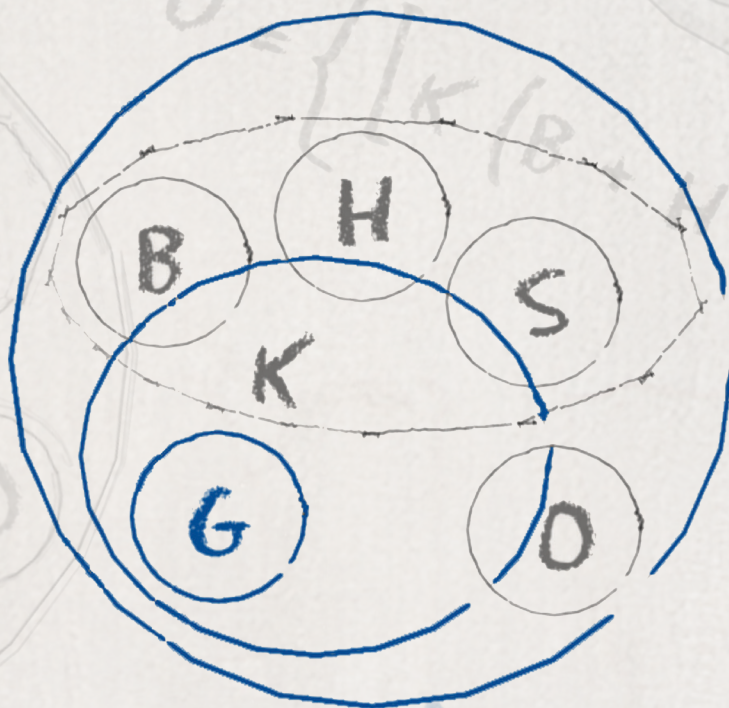


DEMOCRACY WITHOUT CITIZENS?

LOOKING FOR A MODEL OF
POLITICAL PARTICIPATION OF ALL
CONSTITUTIONAL CATEGORIES
IN BOSNIA AND HERZEGOVINA



$$U = \left\{ \left[K (B + H + S) + O \right] \stackrel{+}{\leq} G \right\}$$

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EXECUTIVE SUMMARY

The constitutional system of Bosnia and Herzegovina is complex, dysfunctional and legally contradictory in itself. The elements of institutional discrimination in the sphere of citizens’ political participation notwithstanding, such a system cannot create a favourable environment for the political, social, economic, cultural, safety and environmental development of the country convenient for the creation of a single economic space and the recognition of regional and local autonomies, or meet requirements for accession to the European Union. In addition, the ruling in the *Sejdić and Finci* case posed to Bosnia and Herzegovina the requirement for a certain level of constitutional reform to eliminate discrimination against citizens and facilitate their equal access to the political sphere at the state level. Constitutional reform is a complex and lengthy process that would ultimately, because of the obsolescence of the (post)conflict logic of the Dayton constitutional system, have to result in the adoption of a completely new Constitution based on the principles of de-ethnicization of law, providing an optimum balance between liberal democracy and territorial-federal model of political decision-making. Still, this process can begin right now by adopting proper constitutional amendments, which in a given political moment can win the support of political actors to equalize the category of „citizens of BiH“ with other categories under the constitutional Preamble when participating in the formation of the Institutions of BiH. This research defines citizens as a constitutional category in Bosnia and Herzegovina providing a model for their political participation through a set of proposed amendments to the Constitution of BiH.

LIST OF ACRONYMS

BiH	Bosnia and Herzegovina
HP	House of Peoples of the Parliamentary Assembly of BiH
ECHRFF	European Convention on Human Rights and Fundamental Freedoms
ECHR	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
ICG	International Crisis Group
OHR	Office of the High Representative in Bosnia and Herzegovina
HR	House of Representatives of the Parliamentary Assembly of BiH
PA	Parliamentary Assembly of BiH
RS	Republika Srpska

INTRODUCTION

Following-up on the ACIPS's project "Others: An Initiative for Re-thinking Constitutional Categories in Bosnia and Herzegovina"¹ implemented in 2009 and 2010, this research has focused on the possible solutions that would ensure equal political participation of all three constitutional categories - **constituent peoples, Others and citizens of BiH** - mentioned in the Preamble to the Constitution of Bosnia and Herzegovina, with emphasis on greater involvement of the category "citizens of BiH" in the decision-making processes within the Institutions of BiH. Bearing in mind the importance of the message that Bosnia and Herzegovina has received through the European Court of Human Rights decision (hereinafter: ECHR) in the case of *Sejdić and Finci Vs. BiH* (hereinafter: *Sejdić and Finci*)² and understanding this judgment in a broader context which includes the constitutional category of "citizens of BiH", this study aims to provide solutions to the changes in the Constitution of Bosnia and Herzegovina (hereinafter: the Constitution), focusing primarily on the structure of BiH Institutions, that is - the central government in BiH.

Bearing in mind the delays in forming the government after the 2010 general elections, it is obvious that the political system of BiH reached a critical point when the integration of the country into the EU has been blocked. The Constitution stipulates that the political positions in the Institutions of BiH can be filled only by those who identify themselves as belonging to one of the "constituent peoples" (parity distribution between Bosniaks, Croats and Serbs). However, as the ECHR has ruled that such constitutional provisions relating to the election of members of the Presidency of BiH (hereinafter: the Presidency) and the House of Peoples of the Parliamentary Assembly of BiH (hereinafter: HP) violate the European Convention on Human Rights and Fundamental Freedoms (ECHRFF), the constitutional reform that would change the current situation has become inevitable. Bosnia and Herzegovina must amend the Constitution to eliminate the discrimination resulting from its provisions. However, taking into consideration the fact that this undertaking involves a sort of revision of the Dayton Peace Agreement, which was based on the idea of the distribution of power solely between the three "constituent peoples", amending the constitutional text would require much more than a mere technical approach to this problem, no matter how unrealistic and unattainable it may seem in this moment³. This brief will therefore strive to offer different options for proposals that would include, on the one hand a necessary amendment to the Constitution taking into consideration the judgment in the case *Sejdić and Finci*, including the category of "citizens of BiH" in the text of the Constitution where it is necessary, while on the other it aims to present a kind of thinking about a comprehensive constitutional reform that would need to happen in the future.

1. 1 Vehabović, Faris and Lajla Zaimović Kurtović. *Naš stav za ustav*. Sarajevo: ACIPS, 2010.

2. Council of Europe, Office in Sarajevo. Web: <http://www.coe.ba/web2/en/document/doc_download/136-sejdic-i-finci-protiv-bosne-i-hercegovine.html> (10.06.2012)

3. International Crisis Group. Europe Briefing N°68. "Bosnia's Gordian Knot: Constitutional Reform". Sarajevo/Istanbul/Brussels, 12 July 2012. PDF document available at: <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b068-bosnias-gordian-knot-constitutional-reform.aspx>> (21.07.2012), p. 1

1. OVERVIEW OF SOME OF THE CONSTITUTIONAL INITIATIVES SO FAR

4. *Proces ustavnih promjena u BiH: Analiza izvještavanja u štampanim medijima, komparativna analiza teksta Ustava i prijedloga izmjena teksta, analiza međunarodnih standarda, analiza stavova pravnih profesionalaca u BiH.* Centar za ljudska prava Univerziteta u Sarajevu, 2006.

5. Ibid, pp. 36-38.

6. Ibid, pp. 44-45.

7. Ibid, p. 54.

8. Fetahagić, Sead S. and Saida Mustajbegović. *Evropski pokret za evropski ustav BiH.* Sarajevo: ACIPS, 2007.

9. Ibid, p. 7

10. Opinions of "The Venice Commission" of the Council of Europe, official documents of institutions and statements of some EU officials and the High Representative in BiH, proposals by think-tank organizations such as European Stability Initiative (ESI), International Commission for the Balkans (ICB) and International Crisis Group (ICG), and recommendations by Swiss experts within the project of Swiss Embassy in BiH and Swiss Agency for Development and Cooperation (SDC).

