom domaćeg (pozitivnog) prava.

“uživanje prava i sloboda sadržanih u Konvenciji biti osigurano bez diskriminacije po bilo kojoj osnovi kao što je pol, rasa, boja kože, jezik, *vjeroispovjest*, [...], *nacionalno* ili društveno *porijeklo*, *pripadnost nacionalnoj manjini*...” (kurziv dodan). Evidentno je da Evropska konvencija štiti prava individue, a ne društvenih-konfesionalnih-etničkih grupa kao takvih. Nažalost, kao što je već rečeno, ukupna politička struktura u Bosni i Hercegovini zasnovana je na dijametralno suprotnom principu – principu ekskluzivnog etničkog predstavljanja samo tri “konstitutivna naroda”, na štetu prava pojedinca.

Preambula Ustava BiH, kao što je rečeno, određuje da su Bošnjaci, Hrvati i Srbi “konstitutivni narodi” u BiH, dok su “ostali” i/ili “građani” samo uzgredno spomenuti. Iz samog teksta preambule Ustava vidi se da su individualna prava data etničkim grupama, a ne građanima. Entitetski ustavi sprječavali su da se (makar) ovaj anahroni i diskriminatorni koncept primjenjuje u cijeloj zemlji, jer Bošnjaci i Hrvati nisu bili konstitutivni narod u Republici Srpskoj (RS), a na isti način je i Srbima negiran taj status u Federaciji BiH. Sva tri naroda su konstitutivna na nivou države BiH. Nažalost, ova prava, zbog takve situacije, jedva da i postoje, pošto su (klasični) prerogativi državne vlasti (poput, npr. policije i pravosuđa) u nadležnosti bosanskohercegovačkih entiteta. Svi “ostali” koji ne pripadaju jednom od ova tri privilegovana naroda priznata Ustavom, izgubili su se negdje “usput”. Oспорavanje konstitutivnosti Bošnjacima i Hrvatima u RS i/ili Srbima u Federaciji BiH, ne samo da nije u skladu sa Ustavom BiH, nego nema ni istorijskog opravdanja, budući je BiH (i) prije rata predstavljala (multi)etnički konglomerat *sui generis* i paradigmu “zajedništva i tolerancije”.<sup>15</sup> Princip “konstitutivnih naroda” pojačan je i razrađen u mnogim odredbama Ustava, gdje se čak ni formalno ne spominju “ostali” ili “građani”.<sup>16</sup>

Jasno je, dakle, da su pripadnici bilo koje od tri etničke skupine u biti zaštićeni samo na bazi njihove pripadnosti nacionalnom kolektivitetu. Ovaj koncept ne pruža nikakvu zaštitu onima koji se ne uklapaju u jednu od ovih grupa, bili to Srbi, Hrvati ili Bošnjaci, ili, pak, žele da iskoriste svoje pravo da ne pripadaju niti jednoj nacionalnoj grupi, što je svakako legitiman zahtjev i stav.<sup>17</sup>

“Nacija, kao forma i suština političkog organizovanja ljudi u određenom društvu ne čini se kao dobro poznat model političke teorije i prakse u zemljama ‘zapadnih demokratija’. Takav model političkog organizovanja i djelovanja je potpuno inkompatibilan (i opasan!) društvima sastavljenim od dvije ili više nacionalnih (religijskih) zajednica... [pa] proklamovanje demokratije dok se gradi društvo na ovakav način jeste hipokrizija *par excellence*.”<sup>18</sup>

Na osnovu gore iznesenog vidi se da koncept “konstitutivnih naroda”, koji sadrži ekskluzivističku konotaciju “nekonstitutivnih”, *per se* predstavlja diskriminatorni tretman

Konzekventno tome, sve odredbe domaćega prava koje su u koliziji sa odredbama Evropske konvencije neustavne su i nezakonite, te se ne smiju primjenjivati. N.B. Termin prioritet je inače pogrešan prevod koji ne odgovara našem državno-pravnom podneblju – engleski termin “prioritet”, koji u našem jeziku ima sasvim drugo značenje, trebalo je prevesti pravnim terminom *primat*.

<sup>15</sup> Situacija je izmijenjena samom odlukom Ustavnog suda (v. pod 1.3.).

<sup>16</sup> Sastav svih “zajedničkih institucija” (kao što su Parlamentarna skupština, Savjet ministara i dr.), zasnovan je na principu “jedna država–dva entiteta–tri naroda. N.B. Gledano *stricto sensu*, ne postoje tzv. *zajedničke institucije* (opet danak nepreciznom i laičkom prevodu), nego “državni organi”.

<sup>17</sup> Vidi šire u: International Crisis Group, *European vs. BiH Human Rights Standards*, a Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14. april 2000. godine

<sup>18</sup> Zarije Seizović, “Addendum to the Phenomenon of the National Pathology”, *Hijatus, časopis za društvena pitanja i kulturu demokrat/cije*, Zenica, august/kolovoz 1996., str. 51.

onih koji nisu konstitutivni, i/ili ostalih, građana. Kako je poznato, Evropska konvencija o ljudskim pravima i osnovnim slobodama garantuje isti katalog ljudskih prava svim građanima, no ova njena odrednica u BiH je stavljena van snage konceptom “konstitutivnih naroda”. Prema tome, potrebno je poduzeti političku i ustavno-pravnu reviziju i restauraciju sistema zaštite ljudskih prava u BiH posredstvom dosljednog i sistematičnog pregleda svih odredaba Ustava BiH kao i etnitskih ustava, u cilju afirmacije **građanskog** i negacije **nacionalnog/etničkog** diskursa. Nije potrebno posebno isticati da se ne radi o diskrecionim ovlaštenjima države Bosne i Hercegovine, nego o njenoj međunarodnoj obavezi da uskladi svoje zakonodavstvo sa evropskim standardima. U svakom slučaju, govoriti o *građanskoj državi* u kojoj je koncept “konstitutivnih naroda” centralni mehanizam funkcionisanja političkog sistema jeste *contradictio in adjecto*. Pojašnjenja radi, zaštita “nacionalnog interesa” u BiH trebala bi podrazumijevati interes cijelog njenog stanovništva, uslovno rečeno “bosanskohercegovačke nacije”, što, očigledno, nije slučaj.

### 1.3. Koncept “konstitutivnih naroda” prema odluci Ustavnog suda BiH

Pitanje **selektivnog pristupa konceptu konstitutivnih naroda** je, *de iure*, riješeno donošenjem odluke Ustavnog suda Bosne i Hercegovine (Ustavni sud BiH),<sup>19</sup> koja je, u jednom dijelu zemlje, ocijenjena kao historijski korak koji potcrtava i reafirmiše tradicionalno bh. “zajedništvo” i “nedjeljivost”.

Zašto (re)afirmiše? Sva tri bh. naroda su (i) bila konstitutivna na cijelom teritoriju BiH, pa ova odluka ima samo tzv. *deklaratorno dejstvo*, jer potvrđuje i (javno) obznanjuje ono stanje koje je postojalo i prije donošenje ova odluke. Pravno posmatrano, najprije je Ustav Federacije BiH, a potom i Ustav BiH, kao rezultat praktičnih real-političkih kompromisa, selektivnim pristupom institutu konstitutivnosti naroda, inaugurisao i pravno ozvaničio stanje u kojem je autohtonom bh. stanovništvu u nekim dijelovima (njihove vlastite) države nametnut degradirajući i pravno neprecizan status “nacionalne manjine”, “ostalnih”, “nekonstitutivnih”. Time je utrt put potonjim nastojanjima političko-teritorijalnog rastakanja BiH.

Jula 2000. godine, Ustavni sud BiH donio je odluku kojom je nametnuo obavezu Federaciji BiH i RS da izvrše izmjene njihovih ustava kako bi osigurali punu jednakost “konstitutivnih” naroda na cijelom teritoriju države. Dejtonski diskriminatorni koncept “jedna država-dva entiteta-tri konstitutivna naroda” bio je politički nestabilan model organizovanja države. Ipak, odluka je okončala ideju priznavanja prava bosanskih Hrvata da formiraju svoju malu kvazi-državu, budući da je zahtijevala od oba entiteta da funkcionišu efikasno i po sastavu budu multinacionalni. Protivnici jedinstvene bosanske države (“unitarne države”) tvrdili su da je odluka protivna DMS-u, dok su zagovornici ideje jedinstvene bosanske države smatrali odluku kao veliko dostignuće, odnosno napredak u dogradnji postojeće dejtonske državno-političke arhitekture koja je, prema njihovom mišljenju, morala biti podvrgnuta ustavnim promjenama.

U svakom slučaju, iako je ova odluka označavala značajan korak u priznavanju iste ustavno-pravne pozicije svim konstitutivnim narodima na svakom dijelu teritorija države, ona nije

<sup>19</sup> Ustavni sud Bosne i Hercegovine, *Djelomična odluka, Predmet U 5/98 III*, 1. juli 2000., *Službeni glasnik Bosne i Hercegovine* br. 23/00.

promijenila ništa u smislu poboljšanja ustavno-pravnog položaja “nekonstitutivnih” u Bosni i Hercegovini. Sa ili bez ove odluke, ustavna pozicija nekonstitutivnih naroda ostala je ista: oni su i dalje bili **nekonstitutivni na cijelom području države**.

Potpuno je jasno da ni individualno, ni kolektivno shvaćena “nacionalna pripadnost” u bh. političkom realitetu ne može biti ekskluzivistički locirana na bilo koji dio teritorija BiH, pa samim tim, bosansko (ili hercegovačko) *Bošnjaštvo*, *Hrvatstvo* ili *Srpstvo* ne može biti teritorijalno ograničeno na jedan dio ili dijelove Bosne i Hercegovine. Pretpostavka da se bude Bošnjak, Hrvat ili Srbin u BiH, odnosno biti pripadnikom nekog od navedenih etnokolektiviteta, automatski ne pret(po)stavlja vezu (samo) sa određenim dijelom teritorija BiH na kojem su živjeli ili žive samo pripadnici tog bh. etničkog korpusa.

Etnokulturološka, konfesionalna, tradicijska, običajna i svaka druga komponenta složenog bosanskohercegovačkog socijalnog miljea satkana je od sofisticiranog spleta svekolikog *bosanskog jedinstva različitosti*, pa je, vezano za to, korištenje teritorijalnog kriterija, kao odrednice pripadnosti jednoj nacionalnoj skupini, teorijski i praktično neosnovano. Stoga je svaka ideja i teorija etnokantonizacije ili koje druge etnoregionalizacije, dolazila ona “izvana” ili “iznutra”, u svojoj biti inkompatibilna multietničkom konceptu bh. društva i nosilac latentne prijetnje državno-pravnom opstanku BiH. Kantonizacija BiH, naravno, može biti koncept unutarnjeg državno-pravnog ustroja multinacionalne državne zajednice pod uvjetom da se radi o civilizovanoj državi u kojoj različitosti nisu uzrok kršenja temeljnih ljudskih prava i sloboda pojedinaca. S druge strane, kantonizacija/regionalizacija BiH na bazi prirodnih i geografskih karakteristika, kao način “de-entitetizacije” BiH, čini se kao razumno i logično ustavno-pravno rješenje unutrašnje teritorijalne organizacije BiH.

## 2. “Državotvorni narodi” u komparativnoj praksi

### 2.1. Koncept

Države koje su, unutar svojih granica, priznale prisustvo etnički i/ili teritorijalno izdiferenciranih autohtonih (izvornih, zavičajnih, starosjedilačkih, domaćih) zajednica naroda, docnije su inaugurisale formalno priznanje širokog spektra njihovih prava. Naime, države mogu identifikovati specifičnu prirodu pojedinih zajednica koje bi spadale pod kategoriju **autohtonih naroda** (kao što su, npr. zajednica sjevernoameričkih Indijanaca, ili albanska zajednica u Autonomnoj pokrajini Kosovo u bivšoj Jugoslaviji) i provesti legislativne akcije kako bi priznale tim zajednicama inherentno pravo na samoupravu unutar državne strukture vlasti. U ovom slučaju, država priznaje *viši stepen prava* ovim zajednicama u poređenju s drugim zajednicama.

Osim priznavanja ovih prava autohtonim narodima, države formalno priznaju i nacionalne manjine (etničke grupe) garantujući im tradicionalno i univerzalno priznata prava koja afirmišu te grupe kao takve (npr. mađarska i italijanska manjina u Sloveniji – v. niže pod 2.2.2.). U ovoj situaciji manjine uživaju zaštitu prava, ali na *nižem stupnju* u poređenju s pravima autohtone populacije (naroda). Govorimo o nacionalnim manjinama koje uživaju određeni skup prava i sloboda. Kvalitet i kvantitet tih prava i sloboda zavisi od zakonodavne vlasti svake zemlje koja stvara i primjenjuje ustavne odredbe koje priznaju ova prava.

“Komunistička vlast nove jugoslovenske federacije nije pokušala, nakon Drugog svjetskog rata, da definiše BiH (za razliku od drugih republika) kao domovinu (neodređenih) naroda, radničke klase i ništa više. Do 1974. godine i poslije efektivnog priznavanja Muslimana (ili Bošnjaka) kao samostalne nacije u kasnim 60-tim, novi Ustav BiH je naveo ‘Muslimane, Srbe i Hrvate i pripadnike drugih naroda i narodnosti koji u njoj žive’ kao bosanske narode, ali je osigurao posebno mjesto ‘radnim ljudima i građanima’.” *Ustav Socijalističke Republike Bosne i Hercegovine* (1974), Odjeljak I, član 1.<sup>20</sup>

Na kraju, Ustav BiH koji je na snazi, priznaje tri konstitutivna naroda (Bošnjake, Hrvate i Srbe) i ostale građane BiH. U njegovoj preambuli stoji da “Bošnjaci, Hrvati i Srbi, kao konstitutivni narodi (zajedno sa ostalima) i građani Bosne i Hercegovine [...] utvrđuju Ustav

<sup>20</sup> International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16. april 2002., ICG Balkans Report No. 128, Sarajevo/Brussels, str. 2, fus-nota 5.

Bosne i Hercegovine...”. Čak i ako prihvatimo da sve njih formulacija preambule Ustava postavlja u istu ravan (što očigledno nije slučaj), odredbe Ustava jasno prave snažnu diskriminatornu distinkciju između konstitutivnih (Bošnjaci, Hrvati i Srbi) i nekonstitutivnih naroda (ostali, građani). Kao što je već naglašeno, sastav svih državnih organa (državnih institucija) Predsjedništva, Parlamentarne skupštine,<sup>21</sup> Vijeća ministara, Ustavnog suda i dr., odražava model “jedna država – dva entiteta – tri naroda”. Ovaj model ne daje nikakve šanse, npr. pripadniku “ostalih” da učestvuje u izbornoj trci za člana Predsjedništva i postane član tripartitnog državnog predsjedništva.<sup>22</sup> Skoro identičan diskriminatorni pristup usvojen je u materiji sastava Parlamentarne skupštine<sup>23</sup> i Ustavnog suda BiH.<sup>24</sup>

## 2.2. Komparativna ustavna rješenja

U daljem tekstu ponudit ćemo kratak pregled komparativnih primjera definisanja “državotvornih naroda” bez ikakvih pretenzija da damo sveobuhvatan kompendij prakse u drugim državama i regionima. Ovaj kratki pregled istih rješenja koje predviđaju ustavi nekih evropskih zemalja prije bi se mogao okarakterisati kao parametar kako bi se to moglo uraditi u BiH, naravno, uzimajući u obzir vrlo složenu političku, etničku, religijsku i tradicijsku supstancu bh. društva.

### 2.2.1. Ustav Hrvatske

Hrvatski Ustav u svojoj prembuli navodi da se “Republika Hrvatska ustanovljuje [...] kao nacionalna država hrvatskog naroda i država pripadnika autohtonih nacionalnih manjina:

<sup>21</sup> Amandmani od 25. marta 2006. godine o kojima su se usaglasile vodeće političke stranke u BiH, također, sadrže isti diskriminatorni koncept nekonstitutivnih građana. *Amandman II* glasi: “U Ustavu Bosne i Hercegovine član IV mijenja se i glasi: [...] 2. Sastav i izbor Parlamentarne skupštine a) Parlamentarnu skupštinu čine Predstavnički dom i Dom Naroda. b) Predstavnički dom ima 87 članova, od čega su 3 mjesta garantirana onima koji ne pripadaju konstitutivnim narodima. [...] d) Dom naroda ima 21 člana, od kojih je 7 Bošnjaka, 7 Hrvata i 7 Srba”. Samo po sebi se razumije da nekonstitutivni građani imaju skoro 30 puta manje šanse da postanu delegati u Parlamentarnoj skupštini u odnosu na one konstitutivne.

<sup>22</sup> *Ustav BiH*, član V, Predsjedništvo: “Predsjedništvo Bosne i Hercegovine se sastoji od tri člana: jednog Bošnjaka i jednog Hrvata, koji se svaki biraju neposredno s teritorija Federacije i jednog Srbina, koji se bira neposredno sa teritorija Republike Srpske”.

<sup>23</sup> *Ustav BiH*, član IV, Parlamentarna skupština: “Parlamentarna skupština ima dva doma: Dom naroda i Predstavnički dom. 1. Dom naroda se sastoji od 15 delegata, od kojih su dvije trećine iz Federacije (uključujući pet Hrvata i pet Bošnjaka) i jedna trećina iz Republike Srpske (pet Srba)” (kurziv dodan). Odredba upotrebljava termin “uključujući” no, u stvari se radi o ukupnom broju delegata iz Federacije – pet Hrvata, plus pet Bošnjaka. Faktički, radi se, o ograničenju na pet Hrvata i pet Bošnjaka. Jednostavna računica pokazuje slijedeće: 5 Bošnjaka + 5 Hrvata + 5 Srba + 0 Ostalih + 0 ... = 15 delegata. Diskriminacija se proteže kroz cijeli Ustav (npr. član IV 3. b): “Svaki dom će većinom glasova usvojiti svoj poslovnik o radu i izabrati među svojim članovima jednog Srbina, jednog Bošnjaka i jednog Hrvata za predsjedavajućeg i zamjenike predsjedavajućeg, s tim da će mjesto predsjedavajućeg rotirati između ova tri lica”. (kurziv dodan).

<sup>24</sup> *Ustav BiH*, član VI, Ustavni sud: Ustavni sud Bosne i Hercegovine sastoji se od devet članova. Četiri člana bira Predstavnički dom Federacije, a dva člana Skupština Republike Srpske. Preostala tri člana bira predsjednik Evropskog suda za ljudska prava nakon konsultacija s Predsjedništvom. U praksi ovo znači da se Ustavni sud čine dva Bošnjaka, dva Hrvata, dva Srbina i tri stranca. Dakle, opet nema *ostalih*. Postoji i primjer drugačijeg pristupa: nakon što je čekao oko šest mjeseci na rezultate primjene odluke Ustavnog suda BiH, Visoki predstavnik je konačno, januara 2001. godine, nakon konsultacija s vodećim političkim strankama, imenovao šesnaest članova Ustavne komisije svakog entiteta: četiri iz svakog konstitutivnog naroda, plus četiri iz reda *ostalih*. No, ovdje se radilo o OHR-u, ne o domaćim političarima.