11. Ibid, pp. 36-40.

12. Vanjskopolitička inicijativa BiH. *Politička analiza: Uloga civilnog društva u reformi ustava u BiH.* Sarajevo, 2009. p. 24.

13. Šarčević, Edin. *Ustav iz nužde.* Sarajevo: Rabić, 2010, p. 414.

14. The Conference was held on 3 February 2010 in the organisation of the Faculty of Political Science in Sarajevo and ACIPS, see *Mjesto i uloga "Ostalih" u Ustavu BiH i budućim ustavnim rješenjima za BiH.* Dino Abazović et al. ur. Sarajevo: Fakultet političkih nauka, 2010.

15. See presentation by Prof. Joseph Marko, *Mjesto i uloga "Ostalih"...* p. 143.

16. Vehabović, Faris and Lajla Zaimović Kurtović. *Naš stav za ustav.* Sarajevo: ACIPS, 2010. pp. 13-14.

In the past few years, civil society in BiH has developed a number of proposals to amend the Constitution and has launched several initiatives for the adoption of amendments and the implementation of the decision *Sejdić and Finci*. The University of Sarajevo Centre for Human Rights, during intensive negotiations on the adoption of the "April package" of constitutional changes, announced the publication "The Process of Constitutional Changes in BiH"⁴. Since the ECHRFF, ratified by BiH as early as 2002, represents a fundamental pillar of the BiH constitutional order with its provisions possessing a character of self-enforceability based on the monistic understanding of the relations between the international and domestic law⁵, and calling upon the opinion of the Constitutional Court of BiH, this publication emphasizes that the "group approach" to special rights regarding the political participation in the Institutions of BiH, embodied in the institute of "vital interests of the constituent peoples", cannot be considered as a generalizable model. On the contrary, all the authorities and institutions in BiH or in the Entities, other than those specifically provided for in the Constitution, must meet the general standard of non-discrimination on the basis of self-enforceable norms under the ECHRFF⁶. As for the remarks about some constitutional initiatives presented in this analysis, its authors emphasize that "every constitutional initiative must take into account social circumstances in which they appear, or assess the realistic possibility that the text gets a wider support from the main political actors in theater."⁷

ACIPS study "European Movement for the European Constitution"⁸ in 2007 had the objective to collect as much relevant information as possible about the model of constitution which would allow BiH to function as a democratic and European society⁹. In addition to the analysis of domestic proposals for the constitutional reform, which heavily relies on the results presented in the "Process of Constitutional Changes", this study has also presented several proposals to amend the Constitution coming from the relevant international

actors¹⁰. Summarized recommendations proposed the following solutions: 1) instead of the constitutional principle of "constituent peoples", to affirm the concept of general citizenship, 2) to apply the principle of federalism completely and equally, with rationalization of public administration by abolishing the FBiH entity level, 3) to transfer a certain scope of powers from the federal entities to the central government, to strengthen the position of the Council of Ministers, to reduce the powers of the Presidency and to introduce its indirect election through the PA and to transform the HP into the "upper house" of a federal assembly in which federal units/entities will be equally represented on the principle of territoriality, 4) to define narrowly and more precisely the protection mechanism of "vital interests of the constituent peoples", and to entrust its implementation to the HR, 5) to build a shared sense of a unified political identity in BiH, and 6) the participants in the reform process should be local actors, including a wider range of civil society organizations.¹¹

Analysis of the Foreign Policy Initiative titled "The Role of Civil Society in the Reform of the Constitution" emphasizes the need for constitutional reform in the interest of the general public, not just of the political elites, proposing the inclusion of broader segments of civil society in this process, including local non-governmental organizations, media, academic community, labour and trade unions¹². This proposal corresponds somewhat with the idea of extra-parliamentary constitution framing¹³ where every powerful social group, political movement or association would be invited to participate in this process. The composition of such a "Constitutional Convention of BiH" would encompass the broadest social strata or classes and would not insist on the primacy of the political parties currently established in the Institutions of BiH or Entity authorities.

Following the opinion of some participants at the conference "The Position and Role of 'Others' in the Constitution of Bosnia and Herzegovina and the Future Constitutional Arrangements for BiH"¹⁴ about the need to protect the collective rights of "Others"¹⁵, ACIPS project "Others: An Initiative for Re-thinking Constitutional Categories in Bosnia and Herzegovina", on which this research follows, advocated the idea of introducing the category of "Others" into the institutions at the state level and its legal equalization with the category of "constituent peoples"¹⁶ so as to ensure equal rights for all citizens of Bosnia and

Herzegovina, regardless whether these are the members of the “constituent peoples”, “national minorities” or the BiH citizens who do not identify with any group understood in ethnic terms. In this sense, “Others” are interpreted as a collective, which although essentially involving an extremely heterogeneous group should enjoy the protection of their collective rights in the similar way. We can say that this attitude stems from the interpretation of the *Sejdić and Finci* judgment in the way that the appellants were denied their rights to stand for the election to the Presidency or the HP because of their membership in the category of “Others.”

This overview of the past initiatives to amend the Constitution, or discussions about the “constituent” categories shall be concluded with the view of the results and conclusions of the study “The New-Old Constitutional Engineering?”¹⁷. The authors of this publication believe that it is desirable and possible “to explore the ways in which Bosnia and Herzegovina could gradually move from ethnic to liberal federation, in which the quota system would be of territorial, but not of ethnic nature” and that “any amendment that would not change ethnic approach (for example, if the House of Peoples and/or Presidency would expand their membership by reserving quota for “Others”) would not really improve the situation: it would be nothing but further falling into the quicksand of the Bosnian ethnopolis”¹⁸.

2. CHARACTERISTICS OF THE DAYTON CONSTITUTIONAL SYSTEM, ITS PROBLEMS AND POSSIBLE SOLUTIONS

2.1 CHARACTERISTICS OF THE „DAYTON CONSTITUTION”

The Dayton Peace Agreement signed in Paris on 14th December 1995 ended three and a half years long war in Bosnia, and the present Constitution was contracted as its Annex IV. A substantial part of the governmental powers was retained at the level of Entities - the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). The Constitution effectively prevents the central government from exercising even such a limited scope of powers as stipulated in it¹⁹, prescribing a complicated system of decision-making by consensus between the representatives of the political parties claiming to represent the interests of the “constituent peoples”.

The Constitution combines the “minimalist” approach to the power of the central government and “maximalist” approach to the balance and distribution of power between the “constituent peoples” and territorial entities that retain a high degree of autonomy. Some of the international instruments for the protection of human rights, restoration of infrastructure and the settlement of disputes between Entities are subject to separate agreements which do not constitute a part of the text of the Constitution²⁰.

The Constitution has confirmed legal continuity between the Republic of Bosnia and Herzegovina and the “Daytonian” BiH with a significant modification of its internal state structure. Two territorial political units created in 1992 and 1994 - RS and FBiH respectively - were confirmed as Entities. The PA as a legislative body consists of of HP and HR, and the role of the head of state is performed by the Presidency, which consists of three members who must declare their affiliation to the “constituent people” provided that they have

17. Hodžić, Edin and Nenad Stojanović. *Novi-stari ustavni inženjering? Izazovi i implikacije presude Evropskog suda za ljudska prava u predmetu Sejdić i Finci protiv BiH*. Sarajevo: Analitika, 2011.

18. Ibid, p. 118.

19. Article III.1. of the Constitution enumerates that “Responsibilities of the Institutions of Bosnia and Herzegovina” cover only: foreign policy, foreign trade policy, customs policy, monetary policy, funding institutions and international obligations of BiH, the regulation of immigration, refugees and asylum seekers, the implementation of international and inter-Entity criminal law enforcement, the establishment of common and international means of communication, regulation of inter-Entity transportation and air traffic control.