Srba, Čeha, Slovaka, Talijana, Mađara, Židova, Nijemaca, Austrijanaca, Ukrajinaca, Rusina i drugih, koji su njezini državljani, kojima se jamči ravnopravnost s građanima hrvatske narodnosti i ostvarivanje nacionalnih prava u skladu s demokratskim normama OUN i zemalja slobodnoga svijeta.” U ovom slučaju, Ustav reguliše položaj hrvatskog naroda i specifičnu ustavno-pravnu poziciju **autohtonih nacionalnih manjina**. Kao što je već objašnjeno, u BiH, postoje ostali, građani i dr. koji nisu nacionalna manjina, pa ne uživaju zaštitu kao što bi uživali da imaju status nacionalne manjine: u stvari, *de iure* i *de facto*, ove kategorije stanovništva su diskriminirane i to samom ustavnom normom.

Hrvatski parlament (Sabor) ima najmanje 100, a najviše 160 zastupnika koji se, na temelju opšteg i jednakog biračkog prava, biraju neposredno tajnim glasanjem.<sup>25</sup> Opet, niti riječi o etničkoj (nacionalnoj) pripadnosti zastupnika. Također, predsjednik Republike bira se na osnovu opšteg i jednakog biračkog prava na neposrednim izborima tajnim glasanjem na vrijeme od pet godina. Ni ovdje se ne pominje nikakav izborni kriterij koji se zasniva na nacionalnoj pripadnosti.<sup>26</sup> Vladu Republike Hrvatske čine predsjednik, jedan ili više dopredsjednika i ministri. Ustav ne pominje nacionalni (etnički) sastav Hrvatske vlade.<sup>27</sup>

## 2.2.2. Ustav Slovenije

Slovenački Ustav navodi da je Slovenija “država svih njenih građana zasnovana na trajnom i neotuđivom pravu slovenske nacije na samoodređenje”<sup>28</sup> (kurziv dodan). O nacionalnoj (etničkoj) pripadnosti građana Slovenije, Ustav daje slijedeće određenje: “Svako ima pravo da slobodno izražava pripadnost svojoj naciji ili nacionalnoj zajednici, da njeguje i izražava svoju kulturu i da upotrebljava svoj jezik i pismo”.<sup>29</sup>

Ustav Slovenije ide i korak dalje u zaštiti nacionalnih manjina (italijanske i mađarske), predviđajući za njih posebnu ustavno-pravnu poziciju.<sup>30</sup>

(1) “Autohtonoj italijanskoj i mađarskoj nacionalnoj zajednici i njihovim članovima garantuje se pravo slobodne upotrebe njihovih nacionalnih simbola te, kako bi sačuvali nacionalni identitet, pravo na formiranje organizacija i razvoj ekonomskih, kulturnih, naučnih i istraživačkih aktivnosti, kao i aktivnosti u domenu javnih medija i izdavaštva. U skladu sa zakonima, ove dvije nacionalne zajednice i njihovi članovi imaju pravo na obrazovanje i školovanje na njihovim jezicima, kao i pravo da formiraju i razvijaju to obrazovanje i školovanje. [...] Ovim nacionalnim zajednicama i njihovim članovima garantuje se pravo da njeguju odnose s matičnim nacijama i državama. Država će osigurati materijanu i moralnu pomoć za uživanje ovih prava.”

Ovim zajednicama je priznato **pravo na samoupravu** u određenom obimu, uključujući i neke funkcije iz nacionalne (državne) nadležnosti.

“Kako bi se mogla vršiti ova prava, pripadnici zajednica će formirati vlastite samoupravne zajednice u geografskim područjima koja naseljavaju. Po prijedlogu ovih samoupravnih

<sup>25</sup> Član 71. (Izbori, kandidovanje).

<sup>26</sup> Član 94. (Šef države).

<sup>27</sup> Član 108. (Premijer, ministri).

<sup>28</sup> Član 3. (Samoodređenje, Suverenitet).

<sup>29</sup> Član 61. (Izražavanje nacionalne pripadnosti).

<sup>30</sup> Član 64. (Posebna prava autohtone italijanske i mađarske nacionalne zajednice u Sloveniji).



nacionalnih zajednica, država ih može ovlastiti da vrše neke funkcije državne nadležnosti, za koje će država osigurati sredstva.”<sup>31</sup>

Ove zajednice su **direktno predstavljene** u državnom parlamentu: “Dvije nacionalne zajednice direktno su predstavljene u predstavničkim tijelima lokalne samouprave i državnom parlamentu”.<sup>32</sup>

Konačno “Zakoni, propisi i drugi opšti akti koji se odnose isključivo na vršenje ustavom utvrđenih prava i položaja nacionalnih zajednica, ne mogu biti usvojeni bez saglasnosti predstavnika ovih nacionalnih zajednica”.<sup>33</sup>

Položaj i posebna prava romske zajednice koja živi u Sloveniji regulisan je zakonom.<sup>34</sup>

Što se državnog parlamenta (*Skupščina Republike Slovenije*) tiče, Ustav reguliše da se on sastoji od delegata *građana Slovenije* i čine ga devedeset delegata izabranih opštim, jednakim, direktnim i tajnim glasanjem. Po pitanju predstavljanja nacionalnih manjina, Ustav osigurava da po jedan delegat italijanske i mađarske manjine uvijek bude izabran u državni parlament.<sup>35</sup> Predsjednik Republike se bira direktnim, opštim izborima tajnim glasanjem.<sup>36</sup> Vlada se sastoji od predsjednika vlade i ministara.<sup>37</sup> Nema nikakvog pomena etničkog/ /nacionalnog sastava niti jednog od pomenutih državnih organa. Reguliše se jedino položaj i učešće u vlasti nacionalnih manjina, ne i “konstitutivnih” i “nekonstitutivnih”.

### 2.2.3. Ustav Španije

Preambula španskog Ustava navodi da je ustav utvrdila “*španska nacija*, želeći da ustanovi pravdu, slobodu, sigurnost i promovise dobrobit svih njenih pripadnika...” (kurziv dodan). Pod *španskom nacijom* podrazumijevaju se svi oni koji su državljani Španije.

Prema Ustavu, Parlament predstavlja španski narod i sastoji se od Predstavničkog doma i Senata.<sup>38</sup> Predstavnički dom se sastoji od najmanje 300, a najviše 400 delegata koji su izabrani opštim, slobodnim, direktnim i tajnim glasanjem na način propisan zakonom.<sup>39</sup> “Senat je dom teritorijalnog predstavljanja. U svakoj provinciji, četiri senatora se biraju opštim, slobodnim, direktnim i tajnim glasanjem od strane glasača za svakog od njih, na način utvrđen zakonom”.<sup>40</sup> Kao što se vidi, niti ovdje nema nikakve odredbe koja govori o nacionalnoj (etničkoj) pripadnosti delegata/senatora.

<sup>31</sup> Ibidem, Par. 2.

<sup>32</sup> Ibidem, Par. 3.

<sup>33</sup> Ibidem, Par. 5.

<sup>34</sup> Član 65. (Status i posebna prava romske zajednice u Sloveniji).

<sup>35</sup> Član 80. (Sastav i izbori).

<sup>36</sup> Član 103. (Izbor predsjednika republike).

<sup>37</sup> Član 110. (Sastav vlade).

<sup>38</sup> Član 66. (Sastav, nadležnost, nepovredivost).

<sup>39</sup> Član 68. (Izbor).

<sup>40</sup> Član 69. (Senat).

## 2.2.4. Ustav Francuske

Preambula Ustava Francuske navodi da “*Francuski narod* [...] svečano proglašava svoju opredjeljenost ljudskim pravima i principu narodne suverenosti kako je definisano Deklaracijom iz 1789., potvrđeno i dopunjeno Preambulom Ustava iz 1946.” (kurziv dodan). Nema nikavog razlikovanja vezanog za etničku pripadnost pripadnika *francuskog naroda*.<sup>41</sup>

Francusko zakonodavno tijelo sastoji se od Narodne skupštine i Senata. Delegati Narodne skupštine se biraju direktnim (neposrednim) glasanjem. Članovi Senata se biraju indirektnim (posrednim) glasanjem, što treba osigurati predstavljanje teritorijalnih jedinica (entiteta) u sastavu Republike. Francuski državljani koji žive izvan države imaju svoje predstavnike u Senatu.<sup>42</sup> Ustavna norma pominje samo francuske državljane – ne koristi nikave druge odrednice.

Ustav osigurava jednakost građana uvodeći klauzulu zabrane diskriminacije: “Svi građani su jednaki pred zakonom, bez obzira na njihovo porijeklo, rasu ili vjeroispovijest. Svi imaju iste dužnosti”.<sup>43</sup>

## 2.2.5. Ustav Njemačke

U preambuli Ustava Savezne Republike Njemačke, kaže se da: “Svjestan svoje odgovornosti pred Bogom i Ljudima, pokretan odlučnošću da služi svjetskom miru kao ravnopravan partner u ujedinjenoj Evropi, njemački narod, na osnovu ustavotvorne vlasti, donosi ovaj Ustav”.<sup>44</sup> Sintagma koja se upotrebljava je *njemački narod*, bez dodatnih referenci ko predstavlja njemački narod.