20. Morrison, Fred L. “The Constitution of Bosnia-Herzegovina”. *Constitutional Commentary* 13/2, 1996. 145-157.

their place of residence in a particular territory - a Serb from the RS and a Bosniak and a Croat from the FBiH. Since the Constitution requires a proportionate participation of the "constituent peoples" in the state bodies, a quota system was established to elect the HP composition²¹, the Chair and the Deputy Chair of the Houses of PA²², the Presidency²³, to appoint ministers and their deputies in the Council of Ministers²⁴ or the first composition of the BiH Central Bank Governing Board²⁵. Article IV/1.b) of the Constitution determines the manner of decision-making in the HP, by requiring a minimal presence and representation of the "constituent peoples". Finally, the principle of the protection of "vital interests of the constituent peoples" was introduced as a further safeguard and mechanism of constitutional protection²⁶. In addition, the general provision of Art. IX/3 requires that "officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina."

It seems warranted here to cite the opinion of Professor Edin Šarčević²⁷, mentioning some of the main characteristics of "the Dayton Constitution": ethnicization of constitutional law on the grounds of the Peace Agreement signed between the representatives of the three Yugoslav "peoples" (ethnic groups) acting as revolutionary framers of the Constitution, the internationalization of constitutional law, its temporary nature, legalization of "ethnic cleansing" as a result of the war, and the presence of constitutional antinomies enabling to reach contradictory solutions by applying or interpreting a single complex of legal norms. An example of the latter would be a case when the text of the Constitution on the one hand requires effective protection of human rights, while on the other it ensures their normative violations.

2.2 WHY DO WE NEED A FURTHER REFORM OF THE CONSTITUTION?

In addition to the above characteristics and perceived problems which by themselves require a certain degree of constitutional reforms, in order to become an EU member, the applicant state must be able to fulfil the obligations that go with the prospective membership. In accordance with the so-called Copenhagen criteria²⁸, the state aspiring to join the EU must have: stable institutions based on the principles of democracy, rule of law, respect for human rights and protection

of minorities; a functioning market economy with the ability to be competitive within the market forces of the EU; and the ability to undertake responsibilities stemming from the membership, including adherence to the aims of political, economic and monetary union.

It should be noted that the existing constitutional framework prevents BiH not only from meeting the EU accession requirements. BiH is also unable to fulfil the obligations arising from its membership in the Council of Europe in terms of harmonization of its legislation with the ECHRFF, which is clearly illustrated by the situation about the application of the ECHR decision in the case *Sejdić and Finci*. Even back in 2005 the "Venice Commission" considered that **the problem was not in the existence of a system of consensus democracy as such, but the problem was in the mixing of territorial criteria with personal criteria** in exercising political rights²⁹. The Commission concluded: "Constitutional reform is inevitable because the current arrangements are not efficient or rational and because they lack a democratic content"³⁰.

A complex decision-making system at the central state level and deficiencies in the vertical and horizontal coordination between all levels of government in BiH are the result of systemically built dependence of BiH institutions on the will of ethnopolitical elites. Such a system does not sufficiently motivate political actors to participate in the political decision-making in the institutions of Bosnia and Herzegovina in any meaningful way. BiH institutions, simply speaking, do not have enough authority or autonomy to act and encourage politicians to seriously participate in their work. In such an institutional framework, the possibility of undermining the system to the point of complete paralysis is opened. This is a consequence, as stated by Šarčević³¹, of the lack of explicit collision norm in the Constitution that would solve the issue of conflict of jurisdiction or of the primacy of the law of BiH in relation to the law of Entities.

In the period so far, the authoritative position of foreign actors (primarily the Office of the High Representative), was instrumental and crucial in transferring certain competences or jurisdictions from the Entities to BiH, without which the country, in terms of international law, could hardly exist (e.g. symbols of statehood, personal documents of citizens, some competencies in the field of security and justice, etc.). However, particular competencies are often only

21. Article IV/1.

23. Article V.

22. Article IV/3.b.

24. Article V/4.b.

25. Article VII, paragraph 1 item 2.

26. Article IV/3.e) and f), or Article V/2.d).

27. Šarčević, Edin. "Dejtonski ustav: Karakteristike i problemi". *Status* 13, 2008. pp. 153-168..

28. European Commission. Enlargement. Web: <http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm> (24.07.2012).

29. European Commission for Democracy Through Law (Venice Commission). "Opinion on the Constitutional Situation in Bosnia and Herzegovina And The Powers of the High Representative". 11.03.2005. CDL-AD(2005)004. Web < [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp)> (05.09.2012).

30. Ibid.

31. Šarčević, 2008. 158

formally transferred to the BiH level, while in reality they remained in formal or informal circles of power at lower levels of government or in non-governmental political party interest structures. In most cases, the Entities are even permitted to retain their jurisdictions, laws and financial control in the same matter in which there was a “transfer” of the jurisdiction to the central government, while the capacities of BiH Institutions extended only “virtually”, with irrational spending of public funds on the establishment of new institutions and “agencies” that have neither a clear constitutional basis³² nor the capacity to exercise authority on the entire territory of BiH.

Finally, the ruling in the case of *Sejdić and Finci* created obligations for BiH to take effective measures in aligning its legislation and constitutional order with the requirements of the ECHRFF. Its enforcement, at a minimum, includes the provision of guarantees to citizens who for whatever reason cannot or do not want to identify themselves as belonging to one of the “constituent peoples”, a full enjoyment of the rights to stand for election without discrimination. As the present case relates to the Presidency and HP, the focus will be primarily on these institutions and the constitutional and legal provisions governing their position, selection of their members, procedures of decision-making and their responsibilities.

However, any new model of the constitutional order of BiH should in principle reflect an abstract civic unity of all who live in the country so as to identify with the state as “their own”. Without this element, regardless of its internal organization, it will hardly ever be a legitimate or a functional state because, as political scientist Sabrina P. Ramet put it, “the legitimacy is a key issue for any politics, while gaining legitimacy is by far the most important task of any system”³³.

3. HOW TO INTERPRET THE CONSTITUTIONAL CATEGORY “CITIZENS OF BIH”?

a) Tenth line of the Preamble of the Constitution

“The Dayton Constitution” has never been officially published in the Official Gazette of BiH, which represents a significant formal legal and practical drawback. However, the referenced translation of the last line of the Preamble, available on the official website of the Constitutional Court (hereinafter: the Court), is available in the Bosnian, Croatian and Serbian versions. The original English text reads as follows: “Recalling the basic principles agreed in Geneva, 8 September 1995 and 26 September 1995 in New York, Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows”³⁴.

What is important for this study is the fact that in all language variants **“and citizens of Bosnia and Herzegovina”** are listed as the subject of sovereignty, the one that “determines the Constitution”. It is important to note, because in many previous initiatives and debates about the constitutional reform, the issue of “citizens” was generally limited to equalization of this category with the category of “Others”, which is only one possible interpretation. However, in the interpretation of the Preamble there are two key issues: 1) whether any normative requirement arises from the Preamble and 2) if the answer to the previous question is affirmative, what implications does it have on the category “citizens of BiH”? For the purposes of this brief, one must pay attention to the interpretation of the Court.

b) Interpretation of the Constitutional Court – Normative binding of the Preamble

As to the first issue, the Court’s decision in the case *Constituent Peoples*³⁵ confirmed that the Preamble constitutes a normative part of the Constitution. Given that the text of the Constitution is an integral part of

32. The laws establishing particular institutions and agencies at the BiH level in the field of security, for instance, in the absence of substantive legal basis in the constitutional text referred in their preamble solely on the procedural norms of Article IV.4.a. of the Constitution stipulating the legislative competence of the Parliamentary Assembly. For example, see the Law on the State Investigation and Protection Agency (SIPA) in 2004. Web: < <http://sipa.gov.ba/hr/pdfhr/sipa27-04.pdf> > (07.09.2012.).