Izbori za *Bundestag* (Donji dom Parlamenta) su regulisani na slijedeći način: “Poslanici u njemačkom Saveznom vijeću se biraju na opštim, neposrednim, slobodnim, jednakim i tajnim izborima. Oni su predstavnici cijelog njemačkog naroda, nisu vezani nikakvim nalogima i uputama i vezani su samo sopstvenom savješću”.<sup>45</sup> Ustav ne spominje etničko porijeklo delegata. Štaviše, Ustav predviđa da aktivno biračko pravo ima *svako* ko ima dvadeset i jednu godinu, dok pasivno biračko pravo ima *svako* ko je navršio dvadeset i pet godina.<sup>46</sup>

Predsjednika savezne države bez rasprave bira Savezna skupština. Izabran može biti svaki Nijemac koji može biti biran u Savezno vijeće i koji je napunio četrdeset godina.<sup>47</sup> Saveznog kancelara bira bez rasprave Savezno vijeće na prijedlog Predsjednika savezne države.<sup>48</sup>

<sup>41</sup> Treba praviti razliku između sintagmi *nacionalna grupa* i *etnička grupa*. U zapadnim zemljama, nacionalni interes znači interes cijele nacije (naroda), odnosno države, zato je nacionalni interes identičan državnom interesu. U BiH, sintagma *nacionalni interes* označava interes jednog od tri konstitutivna naroda (Bošnjaka, Hrvata, Srbina (?!)). To je interes etničke grupe (etnički, ne nacionalni /državni/ interes, shvaćen kao interes cjelokupne populacije jedne zemlje).

<sup>42</sup> Član 24. [Narodna skupština, Senat].

<sup>43</sup> Član 77. [Autonomija].

<sup>44</sup> Ustav Savezne Republike Njemačke (*Grundgesetz für die Bundesrepublik Deutschland*).

<sup>45</sup> Član 38. (Izbori).

<sup>46</sup> Ibidem.

<sup>47</sup> Član 54. (Izbori).

<sup>48</sup> Član 63. (Izbor i imenovanje Saveznog kancelara).

## 2.2.6. Ustav Švicarske

Preambula Ustava Švicarske konfederacije koristi slijedeću formulaciju: “U ime Boga Svemogućeg! *Mi, narod Švicarske i kantona, [...] usvajamo ovaj Ustav...*”. Ustav predviđa da se vlada sastoji od sedam članova koji se biraju među građanima Švicarske koji su podobni da budu članovi Predstavničkog doma, na period od četiri godine.<sup>49</sup>

Predsjednik konfederacije predsjedava Vladom, a bira ga, među članovima Vlade, Parlament na period od četiri godine.<sup>50</sup>

“Iako su primjeri Švicarske i (rjeđe) Belgije često navođeni kao opravdanje ovlašćivanja naroda, njihova relevantnost je samo djelomična. Švicarska konfederacija, npr. predviđa sistem podjele vlasti među kantonima čije stanovništvo govori različite jezike, ali ne definiše ove grupe kao posebne narode u smislu ustavnih kategorija. Svi oni su Švicarci.”<sup>51</sup>

Iako je Švicarska multietnička država, u njoj se ne pravi nikakva razlika između etničkih grupa u smislu da se jednim daje kvalitet “konstitutivnih”, a drugima ne, te na osnovu toga, pravi razlika u njihovoj participaciji u vlasti.

Član 175. Sastav i izbor.

<sup>50</sup> Član 176. Predsjedništvo.

<sup>51</sup> International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, str. 2, fus-nota 5.

## 3. Zaključak i preporuke

### 3.1. Zaključak

Nema sumnje da postojeća legislativna rješenja u Ustavu Bosne i Hercegovine prosto “zazivaju” promjene kako bi se osigurao bolji ustavno-pravni položaj za one koji ne pripadaju trima konstitutivnim narodima i kako bi se stavila tačka na postojeću diskriminaciju koja traje već dvanaest godina i koja se zasniva na **kolektivnom identitetu**. Državni Ustav treba da garantuje jednak položaj i tretman svih građana BiH priznavanjem njihovih individualnih prava, oslobođen od diskriminacije po bilo kojem osnovu, uključujući i onu na osnovu nacionalne (etničke) pripadnosti.

Ustavne promjene, također, bi trebale poraziti ispraznu demagogiju i ideološke fraze, kao npr. *“Trebamo biti jedinstveni kako bismo se odbranili od onih drugih”* i uvesti i afirmisati ideju da su svi građani Bosne i Hercegovine građani jedne države, te da, kao takvi, mogu graditi demokratsku, modernu državu koja je zasnovana na principu vladavine prava. Državu koja stoji iza svojih građana – bez obzira da li su oni pripadnici konstitutivnih naroda ili ne – i pomaže im kao realna snaga na koju uvijek mogu računati.

### 3.2. Preporuke

Ove preporuke bi trebale imati značaj za cijelu državu. One mogu biti korištene kao vodič ili uputstvo za predlaganje ustavnih amandmana u onom dijelu u kojem se amandmani odnose na ljudska prava i koji bi trebali uzeti u obzir postojeće međunarodne standarde i najbolju praksu po pitanju položaja građana i zaštite ljudskih prava.

Materija koja je istražena i analizirana u ovoj studiji ima veliki značaj na ukupan sistem zaštite ljudskih prava u BiH kao i na njen politički i pravosudni sistem (npr. izbore, oblike učešća u procesu odlučivanja, zakondavni postupak, učešće u zakonodavnoj, izvršnoj i sudskoj vlasti na svim nivoima administrativno-teritorijalne organizacije države i dr.).

Preporuke bi, bilo da budu usvojene u cijelosti ili djelomično, redukovale nedostatke u implementaciji međunarodnih standarda za zaštitu ljudskih prava te poboljšale kvalitet domaćih propisa koji regulišu mehanizme zaštite individualnih ljudskih prava u BiH.

### 3.2.1. Opšte preporuke

- Preambulu Ustava Bosne i Hercegovine treba reformulisati tako da nova formulacija ne pravi nikakvu razliku u ustavno-pravnom položaju građana BiH (bez razlikovanja “konstitutivnih” i “nekonstitutivnih”);
- Konsekventno prethodnoj preporuci, koncept “građana” i “građanske države” trebalo bi uvesti u kompletan normativni dio Ustava – u svaku pojedinačnu relevantnu odredbu kako bi se osigurala stvarna jednakost svih građana Bosne i Hercegovine;
- Sve odredbe Ustava koje su u suprotnosti sa aplikabilnim međunarodnim pravnim instrumentima i međunarodno-pravnim okvirom, koji osigurava uživanje ljudskih prava bez diskriminacije, trebaju biti modifikovane kako bi se osigurala jednakost svih pred zakonom, odnosno jednak (nediskriminatoran) tretman za sve građane BiH.

### 3.2.2. Posebne preporuke

Osim preambule, koja je najviša ustavno-pravna i politička proklamacija koja se odnosi na “konstitutivne” i “nekonstitutivne” narode, izmjenama bi trebalo podvrgnuti još neke odredbe Ustava Bosne i Hercegovine kako bi se osigurao jednak ustavno-pravni položaj i tretman svih građana BiH.<sup>52</sup>

#### 1. Parlamentarna skupština

- 1.1. Član IV. 1. – U Domu naroda treba osigurati predstavljanje pripadnika nekonstitutivnih naroda među 15 delegata (ili bilo kojeg drugog broja delagata o kojem se postigne saglasnost).
  - *Trebalo bi predvidjeti biranje najmanje dva delegata (npr. po jedan iz svakog entiteta) iz reda nekonstitutivnih naroda. Ista proporcija bi se trebala primjenjivati i za postizanje kvoruma.*
- 1.2. Član IV. 2. – Predstavnički dom sastoji se od 42 člana, od kojih se dvije trećine biraju s teritorija Federacije, a jedna trećina s teritorija Republike Srpske.
  - *Trebalo bi predvidjeti izbor najmanje šest delegata iz reda pripadnika nekonstitutivnih naroda, od čega dvije trećine s teritorija Federacije BiH, a jedna trećina s teritorija RS.*
- 1.3. Član IV. 3. (b) – Svaki dom će većinom glasova usvojiti svoj poslovnik o radu i izabrati među svojim članovima jednog Srbina, jednog Bošnjaka i jednog Hrvata za predsjedavajućeg i zamjenike predsjedavajućeg, s tim da će mjesto predsjedavajućeg rotirati između ova tri lica.
  - *Predvidjeti da jedan delegat iz reda nekonstitutivnih naroda, također, može biti predsjedavajući i zamjenik predsjedavajućeg.*

<sup>52</sup> Ove posebne preporuke koje se odnose na ustavno-pravni položaj građana BiH ne bi trebale isključivati razmatranje drugih ustavnih amandmana koji se predlažu.

## 2. Predsjedništvo

2.1. Član V. – Predsjedništvo Bosne i Hercegovine se sastoji od tri člana: jednog Bošnjaka i jednog Hrvata, koji se svaki biraju neposredno s teritorija Federacije, i jednog Srbina, koji se bira neposredno s teritorija Republike Srpske.

- *Trebalo bi predvidjeti ustavni mehanizam po kojem ne bi bilo neophodno da Predsjedništvo čine jedan Bošnjak, jedan Hrvat i jedan Srbin. Smisao ove odredbe jeste da osigura da se sastav Predsjedništva smatra legalnim, a ono kao organ potpuno operativnim, u situaciji da je jedan ili više članova Predsjedništva izabran iz reda nekonstitutivnih naroda. Konačni ratio legis bio bi osiguranje jednakog tretmana konstitutivnih i nekonstitutivnih kandidata. Naravno, idealno bi bilo da se bira samo jedan predsjednik, kao inokosni organ.*

## 3. Vijeće ministara

3.1. Član V. 4. (b) – Najviše dvije trećine svih ministara mogu biti imenovani s teritorija Federacije. Predsjedavajući će, također, imenovati zamjenike ministara (koji neće biti iz istog konstitutivnog naroda kao i njihovi ministri), koji će preuzeti dužnost nakon odobrenja Predstavničkog doma.