33. Ramet, Sabrina P. *Balkanski babilon*. Zagreb: Alinea, 2005. p. 421.

34. The Constitutional Court of Bosnia and Herzegovina. Web: < http://www.ccbh.ba/bos/p_stream.php?kat=83 > (29.07.2012). See also Office of the High Representative. Web: < http://www.ohr.int/dpa/default.asp?content_id=372 > (24.09.2012)

35. Decision U 5/98 dated 1 July 2000, *Official Gazette of BiH*, 36/00.

the international peace agreement, the Article 31.2 of the Vienna Convention on the Law of Treaties should apply to it. Under this Article the agreement is to be interpreted in context, along with the text of the agreement that includes the introduction (preamble) and attachments³⁶. As for the second issue, the Court in its third partial decision³⁷ concluded that the term “constituent peoples” incorporates certain principles without which the society could not function efficiently. Prof. Joseph Marko, one of the judges at the time when the decision in the case of *Constituent Peoples* was rendered, believed that the text of the Preamble was to be interpreted functionally and that “the term *constituent peoples* contained in the Preamble, also included the collective equality, not just equality of citizens before the law,” wherefore it would be logical that the “so-called Others also enjoy the same collective rights.”³⁸

Thus, the category “citizens of BiH” was not been specifically addressed by the Court. Keeping this in mind, some of the understandings of this category are the following:

c) How to interpret the category of “citizens of BiH”?

In previous analyses of this issue there are different opinions about the meaning of the category “citizens of BiH”³⁹, with two prevailing views.

1. The phrase “citizens of BiH” actually refers to the “constituent peoples”, who in association with “Others” and “as citizens” determine the Constitution and, therefore, “citizens of BiH” do not constitute a separate constitutional category⁴⁰. If the constitutional categories of the Preamble are marked with a capital letter: B=Bosniaks, H=Croats, S=Serbs, K=constituent peoples, O=others, G=citizens of BH, U=Constitution of BiH, a quasi-mathematical display of this view could look like this:

$$U = \{[K(B+H+S)+O]=G\}.$$

2. There are citizens of BiH who do not belong to the categories of “constituent peoples” or “Others”, thus the term “citizens of BiH” is a special (fifth) constitutional category (apart from three “constituent peoples” and “Others”), which implies that neither “constituent peoples” nor “Others” are

identical with the category of “citizens of BiH”. Our display of such a point of view is as follows:

$$U = \{[K(B+H+S)+O]+G\}.$$

Beyond the legal dogma and “mathematical” understanding of group identities as normative fictions, it is also necessary to note that the group identities, sociologically observed, are often fluid, ambivalent and overlapping⁴¹, and that belonging to one group does not necessarily preclude its simultaneous belonging to some other groups. In addition, since the relationship between the general and the special is one of the key postulates of law and legal drafting, it is worth recalling that the general and the special legal categories cannot be brought into the same level; “the general” in the legal sense is hierarchically higher than “the special”, which leads us to the third interpretation of the term “citizens of BiH”.

3. If this phrase is interpreted as a self-explanatory general category that includes *in abstracto* all inhabitants of BiH (*in concreto* it includes BiH nationals having legal capacity and holding civil rights and obligations) then, specifically enumerated “constituent peoples” (but also “Others”, if taken as a special group consisting of different ethno-cultural sub-groups⁴²) would constitute special categories that include some of these “citizens of BiH”, but not all of them! Therefore, our display in this case could look like this:

$$U = \{[K(B+H+S)+O]<G\}.$$

Hence, “citizens of BiH”, as a general category, cannot be reduced to the special category and it could not be possible to apply to them the doctrine of protection of collective rights, which typically refers to the specific ethno-cultural groups.

3.1 POSSIBLE OPTIONS TO INCLUDE THE CATEGORY OF “CITIZENS OF BIH” IN THE FUNCTIONING OF THE BIH INSTITUTIONS

Since the conception of category “citizens of BiH” stated under 1) does not bring anything new to this discussion, it will not be taken into consideration. The

36. see commentary by Prof. Joseph Marko in Steiner, Christian et al. *Constitution of Bosnia and Herzegovina: Commentary*. Sarajevo: Foundation ‘Konrad Adenauer’ Stiftung, 2010. p. 78.

37. Decision U 5/98 dated 7 January 2000, paragraph 52, *Official Gazette of BiH*, 23/00.

38. Marko, Joseph. “Doprinos presude Evropskog suda za ljudska prava u predmetu *Sejdić i Finci protiv Bosne i Hercegovine* daljem razumijevanju sistema zaštite kolektivnih i individualnih prava”, in *Mjesto i uloga “Ostalih” u Ustavu BiH i budućim ustavnim rješenjima za BiH*. Dino Abazović et al. ed. Sarajevo: Fakultet političkih nauka, 2010, p. 143.

39. See Bogdanović, Sanja. “Perspektive ravnopravnosti ‘ostalih’: Vječni posmatrač političkog i javnog života u BiH?” *Puls demokratije* 2008. Web: <<http://arhiva.pulsdemokratije.net/index.php?id=952&l=bs>> (27.06.2012).

40. As for the similar interpretation, see Dissenting opinion of the Judge Snežana Savić on the Partial Decision of the Constitutional Court U 5/98 dated 1 July 2000. *Official Gazette of BiH*, 36/00.

41. Mrdjen, Snježana. “Narodnost u popisima: Promjenljiva i nestalna kategorija”. *Stanovništvo* 40 (2002) pp. 77-103.

42. Crnjanski-Vlajić, Katarina and Sead S. Fetahagić. (Zlo) upotrebe principa garantiranih mjesta: *Politička participacija nacionalnih manjina BiH u lokalnim izborima 2008*. Sarajevo: ACIPS, 2009. p. 12.

options that follow are based on the assumption that the normative demand for equal political participation of these categories in the institutions of Bosnia and Herzegovina primarily stems from the tenth line of the Preamble of the Constitution, according to the interpretation of the Court, and secondly, that the category of “citizens of BiH” alternatively interpreted in accordance with the understanding 2) or with the understanding 3) as discussed in the previous chapter. In addition to the institutions that were the subject of the decision *Sejdić and Finci*, other BiH institutions listed in the Constitution are also taken into account.

a) First option - “citizens of BiH” as an exclusive constitutional category

If we accept this understanding of the category “citizens of BiH”, the constitutional provisions on the election of representatives and decision-making procedures in the institutions of Bosnia and Herzegovina should be amended so as to broaden the composition of HP by parity number of representatives of the category “Others” and the category “citizens of BiH”, along with specifying the ways of delegating them and the quorum for decision making (Art.IV.1.). Decision-making procedures in both Houses of the PA should be amended by adding the category “Others” and the category “citizens of BiH” in the appropriate places in the provisions of Art. IV.3. items b. e. f. and g. Here an obvious question will be asked - what is the “vital interest” of the categories of “Others” or “citizens of BiH” and whether they actually may have it. As for the Presidency, the composition of this body should be extended to members from among “Others” and “citizens of BiH”, but there is a question on which territory they will be elected.