- *Odredbu treba izmijeniti tako što bi se dodalo, nakon riječi koje stoje u zagradi, poslije riječi "ministri": "... a koji mogu biti iz reda nekonstitutivnih naroda".*

## 4. Ustavni sud

4.1. Član VI. 1 (a) – Četiri člana bira Predstavnički dom Federacije, a dva člana Skupština Republike Srpske.

- *Nakon ove, treba dodati odredbu koja jasno daje pravo pripadnicima nekonstitutivnih naroda da budu imenovani za sudije Ustavnog suda. Formulacija može biti slijedeća: "Oni mogu biti izabrani iz reda konstitutivnih ili nekonstitutivnih naroda". Iako član VI. 1. (a) izrijekom ne predviđa da se članovi Ustavnog suda biraju iz reda konstitutivnih naroda, u praksi je upravo to slučaj, pa zato postoji potreba za jednom ovakvom odredbom.*

\* \* \*

*"... Podsjećajući se na Osnovna načela usaglašena u Ženevi, 8. 9. 1995. godine, i u Njujorku, 26. 9. 1995. godine, građani Bosne i Hercegovine ovim utvrđuju Ustav Bosne i Hercegovine..."*

(Ustav Bosne i Hercegovine, Preambula)

## Bibliografija

### A. Knjige, članci, izvještaji, mišljenja

1. Constitutional Court of Bosnia and Herzegovina, *Partial Decision, Case No U 5/98 III*, July 1 2000. – *Official Gazette of BiH* No. 23/00);
2. European Commission for Democracy through Law (Venice Commission), *Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the "Constituent Peoples"*, adopted by the Commission at its 46<sup>th</sup> Plenary Session, Venice, 9-10 March 2001;
3. International Crisis Group, *European vs. BiH Human Rights Standards*, a Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14 April 2000;
4. International Crisis Group, *Implementing Equality: The "Constituent Peoples" Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels;
5. J. Harris – M.O. Boyle – C Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, 1995;
6. Predloženi Amandmani na Ustav Bosne i Hercegovine, 25. mart 2006.;
7. *The Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14. December 1995, Office of Public Communication, Bureau of Public Affairs, U.S. Department of State;
8. Zarije Seizović, "Addendum to the Phenomenon of the National Pathology", *Hijatus, časopis za društvena pitanja i kulturu demokrat/cije*, Zenica, august/ kolovoz 1996;
9. Zarije Seizovic, "Human Rights Protection in Bosnia and Herzegovina, within the Framework of the Dayton Peace Accords with Special View to Non-Discrimination Policy", essay written in the course of Summer School "Post-Communist transition and the European Integration Processes", organized by *Instituto per l'Europa Centro-Orientale e Balcanica* – International Network Europe and the Balkans and Italian Ministry of Interior in Cervia, Italy, 4-16 September 2000;
10. Zarije Seizović, "Civil State and Concept of Constituent Peoples" in *Bosnia and Herzegovina: Concord of Diversity – Compilation of Legal Essays*, (Studio Flaš, Zenica, 2005).

### B. Ustavi

11. Constitution of Croatia;
12. Constitution of France;
13. Constitution of Germany;
14. Constitution of Slovenia;
15. Constitution of Spain;
16. Constitution of Switzerland.





**“Constituent Peoples”  
and  
Constitutional Changes**

**“... Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina...”**

(Constitution of Bosnia and Herzegovina, Preamble)

## INTRODUCTION

The Euro-Atlantic integration of Bosnia and Herzegovina (BiH), as its strategic goal, assumes set of very complex reforms. The most important of them is a constitutional reform, envisaged to be a pretext to establishment of functional and effective state. The 2006 failure of attempts to carry out this reform postponed the constitutional changes until nowadays. One of absolutely neglected topics in the Constitution of Bosnia and Herzegovina (Constitution of BiH) when it comes to constitutional changes is the issue of “**constituent peoples**”. The human rights protection in BiH is provided for by the **General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP)**.<sup>1</sup> The Constitution of BiH (Annex 4 to GFAP) provides for equality of Bosniacs, Croats and Serbs, claiming that it also guarantees equality of all citizens BiH. Not only that such equality is not ensured by the con/institutional set up, but the current institutional structure constitutes a specific legal framework for discriminatory concept: the system of power structure of the state has been constructed to ensure political participation of the “constituent peoples” marginalizing other citizens of BiH (those “non-constituent”).

The so-called *ethnic(ally) based nationalism* being side-effect of defeat of the (ex)communist authoritarian regimes proved to be a main obstacle to democratization in all multi-ethnic countries in transition, including BiH. Ethnic criterion prevents BiH authorities from sharing political, social and economic power equally within the civil society, favouring ethnic groups to the detriment of an individual citizen. This concept enables constituent peoples to share almost all power between them, inhibiting the enforcement of equal treatment of all.

Although a problem related to inclusion of national minorities into the communities’ social, political and other sorts of life is being addressed to certain extent by a number of projects, a special attention has never been given to a weird concept of “constituent peoples” that, *de iure*, creates model of protection of *collective rights* and a legal basis for discrimination of BiH citizens.<sup>2</sup>

<sup>1</sup> Signed in USA, Dayton, Ohio, December 15, 1995.

<sup>2</sup> *Collective rights*, although nowadays increasingly acknowledged in both theory and practice in Western states, are nonetheless secondary to rights based on individual citizenship. The language and cultural rights of national minorities are protected (in some cases by international conventions), and native peoples have

The central purpose of this paper is to explore the current concept (constitutional position) of “constituent peoples” as a state-making nations and relation of this concept to the concept (constitutional position) of “Others” being discriminated against by virtue of the very constitutional norm. The paper outlines a to-be-achieved position of “Others” in the course of the constitutional changes being proposed and/or to be adopted, which is to guarantee an equal treatment of the BiH citizens no matter whether they belong to the three “constituent peoples”, national minority or *Others*, as specific sort of “minority”. It will also focus on the promotion and development of human rights as individual rights and the application of the non-discrimination clause, as provided for in the Constitution of BiH.<sup>3</sup>

The issue of citizens’ equality in former Yugoslavia was dealt with in both Federal and Republic Constitution. The Constitution of Socialist Federative Republic of Yugoslavia (SFRY) provided for equality of all citizens (Article 154), stating that “[c]itizens are equal as to their rights and duties, regardless of their nationality, race, gender, language, religion, education or social status”. This was a **non-discrimination clause**. The same wording could be found in Article 161 Constitution of Socialist Republic of Bosnia and Herzegovina (SRBiH). Practically, there was always a sharp “discrepancy between the norm and reality”.<sup>4</sup>

If the national homogenization were not explained (and, unfortunately, understood) as sole concept for (biological) survival of the BiH nations, it would not have been necessary to unify something that was, *per se*, unified and single. Therefore, the State of BiH – legally, politically and ethnically torn up – had undergone some sort of artificial institutional reanimation under the patronage of the International Community, and was, just plausibly, re-integrated in a form of bizarre state: one state – two entities – three nations. In such state “[n]ational homogenization will still remain the main obstacle to political and economic reintegration of the [...] society and will be playing significant role in continuing disintegration processes throughout the country while national (ethnic) identity will very likely be almost sole identification model for the [...] citizens”.<sup>5</sup>

Obviously, under the current circumstances, it is necessary to undertake legislative steps (measures), to “equalize” position of all citizens in BiH, in view of international human rights standards, within the realm of both civil and political rights as it is crystal clear that Dayton’s Constitution contains apparent discriminatory concept, as it recognises different legal and political status to the BiH citizens.

often reasserted pre-existing territorial entitlements, but they remain citizens of the states in which they live (International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 2, foot-note 5).

<sup>3</sup> Article II 4 of the Constitution of BiH reads as follows: Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (cited from *The Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14 December 1995, Office of Public Communication, Bureau of Public Affairs, U.S. Department of State.

<sup>4</sup> Statistics show that the 1991 census national break-down was the following: 43,7% Bosniaks, 31,3% Serbs, 17,3% Croats and 7,7% of Others.

<sup>5</sup> Zarije Seizovic, “Human Rights Protection in Bosnia and Herzegovina, within the Framework of the Dayton Peace Accords with Special View to Non-Discrimination Policy”, essay written in the course of Summer School “Post-Communist transition and the European Integration Processes”, organized by *Instituto per l’Europa Centro-Orientale e Balcanica* – International Network Europe and the Balkans and Italian Ministry of Interior in Cervia, Italy, 4-16 September 2000, p. 12.

## 1. Institutionalized discrimination

### 1.1. Concept of “Constituent Peoples” in the Constitution of BiH

The very notion *constitution* develops from the Latin word *constitutio*, meaning “organization”, “system”, “frame”, etc. Accordingly, Latin word *constitutus* means “made”, “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) that state’s social quintessence is composed of.

Despite of 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.<sup>6</sup>

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 as provided for in its Constitution certainly had not succeeded in delivering these fundamental entitlements.<sup>7</sup>

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”<sup>8</sup> (emphasis added). Also the thrust for the ECHR is the securing of individual rather than group rights.<sup>9</sup>

<sup>6</sup> Essay “Civil State and Concept of Constituent Peoples” in: Zarije Seizović, *Bosnia and Herzegovina: Concord of Diversity – Compilation of Legal Essays*, Studio Flaš, Zanic, 2005, p. 11.

<sup>7</sup> International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 1.

<sup>8</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the “Constituent Peoples”*, adopted by the Commission at its 46<sup>th</sup> Plenary Session, Venice, 9-10 March 2001, para 59.

<sup>9</sup> J. Harris – M.O. Boyle – C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, 1995, p. 487.

## 1.2. Protection of vital national interest in the Constitution of BiH

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 through 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 list of standards such as to be adequately represented in legislative, executive and judicial bodies, to have equal rights in the decision-making process, issues related to education, cultural or religion identity and tradition, language, national symbols and flags, cultural heritage, etc. However, those are standards yet to be defined. There are a number of issues that can be placed under each of such standards.<sup>10</sup> The challenge is to compose a list of issues which is not so broad as to give a small number of deputies “licence to kill off” any and all legislation of which they disapprove but leaves scope for the national caucuses to prevent legislation which perpetuates ethnically based discrimination.<sup>11</sup>

The European human rights standards, including *non-discrimination clause* (on any ground) are human rights instruments that became binding for judicial and administrative authorities in the Federation of BiH ever since the Federation Constitution entered into force (March 1994)<sup>12</sup>. GFAP<sup>13</sup> 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 to these rights and freedoms “priority over all other (national) laws”.<sup>14</sup> 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 social/religious/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” only, at the expense of individual’s rights.

<sup>10</sup> See International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 16-17.

<sup>11</sup> 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*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 16, foot-note 45).

<sup>12</sup> 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).

<sup>13</sup> Colloquially known as *The Dayton Peace Accord/s (DPA)*.

<sup>14</sup> 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, judgements). 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*.

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 discriminatory concept as such was applied throughout the country because Bosniacs and Croats were not considered to be constituent peoples in Republika Srpska (RS), in the same fashion as Serbs were left without that status in the Federation. All three peoples were constituent nations only at the State of BiH. Unfortunately, these rights, therefore, hardly existed at all, as state prerogatives, such as the, police and the administration of justice, were bestowed in the two Entities. All “others” who did not belong to any of the privileged, constitutionally recognized ethnic groups, were “lost along the road”. Denying status of constituent peoples to Bosniacs 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, as it is well known that BiH was at all times multiethnic society *sui generis* and paradigm of “unity and tolerance”.<sup>15</sup> The principle of “constituent peoples” is reinforced in many other provisions of the Constitution of BiH, where even an official reference to “Others” or “citizens” one cannot come across.<sup>16</sup>

Hence it is clear that members of any of the three distinguishing ethnic groups are protected only as members of collective, 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.<sup>17</sup>

Nation, being form and essence of the political organizing of the people in a certain society (community) does not look as well known model in the political theory in the countries of “Western Democracies”. Particularly, it is completely incompatible (and dangerous!) in the societies composed of two or more national communities” [...] [So] proclaiming democracy while building up society in such manner is a hypocrisy *par excellence*.<sup>18</sup>

On the basis of the above said, it is observable that concept of “constituent peoples” containing exclusive connotation of “non-constituent”, *per se*, constitute discriminatory treatment against those who are “non-constituent”, and/or others, citizens. As well known, the Convention guarantees the same catalogue of human rights to all (citizens), which is simply put out of force by concept of “constituent peoples”. Accordingly, it was necessary to undertake political and constitutional restoration of the human rights protection system in BiH through consequent and systematic review of all provisions of the Constitution of BiH as well as Entity/Cantonal Constitution, aiming to affirmation of **civil** as opposed to **national/ethnic**. It is indispensable to emphasize that it was not a discretionary power of the State of BiH but its international obligation to harmonize its legislation with European standards. Apparently, discussing *civil state* wherein the concept of constituent people is central point of functioning of political system is *contradictio in adjecto*. Protection of

<sup>15</sup> The situation changed by virtue of Constitutional Court decision (see 1.3. herein).

<sup>16</sup> The composition of all “joint 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*).

<sup>17</sup> See more in: International Crisis Group, *European vs. BiH Human Rights Standards*, a Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14 April 2000.

<sup>18</sup> Zarije Seizović, “Addendum to the Phenomenon of the National Pathology”, *Hijatus, časopis za društvena pitanja i kulturu demokrat/cije*, Zenica, august/kolovoz 1996, p. 51.

“national interest” in BiH should assume interest of all its citizens not of particular nation (more precisely: ethnic group). The very idea comes down to establish “Bosnian-Herzegovinian nation”, which is, obviously, not the case here.

### 1.3. Concept of “Constituent peoples” in the Decision of the Constitutional Court of BiH

This issue of **selective approach to concept of constituent peoples** is *de iure* resolved by the Decision of the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH),<sup>19</sup> estimated to be historical breakthrough that traditional BiH “togetherness” and “inseparability” underlines and re-affirms.

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

In July 2000, the Constitutional Court of BiH made a ruling imposing duty upon the Federation of BiH and RS to amend their constitutions in order to ensure full equality of the “constituent peoples” throughout the state territory. The Dayton’s discriminatory concept of one state/two entities/three constituent peoples was politically unsteady. The decision put an end of the idea of recognising the right of the Bosnian Croats, to establish their small quasi-state, as it required both Entities to be really and efficiently multinational. Adversaries of the single Bosnian state pronounced the decision to run counter the DPA while followers of the idea of a single state considered the decision as a breakthrough as to institutionalizing improvements upon the existing Dayton political architecture that, to their opinion, had to undergo constitutional changes.

However, even though the Decision denoted significant step forward in recognizing the same constitutional position of all constituent peoples in every part of territory of the state, it did nothing in favour of improving the position of 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 more than clear that neither individually nor collectively understood “national affiliation” at the BiH political actuality can be exclusively situated in particular part of the BiH territory. The *Bosniakhood*, *Croatianhood* and *Serbianhood* cannot be limited to one or just some parts of BiH territory. Presumption of *to be* Bosniak, Croat or Serb does not

<sup>19</sup> Constitutional Court of Bosnia and Herzegovina, *Partial Decision, Case No U 5/98 III*, July 1 2000. – *Official Gazette of BiH* No. 23/00).

automatically presume association with specific part of the BiH territory where (used to) live members of that particular ethnicity.

Ethnical, cultural, traditional, habitual as well as other components of complicated BiH social *milieu* is composed of sophisticated net of *Bosnian concord of diversity*, so territorial principle taken as a base to form an opinion on somebody’s ethnic affiliation has no either theoretical or practical rationalization. Thereby any idea and/or theory of “ethno-cantonisation” or any other “ethno-regionalisation”, notwithstanding if it comes from “outside” or “inside”, is absolutely incompatible with multiethnic concept of the BiH society and entails latent threat to survival of the State of BiH. Cantonization, of course, might be concept of internal institutional structure of the multi-ethnic state under the condition that it is a civilized state in which any form of diversity cannot be ground for human rights violation whatsoever. On the other side cantonisation and/or regionalisation based on natural and geographical distinctiveness, as model of “de-entitization” of BiH seems to be the reasonable and logical constitutional solution for internal state organization of BiH.



## 2. “State-making nation” in the comparative view

### 2.1. Concept

The States that within their boundaries have acknowledged the presence of ethnically and/or territorially identified indigenous communities of people recently inaugurated formally recognised broad scope of their rights. Namely, States can identify unique character of certain communities that fall under the category of **indigenous peoples** (such as Indian Community in Northern America, Albanian Community in the Autonomous Province of Kosovo in former Yugoslavia) and make legislative efforts to recognize to that community the *inherent right* to self-government within the state government structure. This means that states recognise *higher level of rights* to those communities in comparison to other communities.

Apart from recognizing those rights to the indigenous peoples, those countries formally recognise national minorities (ethnic groups) granting them traditional and universally awarded rights affirming those groups as such. (e.g. Hungarians and Italians in Slovenia – see herein below under 2.2.2.). This is the situation where the national minorities enjoy protection of their rights but at a *lower level* in comparison to the indigenous peoples. We are talking here about national minorities that enjoy certain catalogue of rights and freedoms. Quality and quantity of those rights and freedoms is up to a legislating authority in any country to make and implement constitutional provisions recognizing these rights.

The communist rulers of the new Yugoslav federation did not attempt after the Second World War to define BiH (unlike other republics) as the homeland of anything other than its (unspecified) peoples and their working class. By 1974, however, and after the effective recognition of Muslims (or Bosniaks) as a nation in their own right in the late 1960s, the new Constitution of BiH listed the “Muslims, Serbs and Croats, and members of other nations (*naroda*) and nationalities (*narodnosti*) who live in it” as Bosnia’s peoples, but accorded pride of place to “working people and citizens”. *Ustav Socijalističke Republike Bosne i Hercegovine* (1974), Part I, Article 1.<sup>20</sup>

<sup>20</sup> International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 2, foot-note 5.