A solution could be to increase the number of the Presidency members with equal representation of the territory of both Entities, but this can lead to irrational expansion of the institution and further complicate decision-making procedures (Art. V, Art. V.2.d.). A better solution would be therefore the introduction of the institution of only one President of BiH. The provisions on the appointment of deputy ministers in the Council of Ministers, in addition to the “constituent peoples” should be amended to include the categories of “Others” and “citizens of BiH” (Art. V.4.b.). General provision of Art. IX.3. should be amended to read as follows: “The officials appointed to positions in the institutions of Bosnia and Herzegovina shall be

generally representative of the constituent peoples, Others and the citizens of Bosnia and Herzegovina.”

b) Second option - “Citizens of BiH” as an inclusive constitutional category

An alternative option under “citizens of BiH” means all inhabitants of BiH, some of which are further identified with one of the “constituent peoples”, or any other ethnic group (“Others”), while some others do not identify at all with any of these special groups. In this case, the composition of the HP could possibly be extended only by a certain number of “Others”, but not of “citizens of BiH”, as these are already represented in the HR. The delegates themselves in the HP are also “citizens of BiH.” As for the election of Houses’ chairpersons and their deputies, if the mechanism of rotation among the representatives of the “constituent peoples” must be kept, the category of “Others” should be also included” (Art. IV.3.b.). “Citizens of BiH” do not have a special “vital interest”, but according to the theory of the “collective rights”, they could appeal to the Constitutional Court for the protection of certain scope of rights understood in broader terms than the current “vital interests of the constituent peoples”. It is therefore necessary to prescribe these “collective rights” in the Constitution. The head of state, regardless of its composition, must represent both the state of BiH and all the “citizens of BiH” and it should not depend on whether and how a candidate for membership of this institution declares himself/herself as belonging to a “people” or ethnic group, because in any case that person is a “citizen of Bosnia and Herzegovina.” In this sense, apart from introducing one President instead of collective Presidency, and with significant reduction of its executive powers, the selection of the head of state would be made indirectly by the Parliamentary Assembly.

Finally, we can conclude that **option b) is the only option that can be actually realized in order to meet both the existing text of the Preamble, and the normative part of the Constitution**, but also the request contained in the judgment *Sejdić and Finci*. The proposed amendments explaining its practical application are attached to this brief.

4. CONCLUSIONS AND RECOMMENDATIONS

If Bosnia and Herzegovina is expected to be organized as a modern European state, which is an implicit request of the institutions of both EU and the Council of Europe, then it should be constituted as a **democratic and secular state based on law**, which takes care of **social and economic security of all its citizens**. It should be also noted that the political power must be in principle legitimized by an abstract will of all its citizens. The process of constitutional reform should imply that the fundamental definition of the constitutional system of BiH lies in the establishment and consistent implementation of human rights and freedoms in accordance with European standards and on the whole territory of the state. The future constitutional setup of BiH should rely on the idea of the **state of all citizens**, with an improved system of the so-called personal (cultural) autonomy, or “collective rights of constituent peoples” throughout the whole territory of the state, provided that it is really necessary to keep it. To bring Bosnia and Herzegovina closer to this model, it is necessary to consider the following recommendations.

- **It is important that the “collective rights” of “constituent peoples” are not treated as sovereign rights territorially determined.** However, they should be treated as special collective rights, which are not transferable and cannot be imposed on to other groups, but that these rights are enjoyed by a member of a particular group as its “personal autonomy”, which implies that they are guaranteed in the Constitution and that they are protected by the governmental institutions.
- As for determining the subjects of sovereignty of the state of BiH, **the constitutional reform should insist on the principle of the sovereignty of all citizens with the special demand for equality of specific cultural groups**, so that the state should be organized neither as a unitary nor as the current hybrid confederal-consociational state where Entities and cantons possess an “excess” of state governing authorities while the representation of ethno-cultural groups is not consistently systematised, but on the basis of stronger central

government with optimized territorial federalism and personal autonomy.

- The division of powers into legislative, executive and judicial, typical for modern democratic states, enables a mutual control and the establishment of the “balance of powers” between different branches of government, as well as reduces the possibility of power abuse. Due to the complexity of the society, **it would be more suitable for BiH to have a parliamentary system of government, instead of the current semi-presidential (actually tri-presidential) system of government. The Parliamentary Assembly should therefore be the centre of decision-making and the highest authority to enact laws and other decisions and exercise control over the executive authorities.** This implies substantially diminished competences of the current Presidency as the executive authority and an indirect election of one President through the Parliamentary Assembly.
- **Human rights and freedoms must occupy a central place in the future constitutional reform and they should be the foundation of the Constitution as a whole.** Due to the nature of self-enforceability and direct applicability of the ECHRFF, **future constitutional structure of BiH should be based on the application of monistic legal theory**, because in this way it is possible to respond to the obligations in the integration processes⁴³. Certainly, the collective rights of constituent peoples, as well as members of other groups, must be protected to the extent that they do not disturb the functioning of a democratic government in BiH and do not violate the individual rights of citizens. However, being the human rights of the so-called “third generation” collective rights are only meaningful if the system is already stabilized on the basis of the human rights of the so-called “first” and “second generation”, that is, on the basis of “classic” civil and political rights, and economic and social rights, respectively.
- Given the role of an abstract citizen of BiH as a subject of national sovereignty, the legitimacy of the BiH government would not be doubtful. **Therefore, the HR should be elected directly by the citizens of BiH.** The protection of “vital interests” or “collective rights” would be exercised by a special mechanism in the HP, with veto rights having a suspensive effect. It automatically entails the reduction of HP competencies to only those matters that have

43. Vehabović, Faris. *Odnos Ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda*. Sarajevo: ACIPS, 2006. pp. 110-111.

elements of protection of “collective rights” or “vital interests.” However, in such circumstances, the enumerated list of “vital interests” would have to be precisely defined in advance.

- **Constitutional reform should ensure the unity of economic space** to guarantee full freedom of movement of persons, goods, services and capital throughout BiH on one hand, and the division of responsibilities between the central and lower levels of government on the other, with specific elements of regional and local autonomies enhanced.

All the above arguments and recommendations are limited in scope by two final court decisions: 1) the Constitutional Court’s interpretation of the normative binding of the Preamble, and 2) the Judgment of the ECHR in *Sejdić and Finci* case. Although it is surely legitimate to question their meaning and social significance theoretically and critically, from a legal standpoint it is not possible to do so. They simply have to be applied.

We have been aware that these recommendations do not address numerous other issues or problems, especially those of essential nature such as the very concept of “constituent peoples”, as well as some structural issues regarding the sub-national levels of government - Entities and cantons, where many aspects of statehood are more strongly manifested in practice than in the Institutions of BiH. Still, this study strived to offer some solutions that could get political support of the ruling political parties at the present moment. But, even if it does not obtain such a short-term support, they are important in order to inform the public on the necessity of amending the Constitution and to point to the process through which it is necessary to pass.

In the long run, however, a comprehensive reform that would result in having entirely new Constitution based on the idea of de-ethnicization of constitutional law would have to strive for balancing between liberal-democratic principle of “one man-one vote” and the federal principle “one federal/constituent unit-one vote”, where the latter would represent a special political interest of territorially-defined communities. These principles would then have to be reflected in the institutional make-up of the legislative body at the “federal”, central level of the government of BiH, where the “lower house” (instead of the current HR)

would represent the general population (citizenry) of Bosnia and Herzegovina in compliance with the liberal-democratic principle, while the “upper house” (instead of the current HP) would equally represent each particular federal/constituent unit as a territory in accordance with the federal principle⁴⁴. So, in both cases we are talking about an representation of abstract citizenry (“the will of the people”), while the difference lies only in its territorial scope (general vs. special citizenry).

Finally, as regards personally (i.e. ethno-culturally) defined communities (“constituent peoples” etc.), which represent a historical backlog of an unfinished process of modernization in BiH⁴⁵, should we insist on the political relevance of such group identities, we would then have to design a very special parliamentary or even extra-parliamentary system to protect their “vital interests”, along with an indispensable legal registration of their affiliation or membership in order to ensure that an elected representative actually represents some “real” social base.

44. Fetahagić, Sead S. “Povijesni (dis)kontinuitet konstitutivnosti naroda BiH i zahtjevi (post)moderne državnosti”. *Status* 15. 2011, pp. 116-117.

45. Ibid, pp. 112-115.

5. WORKS CITED

- Abazović, Dino, Asim Mujkić, Faris Vehabović and Emir Vajzović, ed. Mjesto i uloga "Ostalih" u Ustavu BiH i budućim ustavnim rješenjima za Bosnu i Hercegovinu. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka, 2010.
- Bogdanović, Sanja. "Perspektive ravnopravnosti 'ostalih': Vječni posmatrači političkog i javnog života u BiH?" Puls demokratije (2008) 27 Jun 2012 <<http://arhiva.pulsdemokratije.net/index.php?id=952&l=bs>>.
- Constitution of Bosnia and Herzegovina. Office of the High Representative. 24 Sep 2012 <http://www.ohr.int/dpa/default.asp?content_id=372>
- Council of Europe, Sarajevo Office. Sejdić i Finci protiv Bosne i Hercegovine. Judgement of 22. December 2009. 10 Jun 2012 <http://www.coe.ba/web2/en/dokumenti/doc_download/136-sejdi-i-finci-protiv-bosne-i-hercegovine.html>.
- Crnjanski-Vlajić, Katarina and Sead S. Fetahagić. (Z)loupotrebe principa garantiranih mjesta: Politička participacija nacionalnih manjina BiH u lokalnim izborima 2008. Sarajevo: ACIPS, 2009.
- European Commission. Enlargement. 24 Jul 2012 <http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm>.
- European Commission for Democracy Through Law (Venice Commission). Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative. CDL-AD(2005)004. 11 Mar 2005. 21 Jul 2012 <[http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp)>.
- Fetahagić, Sead S. "Povijesni (dis)kontinuitet konstitutivnosti naroda BiH i zahtjevi (post)moderne državnosti." Status 15 (2011): 108-119.
- Fetahagić, Sead S. and Saida Mustajbegović. Evropski pokret za evropski ustav BiH. Sarajevo: ACIPS, 2007.
- Hodžić, Edin and Nenad Stojanović. Novi-stari ustavni inženjering? Izazovi i implikacije presude Evropskog suda za ljudska prava u predmetu Sejdić i Finci protiv BiH. Sarajevo: Analitika, 2011.
- International Crisis Group. Bosnia's Gordian Knot: Constitutional Reform. Europe Briefing N°68. 12 Jul 2012. 21 Jul 2012 <<http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b068-bosnias-gordian-knot-constitutional-reform.aspx>>.
- Morrison, Fred L. "The Constitution of Bosnia-Herzegovina." Constitutional Commentary 13. 2 (1996): 145-157.
- Mrdjen, Snježana. "Narodnost u popisima: Promjenljiva i nestalna kategorija." Stanovništvo 40 (2002): 77-103.
- Politička analiza: Uloga civilnog društva u reformi ustava u BiH, Analiza 1/09. Sarajevo: Vanjskopolitička inicijativa BiH, 2009.
- Proces ustavnih promjena u BiH: Analiza izvještavanja u štampanim medijima, komparativna analiza teksta Ustava i prijedloga izmjena teksta, analiza međunarodnih standarda, analiza stavova pravnih profesionalaca u BiH. Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, 2006.
- Ramet, Sabrina P. Balkanski babilon. Zagreb: Alinea, 2005.
- Službeni glasnik BiH. 23/00, 36/00.
- Steiner, Christian et al. Constitution of Bosnia and Herzegovina. Commentary. Sarajevo: Konrad Adenauer Stiftung, 2010.
- Šarčević, Edin. "Dejtonski ustav: Karakteristike i problemi." Status 13. (2008): 153-168.
- Šarčević, Edin. Ustav iz nužde. Sarajevo: Rabic, 2010.
- Ustav Bosne i Hercegovine. Ustavni sud Bosne i Hercegovine. 29 Jul 2012 <http://www.ccbh.ba/bos/p_stream.php?kat=83>.
- Vehabović, Faris. Odnos Ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Sarajevo: ACIPS, 2006.
- Vehabović, Faris and Lajla Zaimović-Kurtović. Naš stav za ustav. Sarajevo: ACIPS, 2010.

6. APPENDIX

6.1 PROPOSED AMENDMENTS TO THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Pursuant to Article X/I of the Constitution of Bosnia and Herzegovina, at the _____ session of the House of Representatives held on _____ 2012 and at the session _____ of the House of Peoples held on _____ 2012, the Parliamentary Assembly adopted a decision on

Amendment II to the Constitution of Bosnia and Herzegovina

In Article II of the Constitution of Bosnia and Herzegovina a new Item 9. shall be added to read as follows:

9. Vital interest and collective rights

All members of ethnic and other groups shall enjoy collective rights in compliance with this Constitution and international agreements on civil and political rights, including economic, cultural and social rights, as well as the Declaration on Principles of International Law, Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, and in particular:

- exercising of the right to be adequately represented in legislative, executive and judicial bodies;
- identity of ethnic group and of national minority;
- constitutional amendments;
- organization of public authorities;
- equal rights in the decision making process;
- education;
- religion;
- language;
- culture, tradition and cultural heritage;
- territorial organization;
- public information system;
- and other issues to be treated as issues of vital interest or of the protection of collective rights, if deemed by 2/3 of one of the Caucuses in the House of Peoples.

Amendment III to the Constitution of Bosnia and Herzegovina

In Article III Item 4. the word "Presidency" shall be replaced by the word "the President".

In Article IV Item 4. a) the word "Presidency" shall be replaced by the word "the President".

In Article V Item 4. the word "Presidency" shall be replaced by the word "the President".

In Article VII Item 3. the word "Presidency" shall be replaced by the words "the Council of Ministers".

In Article VIII Item 1. the word "Presidency" shall be replaced by the words "the Council of Ministers".

Amendment IV to the Constitution of Bosnia and Herzegovina

Article IV Item 1. Paragraph 1. shall be deleted.

Article IV Item 1. sub-items a) and b) shall be replaced to read as follows:

a) The House of Peoples shall comprise 36 Delegates, out of whom four Serbs shall be elected by the Serb Caucus, four Bosniaks shall be elected by the Bosniak Caucus, four Croats shall be elected by the Croat Caucus and four from among Others shall be elected by the Caucus of Others from the Council of Peoples of the Republika Srpska National Assembly; four Serbs shall be elected by the Serb Caucus, four Bosniaks shall be elected by the Bosniak Caucus, four Croats shall be elected by the Croat Caucus and four from among Others shall be elected by the Caucus of Others from the House of Peoples of the Parliament of the Federation of BiH, and one Delegate from among each constituent people and from among Others shall be elected by the Assembly of the Brčko District of BiH. Election of Delegates into the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina shall be complete not more than 30 days after the date when the final results of the elections have been published.

b) Twenty members of the House of Peoples shall comprise a quorum, provided that at least five Serb, five Bosniak, five Croat and five Delegates from among Others are present.

Article IV Item 2. Paragraph 1. shall be replaced to read as follows:

The House of Representatives shall comprise 63 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

Article IV Item 3. sub-items b) and c) shall be replaced to read as follows:

b) Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniak, one Croat and one from among Others to serve as its Chair and Deputy Chairs.

c) The laws and other regulations or enactments adopted by the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina shall be submitted to the House of Peoples for approval if they concern the vital interest or collective rights as defined in the Amendment II to the Constitution of Bosnia and Herzegovina.

Article IV Item 3. sub-items e), f) and g) shall be replaced to read as follows:

e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniak, Croat or Serb people, or of collective rights of Others under Article II/9. of this Constitution, by a majority votes of the Bosniak, Croat, or Serb Delegates and Delegates from among Others, selected in accordance with Paragraph I. Item (a) or by 2/3 majority votes if referring to Article II Item 9. Line 9. of the Amendment II to the Constitution of Bosnia and Herzegovina. Such a proposed decision shall require for approval in the House of Peoples of a majority of the Bosniak, of the Croat, of the Serb Delegates and of the Delegates from among Others present and voting or by 2/3 majority votes if referring to Article II Item 9. Line 9. of the Amendment II to the Constitution of Bosnia and Herzegovina.

f) When a majority of the Bosniak, of the Croat, or of the Serb Delegates and the Delegates from among Others, or by 2/3 majority votes if referring to Article II Item 9. Line 9. of the Amendment II to the Constitution of Bosnia and Herzegovina, objects to the invocation of Item (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising eight Delegates, of which two are selected from each constituent peoples and from among Others, to resolve the issue. If the Commission

fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in urgent procedure review it for procedural regularity.

g) The House of Peoples may be dissolved by decision of the President or of the House itself, provided that the House's decision to dissolve is approved by a majority that includes absolute majority of Delegates from the total number of the selected Delegates.