Eventually, in BiH, the Constitution recognizes three *constituent nations* (Bosniaks, Croats and Serbs), *Others* and (the rest of) citizens of BiH. Its Preamble states that “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina [...] determine that the Constitution of Bosnia and Herzegovina is as follows...” Even if we accept that the wording puts all of them at the same level (which obviously is not the case), provisions of the Constitution clearly makes a strong, discriminating distinction between constituent (Bosniaks, Croats and Serbs) and non-constituent peoples (Others, citizens). As already stated, the composition of all state level institutions – the Presidency, the Parliamentary Assembly<sup>21</sup>, the Council of Ministers, the Constitutional Court, etc, is set up on the “one state – two entities – three nations” model. The said model gives no chances, for instance, to a member of “Others” to run the Presidential elections and become member of the tripartite Presidency of the state.<sup>22</sup> Almost the same discriminatory concept is adopted with regards to the Parliamentary Assembly<sup>23</sup> and Constitutional Court of BiH.<sup>24</sup>

## 2.2. Comparative constitutional solutions

The following lines are meant to offer a fleeting look over some comparative examples of defining “state-making nation/s” and has no intention whatsoever to provide a comprehensive and exhaustive compendium as to how-it-is-done in other countries and/or regions. The short overview of the same solutions provided for in some European constitutions is rather a parameter of how-it-may-be-done in BiH, of course, taking into consideration a very complex political, ethnic, religion and tradition structure of the BiH society.

<sup>21</sup> Amendments that mayor political parties in BiH agreed on 25 March 2006 again contain the same discriminatory concept against the non-constituent population. *Amendment II* reads as follows: “Article IV of the Constitution of Bosnia and Herzegovina is altered and reads as following: [...] 2. Composition and Election of the Parliamentary Assembly a. The Parliamentary Assembly shall have two chambers: the House of Representatives and the House of Peoples. b. The House of Representatives shall comprise 87 members, 3 seats out of which are guaranteed for those that do not belong to constituent peoples. [...] d. House of Peoples shall comprise 21 members: 7 Bosniaks, 7 Croats and 7 Serbs.” It is pretty self-explanatory that non-constituent citizens have almost 30 times less chance to become MPs than those constituent ones.

<sup>22</sup> *Constitution of BiH*, Article V, Presidency: “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska”.

<sup>23</sup> *Constitution of BiH*, Article IV, Parliamentary Assembly: “The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives. 1. House of Peoples. The House of Peoples shall comprise 15 *Delegates*, two-thirds from the Federation (including *five Croats* and *five Bosniacs*) and one-third from the RS (*five Serbs*)” – (emphasis added). The provision uses the term “including” but it is actually the total number of MPs from the Federation five Croats plus five Bosniacs. So, it is *limited to five Croats* and *five Bosniacs*, actually. The simple counting is the following: 5 Bosniaks + 5 Croats + 5 Serbs + 0 Others + 0 citizens + 0 ... = 15 MPs. The discrimination goes on through the Constitution (e.g. Article IV. 3. b): “Each chamber shall by majority vote adopt its internal rules and select from its members *one Serb, one Bosniac, and one Croat* to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.” (emphasis added).

<sup>24</sup> *Constitution of BiH*, Article VI, Constitutional Court: The Court is composed of nine justices: four out of nine are selected by the Federation House of Representatives, two by the RS National Assembly and three by the European Court of Human Rights, after consultation with the Presidency of BiH. In practice, this means that the Court is composed of two Bosniaks, two Croats, two Serbs and three foreigners. Again, no *Others*. The example of different approach was the following: The High Representative waiting for about six months for the results of implementation of the Constitutional Court’s decision, eventually in January 2001, in consultation with the main political parties, appointed sixteen members to Constitutional Commission of

### 2.2.1. Constitution of Croatia

The Croatian Constitution in its Preamble mentions *autochthonous national minorities* stating that "Croatia is established as the national state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens, and who are guaranteed equality with citizens of Croatian nationality and the realization of national rights in accordance with the democratic norms of the United Nations Organization and the countries of the free world". In this case, the Constitution provides for constitutional position of national minorities that are **autochthonous**. As already explained, in BiH, there are *Others, citizens*, etc. that are not national minority and therefore do not enjoy protection as if they were national minorities: actually, *de iure* and *de facto*, these categories of population are being discriminated against, by virtue of mere constitutional norm.

The Croatian Parliament has no less than 100 and no more than 160 members, elected on the basis of direct universal and equal suffrage by secret ballot.<sup>25</sup> Again, there is no a single word on MP's nationality (ethnic background). Also, the President of the Republic is elected in direct elections by secret ballot, on the basis of universal and equal suffrage, for a term of five years, without mentioning any criteria based on nationality.<sup>26</sup> The Government of the Republic of Croatia consists of a Prime Minister, one or more Deputy Prime Ministers and ministers. The Constitution is silent on national (ethnic) break-down of the Government.<sup>27</sup>

### 2.2.2. Constitution of Slovenia

The Slovenian Constitution declares Slovenia as "[a] state of *all its citizens* and is founded on the permanent and inalienable right of the Slovene nation to self-determination"<sup>28</sup> (emphasis added). On national affiliation, the Constitution states, *inter alia*, that "Everyone has the right to freely express affiliation with his nation or national community, to foster and give expression to his culture and to use his language and script".<sup>29</sup>

The Constitution of Slovenia goes a bit further in protecting the rights of national minorities (Italian and Hungarian), providing for their specific constitutional position.<sup>30</sup>

(1) The autochthonous Italian and Hungarian national communities and their members shall be guaranteed the right to use their national symbols freely and, in order to preserve their national identity, the right to establish organisations and develop economic, cultural, scientific and research activities, as well as activities in the field of public media and publishing. In accordance with laws, these two national communities and their members have the right

each Entity: four from each constituent people, plus four "others". However, it was OHR not local political leaders!

<sup>25</sup> Article 71 (Elections, Nomination).

<sup>26</sup> Article 94 (Head of State).

<sup>27</sup> Article 108 (Prime Minister, Ministers).

<sup>28</sup> Article 3 (Self-Determination, Sovereignty).

<sup>29</sup> Article 61 (Expression of National Affiliation).

<sup>30</sup> Article 64 (Special Rights of the Autochthonous Italian and Hungarian National Communities in Slovenia).

to education and schooling in their own languages, as well as the right to establish and develop such education and schooling. [...] These national communities and their members shall be guaranteed the right to foster relations with their nations of origin and their respective countries. The state shall provide material and moral support for the exercise of these rights.

These communities are granted **self-governance** to certain extent, including some functions under national (i.e. state) jurisdiction.

In order to exercise their rights, the members of these communities shall establish their own self-governing communities in the geographic areas where they live. On the proposal of these self-governing national communities, the state may authorise them to perform certain functions under national jurisdiction, and shall provide funds for the performing of such functions.<sup>31</sup>

These communities are **directly represented** in the National Assembly: “The two national communities shall be directly represented in representative bodies of local self-government and in the National Assembly”.<sup>32</sup>

Eventually, “Laws, regulations and other general acts that concern the exercise of the constitutionally provided rights and the position of the national communities exclusively, may not be adopted without the consent of representatives of these national communities”.<sup>33</sup>

The status and special rights of the Roma community living in Slovenia is regulated by law<sup>34</sup>.

As far as the National Assembly (*Skupščina Republike Slovenije*) is concerned, the Constitution regulates that it is composed of deputies of the *citizens of Slovenia* and comprises ninety deputies elected by universal, equal, direct and secret voting. When it comes to representation of national minorities, the Constitution secures that one deputy of the Italian and one deputy of the Hungarian national communities shall always be elected to the National Assembly.<sup>35</sup> Also the President of the Republic is elected in direct, general elections by secret ballot.<sup>36</sup> The Government is composed of the president and ministers.<sup>37</sup> There is no reference whatsoever on ethnic/national composition of any of the above mentioned state bodies. It is a constitutional position and participation of national minorities in power-sharing that is being regulated and not a position of “constituent” and “non-constituent” peoples.

### 2.2.3. Constitution of Spain

Preamble of Spanish constitution speaks about “[t]he *Spanish Nation*, desiring to establish justice, liberty, and security and to promote the well-being of all its members...” (Emphasis

<sup>31</sup> Ibidem, Para 2.

<sup>32</sup> Ibidem, Para 3.

<sup>33</sup> Ibidem, Para 5.

<sup>34</sup> Article 65 (Status and Special Rights of the Romany Community in Slovenia).

<sup>35</sup> Article 80 (Composition and Election).

<sup>36</sup> Article 103 (Election of the President of the Republic).

<sup>37</sup> Article 110 (Composition of the Government).

added). It assumes all citizens having Spanish citizenship, by which they fall under the category of "Spanish nation".

According to Constitution, the Parliament represents the Spanish people and is formed by the House of Representatives and the Senate.<sup>38</sup> The House of Representatives is composed of a minimum of 300 and a maximum of 400 Deputies elected by universal, free, equal, direct, and secret suffrage under the terms established by law.<sup>39</sup> "The Senate is the chamber of territorial representation. In each province, four senators will be elected by universal, free, equal, direct, and secret suffrage by the voters of each of them under the terms established by an organic law."<sup>40</sup> Obviously, there is no provision dividing citizens on the basis of their national (ethnic) origin.

#### 2.2.4. Constitution of France

The Preamble of the French Constitution states that "The *French people* [...] solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution" (emphasis added). There is no divergence as to ethnic origin.<sup>41</sup>

The French Parliament consists of the National Assembly and the Senate. Deputies of the National Assembly are elected by direct suffrage. The Senate is elected by indirect suffrage. It shall ensure the representation of the territorial entities of the Republic. French nationals living outside France shall be represented in the Senate.<sup>42</sup> The related constitutional provision mentions only *French nationals* – no other categories deployed.

Constitution provides for equality of citizenry introducing non-discrimination clause: "All citizens shall be equal before the law, regardless of their origin, race or religion. They shall have the same duties".<sup>43</sup>

#### 2.2.5. Constitution of Germany

In the Preamble of the Constitution of the Federal Republic of Germany it is said that "Conscious of their responsibility before God and Men, Animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Constitution".<sup>44</sup> It uses the term *German People* with no further reference as to what it consists of.