Amendment V to the Constitution of Bosnia and Herzegovina

The title of Article V "The Presidency" shall be replaced by the word "The President".

Article V Paragraph 1. shall be deleted.

Article V Items 1. 2. and 3. shall be deleted and replaced by new Items 1. 2. and 3. to read as follows:

1. The President of Bosnia and Herzegovina shall be elected in the House of Peoples by absolute majority of Delegates present and voting.

2. The President may resign or be dismissed by decision of the House of Peoples in the same manner in which he or she has been elected.

3. Powers

The President shall have the following responsibility:

Representing the state abroad;

Announcing parliamentary and other elections at the state level;

Assigning titles, medals, awards and decorations in accordance with the law of Bosnia and Herzegovina;

Accrediting and receiving ambassadors and envoys in accordance with the law of Bosnia and Herzegovina;

Giving individual pardons and amnesties in accordance with the law of Bosnia and Herzegovina;

May convene the sessions of the Council of Ministers and of the Parliamentary Assembly as well as propose and determine the Agenda of these meetings;

May attend and speak at the sessions of the Parliamentary Assembly;

Appointing state officials when required by the law of BiH and in accordance with it;

Appointing a candidate for the Chair of the Council of Ministers;

Dismissing the Parliamentary Assembly having consulted and with the approval of the Chair of the Council of Ministers and in accordance with this Constitution.

Article V Item 4. sub-item b) shall be replaced to read as follows:

b) No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate three Deputy Chairs who shall be of different constituent people and from among Others, and who shall take office upon the approval of the House of Representatives.

Article V Item 5. shall be deleted and in Article V Item 4. after sub-item c) new sub-item d) shall be added to read as follows:

d) The Council of Ministers shall have civilian command authority over the armed forces.

Amendment VI to the Constitution of Bosnia and Herzegovina

In Article IX after Item 3. new Items 4. and 5. shall be added to read as follows:

4. Each of the following functions shall be represented by different constituent peoples and by Others, or citizens, in the following order:

- 1) The Chair of the House of Representatives of the Parliamentary Assembly
- 2) The Chair of the House of Peoples of the Parliamentary Assembly
- 3) The President of Bosnia and Herzegovina
- 4) The Chair of the Council of Ministers.

5. All regulations, including the Constitutions of Entities, Cantons, Statute of Brčko District, statutes, laws, rulebooks, rules of procedures and other bylaws of public authorities, regardless of the enactors, may be the subject of review before the Constitutional Court of Bosnia and Herzegovina, if the process of examining the constitutionality and legality of these enactments, rendered pending the adoption of these Amendments, has been initiated by the majority of any Caucus in the House of Peoples of the Parliamentary Assembly of BiH.

Number _____

Sarajevo _____

Chair of the House of Representatives

Chair of the House of Peoples

6.2 EXPLANATION OF THE AMENDMENTS TO THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

The constitutional basis for the adoption of Amendments to the Constitution of BiH is contained in Article X/1. of the Constitution of BiH determining that: "This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives."

6.2.1 GROUNDS FOR THE ADOPTION OF AMENDMENTS

The Constitution of Bosnia and Herzegovina contains discriminatory norms against Others and citizens but also against the representatives of constituent peoples, depending on the territory where they live. In this manner, it is internally contradictory because Article II (items 1, 2 and 4) guarantees equality, prohibits discrimination and foresees the obligation of Bosnia and Herzegovina to ensure the highest level of internationally recognized human rights and freedoms, simultaneously giving legal priority to the European Convention on Human Rights and Fundamental Freedoms, while its Articles IV (item 1) and V (Paragraph 1) take away the right to stand for election from all those not declaring as members of one of three constituent peoples. Thereby it violates human rights and freedoms while the citizens of Bosnia and Herzegovina, depending on their ethnicity or affiliation, are placed in an uneven position. This fact by itself commits to the adoption of amendments by which the members from among Others and citizens shall be equalized in their rights with the members of constituent peoples, particularly with regard to the exercising of their right to stand for election. Thereby, the Constitution of Bosnia and Herzegovina would be harmonized with the European Convention on Human Rights and Fundamental Freedoms and International Covenant on Civil and Political Rights as its integral parts. Elimination of this discrimination and acknowledgment of equality of all citizens of Bosnia and Herzegovina concerning their rights and freedoms, in this case political rights, would lead to the acknowledgment and practical implementation of a civilizational inheritance - the universality of human rights.

6.2.2 EXPLANATION OF AMENDMENTS TO THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Amendment II expands Article II of the Constitution of Bosnia and Herzegovina by introducing into the constitutional order of BiH the instrument of collective rights protection, which creates a legal basis for the use of all mechanisms intended for the exercise of the rights protected in the acknowledged international instruments for the protection of human rights. Additionally, the introduction of collective rights into the wording of Article II of the Constitution of Bosnia and Herzegovina also enables the institutional protection through the decision-making mechanism of the Constitutional Court of BiH because currently, the rights specified in international documents on the protection of human rights under Annex I to the Constitution of BiH, can be used only by applying Article II/4 of the Constitution of BiH, largely hampering their application since, as it is already known, proving of the discrimination is often very difficult and uncertain due to the unavailability and lack of the appropriate statistical data.

Amendment III is more a technical Amendment than an amendment having a substantive meaning since it adjusts terminology with the changes as proposed in the remaining Amendments. A starting point for such a position is the function of the President of BiH who would have very limited and protocol related powers, whereby it was necessary to harmonize the terminology because of the abolishment of the collective body such as the Presidency and because of the introduction of the President's function. Finally, the option is that all important functions of the Presidency, starting from the foreign policy, commanding over armed forces to the appointment of ambassadors and other functions, should be taken over by the Council of Ministers.

Amendment IV affects the essence of the prohibition of discrimination and the equality of all constituent peoples, including those who do not identify with any of them in respect of the BiH legal system. The current constitutional provision determines that one third of the Members of the House of Peoples shall be elected by the National Assembly of the RS and two thirds by the House of Representatives of the FBiH Parliament, with the ethnic affiliation defined well in advance. Although there is no authentic interpretation of this provision, it is probable that the framer of the Constitution (whoever it might be) started from the current status, according to which, mostly the representatives of the Serb people live on the territory of the RS and the FBiH is exclusively a Croat and Bosniak entity. However, such an understanding is largely corrected by the decision of the Constitutional Court of BiH on the constitutionality of peoples, equalizing the rights of each constituent people in the whole of BiH, failing to define the position of Others. Therefore, it seems quite logical that both Parliaments, through their bodies established after the adoption of this decision, equally decide on the election of the representatives of constituent peoples and Others in the House of Peoples of the BiH Parliamentary Assembly, in which case both bodies would elect an equal number of representatives to this body. The explanation for such an option also lies in the fact that the interests of constituent peoples and national minorities from different territories are not identical and that the House of Peoples must be a place where all interests of each constituent people are tailored. In addition, taking into account the position of the Brčko District of BiH, it is also necessary to include the Brčko District Assembly into the process of indirect elections for the House of Peoples so as to “cover” the territory of the entire state by the election process for the House of Peoples as well as to represent the interests of each constituent people in the territory of the entire state, including those of the representatives of Others.

In addition, a number of the Delegates in the House of Peoples, who would be elected in the respective Caucuses in the legislative bodies of Entities and the Brčko District of BiH, would be increased by reducing the competencies vested currently in that House and by taking into consideration only the issues pertaining to the protection of collective rights of Others or vital interests of constituent peoples.

Finally, to achieve full equality of Others in the decision-making process and protection of collective rights under Amendment II, the participation of the members from among Others is equalized in this process with the possibility of stopping the legislative procedure in case this Caucus calls upon the protection of collective rights instead of vital interests. The difference between these two notions is not substantial but exclusively terminological in nature, covering the same scope of rights exercised by constituent peoples – protection of collective rights with a different terminology because the Others may not have the possibility of calling upon the vital interests, as it is assumed that they are members of different national minorities or those who declare themselves neither as the representatives of the constituent peoples nor as the representatives of national minorities, but who are capable of defining common interests through the mechanism of the collective rights protection which would constitute a cohesive factor intended to bring different groups closer. Without having the possibility that the Caucus of Others participates on equal basis in the decision-making process, also including the right to put a veto, pending the possible decision of the Constitutional Court of BiH, it would not be possible to provide an equal and full participation of this group in running the state and accordingly the protection of their rights. Accordingly, they would practically serve only as “auxiliary voting hands” in the House of Peoples.

It is important to note that this Amendment also increases the number of Deputy Chairs of the House of Representatives and the House of Peoples in order to provide for an equal access to public functions by the group of Others.

It is also important to note the need to increase the number of Members in the House of Representatives, which is the House of all BiH citizens, along with the increase in the number of Delegates in the House of Peoples, which would allow for a more quality and a more prompt work on legislative activity within the commissions and other working bodies of the Parliamentary Assembly of Bosnia and Herzegovina.

The adoption of this Amendment would make a clear difference between the House of Representatives being a House of all BiH citizens and the House of Peoples as a body primarily and exclusively protecting collective rights and vital interests similar to the solutions in the Entities.

Amendment V would transform the Presidency of BiH into the President of BiH to be elected by the House of Peoples. In addition, it would significantly change the competencies of the President of BiH and all important functions of the current Presidency would be transferred to the Council of Ministers, including command authority over armed forces, which is a significant precondition for the fulfilment of the obligations towards the EU and NATO integrations. The amended competencies, which could be also called protocol-related competencies, greatly resembling to the competencies from the *Butmir* process and *April* package, as well as their additional reduction, could avoid a dispersion of the efficient running of the state among different state authorities. However, it would be possible to achieve its incorporation through the actions of the Parliamentary Assembly of BiH and the Council of Ministers, that is, legislative and executive powers.

As is the case with the Chair of both Houses of the Parliamentary Assembly, this Amendment also introduces the third Deputy Chair of the Council of Ministers, whereby enabling the group of Others to participate in the work of this important state authority.

Amendment VI, similar to the solutions from the Entity Constitutions, introduces four key functions at the state level guaranteed to the members of each constituent people, group of Others and citizens. In this manner, it could be possible to prevent potential manipulations since it would be expressly guaranteed that each representative of constituent peoples and group of Others or citizens performs one of the key functions. It would be wrong to introduce the judicial power, which must be independent, into the distribution of key functions thereby avoiding the possibility of any kind of influence by the legislative and executive powers. Such a solution would entirely eliminate fear installed in the members of individual peoples that they could be brought into a situation in which they would be completely excluded from performing important state functions.

Finally, taking into account that the discriminatory provisions of the BiH Constitution have existed in the legal order of BiH for many years and that quite a lot of regulations have been enacted at different levels of authorities based on such discriminatory provisions, it is necessary to enable an additional review of legal acts adopted prior to the adoption of these Amendments. Considering that it would be an additional review of such regulations and their corrections, in case they are discriminatory, the best solution is that the representatives of constituent peoples and Others in the House of Peoples perform this review if they establish that there is doubt about their constitutionality or legality. Thus, they would have the possibility to contest them through the decision-making mechanism before the Constitutional Court of BiH. An additional review of all discriminatory regulations would be introduced in such a manner to eliminate discrimination. Despite the adopted Amendments to the BiH Constitution, these regulations would remain legally effective, leaving the bodies and authorities having enacted these regulations to amend or not amend them. This mechanism would be an opportunity to accelerate the entire process and to make an additional review of these regulations through the activities of Caucuses in the House of Peoples.

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Born on May 23, 1967 in Sarajevo. Graduated from Faculty of Law and passed bar exam in Sarajevo. In 2005, received his MA in European Studies at the Centre for Interdisciplinary Postgraduate Studies at University of Sarajevo, University of Bologna and London School of Economics. From 1996 until the end of 2000 worked as a lawyer in the Institution of Human Rights Ombudsmen of Bosnia and Herzegovina, where he deposited cases in front of Human Rights Chamber. During this period, he also interned at the European Court of Human Rights in Strasbourg. Since January 2001, he worked as a register of the Constitutional Court, and the assistant to the secretary general for legal consultancy, constitutional and judicial practice and documentation. He published a book titled „Relationship between Constitution of Bosnia and Herzegovina and the European Convention for protection of human rights and basic freedoms,” analysis of BiH Constitution and initiative for amendments of BiH Constitution, and several articles in various legal magazines on topics of human rights protection and BiH Constitution. Participated in the Council of Europe’s project of preparation and translation of 93 key rulings of the European Court of Human Rights to be available to lawyers across the country. He is editor of the BiH Constitutional Court newsletter. He is fluent in English. He was appointed a judge at the Constitutional Court of Federation BiH in October 2007, and in January 2010, an ad hoc judge at the European Court of Human Rights.

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Born in 1964. Graduated at the Faculty of Law and completed his MA in the European studies at the Centre for Interdisciplinary Postgraduate Studies (CIPS) at the University of Sarajevo. In 2006, as a guest researcher, participated in creation of teaching curricula for the master’s program in religious studies at the Arizona State University. After initiating MA in Religious studies in CIPS in 2008, worked as a professor and academic tutor in the same program. He was published in magazines *Lica*, *Homo volans*, *Novi pogledi* and *Status*. Participated in the following research projects and policy studies: *Analysis of pre-election messages of leading political parties in BiH* (ACIPS, 2006), *Whose capital is Sarajevo* (CCI, 2006), *European movement for European constitution in BiH* (ACIPS, 2007), *(Ab)use of Guaranteed Seats Principle: Political Participation of National Minorities in BiH Local Elections 2008* (ACIPS, 2009). From 1996 until 2010 worked as a translator and legal consultant with international organizations in BiH (UNMBIH, EC, VSTV, EUPM) in the projects of judiciary and police reforms.

The Association Alumni of the Center for Interdisciplinary Postgraduate Studies (ACIPS) is a non-governmental association of experts in the fields of EU integration processes, democracy, human rights, state management and humanitarian affairs, gender studies and religious studies. Established in February 2003, as a result of the activities of the Center for Interdisciplinary Postgraduate Studies of the University of Sarajevo, ACIPS is a reflection of the necessity to gather the exquisite intellectual and leadership potential of this institution's master's degree holders. The members of ACIPS are active both in the civil society as well as in a variety of governmental, non-governmental and international organizations in Bosnia and Herzegovina and the wider region.

The primary interest of the organization is the raising public awareness about crucial societal topics and the conducting of research and policy studies. Besides being directly involved in policy creation and research, ACIPS also maintains communication on a regular basis with politicians, B&H citizens, NGO representatives and the media.

ACIPS' long-term strategic goals, set upon its establishment are the following:

- Identifying the most relevant European integration issues and challenges that B&H is facing today;
- Achieving high standards of independent policy research applicable in the context of B&H;
- Disseminating policy research findings and views to relevant stakeholders and the general public and advocating for the implementation of these findings,
- Establishing dialogue and cooperation with other policy research institutions, governments and civil society organizations in B&H and the wider region.

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DEMOCRACY WITHOUT CITIZENS?

(Looking for a model of political participation of all constitutional categories in Bosnia and Herzegovina)

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