<sup>38</sup> Article 66 (Structure, Competences, Inviolability).

<sup>39</sup> Article 68 (Election).

<sup>40</sup> Article 69 (Senate).

<sup>41</sup> One has to be aware of distinction between the terms *national group* and *ethnic group*. In the western countries, the national interest means interest of the whole nation (state), therefore the national interest is equal to the state interest, while in BiH, the notion *national interest* denotes the interest of one of three constituent peoples – Bosniaks, Croats, Serbs (?!). That is the interest of an ethnic group (it is an ethnic, not national /state/ interest, taken as the interest of the entire population of the state..

<sup>42</sup> Article 24 [National Assembly, Senate].

<sup>43</sup> Article 77 [Autonomy].

<sup>44</sup> Constitution of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*).

Elections for the *Bundestag* (The Lower House of Parliament) are regulated as follows: “The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience”.<sup>45</sup> No reference made as to ethnic origins of the deputies. Furthermore, the Constitution makes eligible to vote *anyone* who has attained the age of twenty one while anyone who has attained the age of twenty-five is eligible for election.<sup>46</sup>

The Federal President is elected, without debate, by the Federal Convention. Every German is eligible who is entitled to vote for the Bundestag and who has attained the age of forty.<sup>47</sup> The Federal Chancellor is elected, without debate, by the Bundestag on the proposal of the Federal President.<sup>48</sup>

### 2.2.6. Constitution of Switzerland

The Preamble of the Federal Constitution of the Swiss Confederation uses the following wording: “In the name of God Almighty! *We, the Swiss People and Cantons*, [...] adopt the following Constitution...”.

When it comes to Federal Government, the Constitution states that The Federal Government consist of seven members who are elected among the Swiss citizen eligible for membership in the House of Representatives for four years.<sup>49</sup>

The President of the Confederation chairs the Federal Government and is elected by the Federal Parliament for a term of one year, among the members of the Federal Government as President of the Confederation.<sup>50</sup>

Although the examples of Switzerland and (less often) Belgium are invoked in BiH to justify the empowerment of peoples, their relevance is only partial. The Swiss Confederation, for instance, provides for a system of power sharing among cantons inhabited by speakers of different languages, but it does not define these groups constitutionally as separate nations. They are all Swiss.<sup>51</sup>

Although the Swiss is a multi-ethnic country, there is no division between the ethnic groups as to which ethnic group is “constituent” and which is not and how they participate in power sharing.

<sup>45</sup> Article 38 (Elections).

<sup>46</sup> Ibidem.

<sup>47</sup> Article 54 (Election).

<sup>48</sup> Article 63 (Election and appointment of the Federal Chancellor).

<sup>49</sup> Article 175 Composition and Election.

<sup>50</sup> Art. 176 Presidency.

<sup>51</sup> International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 2, foot-note 5.

### 3. Conclusion and recommendations

#### 3.1. Conclusion

There is no doubt that current legal solutions as contained in the Constitution of BiH cry out for changes to be adopted to ensure better constitutional position for those not belonging to the three constituent peoples and to bring to an end the current discrimination based on **collective identity** that goes on for almost 12 years. The state Constitution should guarantee equal treatment of all BiH citizens based on their individual rights, free from discrimination on any grounds, including ethnic affiliation.

The constitutional changes should also defeat demagoguery and ideological phrases such as *“We’d better stick together to protect ourselves from other/s”* and introduce the idea that all citizens of BiH are citizens of one (single) state, and that as such they are able to build up democratic, modern state founded on the principle of rule of law – a state which would stand by its citizenry – no matter they are constituent peoples or not – and help them as real power that citizens can always count on.

#### 3.2. Recommendations

The recommendations certainly have country-wide importance: it may be used as a guide to proposing constitutional amendments related to human rights that would take into consideration a valid international standards and best practices as to status of citizens and human rights protection.

The issues being explored and analysed herein above have a great significance on the entire system of human rights protection in BiH as well as on its political and judicial system (e.g. elections, forms of participation in the decision-making processes, legislation process, participation in legislative, executive and judicial branch of government at all levels).

If adopted in whole or in part, recommendations would narrow down shortcomings in the implementation of international human rights standards as well as improve the quality of national norms related to individual human rights protection mechanisms in BiH.

### 3.2.1. General recommendations

- The Preamble of the Constitution of BiH has to be reformulated and the new wording should make no difference in civil status between the BiH citizens (no difference between “constituent” and “non-constituent”);
- Consequently the concept of “citizens” and “civil state” has to be installed throughout the normative part of the Constitution – in each specific provision to provide for true equality for all citizens in BiH;
- All provisions of the Constitution contrasting the applicable international legal instruments and international legal framework ensuring non-discriminatory enjoyment of human rights have to be modified as to ensuring equality before the law i.e. equal (non-discriminatory) treatment of all BiH citizens.

### 3.2.2. Specific recommendations

Apart from its Preamble, which is the most important constitutional/political proclamation related to “constituent” and “non-constituent” peoples, there are other provisions of the Constitution of BiH to be changed in order to provide for equal treatment of all citizens.<sup>52</sup>

#### 1. Parliamentary Assembly

- 1.1. Art. IV. 1. – House of Peoples should ensure that non-constituent peoples are represented among those 15 (or any other number agreed upon).
  - *There should be, at least 2 elected (e.g. one from each Entity) among non-constituent citizens. The balance should consequently be applied on comprising quorum.*
- 1.2. Art. IV. 2. – House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.
  - *There should be, at least, 6 members of those non-constituent, two-thirds from the territory of FBiH one third from the RS. The balance should consequently be applied on comprising quorum.*
- 1.3. Art. IV. 3. (b) – Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.
  - *One representative among the members of non-constituent peoples should be able to share the role of Chair and Deputy Chair of each chamber.*

<sup>52</sup> These specific recommendations related to constitutional position of the BiH citizens, should not interfere with other constitutional changes being proposed.



## 2. Presidency

2.1. Art. V. – The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

- *There should be a mechanism providing for an option that not necessarily Presidency shall consist of one Bosniak, one Croat and one Serb. The rationale of such provision would be the fact that, even if one or more members are elected among the member of non-constituent peoples, the Presidency would be considered to be duly elected and fully operational. The ultimate ration legis would be to provide equal treatment to non-constituent peoples. Of course, in the ideal World, there should be one President.*

## 3. Council of Ministers

3.1. Article V 4. (b) – No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.

- *There should be provision following the words within brackets, after the word “Ministers”: “...but who can be members also of non-constituent peoples”*

## 4. Constitutional Court

4.1. Art. VI 1 (a) – Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska.

- *Right after this sentence a provision should be made ensuring possibility for non-constituent peoples to be appointed as Justices of the Constitutional Court. The wording may be as follows: “They may be elected from among the members of constituent as well as non-constituent peoples”. Although Art. VI 1 (a) does not provide, expressis verbis, for the members of the Constitutional Courts to be elected from among the Constituent peoples, that is the case in practice. Therefore there is a need for the above said provision.*

\* \* \*

***“... Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina...”***

(Constitution of Bosnia and Herzegovina, Preamble)

## Bibliography

### A. Books, Articles, Reports, Opinions

1. Constitutional Court of Bosnia and Herzegovina, *Partial Decision, Case No U 5/98 III*, July 1 2000. – *Official Gazette of BiH* No. 23/00);
2. European Commission for Democracy through Law (Venice Commission), *Opinion on the implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the “Constituent Peoples”*, adopted by the Commission at its 46<sup>th</sup> Plenary Session, Venice, 9-10 March 2001;
3. International Crisis Group, *European vs. BiH Human Rights Standards*, a Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14 April 2000;
4. International Crisis Group, *Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels;
5. J. Harris – M.O. Boyle – C Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, 1995;
6. Proposed Constitutional Amendments of 25 March 2006;
7. *The Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14. December 1995, Office of Public Communication, Bureau of Public Affairs, U.S. Department of State;
8. Zarije Seizović, “Addendum to the Phenomenon of the National Pathology”, *Hijatus, časopis za društvena pitanja i kulturu demokrat/cije*, Zenica, august/ kolovoz 1996;
9. Zarije Seizovic, “Human Rights Protection in Bosnia and Herzegovina, within the Framework of the Dayton Peace Accords with Special View to Non-Discrimination Policy”, essay written in the course of Summer School “Post-Communist transition and the European Integration Processes”, organized by *Instituto per l’Europa Centro-Orientale e Balcanica* – International Network Europe and the Balkans and Italian Ministry of Interior in Cervia, Italy, 4-16 September 2000;
10. Zarije Seizović, “Civil State and Concept of Constituent Peoples” in *Bosnia and Herzegovina: Concord of Diversity – Compilation of Legal Essays*, (Studio Flaš, Zenica, 2005);

### B. Constitutions

11. Constitution of Croatia;
12. Constitution of France;
13. Constitution of Germany;
14. Constitution of Slovenia;
15. Constitution of Spain;
16. Constitution of Switzerland.

---

CIP – Katalogizacija u publikaciji  
Nacionalna i univerzitetska biblioteka  
Bosne i Hercegovine, Sarajevo

342.724:321.1 (497.6)  
342.4 (497.6)

**SEIZOVIĆ, Zarija**

Konstitutivni narodi i ustavne promjene /autor  
teksta studije Zarije Seizović – Sarajevo :  
Centar za ljudska prava Univerziteta, 2008. – 42  
str. ; 30 cm

Na upor. nasl. str.: Constituent peoples and  
constitutional changes. – Tekst na bos. i engl.  
jeziku

ISBN 978-9958-9541-8-4

COBISS.BH – ID 16297734

---

